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INDIAN TAXATION, TRIBAL SOVEREIGNTY AND ECONOMIC DEVELOPMENT

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INTRODUCTION

The development of Indian law has not been the result of planned and deliberate consolidation and expansion of tribal power by sovereign entities. Rather, the evolution of Indian law has been characterized by crisis-oriented responses and improvised defenses to attacks on tribal sovereignty and authority by external interest groups. An arrest for exercising traditional hunting or fishing rights, a bill to extend jurisdiction in the state for Indian reservations, the construction of a power plant or dam or oil pipeline, and any other action taken by Congress, a state, or third parties may propel Indian nations and Indian lawyers into a multitude of defensive positions with the necessity for immediate response debilitating the development of a concise and defined legal framework. As a result legal priorities for Indians and for lawyers serving them are shaped by external pressure rather than internal planning.

Currently the most significant threat facing the Indian nations concerns the question of state taxation.[1]

Decisions of the United States Supreme Court in *McClanahan v. Arizona State Tax Commission, Mescalero Apache Tribe v. Jones, et al.*, and *Tonasket v. Washington* may be rendered at any time. This article was prepared originally as a working paper for a seminar on the same subject at the 50th Annual National Legal

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1. Mescalero Apache Tribe v. Jones, 432 F.2d 956 (1970), *cert. granted*, 40 U.S.L.W. 3512 (U.S. Dec. 4, 1971); McClanahan v. Arizona State Tax Comm'n., 14 Ariz. App. 452, 484 P.2d 221 (1971), *prob. juris. noted*, 40 U.S.L.W. 3542 (U.S. May 15, 1972); Tonasket v. Washington, 79 Wash. 2d 607, 488 P.2d 281 (1971), *prob. juris. noted*, 40 U.S.L.W. 3588 (U.S. June 12, 1972); Kahn v. Arizona State Tax Comm'n. ——Ariz.——, 490 P.2d 846 (1971), *appeal docketed*, No. 71-1263, 406 U.S. 943 (1972).

Aid and Defenders Association conference held in Miami, Florida, November 9-11, 1972. That working paper was prepared by the authors under the auspices of the Native American Rights Fund on the basis of amicus curiae briefs prepared by them and staff attorney L. Graeme Bell, III, and filed in the United States Supreme Court in the pending tax cases in June and July, 1972. This article opens with a discussion of suggested theories for use in resisting state taxation, followed by an analysis of the effect of Public Law 280 on state taxing powers and concludes with an argument in favor of expanded Indian taxation of business enterprises on Indian reservations.

Recent developments in the area of state taxation of Indians have been precipitated in part by aggressive state legislatures[1a] and revenue departments seeking to expand badly needed revenue sources through termination of Indian immunities. In a very significant sense, the observation of the United States Supreme Court that "because of the local ill feeling, the people of the states where [Indians] are found are often their deadliest enemies," is as timely today as it was in 1886.[2] The several states with substantial Indian populations continue to deal with reservations within their territory as if each Indian tribe was a mere municipalilty possessing certain inexplicable and anomalous immunities from state taxation. The conduct of many states toward Indian nations within their boundaries is disrespectful and degrading to the status of the tribe as a domestic dependent nation and to the Indian people as a separate people with a proud culture, proud traditions and plans for their own development. The states, whether out of mere lust for power, or whether as agents for ranchers, farmers, power companies, residential developers and other private moneyed-interests, ignore federal policy and separate Indian identifications and attempt to treat Indians as fungible parts of their general citizenry.

I. RESISTING STATE TAXATION OF INDIANS ON JURISDICTIONAL GROUNDS

On those occasions when the federal judiciary has protected Indian tribes and tribal property from state taxation, state taxing

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1.a Attorneys for the Navajo and Uapago Tribal Utility Authorities have opposed the imposition of a tax on the wholesale sale of power to the tribal authorities. In the Matter of the Protest of Arizona Public Service Company, Arizona State Tax Commission, Amicus Brief of Navajo Tribal Utility Authority filed February, 1973. The Arizona Legislature was surprisingly candid in enacting the tax:

> The purpose of this legislation is to tax wholesale sales of power which escape taxation because of certain exempt status. Arizona Laws, 1972, Chapter 93, Section 1, Effective August 13, 1972. *See* ARIZ. REV. STAT. ANN. § 42-1210, 2(b) (1972 Supp.).

2. United States v. Kagama, 118 U.S. 375, 384 (1886).

officials have sought either to avoid the federal rulings or to relitigate the issues in case after case over the years. Frequently, this course of action takes advantage of the individual Indian's lack of knowledge as to his immunity from state taxation. The situation in South Dakota provides a particularly vivid example. In *United States v. Rickert*,[3] the Supreme Court decided that the State of South Dakota could not impose personal property taxes on cattle and ranching implements when used on the reservation by reservation Indians. Notwithstanding this decision, the State of South Dakota consistently sought to tax Indian-owned cattle, hoping in each case to prove that the Indian could not trace the origin of his herd to "Sioux Benefits" or to other property put into the Indian's hands by the United States. The State sought thereby to establish that any commingling of separate funds (gained by the Indian in ways other than obtaining the property directly from the government of the United States) broke the instrumentality chain and deprived the Indian property of its tax-exempt status. At one trial, counsel for a Board of County Commissioners went so far as to inquire whether a white man's bulls were used to inseminate the Indian rancher's cows. While the state had, in fact, no power to tax the personal property of the Indians in Indian country, persistent attempts were made to tax unknowing Indians, and thereby, to reduce the revenue base of the tribe. The Oglala Sioux Tribe, for example, enacted a personal property tax of a $1.50 per head on cattle owned within its jurisdiction.[4] In 1968 the South Dakota Supreme Court decided the case of *Pourier v. Board of County Commissioners of Shannon County*,[5] articulating two independent bases for *immunity* of Indian personal property from the tax. The two bases were the government instrumentality theory set forth in *Rickert*, and secondly, the jurisdictional inability of South Dakota taxing power to reach personal property owned and used by Indians within Indian country.[6]

Notwithstanding the decision of the South Dakota Supreme Court in *Pourier*, County Commissioners of Fall River County, sitting for the unorganized county of Shannon on the Pine Ridge Reservation, continued to tax all Indian cows and require the Indians, on a case by case basis, to establish their "exemption" from

3. United States v. Rickert, 188 U.S. 432 (1903).

4. Tribal taxation of non-Indans was sustained in Oglala Sioux Tribe v. Barta, 146 F. Supp. 917 (D.S.D. 1956); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956).

5. Pourier v. Board of County Commissioners of Shannon County, 157 N.W.2d 532 (S.D. 1968).

6. Judge Grieves of the 10th Judicial Circuit had decided in 1965 that Indian-owned cattle could not be taxed by the state, following the instrumentality or government purpose theory set forth in Rickert. *See* Colombe v. Todd County, S.C. Cir. Ct., Grieves, N.J. Feb. 27, 1965.

the state tax. Recently, the Circuit Court of the Seventh Judicial Circuit decided in the cases of *Board of County Commissioners of Shannon County v. Montileaux, Bissonette, Wilson* and *Sauser,* memorandum opinions, August 18, 1972, that the state has no power whatever to enforce its personal property taxes against Indian property on the reservation. The crowning blow in the development of this story of taxation in South Dakota is the fact that in the *Bissonette* case, the court, while ruling that the state had no power to tax within the reservation, (the court did *not* hold that the animals were merely exempt from an otherwise valid state tax) nevertheless ruled that a state statute of limitations on application for refunds barred Bissonette from recovering $2500 in taxes which he paid under the threat of having deeded land which he owned on the reservation sold at a tax sale.

Attempted imposition of state taxes on reservation Indians must not be viewed simply as a good-natured dispute between adjacent governments over the rightful power to tax or the allocation of taxing jurisdiction. Attempted assertions of state taxing power and state regulatory power are necessarily aimed at the involuntary assimilation of tribal Indians into the "dominant" culture on terms and at a rate which can only be detrimental to them. Certainly no Indian who chooses to enter non-Indian society with its materialistic competition should be denied full opportunity on the level of all citizens. The attitude of a state trying to assimilate Indians who wish to maintain a separate enclave, however, is as condescending and arrogant as that of an anthropologist, who, for his own purposes, wishes to preserve as museum pieces, tribes who do wish to assimilate. It must be made clear that non-Indians, be they state governments, ranchers, oil companies, real estate developers, or county assessors, have no right to make decisions for individual Indians or for tribes.

From the foregoing comments, it is suggested that an analysis of state taxation of Indians should proceed from the assumption that most Indians are unalterably opposed to the extension of state power in Indian country, and that it does not lie within the province of any non-Indian, lawyer or not, to compromise the Indian immunity from taxation and other assertions of state power. Accordingly, as a preliminary matter, it is not appropriate to engage in economic analysis of the incidences and theoretical economic justifications of the various taxes imposed by various states. Consistent with the national goals of Indian tribes it must be argued that no state-imposed tax on Indian business activities, Indian property, or Indian income within Indian country is valid without the explicit consent of Congress. This position is fully consistent with the case

law decided to date; it is not necessary to construct novel legal theories in order to maintain the national immunity of Indians and their property from taxation by any state or subdivision.

There have been, on occasion, Acts of Congress granting specific states the power to tax certain kinds of tribal property.[7] In the absence of such a statute, the only conceivable argument for the ability of states to tax Indians would be the existence of a general grant of power to the states to apply all of their laws in Indian country. No such statutes have ever been enacted.[8] Thus, state assertion of tax powers has traditionally been resisted by asserting that the existence of sovereign, self-governing tribes, exercising the full range of powers which the United States Supreme Court recognized as powers possessed by the Cherokee Nation in *Worcester v. Georgia*,[9] creates an impassable jurisdictional barrier. In *Worcester*, the Supreme Court recognized that the Cherokee Nation was a "domestic dependent nation" and a "distinct political community" in which the laws of the state of Georgia can have no force and effect.[10] Today however, states are increasingly taking the position that the developments in law have taken so great a toll of attrition upon tribal sovereignty that states may enact and enforce whatever taxes they choose except taxes directly imposed on trust or restricted real or personal property.

