North Dakota Law Review

Volume 49 | Number 2 Article 7

1973

State Taxation on Sales to Reservation Indians: A Comment on the North Dakota Attorney General's Position

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NOTES

STATE TAXATION ON SALES TO RESERVATION INDIANS: A COMMENT ON THE NORTH DAKOTA ATTORNEY GENERAL'S POSITION

INTRODUCTION

In a letter to the Attorney General of North Dakota, the Tax Commissioner of North Dakota asked whether a state sales tax[1] could be imposed on sales made to reservation Indians when those sales were made by retailers located on the reservation.[2] The Attorney General replied that such a tax was permissible on sales made to individual Indians.[3]

This note will analyze the Attorney General's arguments in light of the relevant principles governing State-Indian tax relations.

I. The Attorney General's Opinion

The Tax Commissioner requested the Attorney General to respond to the following four questions:

> 1. Is a non-Indian retailer whose place of business is located within the boundaries of an Indian reservation and on "trust land"[4] as that term is explained above, required to charge North Dakota retail sales tax and pay the tax to the state on retail sales made to—
>
> a. A non-Indian
> b. An Indian
> c. An Indian tribe or band

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1. N.D. CENT. CODE ch. 57-39.2 (1972).
2. Letter from Byron Dorgan, Tax Commissioner of North Dakota to Helgi Johanneson, Attorney General of North Dakota, February 3, 1972.
3. [1970-1972] REP. OF ATT'Y GEN. OF NORTH DAKOTA Feb. 24, 1972. Four separate challenges to the Attorney General's opinion were upheld in the District Court of Burleigh County and the North Dakota Supreme Court, White Eagle v. Dorgan No. 21937 (Burleigh County, N.D., Sept. 19, 1972), *appeal docketed,* No. 8856, N.D. Sup. Ct., Nov. 17, 1972; Condon v. Dorgan No. 21938 (Burleigh County, N.D., Sept. 19, 1972), *appeal docketed,* No. 8857, N.D. Sup. Ct., Nov. 17, 1972; Bailey v. Dorgan No. 21939 (Burleigh County, N.D., Sept. 19, 1972), *appeal docketed,* No. 8858, N.D. Sup. Ct., Nov. 17, 1972; Fast Horse v. Dorgan, No. 21941 (Burleigh County, N.D., Sept. 19, 1972), *appeal docketed,* No. 8859, N.D. Sup. Ct., Nov. 17, 1972).
4. The Tax Commissioner defined "trust land" as "land held in trust for the tribe or for an Indian so that the power to dispose of it is restricted by federal law." Letter from Byron Dorgan, Tax Commissioner of North Dakota to Helgi Johanneson, Attorney General of North Dakota, February 3, 1972.

2. The same question as in number 1, except that the non-Indian retailer's place of business is located on "deeded land"[5] as that term is explained above.

3. Is an Indian retailer whose place of business is located within the boundaries of an Indian reservation and on "trust" land," as that term is explained above, required to charge North Dakota retail sales tax and pay the tax to the state on retail sales made to—

a. A non-Indian
b. An Indian
c. An Indian tribe or band

4. The same question as in question number 3, except that the Indian retailer's place of business is located on "deeded land" as that term is explained above.[6]

In an opinion dated February 24, 1972,[7] the Attorney General answered that a state sales tax may legally be imposed and collected from sales to non-Indians and Indians alike.[8] Sales to the tribes, however, were exempted from the state sales tax.[9] The Attorney General observed that an Indian tribe, like a federal agency, is an instrumentality of the federal government and hence, not subject to state taxation.[10]

The Attorney General found it unnecessary to distinguish between "deeded land" and "trust land".[11] Nor did he find it important to distinguish between non-Indian and Indian traders.[12] Thus, the answers to questions 2, 3, 4 were identical to that of question 1.[13]

In arriving at his decision, the Attorney General offered numerous arguments in support of his contention that Indians on the reservation were subject to state sales tax. Briefly, these were the justifications:

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5. The Tax Commissioner defined "deeded land" as "land owned by a non-Indian or land allocated to an Indian who has the unrestricted right to dispose of it or land owned by an Indian tribe or band with the power unrestricted by federal law to dispose of it." *Id.*

6. *Id.* It appears that the Tax Commissioner's request for information was a direct result of the ruling in New Town v. United States, 454 F.2d 121 (8th Cir. 1971), that the boundaries of the Fort Berthold Indian Reservation had not been diminished by the Act of June 1, 1910, 36 Stat. 455 which opened portions of that reservation to homesteaders. In his letter dated February 3, 1972, the Tax Commissioner seemed concerned that "some legal advisers to the Fort Berthold Indians, apparently regard the New Town decision as holding that the state and its political subdivisions do not have any civil jurisdiction within a reservation's boundaries over Indians." Letter from Byron Dorgan, Tax Commissioner of North Dakota to Helgi Johanneson, Attorney General of North Dakota, February 3, 1972.

Though the problem arose in this particular context, it should be noted that the Attorney General did not limit his decision to the Indians on the Fort Berthold Reservation.

7. [1970-1972] REP. OF ATT'Y GEN. OF NORTH DAKOTA Feb. 24, 1972.
8. *Id.* at 9.
9. *Id.*
10. *Id.*
11. *Id.*
12. In his answer to the Tax Commissioner, the Attorney General makes no mention of this distinction.
13. [1970-1972] REP. OF ATT'Y. GEN. OF NORTH DAKOTA Feb. 24, 1972 at 9.

