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American Indian Law Review

Volume 10 | Number 1

1-1-1982

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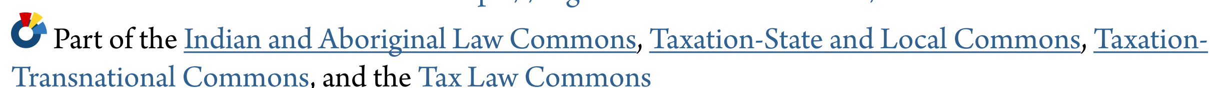
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Recommended Citation

David B. Wiles, *Taxation: Tribal Taxation, Secretarial Approval, and State Taxation--Merrion and Beyond*, 10 Am. Indian L. Rev. 167 (), https://digitalcommons.law.ou.edu/ailr/vol10/iss1/6

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TAXATION: TRIBAL TAXATION, SECRETARIAL APPROVAL, AND STATE TAXATION—*MERRION* AND BEYOND

*David B. Wiles**

The power to tax is inherent in sovereignty and "essential to the existence of independent government."[1] States have broad powers to tax within their own boundaries. Within limitations, this power includes the levy of taxes by Indian tribes on their reservations. The tribes' authority to tax is derived from retained "attributes of sovereignty over both their members and their territory."[2] This power has been described as "an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management."[3] At a time when federal programs are being sharply cut and the costs of providing public services are soaring, many state and tribal governments are turning to taxation as a means of raising revenue. The increased awareness of mineral-rich lands and the development of mineral production is causing states and tribes to consider the taxing of natural resource development. A problem arises, however, in that a significant percentage of these natural resources are located on Indian lands.[4] Between the state and the tribal governments, who has taxing authority? The mere existence of a tribal tax does not invalidate a state tax, but to what extent may the state or tribe impose the tax? It appears that a state may levy taxes on non-Indians on Indian lands as long as the tax does not interfere with the tribe's ability to self-govern. On the other hand, pursuant to tribal sovereignty, a tribe can tax the development of natural resources by non-Indians.

On several occasions, the United States Supreme Court has addressed the issue of state-imposed taxes on Indian lands.[5] In

* Second-place Winner, 1983 Indian Law Writing Competition

1. 71 AM. JUR. 2d *State and Local Taxation* § 71 (1973).

2. United States v. Mazurie, 419 U.S. 544, 557 (1975).

3. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982). "Taxation can serve as a mechanism to achieve the tribe's public goals, whether the goals are a distribution of income, asset replacement, payment of development costs, rates of development, protection of natural and social environment, or merely the raising of revenues to maintain a government." Redhouse & Smith, *American Indian Tribal Taxation of Energy Resources*, 22 NAT. RESOURCES J. 659, 660 (1982).

4. Exact numbers are unknown.

5. Ramah Navajo School Bd. v. Bureau of Revenue, 102 S.Ct. 3394 (1982) (federal law preempted tax imposed on non-Indian construction company for gross receipts re-

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Washington v. Confederated Tribes of the Colville Reservation,[6] the Supreme Court held that a state tax will be upheld if it is not federally preempted nor infringes on the tribe's right to self-government.[7] Never has the Supreme Court addressed the infringement of tribal self-government by a state-imposed severance tax.[8]

In *Colville,* the tribe's authority to tax non-Indians was also validated; however, this holding was limited to sales made on the reservation.[9] On only one occasion has the United States Supreme Court addressed a tribe-imposed severance tax. In *Merrion v. Jicarilla Apache Tribe,*[10] the Supreme Court held that a tribe has inherent authority to impose a severance tax as part of its power of self-government.[11] Although the Supreme Court in *Colville* and *Merrion* addressed all issues properly brought before it, additional questions concerning approval by the Secretary of the Interior of tribal tax ordinances and the extent states are allowed to tax natural resource development remain unanswered and unsolved.[12]

This note will address and analyze the following areas of controversy and resolution embodied in the concept of taxation of natural resources development on Indian lands: (1) the Supreme

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ceived from tribe for construction of school for Indian children on reservation); Moe v. Confederated Salish & Kootenai Tribes of Flathead Indian Reservation, 425 U.S. 463 (1976) (state barred from imposing cigarette sales tax on on-reservation sales by tribal members to Indians living on reservation, vendor license fee on tribal member operating shop on reservation, and personal property tax as condition precedent for registration of motor vehicle, but allowed to require precollection of cigarette sales tax imposed by law on non-Indian purchaser); Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) (state may impose a nondiscriminatory gross receipts tax on ski resort operated by tribe on off-reservation land leased from federal government).

6. 447 U.S. 134 (1980).

7. *Id.* at 150-62.

8. In Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981), the Supreme Court upheld the Montana severance tax imposed on coal mined in the state against challenges that it violated the commerce clause and the supremacy clause. However, the issue of whether the tax infringed upon the tribe's ability to self-govern was not before the Court.

9. *Colville,* 447 U.S. 134, 153 (1980).

10. 455 U.S. 130 (1982).

11. *Id.* at 137-44.

