AT A COMPLEX CROSSROADS: ANIMAL LAW IN INDIAN COUNTRY

By
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Animals play an especially important role in Indian history and culture. The value of animals to Indian tribes is reflected in every aspect of their culture, from song and dance to land use and treaty terms. Tribes today are still dependent on fish and wildlife for ceremonies and everyday living. Tribes have translated their value for animals into creative ways to protect domestic animals and manage animal populations, including working with state and federal governments to co-manage fish and wildlife populations. This article begins with a discussion of criminal and civil jurisdiction within Indian Country. The article provides a brief survey of the legal issues found at the intersection between Indian law and animal law, including both domestic animal issues and fish and wildlife issues. The article presents a working understanding of animal advocacy in Indian Country today and concludes that Indian Country may provide a valuable opportunity to craft model animal protection schemes.

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I. INTRODUCTION

For centuries before contact with white settlers, Indian tribes and tribal members were stewards of their land, the natural environment, and the vast natural resources of what is now the United States. The earth's bounty provided tribes with cultural, spiritual, and economic means, and, of course, subsistence. Animals played an especially important role.

The importance of animals is reflected in native dance, song, and art. Land use is also affected by animal use. Fish and wildlife often reflect prominently in the location of reservations selected for tribes, such as for the Hoopa Valley Tribe in California, whose reservation lands encompass the Klamath and Trinity Rivers, upon which the Tribe has fished for millennia.[1] Through treaties with the United States, tribes also ensured continued access to the fish and wildlife they relied upon during aboriginal times.[2] For example, the Puget Sound tribes executed several treaties during the 1850s, wherein the tribes reserved the right of taking fish at their usual and accustomed fishing grounds, in common with white settlers.[3]

The reservation of hunting and fishing rights is not isolated to the Pacific Northwest. Many of the 562 federally-recognized Indian tribes across the nation, from New York State to Arizona, reserved hunting, fishing, and gathering rights that exist to this day and are recognized

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[1] The Hoopa Valley Tribe has lived in its valley since "time immemorial" and bases its traditional way of life on the semiannual king salmon runs of the Trinity River. *See* Hoopa Valley Tribe, *Tribal History,* http://www.hoopa-nsn.gov/culture/history.htm (describing how the "natural environment, the rivers, mountains and oceans forged the cultural backbone" of the Tribes' ancestors) (accessed Nov. 17, 2007); *Mattz v. Arnett*, 412 U.S. 481, 487 (1973) (finding the location of the original Hoopa Valley Reservation was specifically selected to preserve the Tribe's access to fish runs).

[2] Over a seven-month period in late 1854 to 1855, Isaac Stevens, Superintendent of Indian Affairs and Governor of the Washington Territory, negotiated treaties with more than 17,000 Indians that contained a guarantee for "the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them. . . ." Dale D. Goble and Eric T. Freyfogle, *Wildlife Law* 590–91 (Foundation Press 2002).

[3] *See e.g. Treaty of Point Elliott* art. V (Jan. 22, 1855), 12 Stat. 927 ("The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory. . . ."); *Treaty of Neah Bay* art. IV (Jan. 31, 1855), 12 Stat. 939, 940 (reserving to the Makah Tribe the "right of taking fish and of whaling or sealing at usual and accustomed grounds and stations. . . ."). For additional discussion of the Makah Tribe's treaty-reserved whale hunting rights, and cultural and aboriginal subsistence on marine mammal hunting, see *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000) (describing the Makah's reserved whaling rights under the Treaty of Neah Bay and the culturally important practice of whaling); *Anderson v. Evans*, 314 F.3d 1006 (9th Cir. 2002) (discussing the Makah's plan to resume gray whale hunting off the coast of Washington State as an attempt at cultural revival).

as the supreme law of the land.[4] In addition, courts have recognized the importance of fish and wildlife for the continued survival of Indians by finding that the fishery is "not much less necessary to the existence of Indians than the atmosphere they breathed."[5] Fisheries, no less than water in water rights cases, have been deemed "essential to the life of the Indian people" for whom certain reservations were created.[6]

While times have changed and tribes are no longer solely reliant on fish and wildlife for commerce and subsistence, becoming major players in local economies has not changed the fact that tribes and tribal members remain dependent upon fish and wildlife for ceremonies and everyday living. Tribes are co-managers of fish and wildlife, working with federal, state, and local governments to preserve habitat and manage treaty harvest to prevent overfishing.[7] Tribes have also explored creative ways to protect domestic animals and manage animal populations on tribal lands.[8] This essay provides a brief survey of the legal issues found at the intersection between Indian law and animal law. While this essay cannot be exhaustive of these complex topics, it should give animal law practitioners a working understanding of animal advocacy in Indian Country today and provide a view toward how to work with tribal governments to strengthen animal protection statutes, both within and beyond the boundaries of Indian reservations.[9]

Part II of this essay provides an overview of criminal and civil jurisdiction within Indian Country. Part III surveys selected tribal civil animal control statutes. Part IV discusses a selection of tribal criminal animal anti-cruelty statutes. Part V provides an overview of Indian hunting and fishing rights. Finally, Part VI concludes that the Indian Country may provide a valuable opportunity to craft model animal protection schemes.