The primary opposition to state taxation of Indians must be the objection based on a lack of state jurisdiction. Jurisdictional restraints on state assertion of taxing power should be most aggressively pursued: Indian tribes are "domestic dependent nations" and "distinct political communities in which the laws of the [states] . . . can have no force."[11] Simply put, it must be asserted that tribes are vested with all governmental power[12] and as a matter of tribal will and federal policy, continue to possess all governmental power not taken from them by the Congress in the exercise of its plenary power in the field of Indian affairs.[13] From this beginning, conclusions consistent with self-determination follow logically. Affirmative congressional legislation in derogation of tribal power must be specifically enacted, in order for it to be concluded

7. *See, e.g.*, 25 U.S.C. § 398(c) (1970).
8. *See* discussion, relating to the impact of Public Law 280 on the power of states to impose state taxes, *infra*, where it is argued that Public Law 280 does not confer on the states the power to impose comprehensive state taxation.
9. Worcester v. Georgia, 31 U.S. (5 Pet.) 515 (1932).
10. *Id.* at 560.
11. Seneca Constitutional Rights Organization v. George, _____F. Supp._____, Civil No. 1972-152 (W.D.N.Y. August 9, 1972); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956); *Ex Parte* Crow Dog, 109 U.S. 556 (1883).
12. Seneca Constitutional Rights Organization v. George, _____F. Supp._____, Civil No. 1972-152 (W.D.N.Y. August 9, 1972); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956); *Ex Parte* Crow Dog, 109 U.S. 556 (1883).
13. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

that a tribe has been stripped of, or has otherwise relinquished, its authority. Similarly, it must be presumed that all state laws can have no force or affect in Indian country unless Congress has explicitly permitted the state to apply its laws in Indian country. This argument appears to be the only approach to Indian taxation problems which is consistent with the law as it has developed, with economy in the use of judicial time, and with the sovereignty, dignity, and self-determination of Indian nations. Moreover, the validity of the jurisdictional argument for Indian immunity from state taxation has been recognized by Felix Cohen, the leading authority on Indian law.

> To the extent that Indians and Indian property within an Indian reservation are not subject to state laws, they are not subject to state tax laws.
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> We have seen elsewhere, that state laws, are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that state laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to state taxation except by virtue of express authority conferred upon the state by act of Congress.[14]

This argument begins, of course, with the landmark case of *Worcester v. Georgia*. Since that case, there has been no case in the United States Supreme Court holding that states may apply their tax laws to Indians on reservations.[15] In only a few instances[16] has the Congress explicitly permitted states to tax Indians and their property on reservations.

Since there is no Act of Congress which explicitly confers general taxing jurisdiction, we turn for guidance to Public Law 83-280, 67 Stat. 588, as amended by Public Law 90-284,[17] which conferred on certain named states civil and criminal jurisdiction over selected Indian reservations. At this point we look at Public Law 280 not to determine whether it provides either a Congressional grant of exemption to Indians from state taxation or a congressional conferral on the states of power which could sustain the assertion of state taxation over Indians,[18] but rather as a tool for analysis in helping us to determine just what taxing power states would have in the

14. F. S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 254 (reprint 1942).

15. Cases have been decided applying state taxes to restricted and trust lands not on reservations. *See* West v. Oklahoma Tax Comm'n., 334 U.S. 717 (1948); Oklahoma Tax Comm'n. v. United States, 319 U.S. 598 (1943). These cases have been criticized. Mason v. United States, 461 F.2d 1364 (1972), *cert. granted,* 41 U.S.L.W. 3391 (U.S. Jan. 16, 1973).

16. *E.g.,* 25 U.S.C. 398(c) (1970).

17. Pub. L. No. 90-284 *repealed* § 7 of Pub. L. No. 280 and added an Indian consent requirement. *See* 25 U.S.C. §§ 1322, 1326 (1970).

18. *See* text, Section IV *infra.*

absence of a specific statute authorizing taxation. For this reason, it is important that we look at Public Law 280, not only for those states which have had state jurisdiction imposed or permitted through its terms, but also with reference to states which have not assumed jurisdiction under Public Law 280. It has been held that Public Law 280 did not grant additional exemptions from taxation but rather merely restated the law as it existed prior to the time Public Law 280 was enacted.[19] If this is the case, then, Public Law 280 did not purport to render trust or restricted real or personal property taxable if it was not previously taxable, nor to extend to it immunity if it was previously taxable. It goes without saying that the tax status of property, persons, and transactions in states not acting under Public Law 280 is not affected thereby. At the outset of this analysis, it is important to note that had Public Law 280 been enacted in a state, the state would have acquired, in addition to the power of exercising criminal and civil "cause of action" jurisdiction over Indian country, the power to apply some of its laws of general application to Indian persons and property in Indian country. Nowhere else, save in a few explicit acts dealing with individual reservations or specific kinds of property, do we find any permission to any state to apply its laws.[20] In short, the full force and effect which *Worcester v. Georgia* denied to state laws must be held to be still inapplicable in Indian country, unless Public Law 280 is the vehicle with which the state applies its laws.

It is difficult to see how a state can argue (in the face of Public Law 280 and its failure to take action to assume jurisdiction and to apply its law as provided by that law) that it has residual or general jurisdiction on the theory that Congress has not *prohibited* it from exercising such jurisdiction.

Because states insist that they have the right to apply their tax laws to reservation Indians, it becomes necessary to analyze Public Law 280 in the context of *Williams v. Lee*.[21] The states take the position that they may apply any state laws which do not infringe upon tribal self-government. They argue that the tax on income or business activity of an individual member can have no impact on tribal self-government as a whole, and that therefore the exercise of state jurisdiction is acceptable notwithstanding their failure to act under Public Law 280. The reasoning of the state is erroneous in at least two respects. First of all, one reaches the question of whether a particular state action interferes with tribal self-government only after one searches for an explicit Act of Con-

19. Kirkwood v. Arenas, 243 F.2d 863 (1957).
20. *See, e.g.*, 25 U.S.C. §§ 231, 398(c) (1927).
21. Williams v. Lee, 358 U.S. 217 (1959).

gress which authorizes the particular application of state law for which the state contends.[21a] In the case of assumption of jurisdiction over civil and criminal causes of action, the United States Supreme Court has held that Public Law 280 is a "governing Act of Congress" within the meaning of the text set forth in *Williams v. Lee.*[22] While the court in *Kennerly* dealt principally with the question of whether unilateral tribal action before 1968 was sufficient to confer jurisdiction upon Montana to adjudicate a civil controversy,[23] and while the court decided that the proper procedural steps had not been followed by either the state or the tribe in the required sequence, the reasoning which underlies the decision is applicable to the present analysis. If Public Law 280 provides the governing Act of Congress by which a state assumes legislative jurisdiction to apply its state tax laws (among its other laws of general application) then one need not inquire whether the tax which the state sees fit to levy interferes with tribal self-government.[23a] One need only ask whether the state has taken the proper steps under Public Law 280 to impose and collect that tax. If a state has not so acted, assuming, arguendo, that Public Law 280 grants taxing authority, then it is clear that its laws do not apply for the purpose of levying taxes and collecting them as against Indians, Indian property, or Indian activity within Indian country.

The essence of the Court's decision in *Kennerly* is that both the tribe and the state must comply with the strict terms of the statute for the assumption by the state of jurisdiction to adjudicate causes of action in Indian country. The same reasoning applies to jurisdiction to apply state tax laws, again assuming Public Law 280 grants taxing authority. Failure to comply with the terms of Public Law 280 as amended leaves the state with no taxing authority whatsoever.

The principal argument which the states have advanced in an attempt to defeat this jurisdictional argument for Indian tax immunity stems from the misreading by the states of *Williams v. Lee,* and *Organized Village of Kake v. Egan.*[24] There is, unfortunate-

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21.a. "Essentially *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." *Williams v. Lee,* 358 U.S. 217, 220 (1959). (Emphasis added)

22. Kennerly v. Montana District Court, 400 U.S. 423, 427 (1971).

23. *Id.* at 427.

23.a. If, however, Public Law 280 does not provide the means by which a state may apply its tax laws in Indian country, it does not necessarily follow that a state may enact and enforce taxes which the state considers to be non-interfering as to tribal self-government. "Essentially applications of state law to Indians on reservations are *per se* infringements on the treaty-protected right of the tribe to make its own laws and be ruled by them." *Williams v. Lee,* 358 U.S. 217, 223 (1959). *See,* text accompanying notes 55-58, *infra,* where it is argued that a finding of non-interference has resulted only in cases where the challenged application of state law in Indian country had nothing to do with Indians. And there is no other authorization for state taxation in Indian country.

24. Organized Village of Kake v. Egan, 369 U.S. 60 (1962).

ly, unsupported dicta in both of those opinions which lends the states some small mount of credibility in their arguments. The trouble began with the formulation of the infringement test in *Williams v. Lee.* Ignoring Public Law 280, the states argued that since there is no specific act prohibiting them from exercising taxing jurisdiction, and since there is no act specifically authorizing it, the test becomes whether the tax infringes upon the right of the tribe to make its own laws and be ruled by them.[25] The states then launch into a general discussion of inter-governmental taxing immunity and the incidence of the tax which they attempt to impose.

As a first argument, it is appropriate to point out that the infringement test was never intended to be so used. In *Williams v. Lee,* the infringement test was articulated after a review of certain cases and statutes purporting to permit the states to exercise certain powers within Indian country. A brief review of those statutes and cases follows, but in summary it is sufficient to say that the statutes are specific Acts of Congress authorizing expansion of state power in very narrow and explicit circumstances and none of the cases seeks to apply state law (whether tax law or other law) *to Indians.*

In *Williams,* the Court reviewed the federal statutory and case law developments affecting the doctrine announced in *Worcester v. Georgia.* As an example of the changes which have occurred the Court said: "Thus suits by Indians against outsiders in state courts have been sanctioned."[26] This certainly does not expand state power to legislate affecting Indians on reservations.