12. A question unanswered by the *Merrion* Court and beyond the scope of this note: Are Indian tribes to be constrained by "negative implications" of the interstate commerce clause? *See also* Ragsdale, *The Taxation of Natural Resources by Indian Tribes: Merrion, A Comment,* 22 NAT. RESOURCES J. 649 (1982) (addresses implications of *Merrion* and secretarial approval); Dockins, *Limitations on State Power to Tax Natural Resource Development on Indian Reservations,* 43 MONT. L. REV. 217 (1982) (state cannot justify tax that results in severance of a natural resource component from the land).

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Court's decision in *Merrion v. Jicarilla Apache Tribe* and some effects; (2) whether secretarial approval is required for ordinances passed by tribes not organized under the Indian Reorganization Act of 1934; and (3) to what extent states may impose a tax on natural resources developed by non-Indians on Indian lands.

Tribal Taxation: Merrion v. Jicarilla Apache Tribe

In Merrion v. Jicarilla Apache Tribe,[13] the United States Supreme Court upheld a tribal oil and gas severance tax against challenges based on lack of tribal powers and violations of the commerce clause.[14] In *Merrion,* the Jicarilla Tribe enacted an ordinance imposing a severance tax on oil and gas production on tribal land.[15] While the tax applied to "any oil and natural gas severed, saved and removed from Tribal lands. . . ,"[16] it did not apply to leases previously approved by the tribe and from which royalties were being received.[17] Pursuant to the tribe's constitution, the ordinance was approved by the Secretary of the Interior.[18]

Subsequently, several individuals and corporations brought action in the federal district court of New Mexico to enjoin enforcement of the severance tax. Consolidating the cases, the district court enjoined enforcement of the tax.[19] The district court ruled that "the Tribe lacked the authority to impose the tax, that only state and local authority had the power to tax oil and gas production on Indian reservations, and that the tax violated the Commerce Clause."[20] On appeal, the Court of Appeals for the Tenth Circuit reversed.[21] The court held that the power to tax is "an inherent attribute of tribal sovereignty that has not been divested

13. 455 U.S. 130 (1982).

14. *Id.*

15. Jicarilla Apache Tribe, Ordinance No. 77-0-02 as amended by Ordinance No. 77-0-195.

16. *Id.*

17. *Id.*

18. "The ordinance was approved by the Secretary, through the Acting Director of the Bureau of Indian Affairs, on December 23, 1976." 455 U.S. 130, 136 (1982).

19. *Id.*

20. *Id.*

21. Merrion v. Jicarilla Apache Tribe, 617 F.2d 537 (10th Cir. 1980). Two judges dissented, arguing that inherent tribal sovereignty does not include the authority to impose taxes on non-Indian leases. *Id.* at 551-56. For an examination of the rationale employed by the Tenth Circuit in deciding *Merrion* and other cases with natural resource issues, *see* Note, *Land and Natural Resources,* 58 DEN. L.J. 415 (1981). *See also* Note, *Tribal Severance Taxes—Outside the Purview of the Commerce Clause,* 21 NAT. RESOURCES J. 405 (1981) (discusses court's disposition of commerce clause issue).

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by any treaty or Act of Congress."[22] In addition, the court found no violation of the commerce clause.[23] Granting certiorari,[24] the United States Supreme Court affirmed.[25]

In an opinion delivered by Justice Marshall expressing the view of six members of the Court,[26] it was held that the severance tax was authorized by the tribe's inherent authority to tax as part of the power of self-government and that the tax did not violate the commerce clause. In addressing the tribe's power to impose the severance tax, the Court found that the tribe had the inherent authority to impose the tax both as a part of its power to govern and pay costs of self-government,[27] and in its power to exclude non-Indians from the reservation.[28] The Court noted that the tribe's authority was not preempted by congressional enactment of the mineral leasing acts of 1927[29] or 1938.[30]

The Court also held that the commerce clause doctrine is only engaged when "Congress has not acted or purported to act."[31] Because Congress has provided procedures that must be followed before a tribal tax is to take effect, and in this case the Jicarilla Tribe fulfilled these requirements, the Court concluded that "it is not our function nor our prerogative to strike down a tax that has traveled through the precise channels established by Congress,

22. *Merrion*, 455 U.S. at 136. "They retain those powers of self-government not voluntarily relinguished by treaty, not divested by Congress in the exercise of its plenary authority over them, or not inconsistent with the superior interests of the United States as a sovereign nation." 617 F.2d at 541.

23. 617 F.2d at 545-46.

24. 449 U.S. 820 (1980).

25. *Merrion*, 455 U.S. at 136.

26. Justice Marshall was joined by Brennan, White, Blackmun, Powell and O'Connor, J.J.

27. 455 U.S. at 137-44.

> The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services. The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction.

Id. at 137.

28. *Id.* at 137-44.

29. 25 U.S.C. §§ 398 (a)-(e) (1976). The 1927 Act allows state taxation of mineral production on Indian reservations.

30. 25 U.S.C. §§ 396(a)-(g) (1976). The 1938 Act establishes procedures for oil and gas leases on tribal lands.