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[4] *See e.g. Treaty with the Wyandot, etc.* art. 11 (Sept. 29, 1817), 7 Stat. 160 *(*reserving hunting rights near Lake Erie); U.S. Const. art. VI (including an express affirmation of the federal treaty-making power, the Supremacy Clause states "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . .").

[5] *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981) (quoting *U. S. v. Winans*, 198 U.S. 371, 381 (1905)).

[6] *Ariz. v. Cal.*, 373 U.S. 546, 599 (1963).

[7] U.S. Fish and Wildlife Serv., *Fish and Wildlife Management Offices—State, Territorial, and Tribal*, http://www.fws.gov/offices/statelinks.html (accessed Nov. 17, 2007).

[8] R. Smith, *Unbearable? Bitterroot Grizzly Bear Reintroduction & the George W. Bush Administration*, 33 Golden Gate U. L. Rev. 385, 407 (2003) (discussing grizzly bear reintroduction efforts and the Nez Perce Tribe's successful wolf reintroduction effort in north central Idaho).

[9] "Indian Country" is a term of art defined at 18 U.S.C. § 1151 (2001) (Indian Country includes reservations, dependent Indian communities, and all Indian allotments the Indian titles to which have not been extinguished).

II. CRIMINAL AND CIVIL JURISDICTION WITHIN INDIAN COUNTRY

Animal law in Indian Country presents some unique legal challenges involving multiple, and sometimes conflicting, statutory schemes. In order to understand the application of federal, state, and tribal laws within Indian Country, it is necessary to begin with a brief primer on tribal criminal and civil jurisdiction over tribal members, nonmembers, non-Indians, and animals within Indian reservations.[10] Whether federal, state, or tribal laws apply depends on where the subject activity takes place and who is involved. These resulting overlapping statutory schemes create a patchwork of laws addressing the protection and use of animals within Indian Country.

A. Tribal Criminal Jurisdiction

On their reservations, Indian tribes generally exercise all of their inherent sovereign powers except those expressly removed by treaty or act of Congress, or those implicitly divested by virtue of their "domestic dependent" status.[11] Thus, tribes generally have full regulatory and adjudicatory authority over tribal members. As the U.S. Supreme Court has stated,

> [i]t is undisputed that Indian tribes have power to enforce their criminal laws against tribe members. Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain 'a separate people, with the power of regulating their internal and social relations.'[12]

Any "limitations on an Indian tribe's power to punish its own members must be clearly set forth by Congress."[13]

In contrast, tribal authority to prosecute non-Indians on tribal lands is circumscribed. Tribes do not have criminal authority to punish non-Indians who violate tribal, state, or federal laws. However, tribes do have the power to detain non-Indian offenders and transport them

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[10] This jurisdiction discussion is by no means comprehensive. Where possible, the author has focused on Washington State. Animal law practitioners interested in knowing more about these complex issues of Indian law are encouraged to review Felix Cohen's *Handbook of Federal Indian Law 2005 Edition*.

[11] The concept that tribes are "domestic dependent nations" and have a relationship to the United States similar to that of a "ward to his guardian" is derived from Chief Justice Marshall's opinion in *Cherokee Nation v. Ga.*, 30 U.S. 1, 2 (1831). Cherokee Nation recognized the legal proposition that tribes are distinct political communities with exclusive authority over lands within the territorial boundaries, with certain exceptions. *See e.g., Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978) (holding that tribes do not have criminal jurisdiction over non-Indians).

[12] *U.S. v. Wheeler*, 435 U.S. 313, 322 (1978) (quoting *U.S. v. Kagama*, 118 U.S. 375, 381–82 (1886)).

[13] *Walker v. Rushing*, 898 F.2d 672, 675 (8th Cir. 1990) (citing *U.S. v. Quiver*, 241 U.S. 602, 606 (1916)).

to the proper authorities.[14] Tribes have concurrent authority with the states to arrest and try their own members for violations of tribal law.[15] Tribes also have authority to either eject nonmembers committing criminal violations from the reservation or to turn them over to the proper federal or state authorities.[16]

B. Tribal Civil Jurisdiction

The principles governing civil jurisdiction in Indian Country have developed in a markedly different fashion from the development of rules dealing with criminal jurisdiction. Tribes retain civil jurisdiction over any suit, brought by any person, against an Indian for a claim arising in Indian Country.[17] Tribes also have exclusive civil jurisdiction over disputes between tribal members who are domiciled or physically within tribal territory, even if such claims arise outside Indian Country.[18] Further, an Indian tribe has exclusive jurisdiction over internal tribal subject matters, such as membership disputes and other similar issues.[19]

Tribes also retain considerable control over nonmember conduct on tribal land.[20] The U.S. Supreme Court has recognized that tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty.[21] Absent express congressional authorization, tribal civil jurisdiction generally encompasses nonmembers and non-Indians in two situations. First, tribes retain civil jurisdiction when nonmembers enter into formal "consensual relationships" with the tribe or its members, through "commercial dealing, contracts, leases, or other arrangements."[22] Second, a tribe "may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[23]

Because governance over non-Indians within a tribe's borders is so important to tribal sovereignty, tribes have the authority, under certain limited circumstances, to exercise civil jurisdiction over non-Indians' activities, even when such activity occurs on non-Indian lands

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[14] *See e.g. Duro v. Reina*, 495 U.S. 676, 697 (1990) (acknowledging that "[w]here jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities"); *Gardner v. U.S.*, 25 F.3d 1056 (table), 1994 WL 170780 (10th Cir. 1994) (noting that even if not cross-deputized, "[t]ribal officers have authority to detain an offender on a reservation and transport him to the proper authorities").

