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** Davis, Graham & Stubbs, Denver, Colorado, LL.B. Stanford 1965.

I. INTRODUCTION

Whether in response to recently experienced shortages in our domestic mineral and energy resources, or simply in recognition of the steadily increasing demand for such materials, interest in development of the considerable resources on Indian reservations seems to have undergone a renaissance. A wide range of obstacles and uncertainties—such as successful location of minerals in commercial grades and quantities, identification of supportive long-term markets, and access to economic transportation services, to name a few—are common and inescapable features of all mineral activities. But when such operations are conducted on Indian reservations, operators are exposed to additional and serious uncertainties about the extent to which a wide and seemingly ever increasing range of state and local statutes and ordinances relating generally to mineral operations will be applicable to on-reservation operations. Such statutes, which often conflict with or are duplicative of federal or tribal requirements, expose operators to additional expense, delays and other frustrations and uncertainties, whether the operators elect to comply or not with the state statutes.[1]

Reconciliation of such conflicts or eliminiation of duplication is often difficult, principally because the legal status and nature of Indian tribes and their reservations and their unique relationship to federal, state, and local governments is exceedingly complex.[2] In part that complexity reflects the fact that the nature of the relationship between Indians and state and federal governments is dependent upon treaties and statutes, generally uncodified, which often have application only to particular Indian tribes or reservations. In part the complexity results from the many historical shifts in the general policies of the United States toward Indians and Indian tribes.[3]

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1. The uncertainties associated with noncompliance include, at a minimum, exposure to litigation by the state to enforce compliance, and the related risks of judicial suspension of operations pending resolution of potentially protracted litigation. Alternatively, election by the operator to comply with a state statute, even where no outright conflicts with federal or tribal directives are involved, may involves considerable additional expense or delay, especially where issuance of a permit or authorization after public or other hearings is involved. Of equal significance, such a decision may be contrary to the wishes of the Indian tribe itself, which is often in the position of resisting a variety of state and local efforts to exercise jurisdiction on the reservation, and may have a detrimental effect on the working relationship between the tribe and the mineral operator.

2. The extent of state jurisdiction over non-Indians on reservations has been described as the murkiest question of all. Chambers, "Federal Environmental Regulation of Minerals Resources Development with Particular Emphasis on Indian Lands," *Western Coal Development Institute, Rocky Mountain Mineral Law Foundation* 35 (1973).

3. Compare Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) and McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 171 (1973). The early attitude, persisting through 1871, was to deal with Indian tribes as separate nations through treaties. Then, as evidenced by the General Allotment Act of 1887 (Act of February 8, 1887, 24 Stat. 388) a policy of distribution of the lands in Indian reservations to individual Indians and the assimilation of Indians into society was begun and followed (with the resultant loss of a substantial portion of the Indian land base) until the major change in policy signaled by

The uncertainties which result from that complexity are compounded when questions relating to mineral activities are involved. Although there is an enormous mass of material dealing generally with Indian tribes and their relationships with state and local governments,[4] few authorities or commentators deal specifically with mineral matters.[5]

And yet, the available authorities, even though not specifically applicable to minerals, do provide a basis for formulating a test or generalized analytical tool by which the extent of state or local jurisdiction over non-Indian activities on an Indian reservation can be measured on a case by case basis. And, with appropriate additional consideration of particular treaties or statutes dealing with a Tribe's mineral rights and of federal statutes of general application to Indian mineral matters, such test ought to be equally effective as a device for measuring state jurisdiction over non-Indian mineral activities on Indian reservations. Formulation of such a test and consideration of treaties, statutes, and regulations having particular application to such mineral activities is the objective of this investigation.

II. THE NATURE OF INDIAN TRIBES AND RESERVATIONS

The unique nature of Indian tribes[6] makes a brief review of their essential characteristics and of the nature of federal power over them an essential ingredient in this inquiry.

A. . INDIANS AND INDIAN TRIBES

Indians preceded European settlers in their dominion and control over the lands now comprising the United States. Their aboriginal rights in the lands by reason of such presence was acknowledged by

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the Indian Reorganization Act of 1934. Act of June 18, 1934, Pub. L. No. 73-383, ch. 576, 48 Stat. 984, codified at 25 U.S.C. §§ 476, *et seq.* (1970). That enactment, providing mechanisms for organization and self-government by Indian tribes, reflected a federal policy of encouragement and preservation of the Indian tribes as entities. Later enactments illustrate the continuing conflicts in Congress between those favoring preservation and enhancement of Indian tribes as separate cultures and those favoring termination of tribes as separate entities and assimilation of individual Indians into the main stream of society.

4. Monroe Price's pioneering casebook on Indian Law studies characterizes it as a "mountain of material." Price, Law and The American Indian vii-viii (1973). The quantity is reflective of the fact that the issues have frequently recurred throughout the Nation's history.

5. Notable exceptions are the excellent article by Reid Chambers, identified in note 2, *supra*, and the presentation by Messrs. Berger and Mounce at the Sixteenth Mineral Law Institute. Berger and Mounce, "Applicability of State Conservation and Other Laws to Indian and Public Lands," 16 *Rocky Mt. Min. L. Inst.* 347 (1971). Judicial decisions involving state jurisdiction over mineral matters, as reviewed below, have been few in number and generally superficial in their analysis.

6. This unique status has been characterized as long standing in nature and founded upon diverse sources; but of sufficient substance, for example, to justify special federal hiring practices for Indians (see 25 U.S.C. § 472 (1970)) notwithstanding the prohibitions against racial discrimination in federal hiring in the Equal Employment Opportunity Act of 1972 (42 U.S.C. § 2000e-16(a) (Supp. 1973) and of the Fifth Amendment of the United States Constitution. See Morton v. Mancari, 417 U.S. 535 (1974).

our courts from the earliest dates of the nation.[7] Such rights were those of occupancy rather than in fee simple,[8] and were subject to the superior rights of the discovering or conquering nation,[9] although enforceable against parties other than the United States.[10] Definition of the scope and extent of such rights by the discovering power has been described as a political matter,[11] and modification or extinguishment of such rights, (as opposed to rights which have been recognized by treaty or statute) violates no precept of the Fifth Amendment of the United States Constitution against taking of private property without compensation.[12]

The federal government has plenary power over Indians and Indian tribes[13] based on the commerce clause[14] (the only grant of power in the Federal Constitution which mentions Indians), the treaty power,[15] and the power to control the property of the United States,[16] among others, contained in the United States Constitution.[17]

In *Worcester v. Georgia*,[18] sometimes called the "primordial" decision in Indian affairs, Chief Justice Marshall confirmed the special sovereign status of Indian tribes and the plenary authority of the United States over them, stating:

> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, in which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties and with the acts of congress.[19]

Consistent with such conclusions, tribes are recognized to be unique aggregations possessing attributes of sovereignty over both their members and their territory.[20]

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7. Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746 (1835).
8. See generally the discussion in *United States Department of Interior, Federal Indian Law*, 18-21, 593-601 (1958) (hereinafter *Federal Indian Law*).
9. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).
10. Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955). *See also* United States v. Santa Fe Pac. R.R., 314 U.S. 339 (1941).
11. Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335 (1945).
12. Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).
13. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Antoine v. Washington, 420 U.S. 194 (1975).
14. Art. I, sec. 8, cl. 3 of the United States Constitution grants to Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."
15. U.S. Const., Art. II, sec. 2, cl. 2.
16. U.S. Const., Art. IV, sec. 3, cl. 2.
17. See generally *Federal Indian Law* 21-91. The United States Supreme Court recently acknowledged the confusion over the precise sources of federal authority, but concluded that "it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making." McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 172 note 7 (1973).
18. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).
19. *Id.* at 561.
20. For contemporary recognition of such status see United States v. Mazurie, 419 U.S. 544 (1975).

Although recognized as sovereign in many respects and generally intended by treaty to be left free to govern their tribal affairs within their designated reservations, cultural differences between European settlers and Indians, differences in property concepts, and sheer population pressures from non-Indians soon made it apparent that the Indians were ill equipped to protect the rights granted to them by treaties.[21] Eloquent recognition of the plight of the Indians and of the special responsibilities of the United States toward them—a relationship described as being like that of guardian and ward—was articulated by the Supreme Court in *United States v. Kagama* as follows:

> These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.
>
> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary for their protection, as well as to the safety of those among whom they dwell.[22]

Recognition of the Indians' condition and of their educational and cultural differences lead the courts to the conclusion that Indian treaties and statutes ratifying agreements with the Indians cannot be read as ordinary contracts agreed upon by parties dealing at arm's length and with equal bargaining positions.[23] In response the courts adopted a canon of construction for such treaties and statutes to the effect that "doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent upon its protection and good faith."[24]

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21. *See*, for example, Comment, "The Indian Battle for Self-Determination," 58 *Cal. L. Rev.* 445 (1970).

22. 118 U.S. 375, 383-84 (1886).

23. McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 174 (1973).

24. Choate v. Trapp, 224 U.S. 665, 675 (1912); Carpenter v. Shaw, 280 U.S. 363, 367 (1930). *See* Jones v. Meehan, 175 U.S. 1, 101-2 (1899), for an early, and perhaps the best statement of the rule. See also Antoine v. Washington, 420 U.S. 194 (1975), for a clear reaffirmation of its current vitality.

B. INDIAN RESERVATIONS

As noted, many treaties or agreements designated specific geographical areas for use of Indian tribes, with the precise delineation of the boundaries of such areas a major part of early government policy in Indian affairs as a means of securing peace between Indians and non-Indians.[25] While a few of such treaties granted a fee simple interest to the Indian tribe,[26] more commonly the treaties merely memorialized the fact of long standing Indian occupancy of the area.[27] Differing from aboriginal rights, rights recognized or confirmed by treaty were accorded the full range of Fifth Amendment protections.[28]

Lands located in such Indian reservations occupy a special status in many respects. They are no longer part of the public domain, and laws and regulations applying generally to the public domain are not applicable to lands in Indian reservations,[29] unless the intent that they so apply is clearly shown.[30] Within such areas, except to the extent limited by treaty, and subject to the plenary power of the United States, Indian tribes are free to govern themselves.[31] The analytical basis for such authority is succinctly summarized in Federal Indian Law:

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possessed, in the first instance, all the powers of any sovereign State. (2) Conquest rendered the tribe subject to the legislative power of the United States and, in substance, terminated the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but did not by itself terminate the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These internal powers were, of

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25. *Federal Indian Law*, note 8 *supra* at 643.

26. *See* Treaty with the Creek Indians, Feb. 14, 1833, 7 Stat. 417 at Article 3: "The United States will grant a patent, in fee simple, to the Creek nation of Indians for the land assigned said nation by this treaty or convention. . . ."

27. Treaty with Sac and Fox Indians, Nov. 3, 1804, 7 Stat. 84, at Article 7 provides, for example: "As long as the lands which are now ceded to the United States remain their [the United States'] property, the Indians belonging to the said tribes, shall enjoy the privilege of living and hunting upon them." [Parenthetical added]. See also Treaty with the Menominee Indians, May 12, 1854, 10 Stat. 1064, 1065.

28. Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955); United States v. Shoshone Tribe of Indians, 304 U.S. 111 (1938).

29. 34 Op. Atty. Gen. 181 (1924).

30. See, for example, Section 701 of the recently vetoed Surface Mining Control and Reclamation Act of 1975 which expressly provided for application of certain provisions of the Act to "Indian lands." H.R. 25, 94th Cong., 1st Sess. (1975).

31. In United States v. Mazurie, 419 U.S. 544, 557 (1975), the Supreme Court recapitulated its previous decisions recognizing this authority, stating: ". . . Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, *Worcester v. Georgia*, 6 Pet. 515, 557 (1832); they are 'a separate people' possessing the 'power of regulating their internal and social relations. . . .' *United States v. Kagama*, 118 U.S. 375, 381-382 (1886); *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 173 (1973)."