31. *Merrion*, 455 U.S. at 154.

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and has obtained the specific approval of the Secretary."[32] The Court further noted that even if the tax could be challenged under the interstate commerce clause, it would survive judicial scrutiny.[33]

Justice Stevens, writing for the dissent, held that the power of the Indian tribes to tax nonmembers stems not from the tribes' inherent power of self-government but from their power to exclude nonmembers.[34] Furthermore, the tribe could not retroactively impose a tax on a lease in which the tribe had failed to retain the power to challenge or alter conditions.[35]

Today, *Merrion* is *the* case in tribal taxation. In deciding as it did, the United States Supreme Court has buried any fear held by the Indian tribes as to their governing and regulatory authority.[36] While consistent with case law upholding tribal taxing power,[37] *Merrion* is the first case specifically to allow a tribal severance tax on the production of oil and gas by non-Indians on tribal lands.[38] In addition to confirming that Indian tribes have sovereign power to levy taxes on non-Indians, the Court reaffirmed Congress' ability to limit that power.[39] However, as the *Merrion* Court insisted, such congressional intent to limit a tribe's sovereign power must be by "clear indications." The Court held: "[A] proper respect for both tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."[40] Further-

32. *id.* at 156.

33. *Id.* A tax will survive judicial scrutiny if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." Complete Auto Transit v. Brady, 430 U.S. 274, 279 (1977).

34. 455 U.S. at 186.

35. *Id.* at 189.

36. Recent United States Supreme Court decisions have given rise to question the extent of tribal powers. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (tribe lacked criminal jurisdiction over non-Indian); Montana v. United States, 450 U.S. 544 (1981) (tribe could not regulate fishing by non-Indians on non-Indian fee land on the reservation).

37. In Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152 (1980), the Court held: "The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implications of their dependent status."

38. "Indeed, the conception of Indian sovereignty that this Court has consistently reaffirmed permits that no other conclusion." 455 U.S. at 140.

39. *Id.* at 141.

40. *Id.* at 152, *citing* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978). The

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more, language in the Court's opinion indicates that a general ceding of tribal civil or criminal jurisdiction is not enough to prevent tribal taxing powers.[41] Finally, beyond consent by the tribes for non-Indians to conduct business on the reservation, the tribes are under no obligation to offer governmental services in return for the taxes.[42]

Although *Merrion* addressed many issues, two questions remain for Indian mineral taxation: first, is secretarial approval required for ordinances passed by tribes not organized under the Indian Reorganization Act of 1934; and second, to what extent are states allowed to tax mineral activity by non-Indians on Indian lands?

Secretarial Approval of Tribal Tax Ordinances

Case Law

What is the power of the Secretary of the Interior in approving tribal tax ordinances? In 1934, Congress enacted the Indian Reorganization Act (IRA).[43] Passed with the intent to provide regulatory supervision, the Act requires tribal constitutions and bylaws to be "approved by the Secretary of the Interior."[44] In addition, "[a]mendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws."[45]

In *Merrion*, the Jicarilla Tribe organized and adopted a constitution pursuant to the IRA.[46] Subsequently, the tribe revised its constitution specifically requiring secretarial approval of all ordinances imposing "taxes and fees on nonmembers of the tribe doing business on the reservation."[47] Because the Secretary had approved the Jicarilla resolution as required in the tribe's constitution, lack of secretarial approval was not an issue in *Merrion*.

Court further cautioned: "In any event, if there were ambiguity on this point, the doubt would benefit the Tribe, for '[a]mbiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence.' *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143-44 (1980)."

41. This was argued by a United States District Court. *See* Southland Royalty Co. v. Navajo Tribe, No. 79-0140, slip op. at 6 (D. Utah June 5, 1980).

42. *Id.* at 10.

43. 25 U.S.C. §§ 461-486 (1964).

44. *Id.* at § 476.

45. *Id.*

46. 455 U.S. 130, 134 (1982).

47. *Id.* at 135.

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However, following *Merrion*, it is clear that a tribe organized under the IRA or held to secretarial approval by its own constitution, "must obtain approval from the Secretary before it adopts or revises its constitution to announce its intention to tax nonmembers."[48]

But, what about a tribe that is not organized under the IRA or held by its own constitution to secretarial approval; is it held to the same standards? Lower courts have held that tribes not organized under the IRA will be held to secretarial approval.[49] Although there is no express statutory language requiring secretarial approval, congressional intent has been interpreted as requiring such.

In *Southland Royalty Co. v. Navajo Tribe*,[50] and *Kerr-McGee Corp. v. Navajo Tribe*,[51] the United States district courts for Utah and Arizona, respectively, addressed the validity of taxes imposed by the Navajo Tribe. In 1934 the Navajo Tribe rejected application of the IRA.[52] Furthermore, the tribe has never ratified a constitution.[53] In 1978 the tribe passed two tax resolutions. The first, a possessory interest tax, required "any person having ownership rights in a lease granted by the Navajo Nation to pay an annual tax on the value of the lease site and underlying natural resources."[54] The second, a business activity tax, required "any person engaged in productive activity within the Navajo Nation to pay a tax on the gross receipts. . . ."[55] In both district court cases, oil companies brought suit against the tribe to contest the validity of the taxes.