1. The Attorney General first examined the Organic Act of March 2, 1861[14] and the Enabling Act of February 22, 1889[15]—two federal laws by which North Dakota acquired statehood. These two laws protect certain rights relating to Indians from state encroachment. The Organic Act states that:

> [N]othing in this act, contained shall be construed to impair the rights of persons or property now pertaining to the Indians in said [t]erritory, so long as they shall not be extinguished by treaty.[16]

The Enabling Act provides that North Dakota residents shall disclaim title to "all lands lying within said limits owned or held by an Indian or Indian tribes."[17] That act also states that such "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States."[18]

He noted that the net result of these two statutes is a state disclaimer of all title to Indian trust lands.[19]

2. The Attorney General stated that the rule in *McCulloch v. Maryland*[20] which exempted an instrumentality of the United States government from state taxation has been applied too broadly in the case of individual Indians.[21] He argued that individual Indians are not the instrumentality itself and therefore, they, like federal employees, should be subject to state taxation.[22]

3. Next, he made several arguments based strictly on equitable principles. He observed that though the Indian has certainly been mistreated, North Dakota is not responsible. Any reparations should be made by the United States Government, not the state of North Dakota.[23] He also noted that Indians have been made state residents pursuant to the Fourteenth Amendment and have a voice in making state laws including tax law.[24] Furthermore, he pointed out that since Indians receive state welfare money[25] and state educational benefits,[26] they should help support these programs by

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14. Organic Act of March 2, 1861, 12 Stat. 239.
15. Enabling Act of February 22, 1889, 25 Stat. 676.
16. Organic Act of March 2, 1861, 12 Stat. 239.
17. Enabling Act of February 22, 1889, 25 Stat. 676, 677.
18. *Id.* at 677.
19. [1970-1972] REP. OF ATT'Y GEN. OF NORTH DAKOTA Feb. 24, 1972, at 15. The Attorney General also mentioned the Act of June 1, 1910, 36 Stat. 455 which opened portions of the Fort Berthold Reservation for homesteading. He noted that in *New Town v. United States*, 454 F.2d 121 (8th Cir. 1971), the Court held that that act did not in any way affect the boundaries of the Fort Berthold Reservation. *Id.* at 4.
20. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 427 (1819).
21. [1970-1972] REP. OF ATT'Y. GEN. OF NORTH DAKOTA Feb. 24, 1972, at 5.
22. *Id.* at 5.
23. *Id.* at 6.
24. *Id.* at 7.
25. *Id.* at 7.
26. *Id.* at 7.

paying state taxes.[27] The Attorney General concluded that to treat treat Indians differently from other state citizens with regard to taxation on the basis of their race would be a violation of the Equal Protection Clause of the Fourteenth Amendment.[28]

4. The Attorney General also observed that taxing individual Indians was not an interference with tribal sovereignty.[29] He pointed out that in *McClanahan v. State of Arizona Tax Commission,*[30] the Court of Appeals of Arizona ruled that an income tax on Indians whose livelihood was directly derived from on the reservation activities, was too remote to be an infringement on the right of tribal self-government.[31]

5. He noted that the Supreme Court of the United States in *Warren Trading Post Co. v. Arizona State Tax Commission,*[32] had held that an Arizona sales tax did not apply to the Warren Trading Post Company which was doing a retail trading business with the Indians on the Navajo Reservation because of Congressional preemption of Indian trade.[33] However, he asserted that the Court had based its ruling on the fact that this congressional enactment protected only Indian traders, not Indians, from state burdens.[34] The Attorney General also observed that certain Indian traders not required to obtain licenses pursuant to the Indian Trader Act[35] were not subject to federal control.[36]

II. Critique

In the last twenty years, the legal relationship of reservation Indians to the state wherein their reservation is situated has become

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27. *Id.* at 7.
28. *Id.* at 7.
29. *Id.* at 7.
30. McClanahan v. State Tax Comm., 14 Ariz. App. 452, 484 P.2d 221 (Ct. App. 1971), *appeal docketed,* No. 71-834, 40 U.S.L.W. 3322 (U.S., Dec. 23, 1971).
31. [1970-1972] REP. OF ATT'Y. GEN. OF NORTH DAKOTA Feb. 24, 1972 at 7-8.
32. Warren Trading Post Co. v. Arizona State Tax Comm., 380 U.S. 685 (1965).
33. [1970-1972] REP. OF ATT'Y. GEN. OF NORTH DAKOTA Feb. 24, 1972, at 8. The Attorney General stated that the court based its opinion on the Buck Act, 4 U.S.C. §§ 105-110 (1970), which "regulated trade and intercourse with Indian tribes." [1970-1972] REP. OF ATT'Y. GEN. OF NORTH DAKOTA Feb. 24, 1927 at 8. This is clearly incorrect. The Court in *Warren* ruled that the Indian Trader Act, 25 U.S.C. §§ 261-264 (1970) preempted trade with the Indians. Warren Trading Post Co. v. Arizona State Tax Comm., 380 U.S. 685, 688-689 n.n. 7, 10, 11 (1965). The Court observed that the Buck Act, 4 U.S.C. §§ 105-110 (1970) which allows states to impose sales and use taxes within certain federal areas, does not apply to Indian reservations. Warren Trading Post Co. v. Arizona Hute Tax Comm., 380 U.S. 685, 691 n. 18 (1965).