> course, subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, many powers of internal sovereignty have remained in the Indian tribes and in their duly constituted organs of government.[32]

The reservations created by treaty were frequently reduced in area by subsequent treaties, agreements, or statutes by which lands were ceded by the tribe to the United States in exchange for cash payments or promises of various kinds of assistance.[33] Such cessions generally resulted in an intact, although diminished area reserved for the tribe with respect to which the tribe's authority remained unchanged.

The United States has defined all lands within the limits of any Indian reservation, among others, as "Indian country"[34] and utilizes that definition for a variety of purposes.[35] Since it is clear that the United States has the authority unilaterally to terminate the status of any lands as Indian reservations,[36] questions often arise under statutes utililzing the "Indian country" definition about whether later action by the United States has operated to effect such termination.

For example, the Dawes Act,[37] enacted in 1887 in an attempt to reconcile the government's responsibility for the Indians' welfare and the desire of non-Indians to settle on reservation lands, resulted in non-Indian ownership of substantial tracts of land within areas set aside as Indian reservations.[38] It has been established as a general rule that once a showing is made that Congress has created a

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32. *Federal Indian Law* 398.

33. The history of the Crow Indian Reservation provides one of the most startling examples of the extent to which reservations were reduced in area by such cessions. The initial treaty with the Crow Tribe did not limit or define the Tribe's territory, although it recognized its existence. (Crow Treaty of Aug. 4, 1825, 7 Stat. 266). In 1851, however, a reservation for the Crow, Sioux and other tribes was delineated by treaty and encompassed approximately 38 million acres. Subsequent treaties and statutes providing for cession of lands reduced the portion of the initial reservation allocated to the Crow Tribe to an area of approximately 1.5 million acres. (Treaty of May 7, 1868, 15 Stat. 649; Act of April 11, 1882, 22 Stat. 42; Act of March 3, 1891, 26 Stat. 989; Act of April 27, 1904, Pub. L. No. 58-183, 33 Stat. 352; Act of August 31, 1937, Pub. L. No. 75-410, 50 Stat. 884).

34. 18 U.S.C. § 1151 (1970).

35. See, for example, 18 U.S.C. § 1154 (1970) pertaining to control of liquor within such areas; 18 U.S.C. § 1153 (1970) relating to exclusive federal jurisdiction over certain criminal offenses committed there; and 25 U.S C. §§ 1321, 1322 (1970) dealing with acquisition by States of criminal and civil jurisdiction over Indians in such areas.

36. See, for example, DeCoteau v. District County Court, 420 U.S. 425 (1975). However, a Congressional intent to abrogate treaty rights is not lightly imputed to Congress. *See* Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968).

37. Act of February 8, 1887, ch. 119, 24 Stat. 388. The act was entitled The General Allotment Act of 1887 and authorized the President to allot portions of tribal lands to the individual Indians and, with the approval of the tribe, to sell the balance of the various reservations to non-Indian settlers, with the proceeds of sale dedicated to the Indian's benefit.

38. For example over half of the land within the Flathead Indian Reservation is owned by non-Indians, and Indians comprise only nineteen percent of the total population within the reservation boundaries. *See* Security State Bank v. Pierre, 162 Mont. 298, 511 P.2d 325 (1973).

reservation, all areas included within the defined boundaries remain a part of the reservation until a Congressional intent to terminate reservation status with respect to the tract involved is shown.[39] Such intent must be expressed on the face of the act or be clear from the surrounding circumstances and legislative history,[40] another canon of construction which may reflect the courts' awareness of the special responsibilities of the United States to Indians. Opening reservation areas for non-Indian settlement pursuant to the Dawes Act has been held not to show a Congressional intent to terminate the reservation status of lands affected,[41] nor did permission for white settlement under other acts following the pattern of the Dawes Act but applying only to individual reservations have such effect.[42] In proper circumstances, however, a Congressional intent to terminate a reservation can be shown notwithstanding absence of express language to that effect in the statute.[43]

In summary, Indian tribes have sovereign rights, subject to the plenary powers of the United States. Reservations, which are territorial areas defined by treaty or statute, are the locations within which tribes are entitled to exercise their sovereignty. Such areas may contain substantial non-Indian ownership and yet retain their reservation status. Such reservations are therefore the areas within which federal, state, and tribal exercise of governmental authority over mineral activities results in the conflicts which this investigation seeks to resolve.

III. STATE JURISDICTION OVER NON-INDIANS ON RESERVATIONS—THE SUPREME COURT SPEAKS

Supreme Court decisions involving the extent of state jurisdiction over non-Indians on Indian reservations, or otherwise having a bearing on that question, are surprisingly few in number. Equally surprising is the extent to which the Court has reached essentially consistent conclusions on the scope of such state jurisdiction despite the fact that the decisions span a period of almost one hundred and fifty years and the fact that the cases consider exceedingly diverse fact situations.

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39. United States v. Celestine, 215 U.S. 278, 285 (1909).

40. Seymour v. Superintendent, 368 U.S. 351 (1962). *See also* United States *ex rel.* Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973).

41. United States v. Nice, 241 U S. 591 (1916).

42. See, for example, Mattz v. Arnett, 412 U.S. 481 (1973), interpreting the effect of the Act of June 17, 1892, 27 Stat. 52, on the Klamath River Reservation; and Seymour v. Superintendent, 368 U.S. 351 (1962), concerning the effect of the Act of March 22, 1906, 34 Stat. 80, on the Colville Indian Reservation.

43. See DeCoteau v. District County Court, 420 U.S. 425 (1975), holding the Act of March 3, 1891, 26 Stat. 1035, providing for allotment of reservation lands, effected termination of the Lake Traverse Indian Reservation in view of the history of negotiations of the Agreement with the Indians, and the legislative history of the Act ratifying it.

A. EARLY DECISIONS

The investigation here too begins with Chief Justice Marshall's analysis in *Worcester v. Georgia*,[44] which involved the attempts of the State of Georgia to require certain missionaries, residing within the Cherokee reservation as permitted by federal law and pursuant to federal licenses, to comply with state laws forbidding residence by non-Indians on the reservation without a license from the state. The missionaries' criminal conviction in a state court for failure to have a state license was appealed to the United States Supreme Court, and was reversed on the basis that the Cherokee Nation enjoyed sovereign status insofar as individual states were concerned, which status had been recognized by the Indians' treaties with the United States. Within the territorial confines of the Cherokee Reservation the state's laws were without effect.[45]

Virtually all of the modern Supreme Court decisions involving questions of state jurisdiction have recognized and relied upon *Worcester v. Georgia* as the point of beginning for resolution of the issues, regardless of the type of state jurisdictional exercise under consideration. Curiously, however, most of the older decisions ignored it and did not include it in their analysis.

In 1882 the Supreme Court, in *United States v. McBratney*, was asked to consider whether or not the conviction in federal court of one non-Indian for the murder of another non-Indian on the Ute Reservation was proper, or whether jurisdiction was properly in the Colorado State courts,[46] there being a federal statute granting to the federal courts jurisdiction over such crimes only if the state courts lacked such jurisdiction. The Court did not focus on the sovereign status of the Indian tribe, because an 1861 Congressional Act establishing a temporary government for Colorado territory[47] granted such government jurisdiction over all areas within the territory except areas included in Indian reservations by treaty. The Ute Reservation was not created until 1868,[48] seven years later. The subsequent statehood enabling act did not contain the express disclaimer of jurisdiction language common to later enabling acts, and was interpreted as not excepting state jurisdiction over the Ute Reservation, in view of the authority granted in the initial territorial act. *McBratney* has been relied upon in subsequent Supreme Court decisions, particularly those involving criminal jurisdiction over non-Indians, but the later cases have failed to focus on the peculiar fact in *McBratney* that creation of the Colorado Territory *preceded* crea-

44. 31 U.S. (6 Pet.) 515 (1832).
45. *See id.* at 561.
46. United States v. McBratney, 104 U.S. 621 (1882).
47. Act of February 28, 1861, ch. 70, 12 Stat. 172.
48. Treaty of March 2, 1868, 15 Stat. 619.

tion of the Indian Reservation. None of the later cases which rely so heavily on *McBratney* involved such facts.

In *Utah & Northern Ry. Co. v. Fisher*[49] the Court was asked to determine whether or not the Territory of Idaho could properly impose a property tax upon that portion of the railroad's property located on the Fort Hill Indian Reservation. The Court held that the tax was properly imposed on the non-Indian entity, stating that the authority of the Territory extended to all matters not interfering with the protection of the Indians which were agreed to by the United States in its treaties. For the first time, the Court considered the extent to which imposition of state jurisdiction would constitute an impairment of any of the rights guaranteed to the Indians under their treaties with the United States. The case did not involve any federal enactments other than such treaties. On the facts, the Court concluded that no such interference would occur and upheld the right of the Territory to impose the tax.[50]

The Supreme Court was again called upon in 1896 to consider the extent of a state's criminal jurisdiction over non-Indians on reservations within the state. In *Draper v. United States*,[51] as in *McBratney*, a federal conviction of one non-Indian for the murder of another non-Indian on the reservation would have been improper if the state courts had jurisdiction over the offense. In *Draper*, however, the state's Enabling Act contained an express disclaimer of jurisdiction:

> Second. That the people inhabiting the said proposed States [including Montana] do . . . forever disclaim all right and title . . . to all lands lying within said limits [of the state] owned or held by any Indian or Indian tribes . . . and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . . .[52] [Parenthetical material added.]

Notwithstanding the fact that no statute granting full territorial jurisdiction preceded the treaty creating the reservation, as was the case in *McBratney*, the Supreme Court concluded that the decision in *McBratney* was controlling unless the foregoing language in Montana's Enabling Act required a different result. The Court interpreted the language in the Enabling Act in light of the General Allotment

49. 116 U.S. 28 (1885)

50. Although the Court's form of analysis was thoughtful, and the apparent forerunner of later decisions, the strength of the holding is undercut by the fact noted in the opinion that the lands upon which the railroad was located were ceded by the Tribe to the United States for a cash payment. At least arguably, upon such cession, the lands ceased to be a part of the reservation. This factual support for the holding was not noted in later cases until Justice Frankfurter's opinion in Organized Village of Kake v. Egan, 369 U.S. 60, 73, note 2 (1962). See also Maricopa & Phoenix R.R. v. Arizona Territory, 156 U.S. 347 (1895).

51. 164 U.S. 240 (1896).

52. Act of February 22, 1889, 25 Stat. 676.

Act of 1887,[53] enacted two years previously, which in its view provided for "the gradual extinction of Indian reservations and Indian titles by the allotment of such lands to the Indians in severalty."[54] As indicated above, the Act provided for allotment of a portion of reservation lands to individual Indians (subject to limitations administered by the United States for a period of years on the Indians' right to sell or encumber such lands) and for sale of the balance of the reservation lands to non-Indians. In light of such scheme, considered by the Court to provide for termination of the reservations, the Court concluded that the language in the Enabling Act was only intended to allow the United States to continue its administrative powers over lands alloted to individual Indians after such lands became subject to state jurisdiction upon termination of the reservation. The Court therefore held that Montana's courts did have jurisdiction over the crime, even though it was committed on the reservation. In light of the later indications of Congressional intent to preserve Indian tribes and reservations[55] and the decisions of the Supreme Court holding that the General Allotment Act did not reflect a Congressional intent to terminate reservations,[56] and considering the fact that the Court entirely failed to discuss the tribal sovereignty principles noted in *Worcester v. Georgia,* the Court's decision in *Draper* must now be regarded as subject to serious question and as having doubtful precedential value.