In *Southland*, the court found that although there was no statutory authority that expressly required secretarial approval of the Navajo tax resolution, approval was required for several reasons.[56] The court reasoned that since secretarial approval is required for a tribal ordinance passed pursuant to the tribe's constitution, approval is likewise required for a tribe without a constitution.[57] The court continued by saying:

48. *Id.* at 155.

49. See *infra* text accompanying notes 50-65.

50. No. 79-0140 (D. Utah June 5, 1980).

51. No. 80-247, 9 I.L.R. 3110 (D. Ariz. 1982).

52. Brief for Respondents at 6, Southland Royalty Co. v. Navajo Tribe, No. 79-0140 (D. Utah June 5, 1980).

53. *Id* at 7.

54. Navajo Tribe Resolution, CJA-13-78.

55. Navajo Tribe Resolution, CAP-36-78.

56. *Southland*, slip op. at 13-16.

57. *Id.* at 14.

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> Although Congress never intended to require a tribal constitution, Congress certainly did intend to encourage the Navajos to adopt one. However there is no such encouragement if on the one hand tribes adopting a constitution must have that constitution approved by the Secretary, but on the other hand tribes without a constitution may govern solely by tribal resolution without need for Secretarial approval. In fact this state of affairs would encourage tribes *not* to adopt a tribal constitution, because to do so would be to place limits on tribal self-government that would not otherwise exist.[58]

In finding congressional intent, the court further noted that under the Mineral Leasing Act of 1938, the Secretary must approve all oil and gas leasing on the reservation.[59] If a tribe's constitution is approved pursuant to the IRA, regulatory authority passes to the tribe.[60] Without an approved constitution, the power to regulate remains with the Secretary.[61] In light of this, the *Southland* court held that it appears "Congress intended to require Secretarial approval of tribal tax resolutions, passed without benefit of a tribal constitution, if such resolutions could have a significant effect on reservation oil and gas leases."[62] In addition, "Congress intended that the Secretary would examine these taxes to determine whether they are consistent or inconsistent with the federal regulatory framework."[63] In concluding that secretarial approval is required, the Court stated:

> Congressional intent for such a requirement must be inferred from the requirement that the Secretary approve tribal constitutions, from the delegation of regulatory authority over reservation oil and gas leases to the Secretary, in the absence of a tribal constitution, and from the historical relationship between the Interior Department and the Navajo Tribal Council.[64]

The *Kerr-McGee* court's opinion was consistent with *Southland*.[65]

The United States Supreme Court has yet to address the issue of secretarial approval of ordinances passed by nonorganized

58. *Id.*
59. *Id.* at 15.
60. *Id.* at 14.
61. *Id.* at 14-15.
62. *Id.* at 15.
63. *Id.*
64. *Id.* at 16.
65. Kerr-McGee Corp. v. Navajo Tribe, No. 80-247, slip op. at 22, 9 I.L.R. 3110, 3113 (D. Ariz. 1982).

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tribes. However, in *Merrion* the Court's opinion does include language supporting the result reached in *Southland* and *Kerr-McGee*. The *Merrion* Court stated that:

> [T]he Tribe's authority to tax nonmembers is subject to constraints not imposed on other governmental entities: the federal government can take away this power, and the Tribe must obtain the approval of the Secretary before any tax on nonmembers can take effect. These additional constraints minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any exercise of the tribal power to tax will be consistent with national policies.[66]

Following the holdings of *Southland* and *Kerr-McGee* and the language found in *Merrion*, tribal taxes must be approved by the Secretary, even if the tribe is not organized under the IRA. By requiring secretarial approval, congressional intent to monitor tribal authority and protect economic development and interests of the tribe is pursued.[67] If in the future the United States Supreme Court should specifically address secretarial approval of non-organized tribes, *Southland* and *Kerr-McGee* should be strong indications as to the outcome.

Guidelines

In response to the increase of tribal ordinances imposing taxes on mineral activities, the Secretary of the Interior has developed guidelines to assist in the review procedure and the standard of review.[68] Approved January 18, 1983,[69] these guidelines are intended to "implement the Area Directors' authority to review or approve tribal ordinances imposing taxes on mineral activities by suggesting a procedure by which tribes can consider interests of

66. 455 U.S. 130, 141 (1982).

67. *See* F. COHEN, FEDERAL INDIAN LAW 220-28 (ed. 1982).

68. *See* BUREAU OF INDIAN AFFAIRS, U.S. DEP'T OF THE INTERIOR, REVIEW OF TRIBAL ORDINANCES IMPOSING TAXES ON MINERAL ACTIVITIES (Jan. 18, 1983) [hereinafter cited as REVIEW OF TRIBAL ORDINANCES].