[15] *Wheeler*, 435 U.S. at 326–27.

[16] *Duro*, 495 U.S. at 697.

[17] *Williams v. Lee*, 358 U.S. 217, 223 (1959).

[18] *Wheeler*, 435 U.S. at 324–25.

[19] *Smith v. Babbitt*, 100 F.3d 556, 558 (8th Cir. 1996).

[20] *Montana v. U.S.*, 450 U.S. 544, 564 (1981).

[21] *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987).

[22] *Montana*, 450 U.S. at 565.

[23] *Id.* at 566.

within the tribe's reservation boundaries.[24] For instance, a tribe may prohibit nonmembers from hunting and fishing on lands belonging to the tribe or held by the United States in trust for the benefit of the tribe.[25] Other tribal regulation may occur by virtue of consensual relationships, such as contracts, leases, or licenses, between the tribe and a non-Indian.[26]

C. Federal Jurisdiction within Indian Country

The general rule presumes that "a general statute in terms applying to all persons includes Indians and their property interests."[27] The U.S. Supreme Court has observed, albeit in dicta, "that general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary. . . ."[28] However, federal courts have held that federal laws of general applicability may not necessarily apply to Indian tribes unless the intent of Congress to apply such laws to Indian tribes is clear. In *Coeur d'Alene Tribal Farm*, the Ninth Circuit indicated that

> [a] federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches "exclusive rights of self-governance in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof "by legislative history or some other means that Congress intended that [the law] not to apply to Indians on their reservations. . . ."[29]

If any of these exceptions apply, Congress must have expressly applied the statute to Indians before the courts will hold that the statute reaches them.[30]

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[24] *Id.* at 557.

[25] *Id.*

[26] *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 651 (2001).

[27] *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985) (quoting *Fed. Power Comm'n. v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960)). For instance, the Animal Welfare Act, 7 U.S.C. § 2131–2156 (1999), is a statute of general applicability that might apply to Indian tribes. The author's research has not revealed any efforts to apply the Animal Welfare Act to Indian tribes. This is likely because, to the author's knowledge, none of the types of facilities subject to regulation under the Animal Welfare Act are operated by Indian tribes. Even if such facilities were operated by Indian tribes on tribal lands, the tribe operating such a facility might be immune from a suit challenging the tribe's failure to follow the statute based on the tribe's inherent sovereign immunity from unconsented suit in tribal, state, or federal court. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (finding that under the Indian Civil Rights Act, actions against a tribe are barred by its sovereign immunity).

[28] *Tuscarora*, 362 U.S. at 120.

[29] 751 F.2d at 1116 (quoting *U.S. v. Farris,* 624 F.2d 890, 893–94 (9th Cir. 1980)).

[30] There are special United States statutes specifically addressing Indians that can be found at Title 25 of the United States Code.

D. State Jurisdiction within Indian Country

The application of state laws within Indian Country varies by state. As a general rule, state civil regulatory laws do not apply to tribes operating within their reservations.[31] Likewise, state criminal laws do not apply to the conduct of tribal members within Indian lands.[32] There are exceptions to this general rule, as discussed below, but neither state nor federal law establishes exclusive state jurisdiction over any matter. Accordingly, an Indian tribe or the federal government may hold concurrent jurisdiction with the state over a particular matter or parcel of land.[33]

In 1953, Congress enacted Public Law 280 (P.L. 280), which gave certain states permission to assume certain criminal and civil jurisdiction over Indian Country.[34] For example, as described below, Washington State assumed such partial jurisdiction in 1957.[35] In 1968, Congress enacted the Indian Civil Rights Act (ICRA), which required tribal consent for all future assumptions of state jurisdiction over Indian Country.[36] ICRA did not invalidate any state's prior assumption of jurisdiction.[37]

In 1957, when the State of Washington enacted Washington Revised Code Ch. 37.12 (amended in 1963), it assumed the civil and criminal jurisdiction "over Indians and Indian territory, reservation, country, and lands" described in P.L. 280.[38] Washington Revised Code Ch. 37.12 required tribal consent for the state to apply Washington law to Indians on those tribal or allotted lands within an established Indian reservation.[39] No tribal consent is needed, however, for the state to assume jurisdiction over Indians on their reservation with respect to eight specifically enumerated matters: compulsory school attendance; public assistance; domestic relations; mental illness; juvenile delinquency; adoption proceedings; dependent children; and operation of motor vehicles upon the public streets, alleys, roads, and highways.[40] While none of the eight on-reservation matters expressly include criminal activities, the state of Washington generally has criminal jurisdiction over non-Indian suspects and arguably has criminal jurisdiction associated with the eight matters (*e.g.*, juvenile delinquency).