In *Thomas v. Gay,*[57] the Court was asked to consider the authority of the Territory of Oklahoma to tax cattle owned by non-Indian lessees and maintained on the Osage and Kansas Indian reservation in Oklahoma pursuant to leases granted by the tribal government and approved by the Bureau of Indian Affairs. The court's attention was directed to the language of the territorial organic act providing that nothing in the act was to be construed (i) to impair any rights of Indians or Indian tribes in the territory pursuant to laws, agreements, and treaties of the United States; or, (ii) to impair the personal property of the Indians; or, (iii) to affect the authority of the government of the United States to make laws or regulations relating to the Indians and their property. No other federal enactment was involved in the case. The Court, citing the *Utah & Northern Railroad* case reviewed above, distinguished between the imposition of tax on the Indians themselves or upon their property and a tax imposed upon properties in which they had no interest. Apparently recognizing the inadequacy of that distinc-

53. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388.
54. 164 U.S. at 246.
55. Such intent is clearly reflected in the Indian Reorganization Act of 1934. Act of June 18, 1934, Pub. L. No. 73-576, 48 Stat. 984, codified at 25 U.S.C. §§ 476, *et seq.* (1970).
56. See the cases cited at notes 41 and 42, *supra* and related text.
57. 169 U.S. 264 (1898).

tion as the sole basis for its decision, however, it further considered whether or not such tax nevertheless would constitute an impairment of the rights of the Indians contrary to the provisions of the organic act. In applying that analysis it utilized the approach suggested in its *Utah & Northern Railroad* decision. The Court concluded that the tax would not constitute such an impairment, noting that the tax was "too remote and indirect to be deemed a tax upon the lands or privileges of the Indians."[58] The court utilized analogous cases evaluating the impact of state taxes on interstate commerce to support its conclusion and the propriety of that method of analysis.

The individuals objecting to the tax also contended that imposition of the tax constituted an infringement by the territory upon federal jurisdiction and on the power of Congress to regulate commerce with the Indian tribes. In response to that contention, the Court distinguished between the issue of state jurisdiction over Indians themselves, and its jurisdiction over non-Indians acting on reservations in holding:

> The unlimited power of Congress to deal with the Indians, their property and commercial transactions, so long as they keep up their tribal organizations, may be conceded; but it is not perceived that local taxation, by a state or territory, of property of others than Indians would be an interference with Congressional power.[59]

In conclusion, the Court noted:

> The taxes in question here were not imposed on the business of grazing, or on the rents received by the Indians, but on the cattle as property of the lessees, and as we have heretofore said that such a tax is too remote and indirect to be deemed a tax or burden on interstate commerce, so is it too remote and indirect to be regarded as an interference with the legislative power of Congress.[60]

In *New York ex rel. Ray v. Martin*,[61] the Supreme Court concluded that the State of New York had jurisdiction to punish the murder of one non-Indian by another on the Salamanca Indian reservation, following *McBratney*, and citing it as controlling and as establishing the proposition that "in the absence of a limiting treaty obligation or Congressional enactment each state had a right to exercise jurisdiction over Indian reservations within its boundaries."[62] The

58. *Id.* at 273.
59. *Id.* at 274-275.
60. *Id.* at 275. *See also* Truscott v. Hurlbut Land & Cattle Co., 73 F. 60 (9th Cir. 1896), upholding a similar tax on cattle on the Crow Reservation in Montana.
61. 326 U.S. 496 (1946).
62. *Id.* at 499.

court expressly noted the fact that the treaty establishing the reservation[63] contained no provision which would be violated by the state's exercise of such jurisdiction in a situation which did not directly affect the Indians.[64]

In 1949, after a long series of decisions which continued the federal instrumentality theory as the basis for prohibiting imposition of state taxes on the activities of non-Indian mineral lessees on Indian reservations[65] the Court held that nondiscriminatory taxes could be imposed on such lessees.[66] The lands in question had been allotted to individual Indians pursuant to the General Allotment Act,[67] and although the opinion does not so state, were presumably located within the boundaries of various Indian reservations.

B. MODERN DECISIONS

1. *Williams v. Lee*

The Supreme Court rendered its first, and probably still its most important modern decision on the issue in 1959.[68] In *Williams v. Lee* the Court concluded that an Arizona state court did not have jurisdiction over a civil suit brought by a non-Indian operating a store on the reservation to recover amounts due on credit sales made to Navajo Indians on the reservation. Thus, in summary, the case involved reservation Indians and on-reservation activities of a non-Indian.

The Court returned to *Worcester v. Georgia* and confirmed the continuing vitality of the basic policies enunciated there; namely federal plenary power and tribal sovereignty.[69] The Court summarized a number of its decisions since *Worcester*, including several of the cases reviewed above, and conceded that the Court had modified the *Worcester* principles "in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized. . . ."[70] By way of example, the Court noted that suits by Indians against non-Indians in state courts had been authorized and state courts had been allowed to try non-Indians for crimes committed against other non-Indians on reservations.[71] The Court also pointed out the fact that Congress has "acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation,"[72] noting:

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63. Treaty of November 11, 1794, 7 Stat. 44.
64. 326 U.S. at 500-501.
65. *See* Howard v. Gipsy Oil Co., 247 U.S. 503 (1918); Large Oil Co. v. Howard, 248 U.S. 549 (1919); Gillespie v. Oklahoma, 257 U.S. 501 (1922); and Oklahoma *ex rel.* Oklahoma Tax Commission v. Barnsdall Refineries, 296 U.S. 521 (1936).
66. Oklahoma Tax Commission v. Texas Co., 336 U.S. 342 (1949).
67. *Id.* at 343-344.
68. Williams v. Lee, 358 U.S. 217 (1959).
69. *Id.* at 218-220.
70. *Id.* at 219.
71. *Id.* at 220.
72. *Id.* at 220.

> Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which Worcester v. Georgia had denied.[73]

The Court concluded that the holdings in the indicated cases and the general principles of *Worcester* were in harmony and stated for the first time what seems to be the fundamental approach by which the extent of state jurisdiction over non-Indians on reservations is to be measured:

> 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.[74]

Because the treaty establishing the Navajo Reservation[75] set such area apart as a permanent home for the Tribe and provided that none except United States government personnel could enter without tribal permission, the Court found it implicit that control of tribal affairs is exclusively within the jurisdiction of the tribal government. In view of such jurisdiction, and the resulting creation and operation of a comprehensive tribal court system with jurisdiction broad enough to deal with the controversy, the Court held:

> [T]o allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.[76]

2. *Organized Village of Kake v. Egan*

The analytical approach enunciated in *Williams* seems clear enough,[77] if potentially difficult to apply in individual fact situations. But in *Organized Village of Kake v. Egan*,[78] a 1962 decision not involving an Indian reservation, Justice Frankfurter sowed the seeds of confusion. After summarizing the Court's previous decisions in *Thomas v. Gay*,[79] *New York ex rel. Ray v. Martin*,[80] and *Williams v. Lee*,[81] all cases involving state jurisdiction over non-Indians on reservations, the opinion offered the following unfortunate *dicta*:[82]

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73. *Id.* at 221, n.6. As examples the Court cites various federal statutes granting broad criminal and civil jurisdiction to New York, other statutes granting such jurisdiction to California, Minnesota, Nebraska, Oregon and Wisconsin and statutes granting such jurisdiction to Oklahoma.
74. *Id.* at 220.
75. Treaty of June 1, 1868, 15 Stat. 667.
76. William v. Lee, 358 U.S. 217, 223 (1959).
77. *But see*, Note, "Indian Law—Taxation—Reservation Indian's Income not Taxable if Derived from Reservation Sources—State Power over Reservation Indians is Limited," 22 Kan. L. Rev. 470 (1974), alleging lack of "conceptual clarity" in the decision.
78. 369 U.S. 60 (1962).
79. 169 U.S. 264 (1898).
80. 326 U.S. 496 (1946).
81. 358 U.S. 217 (1959).
82. *See* McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 176, note 15 (1973).

> 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.[83]

The import of the language was the seeming abandonment of concepts of Indian sovereignty on reservations and limited state jurisdiction as a beginning point of analysis, and substitution of a virtual presumption of state jurisdiction *unless* its exercise would interfere with Indian self-government or impair a right granted or reserved by federal law.

The lower courts were understandably confused by the meaning of *Kake* and its relationship to the Supreme Court's holdings in *Williams* and *Worcester*. Some courts used the *Williams* analysis, as reflected in *Kake*, to expand state court jurisdiction.[84] Such decisions relied on the *dicta* in *Kake* to focus on whether or not the subject matter of the state action infringed on tribal self-government or was subject to a controlling federal law, rather than giving consideration to whether or not the activity occurred within the territorial limits of a reservation and to concepts of tribal sovereignty.

Other courts limited their jurisdiction over Indians on the general basis that exercise of jurisdiction over on-reservation activity would infringe on tribal self-government.[85]

3. *Warren Trading Post Co. v. Arizona Tax Commission*

The Supreme Court eliminated the basis for confusion and elaborated on the *Williams* approach in three decisions following *Kake*.[86] In *Warren Trading Post Co. v. Arizona Tax Commission*[87] the Court was asked to consider whether or not Arizona could levy its sales tax on a non-Indian retail trading business conducted on the Navajo Reservation with reservation Indians. The trader was licensed and regulated by the United States under a variety of statutes, including an 1816 enactment giving the Commissioner of Indian Affairs the "sole power and authority to appoint traders to the Indian tribes" and to specify "the kind and quantity of goods and the prices at which such goods shall be sold to the Indians."[88] After reviewing the provisions

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

84. See State *ex rel.* Iron Bear v. District Court, 512 P.2d 1292 (Mont., 1973); Natewa v. Natewa, 84 N.M. 69, 499 P.2d 691 (1972); McClanahan v. State Tax Commission, 14 Ariz. App. 452, 484 P.2d 221 (1971).

85. See Arizona *ex rel.* Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970).

86. Although the cases reflecting such seeming confusion deal with Indians themselves, the *dicta* in Kake would have equal impact on non-Indian activities on reservations since any limitations on state jurisdiction over non-Indians would be dependent upon protected rights of the Indians themselves.

87. 380 U.S. 685 (1965).

88. Act of Aug. 15, 1876, § 6, 19 Stat. 200, 25 U.S.C. § 261 (1970).

of the detailed regulations promulgated under such statutes, the Court held:

> These apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens on traders.[89]

And further:

> We think the assessment and collection of this tax would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed on Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts.[90]

In relation to the *Williams v. Lee* analysis, the decision deals with the first portion, and confirms that governing acts of Congress are controlling on the states, even if such acts impose control by implication rather than express language.

4. *Kennerly v. District Court*

The Court again considered the governing acts of Congress portion of the *Williams* test in *Kennerly v. District Court*,[91] a 1971 opinion concerning application of two federal acts dealing with state jurisdiction by express language, rather than by implication as in *Warren Trading Post*. Pursuant to a 1953 federal statute[92] states were granted or authorized to acquire civil and criminal jurisdiction in suits involving matters occurring on Indian reservations within their boundaries. However, states desiring to acquire such jurisdiction were required to take "affirmative legislative action"[93] to effect such acquisition. Montana took no legislative action to assume civil jurisdiction over the Flathead Indian Reservation, although in 1967 the Blackfeet Tribal Council adopted a resolution providing that Montana State and Blackfeet Tribal courts would have concurrent and not exclusive jurisdiction over suits involving Tribal members and on-reservation matters. The 1953 Act was amended by Title IV of the Civil Rights

89. 380 U.S. 685, 690 (1965).

90. *Id.* 690-91. See also Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

91. 400 U.S. 423 (1971).

92. Act of August 15, 1953, 67 Stat. 588.

93. *Id.* Section 7. "The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative action, obligate and bind the State to assumption thereof."

Act of 1968,[94] deleting the requirement for "affirmative legislative action" but requiring, as a condition to the state's assumption of jurisdiction, the consent of the Indian tribe by majority vote of adult Indians voting at a special election held for the purpose.[95]

Subsequent to the 1968 Act a non-Indian store owner of the reservation brought an action in state court against certain reservation Indians to recover the purchase price of items sold to the Indians. The Montana Supreme Court upheld the state court jurisdiction concluding that since the Tribal Council had consented to such jurisdiction, no infringement of the Tribe's self-government rights would occur.[96] The Supreme Court reversed, holding that where there is an Act of Congress involved, its requirements must be complied with explicitly. Moreover, the Court held that failure to meet the first requirement of the *Williams* analysis—compliance with the governing federal act, cannot be cured by meeting the second portion of such analysis—showing no interference with the Tribe's right to govern itself.[97]

5. *McClanahan v. Arizona State Tax Commission*

But as important as *Warren* and *Kennerly* were, their impact was far exceeded by the Court's broad and far reaching decision in *McClanahan v. Arizona State Tax Commission*.[98] Although the case involved the question of a State's authority to impose its income tax on an Indian (rather than a question about jurisdiction over non-Indians on reservations), the Court's analysis of the entire area of federal-state-tribal relationships and its review of the various authorities governing those relationships has a direct and important bearing on questions of state jurisdiction over non-Indians as well.