> The patent effect of the . . . regulations is to make it enormously more difficult for tribes to enact severance taxes and get them approved; to make it vastly easier for the Secretary to disapprove such ordinances on the simple ground that they fail to meet any one of a number of complicated, costly and time-consuming requirements; and to make any ordinance which is approved much more vulnerable to legal challenge from the resource companies which would pay a tribal severance tax.

15 AMERICAN INDIAN LAW NEWSLETTER 20 (1982).

69. The guidelines were approved by Ken Smith, Assistant Secretary of Indian Affairs.

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persons affected by their taxing ordinances, and by establishing a standard for review of such ordinances by the Area Directors."[70] Furthermore, they are to "assist Indian tribes in the exercise of their inherent authority to tax mineral activities within their jurisdiction."[71]

Procedures precedent to the enactment of a tribal ordinance require that the tribe obtain approval from the Bureau of Indian Affairs superintendent,[72] who in turn submits it to the area director for review. In pursuing approval, the tribe is required to submit written notice of its intent to enact an ordinance to the superintendent;[73] the superintendent is to give notice to the public;[74] and then the tribe has the option to hold a public hearing.[75] If the tribe fails to give (1) written notice, (2) a transcript of any public hearing held, or (3) other documentations believed to be important for review by the tribe, the superintendent will disapprove the ordinance.[76] If the ordinance is approved, all documentation is forwarded to the area director.[77] The area director will disapprove the tribal ordinance if it is found that:

(1) "The tribe has failed to comply with the [written notice and submission of documents] requirements. . . .";[78]

(2) "The ordinance was enacted by a tribal governing body to which the tribe's constitution, if the tribe has a constitution, has not delegated the power to impose the tax";[79]

(3) "The ordinance does not provide a procedure, in the ordinance itself or by reference to other tribal law, by which a taxpayer may contest his or her tax liability, and be afforded a right to a hearing before a tribal forum other than the body which enacted the tax";[80] or

(4) "The ordinance violates federal or tribal law."[81]

70. REVIEW OF TRIBAL ORDINANCES, *supra* note 68, at 1.1(A) (1). The area director is defined as "the Bureau of Indian Affairs official in charge of an Area Office who . . . exercises the Secretary's authority to approve or disapprove tribal ordinances. . . ." *Id.* at 1.2(A).

71. *Id.* at 1.1(A) (2).

72. The superintendent is defined as "the Bureau of Indian Affairs Official in charge of an agency office. . . ." *Id.* at 1.2(G).

73. *Id.* at 1.3(A).

74. *Id.* at 1.3(B).

75. *Id.* at 1.3(C).

76. *Id.* at 1.3(E).

77. *Id.* at 1.4(B).

78. *Id.* at 1.6(B) (1).

79. *Id.* at 1.6(B) (2).

80. *Id.* at 1.6(B) (3).

81. *Id.* at 1.6(B) (4).

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Furthermore, the guidelines provide that all decisions are subject to appeal.[82] The question of whether the grounds for disapproval by the area director are supported by, or comport with, federal Indian law has not yet been considered by the courts.

Finally, these guidelines specifically state that they are to apply only where secretarial approval is expressly required by federal law or provided for in the tribe's constitution.[83] Those tribes without a constitution or tribal ordinance restricting their authority "will be considered to possess the authority to exercise the inherent power of the tribe to tax."[84] By narrowing the scope of these guidelines, in effect what has emerged is a clear distinction between tribes that have organized and tribes that have not organized pursuant to the IRA. While this is inconsistent with *Southland* and *Kerr-McGee*, it is consistent with current federal policy and United States Supreme Court case law. However, it is reasonable to assume that as the question of whether to require nonorganized tribes to obtain secretarial approval is more thoroughly discussed by the Supreme Court, these guidelines will eventually be applicable to all tribes, organized or nonorganized. In support of this proposition, as stated in *Southland*, if a tribe is not required to obtain secretarial approval absent a constitution or tribal ordinance requiring such, the intent and purpose of the IRA would be burdened by placing limitations on tribes that did organize under the Act,[85] a result Congress and the courts have earnestly fought to prevent.

State Taxation in Indian Country

In Merrion the Supreme Court limited its holding to the validity of the tribal severance tax. But, what about a state severance tax? Suppose a state wishes to place a severance tax on the development of the same materials being taxed by the Indian tribe, what result? We know that the mere existence of a tribal tax does not invalidate a state tax,[86] but to what extent may the state impose such a tax?

States have broad powers to tax within their own boundaries. The problem arises when determining the boundaries and rights between state regulatory authority and tribal self-government.

82. *Id.* at 1.7.
83. *Id.* at 1.1(B).
84. *Id.* at 1.6(B) (2) (b).
85. *Southland*, slip op. at 14.
86. *See Colville*, 447 U.S. at 147.