As a general rule, however, states might lack jurisdiction within an Indian reservation to enforce animal cruelty or other laws against

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

[32] *Ex Parte Crow Dog*, 109 U.S. 556, 572 (1883).

[33] *Cordova v. Holwegner*, 971 P.2d 531, 538 (Wash. App. 1999).

[34] 18 U.S.C. § 1162 (2000); 28 U.S.C. § 1360 (2000).

[35] Wash. Rev. Code Ch. 37.12 (2003).

[36] 25 U.S.C. §§ 1321–31 (2000).

[37] *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 887 (1986).

[38] Wash. Rev. Code § 37.12.010 (2003).

[39] *Id*.

[40] *Id*.

tribal members. Thus, within this complex web of overlapping jurisdiction, a regulatory vacuum might exist, at least with respect to tribal members acting within Indian reservations, unless the tribe has corresponding animal protection statutes.

III. TRIBAL CIVIL ANIMAL CONTROL STATUTES

Many people have likely heard horror stories of the so-called "rez dog"—unkempt, uncared for, semi-feral creatures running amuck on Indian reservations across the West. Unfortunately, some of the stories are true, or at least they used to be. Tribes have been extremely proactive in passing laws regulating the protection, control, and maintenance of domestic and certain wild animals within Indian reservations. These tribal statutes range from extremely conservative to quite progressive, including some that attempt to prohibit animal testing and others that appear to advance the standing of animals by defining animals as living sentient beings, rather than as the personal property of a tribal member. Although many tribes have animal-related laws, this essay focuses on a sample of tribal laws that reflect the broad spectrum of tribal governmental regulation concerning the protection and use of animals on Indian reservations. Three examples of tribal civil animal control statutes are discussed below.

The Sault Ste. Marie Tribe of Chippewa Indians in Michigan has enacted an animal control statute defining an "animal" as "one (1) or more of a kingdom of living beings (except humans) differing from plants in capacity for spontaneous movement and rapid motor response to stimulation."[41] This definition of "animal" is among the more progressive in either Indian Country or other jurisdictions, suggesting that animals are something more than chattel and might be living sentient creatures in the eyes of the law. The Sault Ste. Marie animal control statute provides for the removal[42] of an animal found to be "dangerous"[43] or that is a "nuisance in the neighborhood,"[44] as well as a prohibition on permitting dogs "at any time to be on any road or street, in a public park, public building or any other public place, except that [sic] when held securely by a leash of suitable strength and length. . . ."[45] The tribal code provides procedures to properly dispose of sick or deceased animals[46] and places limitations on the ability of persons residing within the Tribe's reservation to "maintain" certain wild animals.[47] To protect the rights of both the animal and its human

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[41] Sault Ste. Marie Tribal Code § 51.102(2) (1995) (available at http://www.saulttribe.com/images/stories/government/tribalcode/chaptr51.pdf) (accessed Nov. 17, 2007).

[42] Among the remedies that may be provided relating to a violation of the animal control statute, the Tribal Court may order the animal boarded with a "humane society" or a "licensed veterinarian" if appropriate. Sault Ste. Marie Tribal Code § 51.118(2).

[43] Sault Ste. Marie Tribal Code § 51.117(26).

[44] *Id.* at § 51.108.

[45] *Id.* at § 51.111.

[46] *Id.* at § 51.109.

[47] *Id.* at § 51.117.

companion, the Tribe also created a court proceeding that requires a showing of cause before an animal is destroyed or removed from tribal lands.[48]

The Susanville Indian Rancheria in California provides an animal control law designed to "preserve the health and safety of persons and animals" within tribal lands.[49] In addition to prohibiting letting animals "run at large," the law provides specific protections for the health and safety of animals.[50] For instance, the Tribe requires that all dogs be "vaccinated against rabies."[51] In addition, and of particular interest to animal rights advocates, "[n]o dog shall be left completely enclosed in a parked vehicle without adequate ventilation, or in such a way as to subject the dog to temperatures that would affect the dog's health and welfare."[52] Dogs that are removed from their owners may be adopted, rather than destroyed.[53] All impounded dogs must be spayed or neutered and provided with proper vaccinations (if they have not already received such vaccinations) prior to adoption.[54] The Tribe provides an additional protection for impounded dogs by providing that "[n]o dog or dogs remaining unclaimed . . . shall be sold, surrendered or given to any hospital or institution of learning for scientific purposes under any circumstance whatsoever. . . ."[55] Thus, the Tribe protects against the use of unclaimed animals in experimentation—a model that other jurisdictions might be willing to adopt.

In contrast, the Oglala Sioux Tribe of South Dakota provides a more conservative animal control statute that focuses primarily on public health and safety, rather than the safety of the animal, as the basis for the animal control code.[56] Such a regulatory approach is more common. However, some provisions for the animal's welfare are provided. The tribal code provides for a compulsory immunization program for cats and dogs.[57] An injured animal found abandoned, or an injured animal not immediately reclaimed by the animal's custodian, is to be "transported to a veterinarian" for treatment.[58] The Tribe also prohibits tribal members from setting traps for wild or domestic animals within tribal lands.[59]

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[48] *Id.* at § 51.118.