A resident of the Navajo Indian Reservation brought suit against the Arizona Tax Commission to obtain a refund of state income taxes withheld from her income earned on the reservation. There appeared to be no applicable federal law prohibiting imposition of the tax,[99] even by implication as in *Warren Trading Post*. Nor, if *Kennerly* and Public Law 280 are read as involving state court procedural jurisdiction rather than the state's authority to impose its substantive laws,

94. Act of April 11, 1968, Pub. L. No. 90-284, tit. IV, §§ 401-406, 82 Stat. 73, codified at 25 U.S.C. §§ 1321-1326 (1970).

95. 25 U.S.C. § 1326 (1970). The 1968 amendment also authorized states to eliminate any constitutional or statutory impediments to assumption of such jurisdiction. *Id.* § 1324.

96. Kennerly v. District Court, 154 Mont. 488, 466 P.2d 85 (1970).

97. 400 U.S. 423, 426-27 (1971).

98. 411 U.S. 164 (1973).

99. Relying on Organized Village of Kake v. Egan, 369 U.S. 60 (1962), the Arizona court held that the language in the Arizona Enabling Act and Constitution requiring that lands within Indian reservations remain "under the absolute jurisdiction and control of the Congress of the United States" (36 Stat. 569) allowed concurrent state jurisdiction so long as tribal self-government was not infringed upon. 14 Ariz. App. 452, 484 P.2d 221 (1971).

did there appear to be an applicable federal law authorizing such jurisdiction subject to compliance with procedural requirements. Accordingly the case seemed to be subject to resolution on the basis of the second portion of the *Williams* analysis; namely, whether imposition of the tax on individual Indians infringed on the right of reservation Indians to make their own laws and be ruled by them. As noted above, the Arizona Court of Appeals upheld the trial court's refusal to require the refund, concluding that imposition of the state income tax on an individual Indian did not cause an impairment of the right of the Navajo Tribe to be self-governing.[100]

The Court immediately perceived the conflict between the rights of the Tribe and the authority of the State which it was being asked to resolve:

> This case requires us once again to reconcile the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on Tribal reservations.[101]

The Court approached resolution of that conflict by again reviewing the principles of Indian sovereignty first articulated in *Worcester v. Georgia,* and, as indicated below, by acknowledging the evolution of those principles over the years:

> This is not to say that the Indian sovereignty doctrine, with its concommitant jurisdictional limit on the reach of state law, has remained static in the 141 years since Worcester was decided. Not surprisingly, the doctrine has undergone considerable evolution in response to changed circumstances. . . .
> [N]otions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians. . . .
> . . . [T]he trend has been away from the idea of inherent sovereignty as a bar to state jurisdiction and toward reliance on federal preemption. . . . The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power.[102]

The Court then summarized the current status of the Indian sovereignty doctrine and its applicability in jurisdictional disputes:

> The Indian sovereignty doctrine is relevant then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read.[103]

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100. 14 Ariz. App. at 457, 484 P.2d at 224.
101. 411 U.S. 164, 165 (1973).
102. *Id.* at 171-72.
103. *Id.* at 172.

Being mindful of Indian sovereignty concepts, and applying the canon of construction that "doubtful expressions are to be resolved in favor of the weak and defenseless people who are wards of the nation,"[104] the Court reviewed the Navajo Treaty of 1868,[105] establishing the reservation as an area for the use and occupation of the Indians free from entry by non-Indians except agents of the United States; the Arizona Enabling Act,[106] wherein the state confirmed the "absolute jurisdiction and control of the Congress of the United States" over the reservation; the Buck Act,[107] authorizing imposition of certain state taxes in federal areas, but providing exceptions for Indians; and, the 1968 Civil Rights Act provisions authorizing state acquisition of jurisdiction over Indians on reservations by compliance with certain procedural requirements.[108] The Court concluded that the treaty and each of the statutes reflected or was consistent with a federal intent that the reservation Indians not be subject to Arizona's tax.

Of particular interest is the Court's response to Arizona's contention that since the tax was imposed on an individual Indian it could not infringe on the Navajo tribal rights of self-government; hence the tax did not violate the standard enunciated in *Williams v. Lee*. The Court rejected the attempted distinction between "individual" and "Tribe," indicating that the critical point was the fact that the income which the state sought to tax was earned on the reservation.[109]

Of greater importance to this investigation is the fact that for the first time the Court expressly characterized as "legitimate" the interests of states in exercising jurisdiction over non-Indians on reservations, advising that it is in such situations that the *Williams v. Lee* "infringement" analysis is applicable.

> It must be remembered that cases applying the *Williams* test have dealt principally with situations involving non-Indians. [citation ommitted] In these situations, both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to

104. *Id.* at 174, citing Carpenter v. Shaw, 280 U.S. 363, 367 (1930).
105. 15 Stat. 667, 668.
106. Act of June 20, 1910, ch. 310, § 20, 36 Stat. 557, 569.
107. 4 U.S.C. §§ 105, *et seq.* (1970).
108. 25 U.S.C. §§ 1321-1326 (1970). Commentators have found it curious that the Court did not simply dispose of the question on the basis that Arizona had failed to comply with the mandatory federal mechanisms for acquisition of jurisdiction, as it did in Kennerly v. District Court, 400 U.S. 423 (1971). Although the opinion does not say so, the Court probably resisted that temptation (which would have produced a perfectly appropriate result in view of the language of the Navajo Treaty and of the State Enabling Act) in an effort to establish and apply an analytical scheme which would have general application. The Court seems to have been suggesting that while the jurisdictional acquisition mechanisms in the Civil Rights Act must be complied with by states which do not otherwise have such jurisdiction, the nature of treaties applicable to particular tribes or other federal statutes may properly grant jurisdiction to states in other ways. Hence, the analysis of the treaty and all applicable federal statutes was warranted.
109. 411 U.S. at 179-81.

> resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.[110]

In summary, *McClanahan* instructs that although sovereignty concepts are relevant, they are to be utilized as "backdrop" to a reading of federal statutes and treaties, and that the real issue is one of federal preemption. Further, States *do* have a legitimate interest in regulating the affairs of non-Indians on reservations, and may do so in conformity with applicable federal statutes and up to the point where such regulation interferes with the right of the Tribe to govern itself.

The Supreme Court has issued a number of significant opinions on Indian matters since *McClanahan*,[111] several of which have been noted above for various purposes. None of them, however, has a direct bearing on the issue of state jurisdiction over non-Indians on Indian reservations. Accordingly the basis for any generalized test for the measurement of such jurisdiction is to be found in the foregoing decisions.[112]

IV. PROPOSAL FOR A TEST TO MEASURE STATE JURISDICTION OVER NON-INDIANS ON INDIAN RESERVATIONS

The purpose of this review of the Supreme Court decisions has been to provide a basis for formulation of a generalized analytical tool or test which will predict with a useful degree of certainty the extent to which a state may apply one or more of its statutes to the activities of a non-Indian mineral operation on an Indian reservation. The cases reviewed do seem to provide an adequate foundation for statement of such a test.

A number of rational approaches for categorizing and analyzing such cases and for creating a general test have been suggested. For example, petitioners in *McClanahan* argued that the extent of the state's jurisdiction should be measured by consideration of three fac-

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110. *Id.* at 179.

111. Mattz v. Arnett, 412 U.S. 481 (1973); Satiacum v. Washington, 414 U.S. 1 (1973); Washington Game Department v. Puyallup Tribe, 414 U.S. 44 (1973); Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974); Morton v. Ruiz, 415 U.S. 199 (1974); Morton v. Mancari, 417 U.S. 535 (1974); United States v. Mazurie, 419 U.S. 544 (1975); Antoine v. Washington, 420 U.S. 194 (1975); and, DeCoteau v. District County Court, 420 U.S. 425 (1975). The *Puyallup* and *Antoine* decisions are particularly interesting in that they suggest the potential for the states' exercise of jurisdiction over Indians in connection with regulation of off-reservation hunting and fishing rights guaranteed to the Indians by treaty. No case involving on-reservation regulation has yet been considered but, on the basis of *McClanahan*, no inherent distinction from the off-reservation cases is immediately apparent. Rather, the language of the treaty creating the reservation would be controlling and might or might not prevent exercise of such jurisdiction on a reservation.

112. For an excellent general review of the development of federal, state and tribal jurisdictional relationships on Indian reservations see Indian Civil Rights Task Force, "Development of Tripartite Jurisdiction in Indian Country," 22 KAN. L. REV. 351 (1974). See also, the general discussion in *Federal Indian Law*, *supra* note 8.

tors; namely, (i) situs of the activity with respect to which the state was seeking to exercise jurisdiction as being on or off the reservation; (ii) status of the individuals involved as Indian or non-Indian; and (iii) consideration of the subject matter involved as being within or without tribal jurisdiction.[113] Although there is merit in this analysis, it has never been adopted or discussed in Supreme Court decisions, including *McClanahan*. One reason may be that it seems to rely heavily on sovereignty notions as enunciated in *Worcester v. Georgia* and therefore does not adequately reflect the controlling nature of applicable treaties and statutes as recognized in *McClanahan*.[114]

Instead the Supreme Court has adopted the approach suggested in *Williams v. Lee* and explained and refined in *McClanahan*. Based on such decisions, and the other cases reviewed above, it is submitted that the analysis to determine the permissible extent of state jurisdiction over non-Indian activities on a reservation within which a tribe has been authorized to govern itself, can be stated in a series of questions, as follows:

(1) To what extent do federal treaties and statutes or regulations thereunder indicate a federal intent to permit or prohibit exercise of such jurisdiction? Consideration should be given to:
  (a) Treaties or statutes which grant such jurisdiction.
  (b) Treaties or statutes which deny or limit such jurisdiction, such denial being in the form of:
    (i) an express denial or limitation of jurisdiction; or
    (ii) a conditional grant of jurisdiction, the conditions not having been met; or
    (iii) an implied denial or limitation of jurisdiction.
(2) In the absence of federal treaties or statutes granting or denying such jurisdiction, to what extent will exercise of such state jurisdiction infringe on the rights of the tribe to make its own laws and to be governed by them?

In utilizing the foregoing analysis, the following factors should be considered:

(1) Doubtful expressions in treaties and statutes will probably be resolved in favor of the tribe, and can be expected to be interpreted by courts to maximize the rights of the tribe to govern itself.[115]
(2) States have a legitimate interest in exercising jurisdiction over non-Indians on Indian reservations.[116]
(3) Notions of Indian sovereignty alone are no longer dispos-

113. *See* McClanahan v. Arizona State Tax Commission, Briefs of Council at 36 L. Ed. 2d 989. The analysis is based upon the late Felix Cohen's definitive work, *Handbook of Federal Indian Law* (1942) upon which *Federal Indian Law*, *supra* note 8, is based.
114. McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973).
115. See the case citations at note 24 *supra*.
116. McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973).

itive of jurisdictional disputes between federal, state and tribal governments, but they do provide a "backdrop" against which federal treaties and statutes are to be read and evaluated.[117]

(4) The federal government has complete and paramount authority over Indian tribes, their reservations, and the activities of Indians and non-Indians on them.[118]

No reason is perceived why the foregoing general approach should not be fully applicable to questions concerning state regulation of activities of non-Indian mineral operators on Indian reservations. Application of the analysis to that particular issue merely involves consideration not only of the federal treaties and statutes relating to the tribe, its reservation and to the state, but of a variety of federal statutes and regulations dealing with mineral activities on such reservations as well. Such evaluation of treaties and statutes having particular application to the substantive subject matter of the state's attempted exercise of jurisdiction is precisely the approach utilized by the Supreme Court in *Williams v. Lee* and in *McClanahan.*[119]

V. REVIEW OF THE TEST AS APPLIED TO STATE JURISDICTION OVER MINERAL ACTIVITIES

Although by definition, the kinds of conclusions which will be reached by application of the test in specific cases will be dependent on the provisions of (i) the treaties and federal statutes of general application to the Indian tribe and its reservation; (ii) specific federal statutes, if any, applicable to the subject matter with respect to which the state is asserting jurisdiction; and (iii) the nature of the state statutes in question, it will be of value to review the various elements of the test and utilize that review as an organizational approach to consider factors which will tend to be generally applicable in most cases.