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Departing from the strict notion that states have no power on Indian reservations[87] and recognizing that Indian tribes retain "attributes of sovereignty over both their members and their territory,"[88] a simple determination of the validity of a state tax is clouded. It has long been recognized that states have no power to tax Indian trust lands,[89] nontrust property owned by a tribal member on tribal land,[90] and income earned by a tribal member on tribal land.[91] On the other hand, courts have allowed states to impose taxes on Indians outside Indian boundaries,[92] property owned by non-Indians within Indian boundaries,[93] and income earned by non-Indians on Indian lands.[94] The law is unsettled as to the validity of a state severance tax on minerals on Indian lands. However, it appears that the same limitations that have applied in previous state-imposed tax cases would also apply to a state severance tax. These limitations fall into two categories: (1) the exercise of the state's authority to tax may be federally preempted,[95] and (2) the state might unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them."[96] Although these limitations are related, each can stand alone as a possible barrier to state regulatory authority.[97]

87. "[T]he laws of [a State] can have no force." Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).

88. United States v. Mazurie, 419 U.S. 544, 557 (1975).

89. The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867).

90. Brajan v. Itasca County, 426 U.S. 373 (1976); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976).

91. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973).

92. Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

93. Thomas v. Gay, 169 U.S. 264 (1898).

94. Kahn v. Arizona Tax Comm'n, 16 Ariz. App. 17, 490 P.2d 846 (1971), *app. dismissed*, 411 U.S. 941 (1973).

95. *See* Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685 (1965).

96. Williams v. Lee, 358 U.S. 217, 220 (1959). *See also* Washington v. Yakima Indian Nation, 439 U.S. 463, 470 (1979); Lytle, *The Supreme Court, Tribal Sovereignty, and Continuing Problems of State Encroachment into Indian Country*, 8 AM. INDIAN L. REV. 65 (1981) (author explores the role of the United States Supreme Court in providing Indians protection against attempted state intrusions). At least one commentator has broken down the two barriers into a three-level test to determine if a state may apply a tax:

> *First*, is the area preempted by the federal government? If so, then the state cannot apply its tax; if not, then: *Second*, does the state have a legitimate interest? If not, then the state cannot apply its tax; if so, then: *Third*, does the tax infringe on the tribe's rights? If so, then the state cannot apply its tax; if not, then the state *may* apply its tax.

Note, *Taxation: State Taxation of Indian Transactions: The Test after Colville, White Indian Apache, and Central Machinery*, 8 AM. INDIAN L. REV. 419, 428 (1981) (emphasis in original).

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

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Preemption

Congress has broad power to regulate tribal affairs under the Indian commerce clause.[98] Absent express congressional authorization, direct state taxation of tribal property or members is presumed to be preempted.[99] However, if a taxation scheme for non-Indians on Indian land does not conflict with federal statutes or treaties, or interfere with the ability of the tribe to govern itself, express congressional authorization is not needed to uphold the tax.[100]

The classic preemption case is *Warren Trading Post Co. v. Arizona Tax Commission.*[101] In *Warren*, Arizona levied a gross proceeds tax on a retailer federally licensed to do business on the Navajo Reservation. Finding "comprehensive federal regulation of Indian traders,"[102] the Court concluded that "Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders."[103]

In *White Mountain Apache Tribe v. Bracker*,[104] the Supreme Court found Arizona taxes preempted by federal law.[105] In *Bracker*, Arizona sought to impose a motor carrier license and fuel tax on a non-Indian logging company doing business on Indian land.[106] In delivering the opinion of the Court, Justice Marshall found that express congressional intent is not required to preempt state law,[107] only that the state scheme conflict with the intent of a federal statute or regulatory purpose. On the other

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omitted):

> The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important "back-drop," against which vague or ambiguous federal enactments must always be measured.

98. U.S. CONST. art. I, § 8, cl. 3. *See, e.g.*, United States v. Wheeler, 435 U.S. 313, 322-23 (1978).

99. *See Bryan*, 426 U.S. at 376-77; *Moe*, 425 U.S. at 475-81; *Mescalero Apache Tribe*, 411 U.S. at 148.

100. *See Colville*, 447 U.S. at 148.

101. 380 U.S. 685 (1965).

102. *Id.* at 688.

103. *Id.* at 690.

104. 448 U.S. 136 (1980).

105. *Id.* at 141-53.

106. ARIZ. REV. STAT. ANN. §§ 40-601, 641 (repealed 1979).

107. 448 U.S. at 144.

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hand, some weight must be given to the state's legitimate and regulatory interest.[108] Therefore, whether a state statute is preempted depends on "a particularized inquiry into the nature of the State, Federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law."[109] Finding comprehensive federal regulation of the harvesting and sale of Indian timber,[110] federal policy supporting federal regulation and no legitimate state interest in imposing the tax, the *Bracker* Court concluded that there was no room for the additional burden and found the state tax impermissible.[111]

In *Merrion* the Court addressed only the validity of the tribal severance tax. What would happen if in that case New Mexico attempted to tax minerals found on the tribe's reservation? Would the New Mexico severance tax be preempted by federal law? In *Crow Tribe v. Montana*,[112] the Ninth Circuit Court of Appeals addressed a similar issue. There the court found an attempt by Montana to impose a severance and gross proceeds tax preempted by the Mineral Leasing Act of 1938 and infringing upon the tribe's right to self-government.[113] The Montana tax was "imposed on each ton of coal produced in the state,"[114] produced meaning "severed from the earth."[115] In addition, the tax rate could vary from 3% to 30% of the value of the coal, depending on the value, energy content, and method of extraction.[116] The legislative intent for its passage was revenue-raising as well as regulatory.[117] Attempting to invalidate the tax, the Crow Tribe argued that federal regulation was so broad in the field of mineral leasing that no room was left for state taxation and regulation.[118]