Williams also cites *New York ex rel. Ray v. Martin.*[27] That case does not support a state's assertion that state law may be applied to Indians on reservations absent interference with tribal self-government. As in *United States v. McBratney,*[28] and *Draper v. United States,*[29] the case simply permitted state courts to assume jurisdiction of the prosecution of one non-Indian for the murder of another non-Indian. Clearly, none of these cases validates the application of any state law to any reservation Indian. While the murders occurred in Indian country, the cases did not even involve Indians.

In *Utah Northern Railway Co. v. Fisher,*[30] cited in *Williams,* the question of the power of the territory of Idaho to tax railroad property within an Indian reservation was presented. The Supreme

25. Williams v. Lee, 358 U.S. 217, 220 (1959).
26. Felix v. Patrick, 145 U.S. 317 (1892); United States v. Candelaria, 271 U.S. 432 (1926).
27. New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946).
28. United States v. McBrantney, 104 U.S. 621 (1881).
29. Draper v. United States, 164 U.S. 240 (1896).
30. Utah Northern Ry. v. Fisher, 116 U.S. 28 (1885).

Court sustained the tax in that case, but it was not called upon to decide whether state action *affecting Indians* in Indian country impaired tribal self-government. Although the railroad's property was located within Indian country, the tax law did not affect Indians in any way.[31] The cases cited in *Williams*, rather than permitting application of state laws to Indians, permit application of state laws in cases having nothing to do with reservation self-government or with reservation Indians at all.

The states also rely heavily upon the opinion in *Organized Village of Kake v. Egan*.[32] Their reliance is misplaced. *Kake* involved the question of whether Alaska could regulate trap-fishing by the Kake and Angoon communities in Alaska. It was held that Alaska could regulate the fishing because no reservation existed from which the right to fish might be implied. A contrary result would have been reached had such a reservation existed.[33] The taxation of Indians, their property and activities on reservations is entirely distinguishable. The Navajo Nation, for example, is a self-governing tribe controlling a large territory which includes parts of three states. The tribe's right to govern the Indians' internal affairs is secured by treaty.[34] Moreover, while Arizona, defendant in *McClanahan*, has assumed no jurisdiction in Indian Country, Congress has explicitly granted Alaska jurisdiction.[35]

Since the *ratio decidendi* of *Kake* was the absence of a reservation, the broad discussion of the changes in Indian law must be regarded as dicta. Nevertheless, Mr. Justice Frankfurter, speaking for the court concluded that:

> These 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.[36]

Justice Frankfurter might have conceived that state taxation of Indians or their property on reservations "impair[s] a right granted or reserved by federal law," even if it did not interfere with reservation self-government.[37] But if this "rule" would require a search of the treaties and statutes for explicit exemptions or immunities from state taxation, then it constitutes an abrupt departure from the law announced in *Williams*. The Court in *Williams* was quite clear as to the continuing vitality of *Worcester v. Georgia*:

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31. *Accord,* Maricopa and Phoenix Ry. v. Arizona Territory, 156 U.S. 347 (1895).
32. Organized Village of Kake v. Egan, 369 U.S. 60 (1962).
33. *Compare* Metlakatla Indian Community v. Egan, 369 U.S. 45 (1962).
34. Williams v. Lee, 358 U.S. 217, 221, 222 (1959).
35. 72 Stat. 545, 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1953).
36. Organized Village of Kake v. Egan, 369 U.S. 60, 75 (1962).
37. *Id.* at 75.

> Despite bitter criticism and the defiance of Georgia which refused to obey this Court's mandate in *Worcester* the broad principles of that decision came to be accepted as law. Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, *but the basic policy of Worcester has remained.* [*Emphasis added.*][38]

Justice Frankfurter's conclusion was not relevant to the facts in *Kake,* nor was it supportable by the authorities cited for it. The principal cases relied upon in *Kake* are *Williams v. Lee* and *Thomas v. Gay.*[39] *Willliams* explicitly rejected the assertion of state civil jurisdiction relying at least in part upon Arizona's failure to acquire jurisdiction under Public Law 280. *Fisher, Maricopa,* and *Martin* clearly involved no application of state law or jurisdiction affecting Indians.[40]

In *Thomas v. Gay,* another case cited by Justice Frankfurter in *Kake,* the Court sustained an Oklahoma territorial law taxing as personal property the cattle of non-Indians on an Indian reservation. Contrary to the dictum in *Kake,* this case does not involve the application of the personal property tax law to Indians. Had the territorial legislation intended to tax cattle owned by Indians, the result would have been different.[42]

In *Langford v. Monteith,*[43] a non-Indian sued another non-Indian before a Justice of the Peace to obtain possession of certain buildings. The defendant claimed that he held the premises under the Indian agent. Again, no effect at all is shown upon Indians, either as to application of state law or the operation of the state's "cause of action" jurisdiction over Indians. The Court said at page 147:

> As there is no such treaty with the Nez Perce' Tribe, on whose reservation the premises in dispute are situated, and as it is a suit between white men, citizens of the United States, the Justice of the Peace has jurisdiction of the parties, if the subject-matter was one of which he could take cognizance.[44]

These cases are not cases which support a rule permitting states to enforce laws and exercise jurisdiction when such state action "affects Indians." Rather they permit application of state law in cases where Indians are not involved at all. A state's misuse of the dicta in *Kake* would result, if accepted, in judicial establishment of taxing power not given by Congress.

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38. Williams v. Lee, 358 U.S. 217, 219 (1959).
39. Thomas v. Gay, 169 U.S. 264 (1898).
40. *See* text accompanying notes 27-31 *supra.*
41. Thomas v. Gay, 169 U.S. 264 (1898).
42. United States v. Rickert, 188 U.S. 432 (1903).
43. Langford v. Monteith, 102 U.S. 145 (1880).
44. *Id.* at 147.

In support of his broad conclusion Justice Frankfurter also discussed statutory developments since *Worcester* in the *Kake* opinion. As to these statutes, it requires no argument that a congressional act conferring upon states the power to affect Indians in one substantive area does not permit the state to exercise jurisdiction or apply its laws in any other substantive area. For example, the 1929 enactment of 25 U.S.C. §231[45] authorizing states to enforce sanitation and quarantine laws on Indian reservations and to make inspections for health and educational purposes, and to enforce compulsory school attendance, does limit or encroach upon tribal self-government to the extent set forth in that statute.[46] That enactment does not, however, confer jurisdiction to tax the income of Indians on Indian reservations. Similarly, the 1934 enactment authorizing the Secretary of Interior to enter into contracts with the states for educational, medical, agricultural, and welfare assistance to reservations, does not extend general jurisdiction to the states. Provisions of 18 U.S.C. §1161,[48] are limited to requiring that transactions regarding liquor on reservations be in conformity with state law. If anything, these statutes demonstrate congressional recognition of tribal immunity in absence of an Act modifying such immunity.

Therefore, while the statutes cited in *Kake*[49] are interesting from an historical point of view, none except Public Law 280 can be said to have any bearing on state taxing jurisdiction over Indians. As Justice Black said, in *Williams*,

> Significantly when Congress has wished the states to exercise this power, it has expressly granted them the jurisdiction which *Worcester v. Georgia* had denied.[50]

The discussion of statutory provisions in *Kake* should be regard-

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45. 45 Stat. 1185, 25 U.S.C. § 231 (1929).
46. Metlakatla Indian Community v. Egan, 369 U.S. 45, 73 (1962).
47. 48 Stat. 596, 25 U.S.C. § 452 (1936).
48. 67 Stat. 586, 18 U.S.C. § 1161 (1966).
49. The Indian Reorganization Act of 1934, 48 Stat. 984, 986, 987, 988, 25 U.S.C. § 461 *et seq.* (1935), was specifically designed to strengthen tribal government, and its enactment certainly cannot be said to permit the application of state laws in Indian country, nor can it be argued that this enactment reversed the doctrine of Worcester v. Georgia, 31 U.S. (5 Pet.) 515 (1932). The provisions of 64 Stat. 845 conferred civil jurisdiction upon the courts of New York in civil actions involving Indians. Similarly, in 63 Stat. 705, certain regulatory jurisdiction is conferred upon the State of California over lands and residents of the Agua Caliente Indian Reservation. *See also* 62 Stat. 1161, 1124 (1948). The termination legislation in the 1950's dealing with the Menominees (68 Stat. 250) and the Klamaths (68 Stat. 718) did not purport to affect any other tribe in any way. Moreover, the House Concurrent Resolution establishing the termination policy, H.R. CONG. RES. 108, August 1, 1953, 67 Stat. 132, 83rd Cong. has been explicitly repudiated by President Nixon, Message to Congress, July 8, 1970, and by a later concurrent resolution which passed the Senate in 1970, U.S. CODE CONG. & ADMIN. NEWS 2965 as S. CON. RES. 26, 92nd Cong. 2nd Sess. Such concurrent resolutions expire at the adjournment of the Congress. CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 1038, at 150 (1935).
50. Williams v. Lee, 358 U.S. 217, 221 (1959).

ed as dicta having no effect to limit the powers of an Indian tribe, nor to enhance the power of a state to apply any tax on a reservation. The states seeking to tax Indians rely upon bootstrap arguments taken from dicta or historical discussions in opinions of the Supreme Court which, in the cases upon which the states rely, refused to extend the application of state laws to reservation Indians.[51]

The state's interpretation of the infringement test must be rejected on the basis of a careful reading of *Kennerly v. Montana District Court*.[52] *Kennerly* presented exactly the same factual situation as did *Williams*, but the Court relied upon Montana's failure to abide by Public Law 280[53] (as the governing Act of Congress for the assumption of civil jurisdication) and upon the Tribe's failure to express consent under the 1968 Amendment thereto.[54] Although tribal consent was not a requirement for the assumption of jurisdiction by the state in 1953, the Court could have decided the *Williams* case on precisely the same ground as it later decided *Kennerly*. Since Arizona had not chosen to exercise the power of unilateral assumption of jurisdiction which the Congress had offered in Public Law 83-280 it was unnecessary for the *Williams* court to reach the infringement question. While *Kennerly* is based upon the construction of the method which the Blackfeet tribe sought to use in granting jurisdiction, the teaching of that case is equally applicable to *Williams*: in order to assume jurisdiction in Indian country the state (and now the tribe) must follow with precision the formula set forth by the Congress.