It should be noted that some federal statutory schemes apply directly to non-Indian activities on reservations. Regulation of non-Indian traders as reviewed in *Warren Trading Post* is an example. But most of the statutes to be considered apply by their terms to Indians and Indian reservations rather than to non-Indians. Nevertheless they are relevant to this inquiry. If a state has been granted jurisdiction over Indians themselves, its jurisdiction over non-Indians on the reservation will be at least coextensive since any limitations on state jurisdiction over non-Indians are based upon protected rights of the

117. *Id.*

118. *See, e.g.*, United States v. Mazurie, 419 U.S. 544 (1975).

119. In Williams v. Lee the Court evaluated federal statutes having a bearing on the Navajo tribal court system. 358 U.S. 217, 222 (1959). In McClanahan v. Arizona State Tax Commission, the Court reviewed the only federal enactment having a bearing on state taxing authority on Indian reservations. 411 U.S. 164, 176 (1973).

Indians themselves. Conversely, if a treaty or statute expressly denies jurisdiction over Indians, such fact will have an impact upon determination of the point at which state regulation of non-Indian conduct will improperly infringe on tribal self-government.

A. APPLICABLE TREATIES AND FEDERAL STATUTES

1. *Treaties or Statutes Granting State Jurisdiction*

No treaties were encountered which grant jurisdiction to state governments, although no effort was made to conduct a systematic review of Indian treaties for this purpose. The apparent absence of such grants of jurisdiction in treaties is not surprising since any such arrangement would be fundamentally at odds with the concepts of federal plenary power over the responsibility for Indian affairs under the Commerce and Treaty powers of the United States Constitution.[120]

Congress has acted by statute on several occasions, however, to make general grants to various states of jurisdiction over Indians and their reservations.[121] By far the most important of these Acts was Public Law 280[122] enacted in 1953, which made an outright grant of such jurisdiction to five states,[123] and which provided for acquisition of jurisdiction by other states.[124] The Act was amended in certain particulars by Title IV of the Civil Rights Act of 1968,[125] although the language describing the scope of authority acquired by the states was not modified.

The extent of the jurisdiction acquired by states under Public Law 280 has been subject to question. The Act provides that "those civil

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120. *Supra* notes 14, 15.

121. *See, e.g.*, Act of July 2, 1948, ch. 809, 62 Stat. 1224 (codified at 25 U.S.C. §§ 232 *et seq.* (1970)) granting to New York civil and criminal jurisdiction over Indians within that state without regard to their presence on or off reservations.

122. Act of August 15, 1953, 67 Stat. 588.

123. *Id.* Section 4, provided in part:

"(a) Each of the states listed in the following table shall have jurisdiction over civil causes of action or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the state to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such state 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:

"State of Indian country affected

California — All Indian country within the State

Minnesota — All Indian country within the State, except the Red Lake Reservation

Nebraska — All Indian country within the State

Oregon — All Indian country within the State, except the Warm Springs Reservation

Wisconsin — All Indian country within the State, except the Menominee Reservation."

124. *Id.* Section 7. For example, Montana acquired criminal, but not civil, jurisdiction over the Flathead Reservation in 1963 (Mont. Rev. Code Ann. §§ 83-801 to 83-806 (1966)). Although the Supreme Court has clearly held that Congress intended that Public Law 280 and its successors were to be the exclusive and mandatory mechanisms by which states not having jurisdiction on Indian reservations could acquire such jurisdiction (Kennerly v. District Court of Montana, 400 U.S. 423 (1971)) an apparently unresolved question is the extent to which the limitations on jurisdiction in Public Law 280 (as considered below) also limit the jurisdictional authority of states which acquired such jurisdiction by treaty, statute or agreement prior to its enactment.

125. 25 U.S.C. §§ 1321-26 (1970). Hereafter references to Public Law 280 will include such later amendments unless specifed to the contrary.

laws of such state that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that state."[126] That language has been interpreted by the Department of Interior as giving the states jurisdiction over persons and private property (Indian and non-Indian) within reservations, but as not granting jurisdiction over property held in trust by the United States for the benefit of individual Indians or the Tribe.[127] No known resolution of this uncertainty has been made to date. If the position taken by the Department of Interior is correct, however, it could mean that Public Law 280 does not grant jurisdiction to states over mineral rights held in trust for the Tribe or individual Indians. Accordingly, it may be that even if a state has been granted or has acquired jurisdiction on an Indian reservation under Public Law 280, absent other federal statutes having a controlling impact, the authority of such state to exercise jurisdiction over a non-Indian lessee of such mineral rights would be subject to the "infringement" portion of the *Williams* test as discussed below.

Another uncertainty relates to the general substantive scope of jurisdictional authority acquired by states under Public Law 280, apart from express limitations in the statute. The Supreme Court expressly declined to determine in *McClanahan* whether Arizona would have been free to impose its tax statute on the reservation if it had complied with Public Law 280.[128] However, in what appears to be the first appellate decision on the point, the Eighth Circuit Court of Appeals recently held that the language of Public Law 280 (as it appears in 28 U.S.C. § 1360 (1958)) includes *all* civil laws of general application in the state.[129] On the facts of that case, the court held that the state was free to apply its income tax laws to Indians and their non-reservation income. The case clearly stands for the general proposition that all state laws would be applicable on the reservation in the same manner as they apply elsewhere in the state, subject to express limitations on such jurisdiction in the statute. The issue will undoubtedly be litigated further as other types of state laws are applied to Indians on reservations.

Differing from the approach reflected in Public Law 280, Con-

126. 25 U.S.C. § 1322(a) (1970).

127. Department of Interior, Office of the Solicitor, Opinion M-36768, February 7, 1968 (unpublished):

"Generally, it is the position of this Department that Public Law 280 invests the states, which were granted or have assumed jurisdiction thereunder, with civil and criminal jurisdiction over the persons and private (nontrust) property of Indians within the Indian country. Jurisdiction over trust property, including authority to regulate its use, was largely unaffected by the Act and remains as and where it was prior to its passage." (at 2) citing Snohomish v. Seattle Disposal Company, 425 P.2d 22, 70 Wash. 2d 668, *cert. denied*, 389 U.S. 1016 (1967).

128. McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 178, n.18 (1973).

129. Omaha Tribe of Indians v. Peters, 516 F.2d 133 (8th Cir. 1975).

gress has also acted to grant jurisdiction to states in specific subject matter areas. For example, in 1929 Congress authorized the Secretary of the Interior, pursuant to rules and regulations to be adopted, to permit state officials to enter reservations for purposes of inspecting health and education conditions and to enforce sanitation and quarantine regulations.[130] It can be argued that the statute provides a basis for imposition of a variety of state statutes which have a relationship to "health" and "sanitation." The argument has not been developed in the literature and apparently has not been considered by a court. The Department of Interior has not issued rules or regulations governing the circumstances under which states may conduct such inspections. The Solicitor has taken the position that the statute is not self-executing, and that in the absence of such regulations and the necessary permission from the Secretary of the Interior, the states have no rights under the statute.[131] It appears doubtful that the statute would be held to constitute general consent by the United States to exercise of state jurisdiction without affirmative approval by the Secretary of the Interior. Even if such consent has been or is hereafter given, the rights granted to the states relate merely to inspections, with enforcement rights only for quarantine and sanitation purposes. Such narrow objectives would provide shaky support, at best, for state statutes not conforming closely to the language in Section 231 and limiting state jurisdiction to such purposes.[132]

Congress has also acted to expressly grant states jurisdiction to tax Indian royalty shares of mineral production on Indian reservations in certain circumstances. 25 U.S.C § 398,[133] providing for leasing of unallotted lands on Indian reservations for "oil and gas mining purposes" contains the following proviso:

> Provided, that the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands. . . .[134]

That statute is now little used, having been largely supplanted by pro-

130. Act of February 15, 1929, ch. 216, 45 Stat. 1185, codified at 25 U.S.C. § 231 (1970).

131. *Supra* note 127 at 4. Citing Superior Sand and Gravel Mining Co. v. Territory of Alaska, 224 F.2d 623 (9th Cir. 1955) and Dredge Corporation v. Penny, 362 F.2d 889 (9th Cir. 1966).

132. An opinion by North Dakota's Attorney General concluded that Section 231 did not apply to mining operations so as to authorize the State Coal Mine Inspector to inspect or require licensing of mining operations in Indian territory. Opinion, N.D. Att'y Gen. 360 (January 2, 1970), *State—State Mine Inspector—Authority on Reservations.*

133. Act of May 29, 1924, ch. 210, 43 Stat. 244, codified at 25 U.S.C. § 398 (1970).

134. *Id.*

visions of the Tribal Leasing Act of 1938[135] which is now commonly utilized for Indian mineral leasing purposes. Section 398 has been upheld by the Supreme Court as a valid grant of taxing authority with respect to leases issued thereunder,[136] but there is authority to the effect that it is not a grant of taxing authority with respect to leases issued under other statutory authority.[137] Although, as indicated, this particular statute is now little utilized, it does provide a good example of an express Congressional grant of authority to the states.

Acting through the Secretary of the Interior, the United States has recently begun expressly to require compliance by mineral lessees with *certain* state laws having application to their operations. The Secretary is authorized to issue mineral leases under such rules and regulations as he may promulgate, and on such terms (subject to limitations imposed by statute or the tribe) as he determines to be in the best interests of the Indians.[138] Apparently pursuant to that authority,[139] certain of the coal leases issued or proposed to be issued on the Crow Indian Reservation in Montana pursuant to public sales in 1968 require lessees to:

> Fully comply with the provisions of the statutes of the State of Montana covering workmen's compensation and occupational disease, as are now in force or as may be amended. Further, the lessee agrees to comply with all the terms and provisions of all applicable laws of the State of Montana and of the United States of America as now exist or as may be amended, pertaining to Social Security, unemployment compensation, wages, hours, and conditions of labor. . . .[140]

Such provision imposes a clear contractual obligation on the lessee to comply with state law. Whether it constitutes a grant of jurisdictional authority to the state is less clear. In any event, subsequent

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135. Act of May 11, 1938, ch. 198, 52 Stat. 347, codified at 25 U.S.C. §§ 396a—396f (1970).

136. British-American Oil Producing Company v. Board of Equalization of the State of Montana, 299 U.S. 159 (1936).

137. Santa Rita Oil & Gas Co. v. Board of Equalization, 101 Mont. 268, 54 P.2d 117 (1936), *rev'd in part*, 112 Mont. 359, 116 P.2d 1012 (1941).

138. 25 U.S.C. § 396d (1970).

139. No portion of the regulations promulgated by the Department of Interior for leasing of tribal lands for mining provides for or authorizes lease terms which require the lessee to comply with state laws. See 25 C.F.R. Part 171 (1975). Although there is some authority to the effect that action by the Secretary of Interior in approving a lease of Indian lands which is inconsisent with the regulations constitutes a modification of such regulations with respect to such lease (See Whitebird v. Eagle-Picher Co., 258 F. Supp. 308 (N.D. Okla. 1966), and Hallam v. Commerce Mining & Royalty Co., 49 F.2d 103 (10th Cir. 1931)) the more recent and compelling authority is that such regulations cannot be promulgated or modified except as provided in the Administrative Procedure Act, 5 U.S.C. § 552 (1970) (See Morton v. Ruiz, 415 U.S. 199 (1974). Any uncertainty about the effectiveness of such lease terms may be resolved, however, by the fact that issuance of such leases were approved by the Crow Tribe in accordance with the provisions of the Indian Reorganization Act of 1934. 25 U.S.C. § 476 (1970).