Turning to the legislative intent and purpose of the 1938 Act, the *Crow* court found that the federal act was designed to achieve

108. *Id.*
109. *Id.* at 145.
110. *Id.*
111. *Id.* at 151.
112. 650 F.2d 1104 (9th Cir. 1981). *See* Recent Development, *Indian Law—Taxation of Non-Indians Transacting Business on Reservations—State Taxes Imposed Upon Non-Indian Mineral Lessees Infringe Tribal Right of Self-Government. Crow Tribe of Indians v. Montana, 650 F.2d 1104 (9th Cir. 1981)*, 60 WASH. U.L.Q. 705 (1982).
113. 650 F.2d at 1107.
114. MONT. CODE ANN. § 15-35-103 (1979).
115. *Id.* § 15-35-102.
116. *Id.* § 15-35-103.
117. 650 F.2d at 1113-14.
118. *Id.* at 1111.

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three goals: (1) "uniformity in the law governing mineral leases on Indian lands";[119] (2) "help achieve the broad policy of the Indian Reorganization Act of 1934. . . .";[120] and (3) "encourage tribal economic development. . . ."[121] Weighing this, the court found the Montana tax invalid. In preempting the state tax, the court held that the Montana tax conflicted with the 1938 Act, particularly with the statutory goal of encouraging tribal economic development and self-government.[122] The court stated that "the magnitude of the tax will prevent the Tribe from receiving a large portion of the economic benefits of its coal."[123]

On the other hand, the United States Supreme Court has, under different circumstances, upheld the same Montana tax preempted in *Crow*. In *Commonwealth Edison Co. v. Montana*,[124] the Supreme Court upheld the tax against claims that the tax was inconsistent with the Mineral Leasing Act of 1920.[125] Different from the Act addressed in *Crow*, appellants argued that the tax reduced the royalty payments due the federal government provided under the 1920 Act.[126] The Court held that "even assuming that the Montana tax may reduce royalty payments to the Federal government under leases executed in Montana, this fact alone hardly demonstrates that the tax is inconsistent with the 1920 Act."[127] In upholding the tax, the Court further held that the tax was not preempted by the Power Plant and Industrial Fuel Act of 1978 nor did it frustrate national energy policies.[128]

Although *Warren*, *Bracker*, and *Crow* found state attempts to tax preempted by federal law, notwithstanding possible infringement of tribal self-government, *Edison* clearly establishes the validity of a state-imposed severance tax on coal and other minerals.

Tribal Self-Government

It is recognized that Indian tribes retain "attributes of sovereignty over both their members and their territory."[129] It is this

119. *Id.* at 1112.
120. *Id.*
121. *Id.*
122. *Id.* at 1113.
123. *Id.*
124. 453 U.S. 609 (1981).
125. *Id.* at 629-33. See *supra* note 8.
126. *Id.* at 629-30.
127. *Id.* at 631.
128. *Id.* at 633-36.
129. United States v. Mazurie, 419 U.S. 544, 557 (1975). *See also* Santa Clara Pueblo

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recognized status that presents a second hurdle for a state in imposing taxes on tribal members and Indian lands. In *Williams v. Lee*,[130] the question of a state's civil adjudicatory jurisdiction was addressed. The petitioner, a non-Indian, brought a civil action against an Indian for the price of goods sold on the Navajo Reservation.[131] The Court announced that the test to be applied in determining jurisdiction between tribal and state courts is that "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[132] Holding that the exercise of state jurisdiction might undermine the tribe's right to self-govern, the Court concluded that exclusive jurisdiction was in the tribal courts.[133] In finding tribal jurisdiction the Court held:

> It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it.[134]

In light of *Williams* and subsequent case law supporting the proposition that a state may impose its laws upon non-Indians on tribal lands,[135] what is the effect of a state severance tax on mineral development on tribal lands? Does such a tax infringe on

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v. Martinez, 436 U.S. 49, 55-56 (1978); United States v. Wheeler, 436 U.S. 313, 323 (1978).

130. 358 U.S. 217 (1959).

131. *Id.* at 217-18.

132. *Id.* at 220.

133. *Id.* at 223. D. GETCHES, D. ROSENFELT & C. WILKINSON, FEDERAL INDIAN LAW 281 (1978): "Not all courts saw Williams v. Lee as an obstacle to state jurisdiction. . . . [M]any state courts read *Williams* as creating a presumption of state jurisdiction not precluded by federal law unless it could be shown that tribal self-government would be impaired." *See, e.g.*, Organized Village of Kake v. Egan, 369 U.S. 60, 75 (1962): "Decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law."