It can be concluded therefore, that the infringement test in *Williams* is not the proper starting point for an analysis of the validity of any tax by the state on Indians in Indian country. If Congress has assented at all to state taxation in Indian country Public Law 280, as amended, is the "governing Act of Congress" for the purposes of the assumption of the taxing power, just as *Kennerly* held that it was a governing act of Congress for the purpose of assuming jurisdiction over civil and criminal causes of action. The failure of any state to abide by it leaves it without taxing power, since the state has no "residual jurisdiction" to apply its tax laws to Indians.

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51. *See, e.g.*, discussion of Arizona *ex. rel.* Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969) *cert. denied*, 396 U.S. 1003 (1970), in McClanahan v. State Tax Com'n., 484 P.2d 221, 223 (Ariz., 1971).

52. Kennerly v. Montana District Court, 400 U.S. 423 (1971).

53. Montana assumed only criminal jurisdiction. MONT. REV. CODE ANN. §§ 83-801, 83-806 (1966). Kennerly v. Montana District Court, 400 U.S. 423, 425 (1971).

54. Kennerly v. Montana District Court, 400 U.S. 423, 428, 429 (1971).

II. RESISTING STATE TAXATION OF INDIANS: TRIBAL SOVEREIGNTY

If the jurisdictional argument outlined above should be rejected in the Indian tax cases presently before the Supreme Court[55] there are several fall-back positions for lawyers serving Indians to take. If the Court were to hold, for example, that Public Law 280 is not a governing Act of Congress with respect to application of state tax laws, then, under the current state of the law, courts would be compelled to determine in each individual case under the *Williams* test whether state tax law infringed upon the right of the tribe to make its own laws and be ruled by them. The first argument under this heading is that any taxation of Indians, tribes, or Indian property or activity within Indian country *per se* infringes upon tribal self-government for the reason that it *affects Indians*. In none of the cases which led to the articulation of the *Williams* test was the application of any state law to Indians involved or upheld. While this result would be less consistent with the dignity of Indian tribes as domestic dependent nations and distinct political communities, the practical result in the terms of the power of state taxation would be the same.

Difficulty arises, however, from the arguments made by the states in their briefs on all three cases pending before the Supreme Court at this time. In those briefs, the states argue that the taxation of individual Indian transactions does not in fact interfere with tribal self-government. If each state tax is to be examined for a determination of whether it interferes with tribal self-government, then Indians might successfully argue that if the tribe has the power to tax the *same* persons, property, or transactions there is a *per se* interference. The argument should probably be made that — where a state tax interferes with the *existence* of taxing power in the tribe — the state's tax is prohibited by the infringement test regardless of whether that tribe chooses to *exercise* the particular taxing power it possesses. Refusal to tax may comprehend important and reasoned tribal decisions as to the ability of their members to pay the tax, its effect on local tribal economic development, etc. Non-exercise or non-use[56] of a tribal power should not be held

55. Mescalero Apache Tribe v. Jones, 432 F.2d 956 (1970), *cert. granted*, 40 U.S.L.W. 3512 (U.S. Dec. 4, 1971); McClanahan v. Arizona State Tax Comm'n., 14 Ariz. App. 452, 484 P.2d 221 (1971), *prob. juris. noted*, 40 U.S.L.W. (U.S. May 15, 1972). Tonasket v. Washington, 79 Wash. 2d 607, 488 P.2d 281 (1971), *prob. juris. noted*, 40 U.S.L.W. 3588 (U.S. June 12, 1972).

56. Seneca Constitutional Rights Organization v. George, _____F. Supp._____, Civil No. 1972-152 (W.D.N.Y. August 9, 1972). Moreover, Cohen states that failure to exercise tribal *criminal* jurisdiction does not confer *jurisdiction* on federal court. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 148 (reprint 1942).

either to extinguish the power, or to permit the state to exercise power.

The foregoing discussion assumes that where tribal taxing power exists, even if not exercised, it is exclusive. If it is held that failure to *exercise* taxing power permits the state to tax on the theory that it does not infringe upon tribal self-government, then an incredible see-saw of taxing power and authority will develop in which tribes will be compelled to enact and collect taxes, simply in order to exclude the state from doing the same. But with a repeal of the tribal tax it would then be urged that the state may enact a like tax because it will no longer interfere with the tribe's revenue base. In operation, however, such a holding would transfer to the state the right to make governmental decisions for Indian tribes on reservations within the state. By enacting a state law to tax certain persons, property or transactions the state effectively could dictate that the tribe must adopt a similar judgment with respect to the wisdom of successfully taxing those resources if the tribe is to exclude the state from exercising the asserted taxing power. Even if the *exercise* of tribal taxing power effectively excludes state taxing power over the same persons and transactions, the right of tribal self-government is interfered with, and the state's power on the reservation is expanded by the negative force which the state can assert. Such a result is inconsistent with the right of tribes to make their own laws and be ruled by them and ought not be allowed under the traditional formulation of the *Williams* test, even as that test is misinterpreted in *Kake*.

It is also possible, of course, that it might be held that state taxation is not precluded by either the existence of tribal power or the actual exercise of tribal power to tax the transactions, persons, and property. In short, concurrent taxing authority might be held to exist. It is difficult to square such a holding with the *Williams* infringement test. Just as in the case of exclusive tribal power to tax where that power is exercised, the state has power to dictate tribal governmental decisions as to taxation by the imposition of the state's own taxes on persons, transactions, or property in Indian country. The most obvious interference in tribal self-government is the tapping of a small revenue base for state purposes at the expense of the same tax base which is used to produce revenue for the exercise of tribal governmental functions. A clearer case of interference with tribal self-government can hardly be imagined. In addition to raising tribal revenues, taxing powers are clearly available for use as elements of fiscal policy and "social engineering." The decision to enact certain taxes

and not to enact others, and the decision to vary rates and exemptions are highly sophisticated tools which can be used to encourage particular kinds of business activity and property-holding and to discourage other such activity. Tax incentives for the location and operation of industry might be a decision which the state is willing to make in a situation where an Indian tribe might choose to foster collective agricultural economic activity or small cottage industry instead.[57] The taxing decisions made or left unmade by the governmental entity significantly affect the culture, economic development, and collective goals of the people. Indian tribes must have the ability to make decisions about the quality of life and economic development upon their reservations unfettered by value judgments made by state revenue directors or state legislators. Interference with tribal self-government must be read in the *Williams* infringement test to comprehend much more than simply competition between the state and the tribe for a particular dollar of revenue. Concurrent taxing power, vested in a state, can be a powerful weapon for the advancement of state interests rather than tribal interests. It is for this reason that state attempts to tax on Indian reservations are arrogant, and potentially genocidal to Indian communities.

It is the policy of the United States Government to permit self-determination among Indians and Indian tribes.[58] Whether or not this remains a current federal policy, it is likely that self-determination will continue to be the desire of many Indian tribes and communities. No amount of sophistry can alter the result that any increase in state taxing power on reservations governed by Indian tribes works to the detriment of federal policy and the very independence and internal sovereignty of Indian tribes.

III. RESISTING STATE TAXATION OF INDIANS: THE FEDERAL ECONOMIC DEVELOPMENT POLICY

The argument has been made that Indians are immune from state taxes because the state has no general jurisdiction on reservations.

> [T]his jurisdictional immunity from state taxation is sometimes buttressed by: (a) The judicial doctrine that states may not tax a federal instrumentality, operating upon the assumption that various incidents of Indian property are federal instrumentalities, . . . It is not clear whether . . . [this] added reason need be advanced to justify the im-

57. The reverse might also be true.

58. President Richard M. Nixon's Message to Congress, July 8, 1970, 116 CONG. REC. 23131 (1970).

munity of Indian property on an Indian reservation from state property taxes.[59]

Writing prior to *Williams*, Cohen did not anticipate that tribal immunity from all exercises of state power would be attacked through the use of the infringement test developed for the protection of the tribes.

In the foregoing sections, it has been argued that Indians, their property and their activity on reservations are immune from state taxation by reason of the absence of state jurisdiction to tax. It has also been argued that when a state under Public Law 280 has failed to acquire civil and criminal jurisdiction, the state should also be denied permission to tax on a reservation for the reason that the imposition of the tax interferes with tribal self-government. Should these arguments be rejected, there is yet another fall-back argument for lawyers serving Indians to make. The policy of the United States to foster Indian economic development may not be hindered by state taxation. This argument, described below and based upon federal supremacy in Indian affairs is also essential when tribes seek to enter into profit-making activities outside of the boundaries of the reservation, or where states seek to apply tax laws to Indians, their property or activity, on Indian lands which are either not within Indian reservations over which a tribe exercises powers of self-government, or where the Indian lands are located in a state which has assumed jurisdiction under the terms of Public Law 280.

This third line of argument is premised upon the supremacy of the federal government in the field of Indian affairs and the manifest commitment of the federal government to Indian economic development.[60] Perez, recognizing that the current state of the law regarding Indian immunity from state taxation is, at best, filled with faulty reasoning and results inconsistent with maximum economic development, proposes a coherent rationale for the immunization of Indian property and activity from state taxation on the basis of "Indian-related" exemptions mandated by the federal policies of protecting Indian land as a base for economic development, and affording Indian tribes some sovereignty from state and local government.

The federal policy of fostering Indian economic development is clearly articulated with respect to Indian land and personal property by the United States Supreme Court in *United States* v.

59. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 254 (reprint 1942).
60. *See* Perez, *Indian Taxation: Underlying Policies and Present Problems*, 59 CAL. L. REV. 1261 (1971).

Rickert.[61] With respect to economic activity by Indian tribes, the concern of the federal government is expressed by such provisions as 25 U.S.C. §470 which establishes a revolving credit program. The Indian Reorganization Act of June 18, 1934,[62] was enacted

> (1) To stop the alienation, through action by the Government or the Indian, of such lands, belonging to ward Indians, as are needed for the present and future support of these Indians.
>
> (2) To provide for the acquisition, through purchase, of land for Indians, now landless, who are anxious and fitted to make a living on such land.
>
> (3) To stabilize the tribal organization of Indian tribes by vesting such tribal organizations with real, though limited, authority, and by prescribing conditions which must be met by such tribal organizations.
>
> (4) To permit Indian tribes to equip themselves with the devices of modern business organization, through forming themselves into business corporations.
>
> (5) To establish a system of financial credit for Indians.
>
> (6) To supply Indians with means for collegiate and technical training in the best schools.
>
> (7) To open the way for qualified Indians to hold positions in the Federal Indian Service.[63]

Most recently, the federal government's commitment to Indian economic development has been expressed by President Nixon in these words:

> It is critically important that the federal government support and encourage efforts which help Indians develop their own economic infrastructure.[64]

It is unnecessary to observe that federal policy in favor of economic development for Indians stems from the exploitation of Indians and the dependent economic position into which they were put when located on reservations. From the constitutional war-making power, treaty-making power, from the power to regulate commerce among the Indian tribes, there arose the duty of federal

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61. United States v. Rickert, 188 U.S. 432 (1903).

62. Act of June 18, 1934, 48 Stat. 983, 25 U.S.C. § 461 *et seq.* (1935), of which § 470 is a part.

63. SEN. REP. No. 1080, 73rd Congress, 2nd Sess. (May 10 [Calendar Day, May 22] 1934).

64. "Indian Affairs," The President's Message to Congress, 6 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 894, 900-01 (1970).

protection of Indians.[65] The supremacy clause is the source of constitutional protection from state interferences with this federal policy of Indian economic development.

Given any policy within the delegated powers of the federal government, it had long been established that a state is without power to interfere with the instrumentalities chosen by the federal government for the carrying out of its purpose, even when the interference is inherent in state taxation.[66]

The teaching of *McCulloch v. Maryland* was clearly applied to the field of federal Indian policy in *United States v. Rickert.*[67] There, the Court made it clear that the lands allotted to Indians under the General Allotment Act were federal instrumentalities for the economic rehabilitation of the federal wards and, therefore, not subject to state taxation. The Court went on to hold that permanent improvements in personal property used in connection with the land were also immune from state taxation. The Court reasoned that unburdened property and improvements were necessary to foster the federal policies of maximizing the economic potential of Indian lands.

> The personal property in question was purchased with the money from the government, and was furnished to the Indians in order to maintain them on the land allotted during the period of the trust estate, and to induce them to adopt the habits of civilized life. It was, in fact, the property of the United States, and was put into the hands of the Indians to be used in execution of the purpose of the government in reference to them. The assessment and taxation of personal property would necessarily have the effect to defeat that purpose.[68]

At least in part, the Court's holding in *Rickert*[69] was premised upon the fact that state taxation of Indian land, improvements, or personal property used thereon, woulld burden the federal purpose in such a way as to make it impossible for the United States to keep its agreement to convey the land to the Indian at the conclusion of the trust period, free from all encumbrances. This commitment on the part of the United States, which finds expression in Section 6 of the General Allotment Act, is also the basis for the holding in *Squire v. Capoeman,*[70] that the federal government did not intend to tax as capital gains the proceeds of sale

65. United States v. Kagama, 118 U.S. 375 (1886).
66. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).
67. United States v. Rickert, 188 U.S. 432, 433-34 (1903).
68. *Id.* at 433-34.
69. *Id.* at 443-44.
70. Squire v. Capoeman, 351 U.S. 1 (1956).

from timber from an Indian allotment. The Court held that the rule regarding Indian federal tax exemptions is different from that pertaining to non-Indian exemptions, for the former tax exemptions could be implied while the latter must be based on an explicit congressional act. The Court of Claims, in *Mason v. United States,*[71] applied similar reasoning regarding the burden imposed on the trust land by a state inheritance tax and struck down the tax relying on *Squire v. Capoeman.*[72]

The touchstone of these cases is the finding that use of federal trust land as an instrument of federal policy for the economic development and rehabilitation of its Indian wards may only be limited by explicit congressional action. The Indian land should be regarded as *the federal instrumentality,* and state taxation of any sort of which minimizes the *profitability* of the use of the trust land for economic development of Indians must be rejected under the supremacy clause as interference with federal Indian policy and a burden upon a federal instrumentality.

Assuming that profitable use of Indian land is necessary for the fulfillment of the federal economic development objective, cases which have eroded the tax immunity of federal instrumentalities relying on the narrow application of implied governmental immunity unit should be regarded as inapplicable as precedent in Indian cases. It is submitted that courts are improperly following the federal instrumentality rationale which is appropriate to cases involving governmental objectives, the profitability of which is not essential (if the activity is performed), but inappropriate in cases involving the instrumentalities used by the federal government for Indian economic development.[73]

Federal Land Bank v. Board of County Commissioners,[74] is an important case which stands for the proposition that a state tax which interferes with a federal policy aimed at profitability of the instrumentality chosen by the government for the accomplishment of economic development objectives is invalid. In *Federal Land Bank,* a subdivision of the state sought to tax mineral estate interests held by the Federal Land Bank. The revenues earned by the Federal Land Bank were paid to its borrower-shareholders, thereby fulfilling the federal purpose of enabling the Federal Land Bank to make low-interest loans.[75]

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71. Mason v. United States, 461 F.2d 1364 (Ct. Cl. 1972).

72. Squire v. Capoeman, 351 U.S. 1 (1956).

73. *See* Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184, 1187 (9th Cir. 1971) (Ely, J., dissenting).

74. Federal Land Bank v. Board of County Comm'rs, 368 U.S. 146 (1961).

75. *Federal Land Bank* also stands for the proposition that no federal functions are

It is important to note that the *sine qua non* of non-taxability under this argument is the location of the property, the earning of the income, or the conduct of the transaction on protected Indian land. If income is earned *from* the land by Indian owners, it is now regarded as exempt for federal income tax purposes.[76] It should, of course, be so regarded for state income tax purposes. The current state of the law seems to be that if income is earned on the land but not from it, no federal tax exemption results.[77] Likewise, if the individual Indian leases trust land (even from the tribe) but has no other enforceable right as to the land, his income earned therefrom is likely to be taxable.[78]

If income-producing property is located on Indian trust land, whether it is owned by an Indian or non-Indian, it is suggested that maximization of the rental return of the trust land requires that the property be immunized from state taxation. While this is, no doubt, the law with respect to personal property only when used by Indians,[79] state taxation of property used on Indian trust land by non-Indians has not yet been prohibited.

One case directly addressing the impact of state taxation of non-Indian cattle on Indian land is *Thomas v. Gay*.[80] In that case, the Court concluded that the effect on Indians or their land was "too remote" to require invalidation of the tax.

A much more recent case suggests that the goal of maximization of the profitability of the use of Indian land may not be sufficient to immunize from state taxation all uses of the land by non-Indians. In *Agua Caliente Band of Mission Indians v. County of Riverside*,[81] the possessory interest of the long-term lessee of Indian lands was taxed by the state, and the tax was upheld notwithstanding the fact that such a tax would obviously diminish the rental value of the protected Indian land.

State sales taxes on transactions between licensed Indian traders and Indians are now immunized by *Warren Trading Post*.[82] The reasoning in *Warren Trading Post* was that the federal government had completely occupied the field of regulation of Indian traders. It could also be argued that since the use of protected Indian

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"proprietary" in that any function properly performed by the federal government under its delegated powers is necessarily "governmental." *Id.* at 150.

76. Squire v. Capoeman, 351 U.S. 1 (1956); Stevens v. Commissioner, 452 F.2d 741 (9th Cir. 1971).

77. Commissioner v. Walker, 326 F.2d 261 (9th Cir. 1964).

78. Holt v. Commissioner, 364 F.2d 28 (8th Cir. 1966).

79. United States v. Rickert, 188 U.S. 432 (1903); Pourier v. Shannon County Comm'r., 157 N.W.2d 532 (S.D. 1968).

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

81. Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971).

82. Warren Trading Post, 380 U.S. 685 (1965).

land by an Indian for the sale or transaction of business would increase the profitability of the land, and assist in the economic rehabilitation of Indians, state sales taxes should likewise be invalidated as inconsistent with the federal purpose of economic development.

Finally, state taxes on the transfer of Indian lands, whether by inheritance or by sale, should be disallowed; federal and state taxation of such property violates the purpose of the General Allotment Act in preserving free from encumbrance the Indians' ownership of the land, and as well, taxation of the transfer of the land minimizes its value to the Indian owner. However once the land is transferred to non-Indian owners, it should no longer be immunized from taxation.