140. *See* Department of the Interior, Bureau of Indian Affairs, Crow Indian Agency, Crow Agency, Montana, Notice of Competitive Sale No. 1, Exclusive Coal Prospecting Permit With Option to Lease Restricted Indian Lands for Coal Mining, February 27, 1968, Coal Mining Lease Indian Lands, Paragraph 21, at 8.

modifications in the lease form to eliminate or change such requirements, as approved by the Secretary of the Interior and the tribe, would rescind or adjust any such basis for state jurisdiction.

In summary, in states where jurisdiction over Indians on Indian reservations has been granted outright or later acquired under Public Law 280 mechanisms, or pursuant to other statutes or federal action, the authority of the state to regulate activities of non-Indian mineral lessees on such reservations is clear, subject (i) to uncertainties about the scope of state jurisdiction over tribal lands, as noted above; (ii) to express limitations contained in such statutes, as noted below; or (iii) to dictates of other controlling federal statutes. In such states, the second portion of the test—relating to infringement upon the rights of the Indians to govern themselves—is not considered because the federal statutes are controlling.

B. TREATIES OR STATUTES DENYING OR LIMITING STATE JURISDICTION

Express Denials

As noted in *McClanahan* with respect to the Navajo Treaty, Indian treates are often worded in terms of the exclusion of non-Indians from the defined reservation area, except for persons authorized to enter by the Indians themselves or representatives of the United States,[141] rather than in terms of the jurisdictional authority of the state in which the reservation is located. The treaties therefore often expressly deny public access to the reservations by express terms, but the principle impact of such treaties on the scope of state jurisdiction is by implication, as considered below.

Federal Enabling Acts authorizing creation of various western states often contain express language which may constitute a denial of state jurisdiction over Indian reservations. Typical language appears in the Montana Enabling Act, which provides in part:

> And said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.[142]

The Montana Statute applied also to North Dakota, South Dakota, and Washington. Identical provisions are found in the Acts admitting New Mexico[143] and Utah,[144] and in the Constitutions of Idaho[145] and

141. McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 174 (1973). See also the Crow Treaty of May 7, 1868, 15 Stat. 649.

142. Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676, 677.

143. Act of June 20, 1910, ch. 310, § 2, 36 Stat. 557, 558-559.

144. Act of July 16, 1894, ch. 138, § 3, 28 Stat. 107, 108.

145. Idaho Const. Art. XXI, § 19 (1890), ratified, Act of July 3, 1890, ch. 656, 26 Stat. 215.

Wyoming.[146] Insofar as Indians themselves are concerned, the language in such Enabling Acts or Constitutions is effective to bar exercise of state jurisdiction over Indians on the reservations.[147]

However, with respect to activities of non-Indians on Indian reservations, it does not appear that such language in statehood Enabling Acts or Constitutions operates as a bar to state jurisdiction. Such conclusion is based upon recent Supreme Court decisions[148] which rely heavily upon the prior holdings of *McBratney*[149] and *Draper*.[150] As indicated above, the Court's conclusion in *McBratney* appeared primarily to be dependent upon the peculiar chronological order in which territorial authorizing acts and treaties creating Indian reservations were adopted. The conclusion in *McBratney* was accepted without critical analysis in *Draper*, although the pertinent statutes and treaties were entirely different. Further, in *Draper* the meaning of the quoted language in the Montana Enabling Act was interpreted in light of the General Allotment Act of 1887; an analysis which, even if valid when the decision was rendered, is now questionable in view of the later decisions by the Supreme Court holding that the General Allotment Act of 1887 did not in and of itself contemplate termination of Indian reservations.[151]

Those early decisions, as well as the Supreme Court's decision in *Williams v. Lee*,[152] led the court in *Organized Village of Kake v. Egan*[153] to interpret the disclaimer language narrowly:

> "Absolute" federal jurisdiction is not invariably exclusive jurisdiction.[154]

Notwithstanding the presence of similar language in Arizona's Enabling Act,[155] the Supreme Court in *McClanahan* confirmed the legitimacy of state interests in regulating non-Indian activities on Indian reservations.[156] Similarly, in *Williams v. Lee*, also involving Arizona's Enabling Act, the Court acknowledged that states have been allowed to exercise jurisdiction in instances where "essential tribal relations were not involved and where the rights of Indians would not be jeopardized. . . ."[157] Accordingly, in *Williams*, having

146. Wyo. Const. Art. XXI, § 26 (1890), ratified, Act of July 10, 1890, ch. 664, 26 Stat. 222.
147. See McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973), and Williams v. Lee, 358 U.S. 217 (1959).
148. *Id.* See also Organized Village of Kake v. Egan, 369 U.S. 60 (1962).
149. United States v. McBratney, 104 U.S. 621 (1882).
150. Draper v. United States, 164 U.S. 240 (1896).
151. See text and cases at note 41 *supra*.
152. 358 U.S. 217 (1959).
153. 369 U.S. 60 (1962).
154. *Id.* at 68.
155. Act of June 20, 1910, ch. 310, 36 Stat. 557, 569.
156. 411 U.S. at 171, 179.
157. 358 U.S. at 219.

determined that the language in the Enabling Act was not dispositive of the jurisdictional question, the Court resolved the issues based on whether or not exercise of such jurisdiction by Arizona infringed on the rights of the Indians to make their own laws and be ruled by them.

On the basis of the foregoing decisions, even though there are substantial questions about the logic of the early cases, the clear current state of the law appears to be that such disclaiming language in state enabling acts or constitutions is not an absolute bar to exercise of jurisdiction by such states over non-Indian activities on Indian reservations.

Notwithstanding such conclusion, however, recent decisions by a Federal District Court and the Montana Attorney General have reached an opposite result in evaluating state jurisdiction over non-Indian mineral operators. In *Shoshone Indian Tribe v. Hathaway*[158] a non-Indian operator on the Wind River Reservation applied to the Wyoming Oil and Gas Conservation Commission for approval of a water flood project. The state commission accepted jurisdiction and ruled on the application over protest of the Shoshone and Arapahoe Tribes. Thereafter the Tribes brought the action in Federal District Court to enjoin enforcement of the Commission's order as applied to the Reservation. Without a detailed analysis of the legal principles, the Court found that the Commission had no jurisdiction to enter its order. The opinion merely noted the jurisdictional disclaimer language in the Wyoming Constitution, the Indian sovereignty concepts enunciated in *Worcester v. Georgia,* and the fact that Indian territory is separate and apart from that of the state.[159] The Court did not make an effort to consider the treaties establishing the reservation or the federal statutes and regulations governing oil and gas leasing and operations on Indian reservations. Further the Court did not attempt to distinguish between state jurisdiction over Indians and state jurisdiction over non-Indians.

In 1973 the Montana Attorney General rendered an opinion[160] on the extent to which Montana's Strip Mining and Reclamation Act[161] applied to coal strip mining activities on the Northern Cheyenne Reservation. It too concludes that the state has no jurisdiction to impose such statute, relying on the disclaimer language in the Montana En-

158. No. 5367 Civil (D., Wyo., Nov. 7, 1969) (Order Sustaining Motion for Summary Judgment and Overruling Motion to Dismiss). The positions of the parties and the facts in the case were reviewed in detail in the Berger and Mounce article, *supra* note 5, at 379-396.

159. *Id.*, at 3-4.

160. Opinion No. 54, Montana Attorney General (December 28, 1973).

161. Mont. Rev. Code §§ 50-1034 to 50-1057 (Supp. 1974).

abling Act[162] and Constitution[163] and on the Supreme Court's decision in *Kennerly*:[164]

> It appears from the foregoing authorities that a state has no jurisdiction over Indian lands unless Congress has authorized that jurisdiction, the state has acted to accept that jurisdiction, and the Indian tribal members have voted to accept the state's jurisdiction.[165]

The opinion does not consider the treaties applicable to the Northern Cheyenne Tribe or Reservation, the federal statutes and regulations pertaining to coal leasing and operations, and makes no distinction between state jurisdiction over Indians and non-Indians.

Although each of the foregoing decisions is seriously deficient in the analytical approach utilized, for the reasons set forth below[166] each seems to have arrived at the proper result.

Another type of express limitation on state jurisdiction, not relating to its scope, but concerning the kinds of impact which it may have, is contained in Public Law 280 and its successors.

> (b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement or statute, or with any regulation made pursuant thereto. . . .[167]

Although the statute is concerned with state acquisition of jurisdiction over Indians rather than acquisition of jurisdiction over non-Indians on reservations, limitations in the statute on the kinds of impacts which exercise of jurisdiction may have on Indian property should operate equally as a limitation on the exercise of jurisdiction over non-Indians. Specifically, exercise of state jurisdiction over non-Indians on Indian reservations may not result in the "encumbrance" of any Indian property located on the reservation which is held in trust by the United States or subject to a restriction on alienation imposed by the United States.

The meaning of the prohibition against "encumbrances" on Indian property is subject to considerable uncertainty. For example, the

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162. Act of February 22, 1889, 25 Stat. 676.
163. Mont. Const. Art. I (1972).
164. Kennerly v. District Court, 400 U.S. 423 (1971).
165. *Supra* note 160, at 3.
166. See text at notes 185 to 218 and 223 to 247, *infra*.
167. 25 U.S.C. § 1322(b) (1970).

cases which have considered the question to date are in conflict about whether the prohibition precludes application of state zoning and general police power ordinances to Indian lands. In *Snohomish County v. Seattle Disposal Co.*,[168] the Supreme Court of Washington held that state statutes and county ordinances requiring a conditional use permit for garbage dumping operations on Indian lands by a non-Indian lessee constituted an impermissible "encumbrance" on the property and could not be imposed against the Indian tribe or its lessee. The decision is of particular importance because it clearly involves application of Public Law 280 limitations to asserted state jurisdiction over non-Indian activities.

The Department of Interior has taken a position in conformity with the *Snohomish* decision, issuing through the Solicitor's Office an opinion concluding that state zoning and conservation laws are an "encumbrance" within the prohibition of Public Law 280.[169]

Conversely, however, in *Rincon Band of Mission Indians v. County of San Diego*,[170] a Federal District Court held that a county ordinance prohibiting utilization of property within a county for gambling purposes was not an "encumbrance" as it applied to Indian lands, because it was directed at conduct not land use. Accordingly, imposition of the ordinance was held not to constitute a violation of the statutory prohibitions in Public Law 280. Similar conclusions were reached in an unreported Federal District Court decision in California, *Ricci v. County of Riverside*,[171] and in a California appellate decision, *People v. Rhodes*.[172] The *Rincon* and *Ricci* decisions were reversed on appeal[173] on the basis of lack of a clear case or controversy within constitutional requirements because of nonenforcement of the ordinances by such counties.[174]

Another express limitation on the permissible scope of state jurisdiction on Indian reservations can be found in the regulations of the Department of Interior pertaining to Indian matters. 25 C.F.R. § 1.4 provides in part:

> (a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating or controlling the use or development of any real or personal property,

168. 70 Wash. 2d 668, 425 P.2d 22, *cert. denied*, 389 U.S. 1016 (1967).
169. *Supra* note 127.
170. 324 F. Supp. 371 (S.D. Cal. 1971).
171. Civ. No. 71-1132-EC (C.D. Cal., Sept. 9, 1971).
172. 12 Cal. App. 3d 720, 90 Cal. Rptr. 794 (1970).
173. Rincon Band of Mission Indians v. County of San Diego, 495 F.2d 1 (9th Cir. 1974).
174. A thorough review of the current state of the law on the meaning of the "encumbrance" prohibition in Public Law 280 can be found in a recent comment in the Land and Water Law Review. Comment, "State Jurisdiction Over Indian Land Use: An Interpretation of the Encumbrance Savings Clause of Public Law 280," IX *Land and Water L. Rev.* 421 (1974).