[49] Susanville Indian Rancheria Animal Control Ord. § 2001-001(B) (2003) (available at http://www.narf.org/nill/Codes/suscode/susvilleanimal.htm) (accessed Nov. 17, 2007).

[50] *Id*. at § F(1).

[51] *Id*. at § F(4).

[52] *Id*. at § G(1)(B).

[53] *Id*. at § G(4), (8).

[54] *Id*. at § G(8)(A).

[55] Susanville Indian Rancheria Animal Control Ord. § G(5)(A) (2003).

[56] Oglala Sioux Tribe Law and Order Code ch. 30 (1996) (available at http://www.narf.org/nill/Codes/oglalacode/chapter30-animal.htm) (accessed Nov. 17, 2007).

[57] *Id*. at § I-19.

[58] *Id*. at § I-14(1)–(2).

[59] *Id*. at § I-18(6).

IV. TRIBAL CRIMINAL ANIMAL ABUSE STATUTES

In addition to tribal civil animal control statutes, a few tribes have established criminal provisions prohibiting and punishing cruel practices toward animals. Many tribes have acknowledged the link between animal abuse and domestic violence by passing tribal laws aimed at prosecuting those who abuse animals and protecting the animals that are the subject of abuse. In the last two decades, the recognition of the correlation between animal abuse and family violence has been well documented.[60] For instance, a violent partner may use the family's pet to intimidate, control, terrorize, or hurt others in the family.[61] A number of specific studies have documented the seriousness of this problem. Approximately fifty percent of abused women in one study had animal companions.[62] Another study showed that eighty-five percent of women entering shelters experienced pet abuse in the family.[63] In a study of families who abused their children, eighty-three percent also abused their animal companions.[64] Four examples of tribal laws are discussed below, indicating that tribes have been more proactive than many jurisdictions in seeking to protect animals from cruelty.

The Nisqually Tribe in Washington makes cruelty to animals a "Class III offense" which carries a term of confinement of thirty to ninety days and a maximum thousand dollar fine.[65] The Tribe's statute is quite protective, reaching cruelty to both domestic and working

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[60] Humane Socy. of the U.S., *Animal Cruelty and Family Violence: Making the Connection*, http://www.hsus.org/hsus_field/first_strike_the_connection_between_animal_cruelty_and_human_violence/animal_cruelty_and_family_violence_making_the_connection/ (accessed Nov. 17, 2007) [hereinafter *HSUS*].

[61] *Id*.

[62] Frank R. Ascione, Claudia V. Weber & David S. Wood, *Animal Welfare and Domestic Violence,* http://www.vachss.com/guest_dispatches/ascione_2.html (accessed Nov. 17, 2007).

[63] *HSUS, supra* n. 60.

[64] Guardian Campaign, *Fast Facts on the Cycle of Violence*, http://www.guardiancampaign.com/violencestats.html (accessed Nov. 17, 2007). In the last two decades, the recognition of the correlation between animal abuse and family violence has been well-documented. Humane Socy. of the U.S., *Animal Cruelty and Family Violence: Making the Connection*, http://www.hsus.org/hsus_field/first_strike_the_connection_between_animal_cruelty_and_human_violence/animal_cruelty_and_family_violence_making_the_connection/ (accessed Nov. 17, 2007) [hereinafter *HSUS*]. For instance, a violent partner may use the family's pet to intimidate, control, terrorize, or hurt others in the family. *Id.* A number of specific statutes have documented the seriousness of this problem. Approximately fifty percent of abused women in one study had animal companions. Frank R. Ascione, Claudia v. Weber & Davis S. Wood, *Animal Welfare and Domestic Violence*, http://www.vachss.com/guest_dispatches/ascione_2.html (accessed Nov. 17, 2007). Another study showed that eighty-five percent of women entering shelters experienced pet abuse in the family. *HSUS*, *supra*, n. 64. In a study of families who abused their children, eighty-three percent also abused their animal companions. Guardian Campaign, *supra* n. 64.

[65] Nisqually Tribal Code §§ 10.08.05, 10.03.03(c) (2003) (available at http://narf.org/nill/Codes/nisqcode/nisqcodetoc.htm) (accessed Nov. 17, 2007).

animals. A person may be prosecuted for cruelty to animals if such person "[t]ortures, mistreats, mutilates, overrides, overloads any animal; [a]bandons any animal; or [d]eprives food or drink to any animal."[66] While some of these terms are subjective and could lead to unfortunate results in litigation,[67] the statute's aim is clearly to benefit domestic animals.

The Chitimacha Tribe of Louisiana enacted its animal cruelty statute in 1993. The Tribe makes it an offense to fail to "adequately house, feed, water or maintain and care for" an animal.[68] The statute also provides that "[a]ny person who intentionally, recklessly or negligently, unnecessarily or cruelly beats, mutilates, kills, tortures or abuses any animal, or causes same to be cruelly beaten, mutilated, killed, tortured or abused" is guilty of a Class B Misdemeanor, unless such abuse results in death, in which case the offense is deemed a Class A Misdemeanor.[69] Interestingly, the statute only prohibits "unnecessary" or "cruel" beatings, suggesting that certain types of animal abuse may not be subject to prosecution under the tribal code if some "necessity" can be shown.[70] This would seem to be a glaring omission in the drafting of the law.