In light of the Attorney General's obvious oversight and to prevent further confusion, the writer has taken the liberty to substitute a citation to the Indian Trader Act, 25 U.S.C. §§ 261-264 (1970) in those instances in the Attorney General's Report where he has erroneously cited to the Buck Act, 4 U.S.C. §§ 105-110 (1970), as preempting trade with Indians.

34. *Id.*
35. Indian Trader Act, 25 U.S.C. §§ 261-264 (1970).
36. [1970-1972] REP. OF ATT'Y. GEN. OF NORTH DAKOTA Feb. 24, 1972 at 8.

a subject of great controversy and dispute.[37] In evaluating the North Dakota Attorney General's arguments set forth above, this note is concerned with only one facet of that debate: whether a state may exact a sales tax from Indians living on a reservation within its borders when those Indians buy from retailers located on the reservation.[38]

A. The Enabling Act and the Organic Act.

Both the Enabling Act of February 22, 1889,[39] and the Organic Act of March 2, 1861[40] are federal laws which granted statehood to North Dakota. They contain passages exempting Indian rights and property from state jurisdiction.[41] In his assessment of the legal effect of these acts, the Attorney General stated generally that they function only as a disclaimer of title to Indian lands.[42]

The language of the Enabling Act is extremely broad. The act states that "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States."[43] In *Your Food Stores Inc. (NSC) v. Village of Espanola,*[44] the Supreme Court of New Mexico interpreted the same phrase in New Mexico's Enabling Act[45] to mean that the state had no governmental powers over Indians on Indian lands unless specifically granted by Congress

37. Comment, *The Indian Battle for Self-Determination,* 58 CALIF. L. REV. 445, 472 (1970).

38. It should be noted that in Tonasket v. State, 79 Wash. 2d 607, 488 P.2d 281 (Sup. Ct. 1971), *appeal docketed,* No. 71-1031, 40 U.S.L.W. 3436 (U.S., Feb. 12, 1972). The Supreme Court of Washington permitted that state, which had assumed civil and criminal jurisdiction over the Colville Indians pursuant to Public Law 280, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, *amending* 18 U.S.C. 53, 1162, 28 U.S.C. §§ 1331, 1360, to levy a sales tax on Indian traders located on the reservation.

Unlike the state of Washington, North Dakota has not obtained criminal and civil jurisdiction over reservation Indians located within its borders pursuant to Public Law 280.

39. Enabling Act of February 22, 1889, 25 Stat. 676.

40. Organic Act of March 2, 1861, 12 Stat. 239.

41. The Organic Act contains the following language:

> That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians. . . .

Organic Act of March 2, 1861, 12 Stat. 239.

The Enabling Act states:

> That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.

Enabling Act of February 22, 1889, 25 Stat. 676, 677.

42. [1970-1972] REP. OF ATTY GEN. OF NORTH DAKOTA Feb. 24, 1972, at 5.

43. Enabling Act of February 22, 1889, 25 Stat. 676, 677.

44. Your Food Stores, Inc. (NSL) v. Village of Espanola, 68 N.M. 327, 361 P.2d 950 (1961).

45. Act of June 20, 1910, 36 Stat. 557, 558-559.

or permitted by the Supreme Court.[46] In *Organized Village of Kake v. Egan*,[47] however, the Supreme Court of the United States speaking through Justice Frankfurter declared that a similar phrase in the Alaska Statehood Act[48] granting "absolute jurisdiction and control"[49] over Indian lands to the United States Government acted as a disclaimer of a proprietary interest only and that the state still retained a governmental interest in the Indian lands within its borders.[50] Justice Frankfurter noted that "absolute meant undiminished, not exclusive."[51] Based on the *Kake* construction of the term "absolute jurisdiction and control", it appears that the Attorney General is correct in asserting that the Enabling Act is a state disclaimer of title to Indian lands.

As to the Organic Act, however, such a limited interpretation may be incorrect.[52] The language in the Organic Act states:

> That nothing in this act shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians . . .[53]

In *Kansas Indians*,[54] the Supreme Court observed that the same wording contained in a federal act admitting Kansas to the Union[55] precluded state sovereignty over Indians because Kansas entered the Union upon the express condition that Indian rights should remain unimpaired.[56] Though *Kansas* was specifically concerned with the question of whether the state could tax Indian lands,

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46. Your Food Stores, Inc. (NSL) v. Village of Espanola, 68 N.M. 327, 361 P.2d 950, 953 (1961).

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

48. Alaska Statehood Act of July 7, 1958, 72 Stat. 339.

49. *Id.*

50. Organized Village of Kake v. Egan, 369 U.S. 60, 69 (1961).

51. *Id.* at 71.

52. At one point, the Attorney General seemed to indicate that the Organic Act and the Enabling Act protect not only Indian lands but also the right to tribal self-government. [1970-1972] REP. OF ATT'Y. GEN. OF NORTH DAKOTA Feb. 24, 1972, at 4. However, he later stated that "[b]asically, the organic law and enabling legislation in essence constituted a disclaimer of title to those lands." *Id.* at 5. In light of the marked conceptual difference between a disclaimer of Indian land title and a safeguard of tribal self-government, his generalization is understated.

53. Organic Act of March 2, 1861, 12 Stat. 239.

54. Kansas Indians, 72 U.S. (5 Wall.) 737 (1866).

55. Act of January 29, 1861, 12 Stat. 126 stated "[t]hat nothing contained in the said constitution respecting the boundary of said State shall be construed to impair the rights of person or property now pertaining to the Indians in said territory. . . ." *Id.* at 127.