> including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.[175]

The regulation, enacted on June 9, 1965, recites that it is based upon statutory authority contained in 25 U.S.C. § 2 (1970). However, whether such statute provides an independent basis for rule making by the Secretary has been questioned. In *Organized Village of Kake v. Egan*,[176] Justice Frankfurter discussed the statute and concluded that it did not provide an independent basis for the regulations thereunder consideration. In that discussion he noted that it is the apparent position of the Department of the Interior itself that the statute merely authorizes the Secretary of the Interior to implement specific laws, rather than constituting a separate grant of general power to make rules governing Indian conduct.[177] In *Norvel v. Sangre de Cristo Development Company, Inc.*,[178] a Federal District Court reached a similar conclusion, holding that 25 U.S.C. § 2 confers only the authority to implement specific laws[179] and that "To the extent that Regulation 1.4 would preclude application of the state laws discussed above, (pertaining to subdivision control, construction licensing and water) it must be viewed as unauthorized legislative action by the Secretary and, as such, beyond the scope of his lawful authority."[180]

On the basis of these decisions, it must be concluded that 25 C.F.R. § 1.4 probably does not constitute a valid limitation on state jurisdiction.[180a]

Implied Denials or Limitation on State Jurisdiction. As noted above[181] the principal impact of Indian treaties on state jurisdiction is by implication. Such treaties commonly reserved defined areas to the sole use and occupancy of the Indians, but said little, if anything, about relationships of the tribe to the surrounding state or territory.[182] Treaty provisions for areas of exclusive use and occupan-

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175. 25 C.F.R. § 1.4 (1975). Subparagraph (b) of the section merely provides that the Secretary of the Interior *may* in specific cases and in specific areas adopt such laws or make them applicable to Indian lands if he determines such to be in the best interest of the Indian owners in achieving the "highest and best use of such property."

176. 369 U.S. 60 (1962).

177. *Id.* at 63. But see Memorandum Opinion, *supra* note 127.

178. 372 F. Supp. 348 (D.N.M. 1974), reversed on the basis of a lack of case or controversy, 519 F.2d 370 (5th Cir. 1975).

179. *Id.* at 355.

180. *Id.* at 357.

180a. *But see* Santa Rosa Band of Indians v. Kings County, Civil No. 74-1565 (9th Cir. November 3, 1975) in which the regulation was upheld as valid.

181. Text at note 141 *supra*.

182. There are, of course, exceptions to this general statement. The Treaty of May 6, 1828, with the Cherokee Nation recites in its preamble:

> . . . the anxious desire of the Government of the United States to secure to the Cherokee nation of Indians . . . a *permanent* home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever—a home that shall never, in all future time, be embarrassed by having

cy, when considered in light of canons of construction applicable to Indian treaties and notions of Indian sovereignty, were, however, sufficient basis for the Supreme Court's conclusion in *McClanahan*[183] that Indians on the reservation were not subject to the taxing authority of Arizona.

> . . . [I]t cannot be doubted that the reservation of certain lands for the exclusive use and occupancy of the Navajos and the exclusion of non-Navajos from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision. It is thus unsurprising that this court has interpreted the Navajo treaty to preclude extension of state law—including state tax law—to Indians on the Navajo Reservation.[184]

Based on *McClanahan* and other decisions, it is clear that treaties creating Indian reservations can and do operate to limit state jurisdiction on such reservations.

Federal statutes too can impliedly deny or limit the scope of state jurisdiction on Indian reservations. Such effect is based on familiar notions of federal supremacy over Indian affairs and federal preemption of a subject matter area or establishment of a federal policy which cannot be interfered with or thwarted by state activity.[185]

The Supreme Court's decision in *Warren Trading Post* expressly applied such standards in resolving questions concerning Arizona's authority to impose its sales tax on a non-Indian trader operating on the Navajo reservation. As indicated above[186] the Court concluded that the detailed federal statutory and regulatory framework governing the activities of such Indian traders on reservations showed "that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders."[187] To allow collection of such tax

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> extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State . . . 7 Stat. 311.

183. McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973).

184. *Id.* at 174-75. Although the Court thereafter reviewed a variety of federal statutes, such review was for purposes of demonstrating the lack of any Congressional intent at odds with the Court's interpretation of the treaty. It is clear that the Court's interpretation of the treaty is the fundamental basis for the opinion.

185. An exposition of the standards applicable to a determination of federal preemption is far beyond the scope of this investigation. However, various approaches utilized by the courts have included, among others, consideration of whether the state regulation is in conflict with the federal statute (Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960)); or consideration of whether the nature and scope of the federal regulation is so complete that a Congressional intent to be solely responsible for regulation in such area is shown (City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973); Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685 (1965)). It is clear that such preemption can be effected by federal administrative action, if such action is within the agency scope of authority. *See* Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945).

186. See text at notes 87 to 90 *supra*.

187. 380 U.S. at 690. *See* 25 C.F.R. Part 251 (1975).

would "frustrate the evident Congressional purpose of ensuring that no burden" be placed on such traders except as authorized by federal statute or regulation.[188]

Applying the rationale of *Warren Trading Post* to non-Indian mineral lessees and to their activities on Indian reservations, it is apparent that a very strong case can be made for the proposition that Congress has preempted the field of regulation of such lessees' mineral operations, and that state land use, reclamation and conservation regulations may not properly be imposed on such operators.

Pursuant to a variety of statutes, now codified at 25 U.S.C. §§ 396-401 (1970), Congress has authorized the leasing of Indian land subject to restrictions on alienation for mineral development, whether Tribal or held by individual allottees. The statutes, some broad in application,[189] some exceedingly narrow,[190] generally provide for approval of such leases by the Secretary of the Interior[191] and for approval by the Tribal council with respect to unallotted lands[192] or by the individual allottee, with respect to allotted lands.[193] The statute gives the Secretary of the Interior complete control over operations of lessees pursuant to such leases.

> All operations under any oil, gas or other mineral lease issued pursuant to the terms of any act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. . . .[194]

Pursuant to such authority the Secretary has promulgated or applies exceedingly detailed regulations[195] which cover all aspects of lease issuance,[196] lessee operations[197] and management of the environ-

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188. *Id.* at 691.

189. Act of May 11, 1938, ch. 198, § 1, 52 Stat. 347, 25 U.S.C. § 396a (1970) governs leases for mining purposes of all unalloted lands held by Indian Tribes (except those several tribes noted).

190. Act of April 28, 1924, ch. 135, 43 Stat. 111, 25 U.S.C. § 401 (1970) pertains solely to leasing for mining purposes of unallotted lands reserved for cemetery, school and agency uses and not needed for such purpose on the twenty acre Kaw Indian Reservation in Oklahoma. U.S. Department of Commerce, *Federal and State Indian Reservations and Indian Trust Areas* (1974).

191. *See*, for example, 25 U.S.C. § 396a (1970).

192. *Id. See also* 25 U.S.C. § 398 (1970). With respect to oil and gas leasing see A. McLane, Oil and Gas Leasing On Indian Lands (1955) which, although now somewhat dated, provides a detailed review of the subject.

193. *See* 25 U.S.C. § 396 (1970).

194. 25 U.S.C. § 396d (1970).

195. *See generally*, 25 C.F.R., Subchapters P and Q (1975).

196. The general regulations governing issuance of oil and gas and mining leases and the terms and conditions thereof are set forth in 25 C.F.R. Part 171, with respect to tribal lands, and 25 C.F.R. Part 172, with respect to alloted lands. However regulations pertaining to mineral leasing on specific Indian reservations appear at 25 C.F.R. Part 173, relating to the Crow Reservation in Montana; 25 C.F.R. Part 174, dealing with the Five Civilized Tribes in Oklahoma; 25 C.F.R. Part 175, concerning the Osage Reservation in Oklahoma and 25 C.F.R. Part 176 relating to lead and zinc mining leases on the Quapaw Reservation in Oklahoma. The special regulations for the Crow Reservation are now no longer utilized in view of the 1969 amendment to 25 U.S.C. § 369f (1970) making the 1938 Tribal Leasing Act applicable to the Crow Reservation. Act of Sept. 16, 1969, 73 Stat. 565. Curiously such amendment is not reflected in the historical notes or supplement in 25 U.S.C.A. § 396f (1970).

197. Operations of lessees are subject to administrative control by the United States

mental impact of such operations.[198]

The lease issuance regulations are broad in scope and deal in detail with matters such as procedures for Tribal and Secretarial approval of leases;[199] qualifications of lessees;[200] term of the leases[201] and restrictions on commencement of operations.[202]

The regulations governing operations are equally broad in scope, and if anything, even more detailed. The oil and gas operating regulations[203] seem to fully control all aspects of such operations and specifically provide that the officer designated by the Secretary of the Interior[204] is "authorized and empowered to supervise and direct oil and gas operations"[205] on Indian lands subject thereto. The coal mine operating regulations are similar in scope, authorizing supervision and regulation of operations[206] in order to assure orderly development of coal resources without waste and consistent with the health and safety of the workmen.[207] The regulations cover in detail, among other things, the obligations of lessees to comply with the terms of the leases and to keep records,[208] preparation and advance approval of development plans,[209] and specific technical requirements for various kinds of operations.[210] The regulations make only brief reference to state laws or reports to state agencies.[211]

The proposed coal mine operating regulations are even more comprehensive,[212] particularly with respect to environmental protection and land reclamation concerns. Their scope is reflected in the statement of purpose:

(b) The purpose of the regulations in this part is to promote

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Geological Survey. By adminstrative practice the coal mining operating regulations for federal lands (30 C.F.R. Part 211 (1974)) are applied to operations on Indian reservations. Proposed revisions to 30 C.F.R. Part 211 were published for comment on January 30, 1975 and are expected to take effect some time during the summer of 1975. (40 Fed. Reg. 4428) (1975). The amended regulations would expressly apply to Indian lands. Proposed Regulation 30 C.F.R. § 211.1(a).

Oil and gas operations are controlled by 30 C.F.R. Part 221 (1974) which makes express mention of Indian lands. 30 C.F.R. §§ 221.2(d), 221.41 (1974).

198. 25 C.F.R. Part 177 (1975).
199. 25 C.F.R. §§ 171.2, 171.3, 171.3a, 172.4 (1975).
200. 25 C.F.R. §§ 171.4, 171.5, 172.3, 172.7, 172.8 (1975).
201. 25 C.F.R. §§ 171.10, 172.12 (1975).
202. 25 C.F.R. §§ 171.20, 171.21, 172.24 (1975).
203. 30 C.F.R. Part 221 (1974).
204. 30 C.F.R. § 221.2(d) (1974).
205. 30 C.F.R. § 221.2(c) (1974).
206. 30 C.F.R. §§ 211.3(a), 221.3a (1974).
207. 30 C.F.R. § 211.2 (1974).
208. 30 C.F.R. §§ 211.5, 211.6 (1974).
209. 30 C.F.R. §§ 211.19, 211.20 (1974).
210. See, for example, 30 C.F.R. § 211.21, 211.24, 211.27, 211.50 (1974).
211. 30 C.F.R. § 211.4(g) (1974), requiring that orders to ensure compliance with rules and regulations do not conflict with state laws; 30 C.F.R. § 211.8 (1974), permitting use of copies of accident reports to the state to be utilized; and 30 C.F.R. § 211.48(b) (1974), in effect adopting by reference state requirements on the maximum crosscut or breakthrough intervals. Such references do not appear to limit the Suprvisor's authority to fully regulate and control such coal mining operations except in the two particulars noted pertaining to enforcement orders and maximum crosscut intervals.
212. 40 Fed. Reg. 4428 (1974). Such regulations will hereinafter be referred to as "Proposed Regulations."