The Cherokee Tribe enacted its statute prohibiting cruelty to animals in 2001.[71] The statute provides that it is unlawful for any person to "purposely or knowingly," among other things, "[t]orture or seriously overwork an animal; [f]ail to provide [necessary care or]; [a]bandon an animal in one's custody."[72] The Code also defines cruelty, in part, as "caus[ing] one animal to fight with another," effectively prohibiting cockfighting or other such deplorable activities that remain permitted in some jurisdictions.[73] Cruelty to animals is punished by a fine not to exceed five thousand dollars or a term of imprisonment of no more than one year in jail, or both.[74] The Code allows, as a defense to a charge of animal cruelty, proof that the conduct of the actor toward the animal "was an accepted veterinary in [sic] practice or directly related to a bona fide experimentation for scientific research" provided that, should death to the animal have resulted, the cause was not "unnecessarily cruel."[75] Conviction may result in confiscation of the cruelly treated animals, to be disposed of at the court's discretion.[76]

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66 *Id*. at § 10.08.05.

67 *See e.g. People v. Garcia*, 29 A.3d 255 (N.Y. App. Div. 2006) (holding animal abuse statute not unconstitutionally vague as applied to defendant for killing a boy's pet goldfish by deliberately crushing it because a "companion animal" includes goldfish).

68 Chitimacha Tribal Code, tit. III § 415 (2003). (available at http://www.narf.org/nill/Codes/chitimachacode/chitimcodet3criminaloff.htm) (accessed Nov. 17, 2007).

69 *Id*. at § 415(b).

70 *Id*. at § 415(a).

71 Cherokee Code § 14-5.20 (2007).

72 *Id*. at § 14-5.20(a).

73 *Id*. at § 14-5.20(a)(6).

74 *Id*. at § 14-5.20(b).

75 *Id*.

76 *Id*. at § 14-5.20(c).

The Absentee-Shawnee Tribe of Indians of Oklahoma offers another variation on animal cruelty statutes. The Absentee-Shawnee Tribe criminalizes cruelty to both domestic animals and livestock.[77] For livestock, the Tribe prohibits, *inter alia,* the knowing failure to "treat" sick animals "where there is a substantial danger of infecting other animals."[78] Punishment includes the imposition of a $250 fine or a maximum of three months in jail.[79] This tribal statute is less protective of animals than others, perhaps owing to the farming and ranching history of Oklahoma Indian tribes.

These examples indicate that tribes across the country have taken a leading role in criminalizing animal cruelty and mandating certain basic protections for animals. Indian Country may provide a fertile field for animal rights advocates working with tribal governments and tribal prosecutors to expand protections for animals. For instance, some tribes might be willing to classify animals as something other than personal property for tort actions. Other tribes might be willing to explore bans on experimentation, certain food processing methods, or the placing of domestic animals in unhealthy conditions. These opportunities should not be overlooked by advocates focusing solely on local and state measures. In fact, it might be considerably easier for advocates to advance domestic animal protection measures within the smaller democracies of tribal government than other jurisdictions. Many non-Indian jurisdictions would do well to follow the lead of Indian Country.

V. INDIAN HUNTING AND FISHING RIGHTS

Tribes not only protect animals for animals' sake, most tribes protect wild animals in order to provide for their availability for use by tribal members. Indian tribes retain close spiritual and cultural ties to the natural environment, including the wild animals therein. These relationships were preserved in the treaties executed between tribes and the United States. While tribes across the country reserved various hunting, fishing, and gathering rights, the bulk of the litigation construing treaty rights in a modern day context has occurred in Washington State. The following provides a brief overview of tribal hunting and fishing rights. While many animal advocates might look askance on hunting and fishing by anyone, such a view sweeps too broadly when it comes to tribal members. Tribes and their members have a unique cultural and legal right derived from time immemorial, not available to non-Indians, to use wild animals for subsistence and commerce.

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[77] Absentee-Shawnee Tribal Code §§ 551–52 (1994).

[78] *Id*. at § 552(a)(5).

[79] *Id.* at § 552(d).

A. Regulation of Fishing and Hunting within Indian Country Generally

Indians generally possess exclusive rights to hunt and fish on reserved land and waters within their reservations. It is a federal crime to fish, hunt, or trap on Indian property without permission of appropriate tribal authorities.[80]

As an incident of sovereignty, tribes retain authority to regulate hunting and fishing by their members on reservation lands. In some cases, the tribal government may also possess the authority to control hunting and fishing by nonmembers on non-Indian-owned lands if nonmember conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.[81]

B. Fishing Rights at "Usual and Accustomed" Fishing Locations

One of the most important reserved Indian treaty rights is the right to fish at all traditional hunting and fishing locations. State law concepts do not defeat the rights of Indians whose tribes were parties to treaties with the United States.[82]