56. Kansas Indians, 72 U.S. (5 Wall.) 737, 756 (1866).

> There can be no question of state sovereignty in the case, as Kansas accepted her admission into the family of states on condition that the Indian rights should remain unimpaired and the general government at liberty to make any regulation respecting them, their lands, property, or other rights, which it would have been competent to make if Kansas had not been admitted into the Union.

Id.

the Court suggested that "lands, property or other rights" were not subject to state jurisdiction.[57]

As *Kansas* points out, the language in the Organic Act, liberates from state control much more than merely title to Indian land. It is indicative of a congressional policy designed to protect not only Indian property, but also the Indians themselves from state encroachment. Even *Kake* acknowledges that the state cannot interfere with "a right granted or reserved by federal law."[58] Notwithstanding the Attorney General's limited interpretation, it is clear that the Organic Act is a substantial safeguard for Indians residing on reservations located within North Dakota.

B. Instrumentality Doctrine

In *McCulloch v. Maryland,*[59] Justice Marshall invalidated a Maryland tax on the Bank of the United States declaring, essentially, that states were not permitted to interfere with federal governmental functions.[60] This rule, which eventually became known as the Instrumentality Doctrine, proved to be unsatisfactorily broad.[61] To restrict the number of exemptions claimed pursuant to this theory, the courts devised a formula which allowed states to tax the federal government or its agent as long as the financial encroachment on the federal policy was so remote that it did not interfere with the accomplishmemnt of that policy.[62] In *Graves v. York ex rel. O'Keefe,*[63] the Supreme Court held that federal employees were subject to state income tax in the state in which they were employed.[64] The Court stated that:

> [T]he purpose of the immunity was not to confer benefits on the employees . . . or to give an advantage to a government by enabling it to engage employees at salaries lower than those paid for like services by other employees, public or private, but to prevent undue interference with the one government by imposing on it the tax burdens on the other.[65]

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57. *Id.*

58. Organized Village of Kake v. Egan, 369 U.S. 60, 75 (1962).

59. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 159 (1819).

60. *Id.* at 209.

61. As the instrumentality doctrine expanded, subsequent courts reacted to the fear that local government were being deprived of too much tax revenue, and they attempted to establish a test that would balance the conflicting intersts of governmental sovereignty and the states' power of taxation. Comment, *Indian Taxation: Underlying Policies and Present Problems,* 59 CALIF. L. REV. 1261, 1275 (1971).

62. *See, e.g.,* Taber v. Indian Territory Illuminating Co., 300 U.S. 1, 3-4 (1936).

63. Graves v. York *ex rel.* O'Keefe, 306 U.S. 466 (1939).

64. *Id.*

65. *Id.* at 483-84.

The Attorney General argued that this reasoning should apply to individual Indians.[66] He seemed to concede that the tribe is a federal instrumentality exempt from state taxation;[67] on the other hand, he considered the relationship between the individual Indian and his tribe to be analagous to the relationship between the federal employee and the federal agency.[68]

The principle of *Graves*, though apposite to non-Indians, is not applicable to Indians because federal policy promotes economic rehabilitation of the reservation Indian.[69] One of the main purposes in granting federally protected land to the Indians is to provide a means by which Indians can achieve economic independence.[70] It follows that any form of taxation exacted from an Indian living on a reservation must be void if it, in any way, diminishes the value of that land as a source of economic benefit to the Indian. In *Makah Indian Tribe v. Clallam County*,[71] the Washington Supreme Court ruled that a state tax on the personal property owned by an Indian and his non-Indian spouse and located on the reservation was invalid because it interfered with the federal Indian policy of economic development:

> The reasons for such a ruling lie almost exclusively in the discernible federal policy of encouraging Indians to become economically self-sufficient on their reservations.[72]

It is clear from the reasoning in *Makah* that while an Indian is on the reservation, this policy protects him from economic burdens

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66. [1970-1972] REP. OF ATT'Y. GEN. OF NORTH DAKOTA, Feb. 24, 1972, at 5.

67. He states that the Indian tribe is exempt from state sales tax. *Id.* at 9.

68. *Id.* at 9.

69. Makah Indian Tribe v. Clallam County, 73 Wash. 2d 677, 685, 440 P.2d 442, 447 (1968); Comment, *Indian Taxation: Underlying Policies and Present Problems* 59 CALIF. L. REV. 1261, 1276 (1971)

70. Comment, *Indian Taxation: Underlying Policies and Present Problems* 59 CALIF. L. REV. 1261, 1264 (1971).

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

72. *Id.* at 447. In Mescalero Apache Tribe v. Jones, 83 N.M. 158, 489 P.2d 666 (Ct. App. 1971) *appeal docketed*, No. 71-738, 40 U.S.L.W. 33.22 (U.S., Dec. 4, 1971). The Court of Appeals of New Mexico held that state taxes on construction materials and gross receipts of a ski resort operated by the Mescalero tribe and located on land leased from the United States Forest Service were permissible. The Court noted that the ski resort was not within the borders of the Indian reservation and, therefore, was amenable to state taxation. *Id.* at 668.