From the foregoing, an argument can be made to immunize activity and property from state taxation to the extent that state taxation will impair the value of Indian land upon which property is used or transactions conducted. It is important to note that this argument deals with Indian land, and not simply with Indian land within reservations governed by organized tribes. In the latter case, absence of state jurisdiction to tax may be urged, and interference with tribal sovereignty may also be advanced, as reasons for the inability of the state to tax. There is no reason to suppose, however, that the federal policy of economic development is terminated by the assumption by the state of general jurisdiction under Public Law 280. As the brief of the Native American Rights Fund in *Tonasket v. Washington*,[83] points out, Public Law 280 may confer only limited jurisdiction upon states, many federal policies with regard to Indians, not specifically repealed or abrogated by Public Law 280, may continue. In *Tonasket*, it is argued that the federal statutes regulating Indian traders,[84] had not been repealed, and that therefore, preemption of trade regulation as set forth in *Warren Trading Post* should apply on reservations in Public Law 280 states. Similarly, since Public Law 280 does not have the effect of terminating federal supervision, it should be argued that the policy of economic development for Indians continues, notwithstanding the state assumption of jurisdiction under Public Law 280. If, therefore, a state's attempted taxation of transactions and property interferes with the economic development of Indians in Public Law 280 states, it should be opposed notwithstanding the fact that the state may have criminal and civil jurisdiction for other purposes. Immunization of Indian property and activity should be urged in

83. Tonasket v. Washington, 79 Wash. 2d 607, 488 P.2d 281 (1971), *prob. juris. noted*, 40 U.S.L.W. 3588 (U.S. June 12, 1972).
84. 25 U.S.C. §§ 261-264 (1943).

all cases where there is an intimate connection to trust land. The theoretical underpinnings of the argument for Indian tax immunity are lost unless there is this nexus.

It is important to make still another point with respect to immunization of Indians and their property from taxation. *Rickert* involved property that was issued to the Indians by the United States and perhaps owned by the United States. But so long as the property is used for the federal purpose of Indian economic rehabilitation, the source or origin of the property used in connection with the Indian trust land, should be irrelevant. Accordingly, if the property used for the economic exploitation of Indian trust land and the economic benefit of Indians has been acquired by expenditure of wages and salaries, gifts, or loans from other sources than the federal government, the property used should, nonetheless be exempt from state taxation. One court has so held.[85]

It is also appropriate to observe that federal purposes regarding Indians which justify immunization of property and transactions from state taxation, are not limited to profit-making use of Indian land. In addition to economic rehabilitation, one federal purpose in connection with the allotment of Indian land to individuals was the provision of such land as a place of residence for the Indian allottees. Accordingly, a state should not be permitted to tax a mobile home purchased by an Indian with wages and used by the Indian to provide a place of residence on his trust land (whether on or off-reservation, and whether in a Public Law 280 state or not).[86]

Primary emphasis has been placed on the use of Indian trust land for economic development purposes and upon the immunization of property and transactions in connection with such land from state taxation. There is yet another subject under the general heading of the federal policy of economic development for Indians which merits discussion. Occasionally, an Indian tribe may itself go into business for the purpose of raising revenues in order to discharge its governmental responsibilities. This was the case in *Mescalero Apache v. Jones et al.*[87] There the Native American Rights Fund argued that the Mescalero Apache Tribe itself was a federal instrumentality and that its gross receipts and personal property were

85. Makah Indian Tribe v. Clallam County, 73 Wash. 2d 677, 440 P.2d 442 (1968).

86. If the tribe operates on its reservation, the state arguably lacks jurisdiction to tax the tribes property, revenue or activity, and such lack of jurisdiction might be predicated upon failure to assume jurisdiction or upon interference with tribal self-government. To the extent that the tribe uses its trust land for economic development purposes, the reasoning in the foregoing section applies.

87. Mescalero Apache v. Jones, 432 F.2d 956 (1970), *cert. granted*, 40 U.S.L.W. 3512 (U.S. Dec. 4, 1971).

exempt from state taxation by reason of the immunity of the federal instrumentality from state taxation.[88]

In such cases, the tribe itself is the federal vehicle for the fulfillment of federal duties for the economic rehabilitation of Indians. The tribe may be chartered under the Indian Reorganization Act,[89] and it may acquire funds by borrowing from the United States under 25 U.S.C. §470. Substantial federal supervision may be exercised, and federal lands may be acquired pursuant to 25 U.S.C. §465 for the purpose of furthering the tribe's economic activity. When tribal activity is sought to be taxed by the state, the state will raise the argument that the Supreme Court has narrowed intergovernmental taxing immunity and the federal instrumentality doctrine. Never, however, has the Court allowed a state to tax an entity which is an instrumentality without a congressional waiver of immunity from state taxation. Moreover, it can be argued that the cases that have eroded the intergovernmental immunity doctrine can be distinguished for they involve either (a) a private individual seeking to immunize himself and his personal profits on the basis of some service to the government or (b) a federal purpose involving only the accomplishment of a particular objective (and not the federal profitability purpose inherent in federal Indian policies). It should also be demonstrated that a tribe meets all of the qualifications for federal instrumentality even under the current articulation of the tests for government instrumentality status.[90]

In summary, where a tribe operates off the reservation to earn monies which are allocated to the fulfillment of the tribal and federal goal of economic rehabilitation of Indians, such tribal enterprises should be regarded as federal instrumentalities and therefore immune from state taxation.

IV. PUBLIC LAW 280 AND INDIAN TAXATION

In *Tonasket v. Washington*,[91] the Supreme Court will consider for the first time the scope of the congressional conferral of criminal and civil jurisdiction made pursuant to Public Law 280.

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88. In connection with individual activity, even if there is no clear federal instrumentality involved, a federal purpose for the economic rehabilitation of Indians may be divined from such things as the use of Indian Business Development Fund loans, the use of tribal bulls in cattle enterprises, provision of boss farmer services to the Indian rancher, the use of a cattle replacement program or the revolving cattle pool under 25 C.F.R., Part 92 (1957). In short, any technical assistance, financial, or other federal activity may support the conclusion that the Indians activity or property and the income therefrom is part of a federal purpose for his economic rehabilitation. He should, therefore be immunized from state taxation.

89. Act of June 4, 1897, 30 Stat. 35, 25 U.S.C. § 476, 477 (1970).

90. Department of Employment v. United States, 385 U.S. 355 (1966); First Agricultural Nat'l. Bank of Berkshire County v. State Tax Comm'n, 392 U.S. 339, 353 (1968) (Marshall, J., dissenting).

Since the case involves the attempted taxation of an Indian trader, the Court will have to consider whether Congress, in enacting Public Law 280, tacitly repealed the long-standing federal statutes and regulations governing trade with Indians insofar as they concern Indian lands over which a state assumes civil and criminal jurisdiction. Similarly, the Court will consider whether and to what extent the assumption of civil and criminal jurisdiction under Public Law 280 constitutes a grant to the State of Washington of the authority to assert comprehensive state taxation within Indian lands.[92]

Public Law 280 is entitled "An Act to confer jurisdiction . . . [on certain states] with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States. . . ." The House Report on H.R. 1063, which became Public Law 280, speaks of the bill as part of a series of measures with two co-ordinate aims: withdrawing federal responsibility for Indians where practicable and authorizing selected state court jurisdiction and law enforcement.[93] Some of the measures proposed to achieve these aims were the complete termination of federal responsibility over certain Indian tribes, including distribution of tribal funds and disposition of trust property; the termination of federal services for Indians; and provision for the issuance of certificates of competency to Indians allowing them to withdraw from tribes and receive a share of tribal property.[94] However, H.R. 1063 itself was not termination legislation and was presented as a more modest solution to a specific problem. The problem addressed by H.R. 1063, according to the committee report, was the inadequacy of law enforcement and of the adjudication of civil conflicts in some Indian lands:

> As a practical matter, the enforcement of law and order among the Indians in the Indian country has been left largely to the Indian groups themselves. In many states, tribes are not adequately organized to perform that function; consequently, there has been created a hiatus in law-enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility.

Similarly, the Indians of several States have reached a stage

91. Tonasket v. Washington, 79 Wash. 2d 607, 488 P.2d 281 (1971), *prob. juris. noted,* 40 U.S.L.W. 3588 (U.S. June 12, 1972).

92. Portions of this discussion are taken from the Amicus Briefs of the U. S. Government, the National Congress of American Indians and the Native American Rights Fund in Tonasket v. Washington, 79 Wash. 2d 607, 488 P.2d 281 (1971), *prob. juris. noted,* 40 U.S.L.W. 3588 (U.S. June 12, 1972).

93. H. REP. No. 848, 83d Cong., 1st Sess. p. 3; S. REP. No. 699, 83d Cong., 1st Sess., p. 3.

94. H. REP. No. 848, 83d Cong., 1st Sess. p. 3; S. REP. No. 699, 83d Cong., 1st Sess. p. 3.

> of acculturation and development that makes desirable extension of State civil jurisdiction to the Indian country within their borders. Permitting State courts to adjudicate civil controversies arising on Indian reservations, and to extend to those reservations the substantive civil laws of the respective States insofar as those laws are of general application to private persons or private property, is deemed desirable.
>
> After consideration of the proposed legislation, the committee concluded that: any legislation in this area should be on a general basis, making provision for all affected States to come within its terms; that the attitude of the various States and the Indian groups within those States on this diction transfer question should be heavily weighed before effecting transfer; and that any recommended legislation should retain application of Indian tribal customs and ordinances to civil transactions among the Indians, insofar as these customs or ordinances are not inconsistent with applicable State laws.[95]

That the bill was considered by those who dealt with it to be a law and order measure and not a general termination of federal responsibility, is apparent. The law amended Titles 18 and 28 of the Code, and not Title 25 in which the general provisions for federal protection of Indians and statutes terminating such protection are found. The law contains broad provisos, apparently intended to make clear that the grant of state jurisdiction would not affect the trust status of Indian property or the regulation of it contrary to federal treaty, agreement or statute.[96] There is no indication in the legislative history that Public Law 280 was intended to terminate existing federal regulation and supervision of Indian country. Moreover, there is no indication in the committee reports or debates that a conferral of civil and criminal jurisdiction under Public Law 280 would extend the power of the State to tax Indians,[96a] although if this were intended it would have been a matter of sufficient importance to be set before Congress. Indeed, the sweeping restriction of §4 prohibiting the alienation or encumbrance of any real or personal trust or restricted property manifests a congressional intent not to grant to the states significant taxing powers,

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95. H. REP. No. 848, 83d Cong., 1st Sess. p. 6; S. REP. No. 699, 83d Cong., 1st Sess. p. 5.