One particular path-making case, *United States v. Winans*, is worthy of special mention. In *Winans*, non-Indian upland owners constructed a fish wheel in the waters of the Columbia River, pursuant to a state license.[83] The fish wheel prevented the Indians from fishing at their traditional fishing area.[84] The U.S. Supreme Court ruled that the fact the defendants had fee patents to the land in question, issued by the government, did not defeat the Indians' treaty fishing rights and that the treaties fixed "in the land such easements as enables the [treaty] right to be exercised."[85] As the U.S. Supreme Court explained, the treaty at issue promised the tribes "the right of taking fish at all usual and accustomed places" and the right "of erecting temporary buildings for curing them."[86] "The contingency of the future ownership of the lands, therefore, was foreseen and provided for" and, "in other words, the Indians were given a right in the land. . . ."[87]

The U.S. Supreme Court has also made clear that tribes' fishing rights in their usual and accustomed places are not diminished by private ownership of those lands. In fact, the Court noted that the treaties "imposed a servitude upon every piece of land as though described

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[80] 18 U.S.C. § 1165 (2000).

[81] *Montana,* 450 U.S. at 566; *see also N.M. v. Mescalero Apache Tribe*, 462 U.S. 324, 344 (1983) (holding that the Tribe's hunting and fishing regulations pre-empt state law).

[82] *U.S. v. Winans*, 198 U.S. 371 (1905).

[83] *Id*. at 372.

[84] *Id*. at 371–72.

[85] *Id.* at 384.

[86] *Id*. at 381.

[87] *Id*.

therein."[88] The tribes therefore also acquired the right to take shellfish from the tidelands within their usual and accustomed grounds, without regard to the public or private nature of the ownership of the underlying lands, in the manner of an easement or servitude.[89]

In the well known fishing rights litigation commonly known as the "Boldt decision" (after the U.S. District Judge issuing the initial decision), the District Court for the Western District of Washington held that usual and accustomed fishing places of the tribes signing treaties with the United States in the 1850s were fishing locations where the tribes reserved, and their members currently possessed, the right to take fish.[90] The U.S. Supreme Court ultimately affirmed that the tribes were entitled to up to fifty percent of the available fish.[91] The courts also later confirmed the right to take "artificial" hatchery fish, even though those fish did not exist at treaty times.[92] Tribes retain the exclusive right to harvest and manage this fifty percent share.

As between tribes that have overlapping fishing areas, courts have found some tribes to have a "primary right" to take fish, based on the pre-treaty relationship between the tribes. A "primary right" is an aboriginal use right defined as "the power to regulate or prohibit fishing by members of other treaty tribes."[93] The "primary right" is an important exercise of tribal sovereignty that can be used to ensure sufficient harvest and for conservation purposes.

The District Court for the Western District of Washington also recently found an aspect of habitat protection to be included in the Western Washington tribes' treaty rights.[94] In the proceeding of the *U.S. v. Washington* litigation known as the "culvert case," the court issued a groundbreaking ruling in August 2007 interpreting the Stevens' treaties as providing the tribes "the right to take fish, not just the right to fish."[95] The court found that the treaties impose upon the state of Washington a duty to refrain from building or maintaining culverts under state owned or maintained roads that block the passage of fish "upstream or down, to or from" tribal usual and accustomed fishing

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[88] *Winans*, 198 U.S. at 381.

[89] *U.S. v. Wash.*, 873 F. Supp. 1422, 1431 (W.D. Wash. 1994).

[90] *U.S. v. Wash.*, 384 F. Supp. 312, 332 (W.D. Wash. 1974), *aff'd sub nom. Wash. v. Fishing Vessel Assn.*, 443 U.S. 658 (1979).

[91] *Wash. v. Fishing Vessel Assn.*, 443 U.S. 658, 685–87 (1979); *See also Antoine v. Wash.*, 420 U.S. 194, 196–97 (1975) (construing similar language referring to the hunting rights of the Colville Tribe).

[92] *U.S. v. Wash.*, 759 F.2d 1353, 1358–60 (9th Cir. 1985).

[93] *U.S. v. Skokomish Indian Tribe*, 764 F.2d 670, 671 (9th Cir. 1985); *U.S. v. Lower Elwha Tribe*, 642 F.2d 1141, 1143–44 (9th Cir. 1981) (a "primary right" imposes a requirement that a tribe seek permission from the "primary" tribe in order to fish in certain area).

[94] 2007 WL 2437166 at *8 (W.D. Wash. Aug. 22, 2007) ("imposes a duty upon the state to refrain from building or operating culverts under State-maintained roads that hinder fish passage" and thus diminish the harvest).

[95] *Id.* at *8.

areas.[96] The declaratory judgment ruling is narrowly tailored, however, to the facts presented—namely, state-owned culverts—and should not be read as imposing a broad "environmental servitude" or the imposition of an affirmative duty to take all possible steps to protect fish runs.[97] The remedy phase of the case has been postponed while the tribes and the State pursue settlement talks to discuss means for the State to improve fish passage.[98] Nevertheless, the importance of the ruling is the judicial recognition that the treaties of 1855 provide fish and secure the environmental conditions necessary to allow those fish to be harvested by tribes.