Consequently, by virtue of the Enabling Act, the Federal Government permitted the state of New Mexico to tax, ". . . as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned and held by any Indian." *Id.* The court rejected the federal instrumentality defense asserted by the tribe by stating that "the ski resort is not essential for the performance of governmental functions. . . ." *Id.* at 670. Unfortunately, the court did not explain its conclusion. Part of the reason, perhaps, is that the court may have felt that the language in New Mexico's Enabling Act of June 20, 1910, 36 Stat. 557 was sufficient grounds for the tax.

imposed by the state.[73] Thus, by placing a financial encumbrance on sales to individual Indians living on the reservation, the state directly contravenes federal policy and violates even the more limited interpretation of the instrumentality doctrine.[74]

C. Tribal Sovereignty

In *Worcester v. Georgia*,[75] Justice Marshall set down basic principles governing the relationships of the Indians to the state and federal governments.[76] Georgia had passed statutes requiring those persons wishing to reside within the limits of the Cherokee Reservation located in the state of Georgia to obtain a license. A Vermont missionary, who entered the reservation without procuring the necessary license, was subsequently convicted of violating the statutes. Justice Marshall ruled the statutes unconstitutional because they interfered with the relations between the federal government and the Cherokee.[77] He stated that the war making power, the treaty making power, and the commerce clause were sufficient to give the United States control over all Indian affairs,[78] and that that control was exclusive.[79] Furthermore, he noted that the Indian nations possessed a quasi-sovereignty which also prevented the state from exercising its jurisdiction over them.[80]

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73. The Attorney General indicates that much of the land in New Town where merchants are located is privately opened. [1970-1972] REP. OF ATT'Y. GEN. OF NORTH DAKOTA, Feb. 24, 1972, at 4. Nevertheless, as the Court pointed in New Town v. United States, 454 F.2d 21 (8th Cir. 1971), New Town is still a part of the Fort Berthold Reservation. Hence, the federal Indian policy of economic rehabilitation is clearly in effect there.

Congress defined "Indian country" as:

> Except as otherwise provided in Sec. 1154 and 1156 of this Title, the term 'Indian country' as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation. . . .

Act of June 25, 1948, ch. 645, 62 Stat. 757, *as amended*, 18 U.S.C. § 1151 (1970).

74. Another objection must also be made to the Attorney General's statement that the bond between an Indian and his tribe is analagous to the bond between a federal employee and a federal agency. It is not necessary to be an anthropologist to understand the cultural insensitivity of such a comparison. It seems that in any subsequent judicial resolution of this particular issue, a court must not overlook the symbiotic relationship between an Indian and his tribe.

It is clear that such a tax also violates the federal policy of tribal sovereignty. See text *infra*.

75. Worcester v. Georgia, 31 U.S. (6 Pet.) 350 (1832).

76. *Id.*

77. *Id.* at 381.

78. *Id.* at 379.

79. The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the Union.
Id. at 378.

80. From the commencement of our government, Congress has passed acts to regulate trade and intercourse with the Indians, which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as *distinct political communities, having territorial boundaries, within which their authority is exclusive*, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.
Id. at 377.

The concept of tribal sovereignty gained new significance in *Williams v. Lee*.[81] A non-Indian trader, licensed by the federal government to operate a store on the Navajo Reservation in Arizona, brought suit in an Arizona Court against Indians to collect goods sold on credit. The Supreme Court of Arizona ruled that since no Act of Congress expressly prohibited their doing so, Arizona Courts were free to exercise jurisdiction over civil suits by non-Indians against Indians on the reservation.[82] In reversing the Arizona Court's decision, the Supreme Court of the United States held that to permit the Arizona Courts to hear such suits would encroach upon the authority of the tribal courts.[83] In reviewing the law concerning state jurisdiction over reservation Indians, the court stated that the precepts of *Worcester* still applied though they had been somewhat modified "in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized . . . ."[84] The court asserted that:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the *right of the reservation Indians to make their own laws and be ruled by them*.[85]

By couching its ruling solely in terms of tribal sovereignty, the Court seemed to reject total federal preemption of Indian affairs.[86] This formulation appeared to give tacit approval to the exercise of state jurisdiction over Indians in instances where it did not interfere with tribal sovereignty.[87] Thus, *Williams* suggested that the guiding principle of state-Indian relations was non-interference with the tribal right of self-government.[88]

In *Organized Village of Kake v. Egan*,[89] the Supreme Court indicated that *Williams* was part of a new approach to the problem of state jurisdiction over Indians on the reservation.[90] Though the precise question in *Kake* involved Alaskan Indians for whom no reservation had been established,[91] Justice Frankfurter examined both the case law and the federal statutes permitting state juris-

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81. Williams v. Lee, 358 U.S. 217 (1959).
82. Williams v. Lee, 83 Ariz. 241, 319 P.2d 998 (1958), *rev'd.*, 358 U.S. 217 (1959).
83. Williams v. Lee, 358 U.S. 217 (1959).
84. *Id.* at 219.
85. *Id.* at 220.
86. Comment, *The Indian Battle for Self-Determination*, 58 CALIF. L. REV. 445, 473 (1970).
87. *Id.*
88. The discussion in this paper of preemption, in general, and Warren Trading Post Co. v. Tax Comm., 380 U.S. 685 (1965), in particular, suggests that the federal government has still retained preemptive control over some areas of Indian affairs.
89. Organized Village of Kake v. Egan, 369 U.S. 60 (1962).
90. *Id.* at 75.
91. The Court held that the Thlinget Indians in Alaska were subject to state conservation laws and had no right to fish salmon with traps. *Id.* at 60.

diction over non-Indians on reservations and concluded that the *Worcester* principles had been significantly altered.[92] In dictum, Justice Frankfurter indicated that "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."[93] Though *Kake* reaffirmed the Williams principle of state non-interference with tribal sovereignty, it seemed to narrow the *Williams* holding by precluding any federal preemption of Indian affairs.[94]