96. Act of August 15, 1953, Pub. L. No. 280, ch. 505, §§ 2(b), 4(b), 67 Stat. 588; 18 U.S.C. 1162(b), 28 U.S.C. 1360(b) (1970).

96.a Legislative history of Public Law 280 which has been unavailable until now came to light recently in connection with the amicus brief filed by the United States in *Tonasket*. This legislative history shows: (1) that Congress was concerned almost exclusively with law and order and criminal jurisdiction and (2) that Congress understood that states assuming jurisdiction would get no direct federal subsidy, and no increased revenue base from which to meet additional governmental expense attributable to the exercise of jurisdiction in Indian country. Committee on Interior and Insular Affairs, Hearings on H.R. 1063, Wednesday, July 15, 1953 and Monday, June 29, 1953.

for the enforcement scheme of most states contemplates upon nonpayment the levy and seizure of real and personal property.

Moreover, the absence of a congressional plan to have Public Law 280 confer on the states the authority to terminate federal regulation and supervision of Indian commerce, to substitute their own regulation and to impose comprehensive state taxation is demonstrated by the continuation of large-scale federal assistance programs for Public Law 280 reservations[97] and by the failure of Public Law 280 states to assume the burden of providing comprehensive state services to Indians consenting to state criminal and civil jurisdiction.

Although Public Law 280 could be interpreted as authorizing an expansive conferral of legislative authority, the Supreme Court in *Kennerly v. District Court of Montana,*[98] *Metlakatla Indian Community v. Egan,*[99] and *Menominee Tribe v. United States*[100] has consistently construed Public Law 280 as a limited conferral of state judicial power, not designed to extinguish or interfere with federal policies regarding Indians.

In *Kennerly v. District Court of Montana,*[101] the Supreme Court concluded that the State of Montana had improperly undertaken the assertion of civil and criminal jurisdiction pursuant to Public Law 280. The Court held that it was necessary to proceed cautiously and deliberately when permitting state action to impinge on the affairs of reservation Indians, observing:

> Our conclusion . . . is reinforced by the comprehensive and detailed Congressional scrutiny manifested in those instances where Congress has undertaken to extend the civil or criminal jurisdiction of certain States to Indian country.[102]

Similarly, in *Metlakatla Indian Community v. Egan,*[103] the Court interpreted Public Law 280 and the exception clause thereunder as providing a broad and comprehensive exception to the imposition of state, civil, and criminal jurisdiction. The Court stated, "This statute expressly protects against state invasion of all uses of Indian property authorized by federal treaty, agreement, statute, or regulation. . . ."[104] In *Menominee Tribe v. United States,*[105] the Court

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97. The Bureau of Indian Affairs, for example, reports expenditures of $14,072,394 for fiscal year 1971 in California although Public Law 280 subjected all Indian lands within that State to state civil and criminal jurisdiction. The only major category of assistance omitted is "maintaining law and order."
98. Kennerly v. District Court of Montana, 400 U.S. 423 (1971).
99. Metlakatla Indian Community v. Egan, 369 U.S. 45 (1961).
100. Menominee Tribe v. United States, 391 U.S. 404 (1968).
101. Kennerly v. District Court of Montana, 400 U.S. 423 (1971).
102. *Id.* at 427.
103. Metlakatla Indian Community v. Egan, 369 U.S. 45 (1961).
104. *Id.* at 56.
105. Menominee Tribe v. United States, 391 U.S. 404 (1968).

again construed Public Law 280, this time in *pari materia* with the Menominee Indian Termination Act of 1954. The Menominee Termination Act was by its terms to provide for the orderly termination of federal supervision over tribal members and tribal property, but Public Law 280, although conferring civil and criminal jurisdiction on the State of Wisconsin, was nevertheless held to preserve for the tribe all hunting, trapping or fishing rights previously granted.

Recent congressional and executive actions have clarified Public Law 280 as conferring limited state judicial authority, not including the power to terminate federal responsibility and supervision over Indian tribes nor the power to assert comprehensive state taxation. In 1968, Public Law 280 was amended to require tribal consent before a state could assert civil and criminal jurisdiction in Indian country, to allow assertion by a state of only a part of its civil and criminal jurisdiction and to allow states to retrocede jurisdiction previously acquired under Public Law 280.[106] The legislative history of these amendments indicates that they were initially proposed because Indian tribes had been critical of Public Law 280 because it authorized unilateral applications of state law without the consent of the tribes and without regard to the special needs and circumstances of an individual tribe. Furthermore, in some tribes Public Law 280 resulted in an unnecessary pre-emption of tribal law with a resulting breakdown in law and order.[107] The 1968 amendments evidence congressional disillusion with the concept of allowing uncontrolled assertion of state jurisdiction over Indian country without regard to the best interest of Indians.

President Richard M. Nixon has taken a strong stand against previous executive and congressional policies favoring fundamental change in the special historical and legal relationships between the federal government and Indian tribes.[108] Present executive policies against termination of the special federal Indian status and in favor of strong tribal self-government are based on solemn obligations entered into by the United States Government in exchange for vast tracts of land surrendered by Indians and on findings which show that the practical result of removing the federal trusteeship has been to produce considerable disorientation among affected Indians in their dealings with a myriad of federal, state and local governments.

The present congressional and executive policies favoring Indian

106. Pub. L. No. 9-284, 82 Stat. 70, *codified as* 25 U.S.C. § 1322 *et seq.* (1970).
107. Comments of Senator Sam Ervin, U.S. CODE CONG. & ADMIN. NEWS 1865, 1866 (1968).
108. Message to Congress, July 8, 1970, 116 CONG. REC. 23131 (1970).

self-government and the preservation of federal responsibility are premised on the failure of recent termination policies. The Supreme Court's limiting interpretation of Public Law 280 is consistent with two United States Circuit Court opinions which turned directly on an interpretation of the scope of Public Law 280. In *Kirkwood v. Arenas*,[109] the court considered in a Public Law 280 jurisdiction whether a trust allotment of the Agua Caliente Band of Indians was exempt from a California inheritance tax and held the allotment not taxable because taxation would conflict with existing federal exemptions provided to the Agua Caliente Indians and with the exception clause of Public Law 280 which the court stated "[m]erely negatives the ideas that any change in the law as to 'alienation, encumbrance, or taxation' of Indian property was intended."[110] In *United States v. Burland*,[111] the court considered whether Public Law 280 was intended to confer Montana State criminal jurisdiction over the people as well as the lands of the Salish and Kootenai tribes. The court construed Public Law 280 narrowly, arguing that Public Law 280 was only part of a larger federal legislative program relating to Indians and that other separate legislation was contemplated to affect specific disabilities and limitations applicable to Indians.

The Supreme Court of Washington also adopted the Supreme Court's limiting view of Public Law 280 in *Snohomish County v. Seattle Disposal Company*,[112] and in *Sohol v. Clark*[113] requiring in each case a showing of an independent congressional authorization apart from Public Law 280, in order to sustain Washington's legislative assertion against Indian country.

The legislative history as well as the cases interpreting Public Law 280 would appear to provide a strong and convincing basis for arguing that a state cannot utilize Public Law 280 to authorize comprehensive state taxation in Indian country.

Notwithstanding these arguments, from a literal reading of Public Law 280 it can be argued that the "civil jurisdiction" conferred on the state envisioned not simply access to state judicial machinery but also contemplated state regulation and taxation of commerce so long as the state does not tax real or personal property in trust or regulate the use of such property in a manner inconsistent with any federal treaty, agreement, statute or regulation.[114] How-

109. Kirkwood v Arenas, 243 F.2d 863 (9th Cir., 1957).
110. *Id.* at 865.
111. United States v. Burland, 441 F.2d 199 (9th Cir. 1971).
112. Snohomish County v. Seattle Disposal Company, 70 Wash. 2d 668, 425 P.2d 22 (1967).
113. Sohol v. Clark, 71 Wash. 2d 664, 430 P.2d 548 (1967), *second appeal*, 78 Wash. 2d 841, 479 P.2d 925 (1971).
114. Act of August 15, 1953, Pub. L. No. 280, ch. 505 § 4(b), 67 Stat. 588, 28 U.S.C. 1360(b) (1970).

ever, a careful reading of the statute would suggest a more limited congressional intent.

Public Law 280 has two operative clauses relevant to the civil aspect. The first says that

> [the state] shall have jurisdiction over *civil causes of action* between Indians or to which Indians are parties. . . .[115]

The second says that

> . . . those civil laws of the State or Territory that are of general application to *private* persons or *private* property shall have the same force and effect within such Indian country as they have elsewhere within the State . . . .[116]

A fair reading of these two clauses suggests that Congress never intended "civil laws" to mean the entire array of state non-criminal laws, but rather that Congress intended "civil laws" to mean those laws which have to do with private rights and status. Therefore, "civil laws . . . of general application to private persons or private property" would include the laws of contract, tort, marriage, divorce, insanity, descent, etc., but would not include laws declaring or implementing the states' sovereign powers, such as the power to tax, grant franchises, etc. These are not within the fair meaning of "private" laws. The Senate Report characterized the bill as relating to

> . . . criminal offenses and *civil causes of action* committed *or arising on Indian reservations* within such States . . .[117]

This does not reveal an intent that the states acquire broad sovereign powers over Indians such as the taxing power.

The dictionary meaning of "civil" corroborates this reading of Public Law 280. Webster's New International Dictionary, Second Edition, defines "civil" as follows:

> "8. *Law.* Relating to the private rights of individuals in a community and to legal proceedings in connection with them; pertaining to rights and remedies sought by action or suit distinct from criminal proceedings . . ."

There is nothing here to hint at the great sovereign powers which states claim they receive as a result of the enactment of Public Law 280.

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115. *Id.* at § 1360(a) (emphasis added).
116. *Id.* (emphasis added).
117. S. REP. No. 699, 83 Cong. (1953).