134. 358 U.S. 217, 223 (1959) (citations omitted).

135. In McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 179 (1972), the Court stated:

> It must be remembered that cases applying the *Williams* test have dealt principally with situations involving non-Indians. In these situations, both the tribe and the State could

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tribal self-government? It is clear that the existence of a tribal tax does not automatically invalidate a state tax.[136] Furthermore, economic impact on the tribe's ability to raise revenue may still not be sufficient to defeat the tax.[137] However, on at least one occasion, the United States Supreme Court has implied that if the regulatory objectives of a tribal tax are impermissibly interfered with by a state tax, that tax may be invalid on grounds of infringement of tribal self-government.

In *Washington v. Confederated Tribes of Colville Reservation*,[138] the Court upheld an excise tax that allowed the state to tax on-reservation sales of cigarettes by Indians to non-Indians.[139] Dismissing arguments of federal preemption and impermissible interference with tribal self-government, the Court stated:

> The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other. While the Tribes do have an interest in raising revenues for essential governmental programs, *that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services.* The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.[140]

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fairly claim an interest in asserting their respective jurisdiction. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.

136. In *Crow*, the Ninth Circuit, summarizing the Supreme Court holding in *Colville*, stated:

> Tribal economic activity, while perhaps providing the wherewithal for tribal governments to sustain themselves, is at best indirectly linked to the effectiveness of tribal government. It is clear that a state tax is not invalid merely because it erodes a tribe's revenues, even when the tax substantially impairs the tribal government's ability to sustain itself and its programs.

650 F.2d 1104, 1116.

137. *See* Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184, 1186 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972).

138. 447 U.S. 134 (1980).

139. *Id.* at 155. The Court noted that: "The value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have significant interest."

140. *Id.* at 156-57 (emphasis added, citations omitted).

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Following *Colville*, it is clear that a state may tax a non-Indian on a reservation, even if that non-Indian is already taxed by the tribe. What is not clear is the proof required to invalidate a state tax because of its infringement on tribal self-government. To what standard will the courts hold the burdened tribe? In *Crow*, the Ninth Circuit Court of Appeals provided such a standard. In invalidating the Montana tax, the court stated: "[T]he Tribe must show that the taxes substantially affect its ability to offer governmental services or its ability to regulate the development of tribal resources, and that the balance of state and tribal interests renders the state's assertion of taxing authority unreasonable."[141]

Evidenced by federal and state court decisions, states may apply their laws to non-Indians on a reservation if the application is authorized by Congress or state jurisdiction does not constitute an interference with federal Indian policies or infringe on tribal self-government. Having received the approval of the United States Supreme Court in *Colville*, there is no doubt that a state may impose a cigarette excise tax and general sales tax on on-reservation purchases of cigarettes by non-Indians. Although *Colville* did not entertain Indian mineral taxation, case law has established some standards that must be met for a state-imposed severance tax to be found valid. In determining the validity of a state severance tax, the following questions should be kept in mind:

1. Does Congress expressly provide or prohibit the state the authority to impose the tax?
2. What are the federal policies promoting tribal self-sufficiency and economic development?
3. What is the nature of the state, the federal, and the tribal interest at stake?
4. What are the legitimate interests of the state in imposing the tax?
5. What is the effect of the economic impact on the Indian tribe?
6. What is the impact on the tribe's ability to govern itself effectively?
7. Does the tax substantially affect the tribe's ability to regulate the development of tribal resources?
8. Balancing state and tribal interests, is the state-imposed tax unreasonable?

The spectrum of state taxation is broad. Although the Supreme

141. 650 F.2d at 1117.

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Court has yet to speak on several issues of natural resource development on Indian lands, if the guidelines set forth in *Williams* and *Warren* are followed and the criteria established by *Colville*, *Bracker*, *Crow*, and other cases are complied with, the power of a state to impose severance taxes on Indian reservations will not interfere with federal law or policies nor infringe on the ability of the tribe to self-govern and will, therefore, be upheld as valid.

Conclusion

With increased awareness of mineral-rich lands and heightened revenue needs, states and tribes are looking toward natural resource development more frequently as a tax source. With the passage of *Merrion*, it is clear that a tribe has inherent authority to impose a severance tax as part of its power of self-government. Whether secretarial approval of a tribal ordinance is a precondition to its validity is unclear. However, following *Southland*, *Kerr-McGee*, and language in *Merrion*, secretarial approval is required for tribes whether organized or nonorganized under the IRA.

While the mere existence of a tribal tax does not invalidate a state tax, states are limited to some extent as to their taxing authority. Withstanding a challenge of federal preemption, *Colville* allows for state taxation of mineral developments on Indian lands so long as the tax does not interfere with tribal self-government. To what extent a state may tax until interference occurs will be determined by the courts. However, in reviewing a state tax, a court will want to look at the ability of the tribe to offer governmental services, its ability to regulate, and whether in light of tribal and state interests, the tax is unreasonable. Finally, whether a state- or a tribe-imposed severance tax will increase revenue or decrease natural resource development will only be answered by time.

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