Taken together, both *Williams* and *Kake* appeared to clear the way for states to assert their sovereignty over Indians on the reservation in certain limited situations. However, it is clear from both rulings that, notwithstanding the apparent demise of the doctrine of total federal preemption of Indian affairs,[95] Indians still had the power "to make their own laws and be ruled by them."[96]

In arguing that a tax on sales to individual Indians does not infringe on tribal sovereignty, the Attorney General placed special emphasis on *McClanahan v. State Tax Commission*.[97] The court in *McClanahan* held that a state tax on income earned by Indians living and working on the Navajo Reservation was not an interference with tribal sovereignty.[98] The Court adopted the reasoning of *Helvering v. Gerhardt*[99] and *Graves v. New York ex rel. O'Keefe*.[100] In *Helvering*, the Court declared that state governmental employees were subject to federal income tax because such an imposition did not interfere with any functions essential to statehood.[101] *Graves* held that federal employees were subject to state taxation because "[t]he theory . . . that a tax on income is legally or economically a tax

92. *Id.* at 71-76.
93. *Id.* at 75.
94. "*Kake's* formulation seemingly reduced federal involvement to supremacy clause terms." Comment, *The Indian Battle for Self-Determination*, 58 CALIF. L. REV. 445, 476 (1970).
95. See text *infra* for a discussion of the present state of the preemption doctrine.
96. Williams v. Lee, 358 U.S. 217, 220 (1959). It is for the courts to define more fully the attributes of tribal sovereignty. One area that has been expressly reserved to the tribe is the power of extradition. In State *ex rel.* Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969), the court held that the refusal of a Navajo tribe to extradite a fugitive to Oklahoma could not be superseded by the state of Arizona. The Court maintained that the power to extradite was an attribute of sovereignty and could not be infringed upon by the state.
97. McClanahan v. State Tax Comm., 14 Ariz. App. 452, 484 P.2d 221 (Ct. App. 1971), *appeal docketed*, No. 71-834, 40 U.S.L.W. 3322 (U.S., Dec. 23, 1971).
The Attorney General also stated that in Ghahate v. Bureau of Revenue, 80 N.M. 98, 451 P.2d 1002 (N.M. Ct. App. 1969), the Court "specifically held that an income tax on Indians did not interfere with self-government of Indian reservations. . . ." [1970-1972] REP. OF ATT'Y. GEN. OF NORTH DAKOTA, Feb. 24, 1972, at 8. It should be noted, however, that in *Ghahate*, the tribe *stipulated* that it was not inconvenienced by the tax. Ghahate v. Bureau of Revenue, 80 N.M. 98, 451 P.2d 1002, 1004 (N.M. Ct. App. 1969). Thus, it was unnecessary for the Court to determine this issue.
98. McClanahan v. State Tax Comm., 14 Ariz. App. 452, 484 P.2d 221 (Ct. App. 1971) *appeal docketed*, No. 71-834, 40 U.S.L.W. 3322 (U.S., Dec. 23, 1971).
99. Helvering v. Gerhardt, 304 U.S. 405 ('938).
100. Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939).
101. Helvering v. Gerhardt, 304 U.S. 405 (1938).

on its source, is no longer tenable."[102] Analogizing from these two cases, the Court in *McClanahan* maintained that an income tax on individual Indians was simply too remote to impair reservation self-government.[103]

Implicit in the Court's ruling is that the principles of federalism which govern federal-state relations are also applicable to state-Indian relations. In light of the holding in *Williams* that reservation Indians possess autonomous rule-making power,[104] it is clear that this assumption is erroneous. In determining if the state has, in fact, infringed upon tribal sovereignty, the only question to be asked is whether the tribe has the right to levy a tax. Since *McCulloch v Maryland*,[105] the power to tax has been recognized as an attribute of sovereignty. Therefore, in order to be truly sovereign, the tribe must be vested with this power.[106] Once this tribal power to tax has been established, it follows, applying *Williams*, that the state may not infringe upon this power by levying a tax which is clearly within the authority of the tribe to exact.[107] It is apparent that a state sales tax levied on Indian traders located on the reservation is a direct and immediate challenge to tribal sovereignty and hence is invalid.[108]

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102. Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 480 (1939).

103. McClanahan v. State Tax Comm., 14 Ariz. App. 452, 484 P.2d 221, 224 (Ct. App. 1971), *appeal docketed*, No. 71-834, 40 U.S.L.W. 3322 (U.S., Dec. 23, 1971).

For an argument that this particular analogy is culturally insensitive see note 74. *supra*.

104. Williams v. Lee, 358 U.S. 217, 220 (1959).

105. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 159 (1819).

106. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 266-67 (1945).

The Constitution of the Three Affiliated Tribes of the Fort Berthold Reservation authorizes the tribe to levy taxes on the reservation. THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION OF NORTH DAKOTA CONST. art. 5, § 5.3(d).

107. There can be no doubt that the tribe may levy a tax on Indian traders located on its own reservation. Though the federal government has preempted the area of Indian trading Warren Trading Post Co. v. Arizona Tax Comm., 380 U.S. 685 (1965), the tribal right to tax Indian traders on the reservation is still recognized. 25 C.F.R. § 252.27 (c) (1972).