In a number of cases, courts have held that certain non-criminal proceedings involving the exercise of sovereign powers are not "civil" proceedings. Of course those were special contexts and of little relevance, yet they add further corroboration to the normal connotation of "civil" (especially as used in Public Law 280) as referring to private rights, as opposed to sovereign powers over citizens. Congress was not concerned that the states lacked these powers on the reservation, but with the absence of a functioning system for the resolution of private rights.

In conclusion, it would appear that Congress in enacting Public Law 280 had in mind a more normal definition of "civil laws" than certain states are currently asserting. If there is any doubt about the scope of Public Law 280, it should be resolved in favor of preserving the tribal powers of self-government.

V. TAXATION BY INDIAN TRIBES

The recent assertion of state taxation against reservation Indians as manifested in *McClanahan,*[118] *Mescalero, and Tonasket*[119] is based in part upon the misconceived conviction that *Organized Village of Kake v. Egan,*[120] and *Williams V. Lee*[121] established the principle of state residual jurisdiction over Indian affairs *except* where (1) Congress has specifically pre-empted the field; or (2) Exercise of state jurisdiction interferes with the Indian's right of sellf-government. Moreover, the states argue that where there is no actual conflict between federal and state authority and where the state action is in an area left void *in fact* by Indian local self-government, they retain residual jurisdiction to assert state taxation. In effect, the states are arguing that state taxation of Indian business does not interfere with the Indian right of self-government under circumstances where *in fact* Indian tribes do not tax Indians or non-Indians with respect to business activities taking place on Indian reservations. This position of the states is responsible in part for the increasing momentum in favor of state assertion of power in Indian country and has left Indians responding defensively to state assertions of taxation. It is suggested that rather than responding defensively, Indians should accept in effect the challenge of the states, affirmatively seize the initiative and assert those taxation powers which they inherently possess to tax enterprises on Indian reservations.

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118. McClanahan v. Arizona State Tax Comm'n., 14 Ariz. App. 452, 484 P.2d 221 (1971), *prob. juris. noted,* 40 U.S.L.W. (U.S. May 15, 1972).

119. Mescalero Apache Tribe v. Jones, 432 F.2d 956 *cert. granted,* 40 U.S.L.W. 3512 (U.S. Dec. 4, 1971). Tonasket v. Washington, 79 Wash. 2d 607, 488 P.2d 281 (1971), *prob. juris. noted,* 40 U.S.L.W. 3588 (U.S. June 12, 1972).

120. Organized Village of Kake v. Egan, 369 U.S. 60 (1962).

121. Williams v. Lee, 358 U.S. 217 (1959).

Williams v. Lee[122] established the proposition that in the absence of a governing Act of Congress, the test for determining the legality of the state assertion is whether the state action infringes on the right of reservation Indians to make their own laws and be ruled by them. *Williams v. Lee*[123] held that the State of Arizona did not have jurisdiction over a civil action brought by a non-Indian against an Indian for the price of goods sold to the latter on the Navajo Indian Reservation. Similar facts were presented in *Kennerly v. Judicial District of Montana*[124] where the Supreme Court indicated that Public Law 280 was a governing Act of Congress, and that since the State of Montana had failed to adopt Public Law 280 properly, it lacked jurisdiction. Furthermore, the Court determined that Public Law 280, which by its specific language involves questions of criminal and civil jurisdiction with respect to Indians on Indian reservations as well as the applicability of state laws to Indians on Indian reservations, controlled the issue of whether a state had jurisdiction over Indians. Accordingly, jurisdiction was to be determined by whether Public Law 280 had been properly adopted and not by reference to the infringement test. Necessarily, the infringement test was only used to determine the question of jurisdiction over non-Indians while residing or doing business in Indian country. It is with respect to non-Indians that the assertion by state taxing authorities that there is no conflict between state authority and tribal authority (when state assertion deals with an area left void *in fact* by Indians) which demands a strong tribal response. Therefore, with respect to the treatment of non-Indians, it is submitted that Indian tribes should undertake affirmative taxation.

It is well settled that one of the powers essential to the maintenance of any government is the power to levy taxes. This power is an inherent attribute of tribal sovereignty and it continues unless withdrawn or limited by treaty or by Act of Congress.[124a] The inherent power of tribal governments to tax has been established in three major cases, *Buster v. Wright*,[125] *Morris v. Hitchcock*,[126] and *Iron Crow v. Oglala Sioux Tribe*.[127]

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122. *Id.*

123. *Id.*

124. Kennerly v. District Court of Montana, 400 U.S. 423 (1971).

124.a. Tribal criminal jurisdiction to punish murder was inherent prior to enactment of the Major Crimes Act in 1885. *See Ex Parte* Crow Dog, 109 U.S. 556 (1883). Recently, tribal eminent domain powers, long unused, have been recognized as inherent. Seneca Constitutional Rights Organization v. George, et al, 348 F. Supp. 48 (W.D.N.Y. 1972).

125. Buster v. Wright, 135 Fed. 947 (8th Cir. 1905), *appeal dismissed,* 203 U.S. 599 (1906).

126. Morris v. Hitchcock, 21 App. D.C. 565 (1903), *affirmed,* 194 U.S. 384 (1904).

127. Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956). *See generally* F. S. Cohen, *Indian Rights and the Federal Courts,* 25 MINN. L. REV. 145 (1942).

In *Buster v. Wright*,[128] the Creek Nation, one of the Five Civilized Tribes, had imposed a tax on all persons, not citizens of the Creek Nation, who traded within the borders of that nation. The plaintiffs in the case were traders doing business on townsites within the boundaries of the Creek Nation who sought to enjoin the Creek Nation from closing down their businesses for non-payment of taxes. The decision of the trial court which dismissed the case was affirmed by the Court of Appeals for the Eighth Circuit and the United States Supreme Court. The Eighth Circuit stated:

> [T]he authority of the Creek Nation to prescribe the terms upon which non-citizens may transact business within its borders did not have its origin in an act of Congress, treaty or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it.[129]

Buster v. Wright dealt with a license or privilege tax on business and the principles therein should be equally applicable to a tax on property.

In *Morris v. Hitchcock*,[130] the Chickasaw Tribe proposed a tax on cattle owned by non-citizens of that nation, that grazed on private land within the tribal boundaries. The Court of Appeals for the District of Columbia stated:

> A government of this kind necessarily has the power to maintain its existence and effectiveness through the exercise of the usual power of taxation upon all property within its limits, save as may be restricted by its organic law. Any restriction in the organic law in respect of this ordinary power of taxation, and the property subject thereto, ought to appear by express provision or necessary implication. . . . Where the restriction upon this exercise of power by a recognized government is claimed under the stipulations of a treaty with another, whether the former be dependent upon the latter or not, it would seem that its existence ought to appear beyond a reasonable doubt. We discover no such restriction in the clause of Article 7 of the Treaty of 1855, which excepts white persons from the recognition therein of the unrestricted right of self-government by the Chickasaw

128. Buster v. Wright, 135 Fed. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906).

129. Buster v. Wright, 135 Fed. 947, 950 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906).

130. Morris v. Hitchcock, 21 App. D.C. 565 (1903), *affirmed*, 194 U.S. 384 (1904).

> Nation and its full jurisdiction over persons and property within its limits.[131]

In *Iron Crow v. Oglala Sioux Tribe*,[132] the Eighth Circuit Court of Appeals determined that the Oglala Sioux Tribe's privilege tax against the lessee of a reservation Indian's property who used the reservation property for grazing stock was properly imposed.[133]

Although the power to tax does not necessarily depend upon the power to remove and has been upheld in *Buster v. Wright*,[134] when there was no power to remove a person, it may impose conditions upon his remaining within tribal territory including the conditions contained in certain taxes. Various tribal constitutions approved under the Indian Reorganization Act of 1934 provide the power to exclude persons not lawfully residing within the reservation.[135]

Once an Indian tribe decides to undertake taxation, a large number of questions present themselves for examination. Will taxation require tribal constitutional as well as statutory authorization? Since the power to tax is inherent in an Indian tribe, constitutional amendments are not necessary unless, of course, constitutional impediments to taxation presently exist. Several tribes have already developed constitutional provisions authorizing taxation, pursuant to the Indian Reorganization Act of 1934.

Presumably, business activity will be the first object of Indian taxation. Do tribes want to impose business taxes on Indian-owned enterprises as well as on non-Indian-owned enterprises? Are there possible constitutional impediments to taxing only non-Indians? If the taxes will be imposed on businesses engaged in interstate commerce, are they fairly apportioned to reflect the portion of the interstate business undertaken within the reservation? What tax collection and enforcement provisions should be enacted? Does the tribe have an appropriate judicial tribunal which could administer the enforcement machinery? Should civil enforcement be limited to the seizure of business related personal property? Will criminal penalties against non-Indians raise certain constitutional problems relating to the non-Indians' right to a jury trial by his peers?

Finally, the form of the business tax must be carefully considered. A business tax would be a tax for the privilege of doing business on the Indian reservation. Such a tax could be calculated for example by reference to gross receipts attributable to the busi-

131. *Id.* at 593.
132. Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956).
133. *Cf.* Iron Crow v. Oglala Sioux Tribe, 129 F. Supp. 15 (S.D. 1955).
134. Buster v. Wright, 135 Fed. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906).
135. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 149 (reprint 1942).

ness activity occurring on the reservation or by reference to the value of business property utilized on the reservation.

Yet another reason exists for the adoption of comprehensive schedules for tribal taxation, consistent with the social and political goals of the tribe. Under the Act of October 20, 1972,[136] Indian tribal governments and Alaska Native villages performing substantial governmental functions are entitled to participate in the sharing of federal revenues under §108 (b) (4) of that Act. The tax effort of local government is important in determining the allocation of a particular county area under the Act (and therefore to individual Indian tribes within the county area). It is important that the tribe demonstrate a substantial tax effort. Where, for example, tribal revenue for financial and governmental purposes is presently realized from the "proprietary" return on tribal lands, the tribes may wish to seek alternative ways of collecting that proprietary return as tax revenue.

136. Pub. L. No. 92-512, 92nd Congress, 2nd Sess., 86 Stat. 919 (1972).