C. Treaty Rights for Shellfish Harvesting

The treaty right to fish has been authoritatively recognized as "not limited by particular species," and specifically to include salmon, herring, artificial or hatchery fish, shellfish, and halibut.[99] In the continuing litigation in *U.S. v. Washington*, the court affirmed that the treaty right to fish includes the right to harvest shellfish imbedded in the State's tidelands and bedlands.[100] The court held that usual and accustomed places for shellfish harvesting are the same as those for salmon and include "all bedlands and tidelands under or adjacent to those areas."[101]

The treaty right to harvest shellfish within usual and accustomed grounds and stations exists whether or not the underlying bedlands or tidelands are in private ownership.[102] In a later implementation order, the *U.S. v. Washington* court limited access for tribal members across privately owned uplands "unless the Tribal members can demonstrate the absence of access by boat, public road, or public right-of-way" to shellfish harvesting areas.[103]

D. Access to "Open and Unclaimed" Lands for Hunting

Courts have affirmed that, under applicable treaties, tribes have the right to hunt on "open and unclaimed lands." For instance, Article III of the Nez Perce Tribe's 1855 Treaty with the United States, reserves the right to hunt on open and unclaimed lands.[104] This right,

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[96] *Id.* at *10.

[97] *Id.*

[98] *Id.*

[99] *U.S. v. Wash.*, 143 F. Supp. 2d 1218, 1222 (W.D. Wash. 2001).

[100] 157 F.3d 630, 647 (9th Cir. 1998).

[101] *U.S. v. Wash.*, 873 F. Supp. at 1431.

[102] *Id.* at 1441. The right does not extend, however, to shellfish beds which are deemed to be "staked or cultivated" by private parties, as those terms were used at treaty times. *Id.* What constitutes a "staked or cultivated" bed is beyond the scope of this essay and is the subject of related litigation.

[103] 909 F. Supp. 787, 793 (W.D. Wash. 1995).

[104] *Treaty with the Nez Percé* art. III (June 11, 1855), 12 Stat. 957 ("The exclusive right . . . is further secured to said Indians . . . together with the privilege of hunting . . . upon open and unclaimed land").

however, is not as broad as the right to take fish at all "usual and accustomed locations." In *State v. Chambers*, the Washington State Supreme Court held that access to hunt contrary to state law was not preserved where the land on which the Indian was hunting was fenced and there was an unoccupied house nearby.[105] However, the Court noted that private ownership must be readily apparent from observation in order to defeat the reserved treaty right.[106] The Washington State Supreme Court has also held that the "open and unclaimed" land language of the Point Elliott Treaty applied only to land within a tribe's "ceded" areas under the treaties or other "traditionally hunted" areas.[107]

Presumably, "open" land, even if "claimed," may still be subject to Indian treaty rights.[108] The issue may turn on whether property transactions, subsequent to the treaty or agreement originally reserving the right, were intended to abrogate the reserved right. In one case, the U.S. District Court for the Western District of Washington denied a motion to dismiss a criminal proceeding for violation of federal statutes barring hunting in the Olympic National Park.[109] The court held that the federal legislation creating the park terminated the "open and unclaimed" nature of the land and that subsequent legislation prohibiting all hunting in the park terminated the "Indian hunting privilege."[110] However, other courts have held that National Forest land is "open and unclaimed land."[111] The issue, therefore, is generally considered unsettled and additional litigation remains pending.

VI. CONCLUSION

Indian tribes are about much more than Indian gaming and tax-free fuel. Tribal members are deeply spiritual and traditional people. Most of these traditional values revolve around animals and their importance to tribal ceremonies and subsistence. Animals play roles in songs, dances, designs, basketry, and pottery. For instance, most tribal oral traditions and creation stories involve animals such as Coyote and Fox, who created and shaped the world—rivers are channeled and mountains built, animal and plant people are given their characteris-

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105 506 P.2d 311 (Wash. 1973).

106 *Id*. at 315.

107 *State v. Buchanan*, 978 P.2d 1070, 1079–81 (Wash. 1999).

108 *See e.g. Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204–08 (1999) (affirming Indian treaty hunting, fishing, and gathering rights on ceded lands within the state and finding that such rights are "not inconsistent with state sovereignty over natural resources").

109 *U.S. v. Hicks*, 587 F. Supp. 1162 (W.D. Wash. 1984).

110 *Id*. at 1163.

111 *See e.g. State v. Arthur*, 261 P.2d 135, 141 (Idaho 1953) (holding that National Forest lands constitute "open and unclaimed" lands for purposes of the Nez Perce Treaty of 1855); *State v. Strasso*, 563 P.2d 562, 565 (Mont. 1977) (holding that National Forest lands are "open and unclaimed" for the purposes of the Salish and Kootenai's Treaty with the United States which reserves the right of hunting on "open and unclaimed" land).

tics, and customs are established that govern relations between all people thanks to animals.[112] Indian people continue to recognize this kinship with animals today. Whether it is through animal protection statutes, annual salmon ceremonies, or managing endangered species reintroduction efforts, Indian tribes remain stewards of the environment and frequently fight to protect habitat for wild animals and ensure protections for the animals themselves.

112 *See e.g. Stories that Make the World: Oral Literature of the Indian Peoples of the Inland Northwest* (Rodney Frey, ed., U. Okla. Press 1995).