In Mescalero Apache Tribe v. Jones, 83 N.M. 158, 489 P.2d 666 (Ct. App. 1971), *appeal docketed*, No. 71-738, 40 U.S.L.W. 3322 (U.S., Dec. 4, 1971), the Court of Appeals of New Mexico held that state taxes on construction materials and gross receipts of a ski resort operated by the Mescalero tribe and located on land leased from the United States Forest Service were permissible. The tribe contended that these taxes were an interference with tribal sovereignty since they would tend to destroy the purpose of the program. *Id.* at 670. Because the court found no factual showing of frustrated purpose, it ruled that tribal autonomy had not been infringed upon. *Id.*

Mescalero is clearly distinguishable from those instances where the state attempts to tax Indians *on the reservaion.* The ski resort in *Mescalero* was located on non-reservation land and hence subject to the special provision of the New Mexico Enabling Act of June 20, 1910, 36 Stat. 557, which allowed for state taxation of "any lands and other property outside of an Indian reservation owned or held by any Indian, ..." *Id.* at 559.

Though it would seem that the tribes' sovereign power to tax should extend to these lands, Congress has expressly provided otherwise.

108. Another argument made by the Attorney General is that in State *ex rel.* Baker v. Mountrail County, 149 N.W. 120 (N.D. Sup. Ct. 1914), the Supreme Court of North Dakota held that all jurisdiction now expressly reserved to the Congress of the United States over the lands in question were relinquished to the state for the purpose of exercising political and governmental functions over such territory. *Id.* at 122. Based on this decision, the Attorney General concluded that the Fort Berthold Reservation was, in fact, a part of the State of North Dakota. [1970-1972] REP. OF ATT'Y. GEN. OF NORTH DAKOHA, Feb. 24, 1972, at 6.

D. Preemption

As was pointed out briefly in Part C, *Organized Village of Kake v. Egan*[109] seemed to vitiate the doctrine of federal preemption on Indian affairs first set out in *Worcester*.[110] Four years after *Kake*, however, the Supreme Court in *Warren Trading Post Co. v. Arizona Tax Commission*[111] asserted that preemption was still a viable doctrine with regard to Indian trading.[112] The Arizona Supreme Court had upheld a sales tax on the Warren Trading Post Company located on the Navajo Reservation and licensed pursuant to the Indian Trader Act.[113] In reversing the Arizona Supreme Court's decision, the Court held that Congress had preempted the field of Indian trading.[114] The Court stated that:

> These apparently all-inclusive regulations [of the Commissioner of Indian Affairs] and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on the reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders.[115]

The Attorney General attempted to distinguish the *Warren* rule by stating that *Warren* was concerned with the burden on the trader, not the Indian.[116] He seemed to say that as long as the Indian paid the sales tax, *Warren* was inapplicable. It is undoubtedly correct that a tax on sales to an Indian is a burden on him since he must pay more for the goods than he would have had to pay had the tax not been levied;[117] but it is also true that the North Dakota sales tax[118] is levied directly on "the gross receipts of retailers

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This contention directly challenges the concept of tribal sovereignty. In Your Food Stores, Inc. (NSL) v. Village of Espanola, 68 N.M. 327, 361 P.2d 950 (Sup. Ct. 1961), the Supreme Court of New Mexico addressed itself to this postulation. The Court stated that:

> It has been suggested that the silence of Congress to enact legislation defining where jurisdiction rests in specific matters discloses no objection by Congress to the operation of state laws over Indians and Indian lands. That, at least can no longer be said to be a valid construction. Indian tribes were given the right of self-government by Congress. Wheeler-Howard Act, 24 U.S.C.A. S. 476. . . .

Id. at 953.

109. Organized Village of Kake v. Egan, 369 U.S. 60 (1962).
110. *See* text accompanying note 94 *supra*.
111. Warren Trading Post Co. v. Arizona Tax Comm., 380 U.S. 685 (1965).
112. *Id.* at 690.
113. Indian Trader Act, 25 U.S.C. §§ 261-264 (1970).
114. Warren Trading Post Co. v. Arizona Tax Comm., 380 U.S. 685 (1965).
115. *Id.* at 690. The Court further extended protection to reservation Indians by modifying the rule in *Kake*. In a footnote, the Court construed *Kake* to mean that "state laws have been permitted to apply to *activities* on Indian reservations, where . . . specifically authorized by acts of Congress, or where they clearly do not interfere with Federal *Policies* concerning the reservations." *Id.* at 687 n. 3. The *Warren* language especially the words, "activities" and "politics" clearly denotes a broader spectrum of federal control than the "rights granted or reserved by federal law" wording in *Kake*.
116. [1971-1972] REP. OF ATT'Y. GEN. OF NORTH DAKOTA, Feb. 24, 1972, at 8.
117. As a practical matter, a retailer will always shift the tax burden to his customers.
118. N.D. CENT. CODE ch. 57-39.2 (1972).

from all sales at retail. . . ."[119] This tax, like the tax in *Warren*, is an encumbrance on the Indian trader and is therefore invalid.

The Attorney General also seemed to make an exception to the Court's rule in the case of merchants who have not been required to obtain licenses under the Indian Trader Act.[120] He indicated that these merchants are not subject to federal control.[121]

In administering the Indian Trader Act,[122] the Interior Department, as a matter of policy, does not require traders residing in townsites within the boundaries of a reservation to obtain licenses to do business with the Indians.[123] Nevertheless, it is clear that the Indian Trader Act itself and not the policy decision of the Department of Interior is determinative as to the issue of preemption.[124] Regardless of the Interior Department's decision to exempt certain merchants from the licensing requirement, the Indian Trader Act, as construed by the Supreme Court, preempts the field.[125]

E. Equitable Arguments

The Attorney General argued that Indians are citizens of the state of North Dakota and have a voice in the making of state policy including tax laws.[126] Furthermore, he declared that Indians receive welfare and educational benefits from the state which are financed through various state taxes including the sales tax.[127] As a matter of equity, he stated that Indians should help finance these programs.[128] Finally, he argued that to treat Indians differently from other state citizens would be a violation of the Equal Protection Clause of the Fourteenth Amendment.[129]

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119. N.D. CENT. CODE § 57-39.2-02 (1972).
120. [1970-1972] REP. OF ATT'Y. GEN. OF NORTH DAKOTA, Feb. 24, 1972, at 8.
121. *Id.* at 8.
122. Indian Trader Act, 25 U.S.C. §§ 261-264 (1970).
123. In a United States Department of Interior memorandum dated April 20, 1972, from the Associate Solicitor of Indian Affairs to the Field Solicitor of Aberdeen on the subject of the application of state sales tax to individual Indians on a reservation, the Associate Solicitor states that:

> The Department has not, in recent years, attempted to license and regulate all those trading on a reservation, especially where the trading post or store occupies non-Indian owned land. This office has, however, consistently held that the above cited statutes [Indian Trader Act] give the Secretary authority to regulate and require licenses from those now exempted by Departmental policy.

124. *Id.*
125. *Id.*
126. [1970-1972] REP. OF ATT'Y. GEN. OF NORTH DAKOTA, Feb. 24, 1972, at 7.
The Attorney General is apparently incorrect in stating that Indians were made citizens of North Dakota "by virtue of the Fourteenth Amendment to the United States Constitution. . . ." *Id.* In 1884, the Supreme Court held that Indians born in the United States were not citizens within the meaning of the Fourteenth Amendment. Elk v. Wilkins, 112 U.S. 94 (1884). Indians were not granted full citizenship by Congress until 1924. Act of June 2, 1924, ch. 233, 43 Stat. 253 (1924). The citizenship act in its present form appears in the McCarren-Walter Act, 8 U.S.C. § 1401(a)(2) (1970).
127. [1970-1972] REP. OF ATT'Y. GEN. OF NORTH DAKOTA, Feb. 24, 1972, at 7.
128. *Id.*
129. *Id.*

The Attorney General failed to note, however, that there are federal programs available through which the states can receive aid to help support their Indian populations.[130] Furthermore, the fact that Indian citizens of North Dakota are exempt from state taxes which non-Indian citizens must pay is not a violation of equal protection since there is a rational basis for the discrimination.[131] State taxation on sales to reservation Indians interferes with the federal policies of economic rehabilitation of the Indian[132] and tribal sovereignty.[133] It also infringes on an area which the federal government has preempted.[134] These reasons are sufficient to justify any discriminatory treatment of Indians with regard to state taxation.

CONCLUSION

There are no firm principles governing State-Indian relations.[135] The major reason is that Congress has continually vacillated in its policy toward Indians and consequently has offered very little guidance to the Courts.[136] As a result, the Supreme Court in *Williams* and *Kake* seemed to create new federal policies with respect to Indians which, in turn, significantly affected State-Indian relations. Whether *Warren* fully restored federal control to its former position is still an open question.

With respect to Indian taxation, however, two points seem clear. It is reasonably certain, in light of *Warren*, that Congress has preempted the field of Indian trading. Furthermore, there can be no doubt that Indians have a right to tribal self-government.[137] As this

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130. Comment, *Indian Taxation: Underlying Policies and Present Problems*, 59 CALIF. L. REV. 1261, 1267 n. 33 (1971).

131. Railway Express Agency v. New York, 336 U.S. 106, 112 (1949).

132. *See* text accompanying notes 60-74 *supra*.

133. *See* text accompanying notes 104-108 *supra*.

134. *See* text accompanying notes 109-115 *supra*.

135. In Kennerly v. District Court of Montana, 400 U.S. 423 (1971), the Supreme Court was faced with the question of whether Montana had obtained jurisdiction over the Blackfeet Indian Reservation as a result of an authorization by the Tribal Council. The Court held that the state did not have jurisdiction over the reservation because the tribe had not complied with § 1322(a) of the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1321-1326 (1970) which requires a majority of adult Indians of the tribe to consent to such jurisdiction. Kennerly v. District Court of Montana, *supra* at 429.

The Court suggested that states could not establish jurisdiction over Indian reservations in any other manner. *Id.* at 429 n. 5. If this is so, it would seem to mean a return to total federal preemption. However, the court did not have occasion to consider the troublesome opinion in Organized Village of Kake v. Egan, 369 U.S. 60 (1961). Without a more thorough discussion, it appears to be somewhat premature to state unequivocally that *Kennerly* has restored full control over Indian affairs to the federal government.

136. Comment, *The Indian Battle for Self-Determination*, 58 CALIF. L. REV. 445, 452-63 (1970).

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

writer has pointed out, either of these arguments is sufficient to negate a sales tax imposed on sales made to reservation Indians.

In making a determination of the correctness the Attorney General's position, a court should give equal weight to both theories. It is clear that there is no inconsistency in this position, since federal law recognizes the Indians' right to tax Indian traders on the reservation.[138] Moreover, it is important to give adequate recognition to the concept of tribal sovereignty so that the tribe may be seen as a powerful entity worthy of respect by those governmental units with which it must coexist.

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138. Pursuant to 25 C.F.R. § 252.27(c) (1972), Indians have the power to tax traders on the reservation.