> orderly and efficient prospecting, exploration, testing, development, mining, preparation and handling operations and production practices, without avoidable waste or loss of coal or other mineral deposits or damage to coal or other mineral bearing formation; to encourage maximum recovery and use of coal resources; to promote operating practices which will avoid, minimize or correct damage to the environment—land, water and air—and avoid, minimize or correct hazards to public health and safety; to require effective reclamation of lands; and to obtain a proper record and accounting of all coal produced.[213]

Consistent with such statement of purpose, the proposed regulations provide for a variety of control procedures, including plan approvals,[214] and impose on lessees a wide range of operating requirements and restrictions[215] all designed to:

> [A]void, minimize or control soil erosion; pollution of air; pollution of surface or ground water; serious alteration of the normal flow of water; damage to vegetative growth, crops or timber; injury or destruction of fish and wild life and their habitat; creation of unsafe or hazardous conditions; damage to improvements . . . ; and damage to recreational, scenic, historical, archaeological and ecological values of the land.[216]

Finally, the regulations at 25 C.F.R. Part 177 (1975) establish a regulatory scheme involving the technical examination of lands upon which operations are contemplated and the preparation, review, approval and enforcement of operation plans to prevent damage to the environment and to avoid, minimize or correct hazards to the public health and safety.[217]

In summary, such statutes, and more particulary the regulations issued thereunder, cover "in the most minute fashion"[218] issuance of mineral leases on Indian reservations and the conduct of operations thereunder. Such comprehensive regulatory scheme, together with the even more detailed proposed regulations, provides a compelling basis for the conclusion that the federal government has entirely occupied the field, particularly with respect to operating, reclamation and pollution control matters. Accordingly, on the basis of the *Warren Trading Post* decision, as a general proposition state

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213. Proposed Regulations at 4430, 30 C.F.R. § 211.1(b).
214. Proposed Regulations at 4432-34, 30 C.F.R. § 211.10.
215. See, for example, Proposed Regulations at 4432, 34, 35, 30 C.F.R. §§ 211.4, 211.21, 211.37.
216. *Id.* at § 211.4(c).
217. 25 C.F.R. § 177.1 (1975). The regulations do not apply to oil and gas operations on lands in which ownership of the surface and mineral estate has been severed. 25 C.F.R. § 177.2(b) (1975).
218. Warren Trading Post Co. v. Arizona Tax Comm'n., 380 U.S. 685, 689 (1965).

statutes relating to such matters should not be applicable to activities of non-Indian lessees on reservations.

In only one known instance has a court considered the extent of a state's jurisdiction over mineral activities on an Indian reservation in light of such federal statutes and regulations. In *Assiniboine and Sioux Tribes v. Calvert Exploration Co.*[219] the Tribes were successful in preventing a non-Indian operator from pooling Indian lands with non-Indian lands pursuant to an order of the Montana Oil and Gas Conservation Commission. The Court reviewed the relevant federal statute[220] and regulations[221] pertaining to formation of such units and concluded that the state was without jurisdiction, holding:

> It seems clear from these regulations that with respect to restricted Indian lands the approval of well spacing programs by the supervisor as the representative of the Secretary of the Interior is required. To argue that Congress has left to the states the determination of conservation practices, and particularly well spacing requirements, is to disregard the plain meaning of the regulations.[222]

VI. INFRINGEMENT UPON THE RIGHTS OF THE TRIBE TO MAKE ITS OWN LAWS AND BE RULED BY THEM

If treaties and federal statutes neither grant nor deny the jurisdictional authority which the state seeks to exercise, the final consideration is whether the state's exercise of such jurisdiction will interfere with the rights of the tribe to make its own laws and be governed by them.

Tribal rights of self-government are founded on the *Worcester v. Georgia* tribal sovereignty concepts and well illustrated in the analysis from *Federal Indian Law* set forth above describing the manner in which tribes retained such authority despite their treaty making with the United States.[223] Such rights are also sometimes found by expression, but more often by implication in the language of treaties.[224]

Such rights also find strong recognition in federal statutes. The Indian Reorganization Act of 1934[225] specifically provided for the en-

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219. Assiniboine and Sioux Tribes v. Calvert Exploration Co., 223 F. Supp. 909 (D.C. Mont. 1963) *rev'd sub nom.* Yoder v. Assiniboine and Sioux Tribes, 339 F.2d 360 (9th Cir. 1964). The reversal on appeal related to a failure of the plaintiff Tribes to show a jurisdictional amount in controversy and was unrelated to the state-tribal jurisdiction issue.

220. 25 U.S.C. § 396d (1970).

221. 30 C.F.R. §§ 221.2, 221.11 (1974).

222. 223 F. Supp. at 913.

223. *Supra* at note 32. A recent expression of the inherent nature of such powers of self-government can be found in Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965) at 376:

> It is also true that an Indian tribe has the power, absent some treaty provision or act of congress to the contrary, to enact its own laws for the government of its people, and to establish courts to enforce them.

224. See, for example, the interpretation of the language in the Navajo Treaty to that effect in McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 174-75 (1973) and in Williams v. Lee, 358 U.S. 17, 220-221 (1959).

225. Act of June 18, 1934, Pub. L. No. 73-383, 48 Stat. 984.

hancement of tribal self-governmental activities.[226] It authorized tribal organization for the common welfare and adoption of tribal constitutions and bylaws.[227] Tribes were also directed to include in their constitutions provisions preventing sale, lease or encumbrance of tribal lands without the consent of the tribe.[228] Alternatively tribes were authorized to adopt charters and eventually to thereby acquire greater control over tribal assets.[229] Even the Indian Civil Rights Act,[230] adopted by Congress to enhance civil liberties of individual Indians by imposing certain due process restrictions on Indian governments, has been interpreted as being consistent with the recognized federal objective of preserving Indian tribes as self-governing autonomous units.[231]

Recall that the Supreme Court in *Williams v. Lee* concluded that although the basic sovereignty principles announced in *Worcester v. Georgia* remained in effect, subsequent decisions indicated that those principles had been modified and states had been allowed to exercise jurisdiction "in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized. . . ."[232] The Court summarized the conclusions it drew from such cases in language which provides the foundation for the test proposed in this inquiry:

> 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.[233]

Utilizing that approach and finding no governing Acts of Congress, the Court held that in view of a functioning tribal court system which had jurisdiction over the controversy, to permit the state court system to exercise jurisdiction would undermine the authority of the tribal court system and "infringe on the rights of the Indians to govern themselves."[234]

Although the "infringement" portion of the *Williams* analysis is easily stated it can be exceedingly difficult to apply in various

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226. *Id.* §§ 16, 17 at 987.
227. Section 16 was codified at 25 U.S.C. § 476 (1970).
228. 25 U.S.C. § 476 (1970) provides in part:
> In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: . . . to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe. . . .

229. 25 U.S.C. § 477 (1970).
230. 25 U.S.C. §§ 1301-1303 (Supp. 1975).
231. See generally, Note, "The Indian Bill of Rights and the Constitutional Status of Tribal Governments," 82 *Harv. L. Rev.* 1343, 1359-60 (1969).
232. 358 U.S. 217, 219 (1959).
233. *Id.* at 220.
234. *Id.* at 223.

fact situations, and there remain a number of uncertainties about its parameters. Some of these uncertainties have been commented upon or dealt with in ensuing federal decisions.

First, in *McClanahan v. Arizona State Tax Commission*,[235] although the case did not involve non-Indians, and although the opinion specifically indicated that the *Williams* infringement analysis was meant to be applied in situations involving non-Indians,[236] the Court nevertheless commented that the impact of the purported exercise of jurisdiction on individual Indians affected the tribe as a whole and could constitute impermissible "infringement."[237]

Second, federal decisions indicate that for infringement to occur, the tribe must be actively excercising the self-governmental right, rather than merely having the potential for exercising such right. Thus in *Williams v. Lee*[238] and in *Littell v. Nakai*[239] active tribal courts were operating which, by their own enabling ordinances, had jurisdiction over the parties and the matter in controversy. In *Arizona ex rel. Merrill v. Turtle*[240] the Court expressly applied the infringement portion of the *Williams* analysis and concluded, in the face of a tribal resolution and existing procedures on extradition, that to allow Arizona to assume the power to control extradition matters would infringe on the tribe's rights of self-government.[241]

Third, such decisions have begun to provide some guidance on the exceedingly difficult fact question of what level of state presence constitutes interference. In *Williams, Littell v. Nakai* and *Arizona ex rel. Merrill v. Turtle,* noted above, the Courts permitted no exercise of state jurisdiction. In each of such cases an individual Indian was involved and the purported state exercise of jurisdiction was in direct conflict with tribal exercise of jurisdiction. However, in *Norvell v. Sangre de Cristo Development Co.*,[242] notwithstanding tribal ordinances establishing subdivision regulations and building, plumbing and electrical codes, the state was permitted to apply its land subdivision act and construction licensing act to non-Indian develo-

235. 411 U.S. 164 (1973).

236. *Id.* at 179.

237. *Id.* at 181.

238. 358 U.S. 217 (1959).

239. 344 F.2d 486 (9th Cir. 1965). See also United States v. Blackfeet Tribal Court, 244 F. Supp. 474 (D. Mont. 1965).

240. 413 F.2d 683 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970).

241. *Id.* at 686. A related series of decisions has concluded that litigants (Indian and non-Indian) must exhaust their tribal remedies before turning to non-Indian courts for assistance. *See*, for example, O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140 (8th Cir. 1973); White Eagle v. One Feather, 478 F.2d 1311 (8th Cir. 1973); McCurdy v. Steele, 506 F.2d 653 (10th Cir. 1974) and Dodge v. Nakai, 298 F. Supp. 17 (D. Ariz. 1968).

242. 372 F. Supp. 348 (D.N.M. 1974); reversed 519 F.2d 370 (10th Cir. 1975). It should be noted that the District Court reached the infringement issue only after concluding that the applicable federal statute (25 U.S.C. § 415), did not preempt the area of such regulation at the time the lease was issued, and that a subsequent amendment to the statute giving the Secretary of the Interior control over matters which the State sought to regulate was not effective as to the lessees involved in the case.

pers operating under a 99 year lease from the tribe. The court concluded on the facts that application of the state statutes would have little if any impact on the Indians themselves, although the opinion does not indicate to what extent the state acts and tribal ordinances may have been in conflict. In summary, these cases seem to say that where there is actual conflict and an Indian is involved, there is infringement. However, where no Indian is directly involved, and where the state exercise of jurisdiction has no impact on the Indians, *Norvell* may be saying that joint regulation of the non-Indian's conduct by state and tribe is permissible, at least to the extent that such regulations do not directly conflict.

Considering these principles, there is considerable potential for state infringement on tribal self-government in connection with state regulation of non-Indian mineral operators. Indian tribes are actively and increasingly involved in control of on-reservation mineral activities. For example, provisions of the Indian Reorganization Act authorize tribal control over the granting of mineral leases.[243] Federal Regulations confirm and elaborate on that authority.[244] In respect to coal leasing and operations, the Secretary of the Interior has determined that all future operations on the Northern Cheyenne Reservation will only be carried out pursuant to mining plans approved by the Tribe.[245] This approach will probably be followed in large scale mineral development operations on other reservations. A Congressional intent to enhance tribal participation in control of coal surface mining operations is apparent in the recently vetoed Surface Mining Control and Reclamation Act of 1975[246] where tribes were authorized to impose more stringent standards.[247] It would not be unreasonable to anticipate that such attitude will manifest itself in future Congressional action concerning Indian tribes.

In summary, there is substantial tribal involvement in respect to regulation and control of mineral activities on Indian reservations. It can be expected to increase, both by reason of federal statutes and regulations and by reason of independent assertions of such authority by individual Indian tribes as their awareness of the need and potential for such involvement increases. The present level of activity, together with the expectation for future tribal involvement to an even greater degree, creates the potential for impermissible infringement on Indian rights of self-government each time a state attempts to apply its jurisdiction to on-reservation mineral operations. But the determination whether such infringement has actually occurred will

243. 25 U.S.C. §§ 476, 477 (1970).
244. See, for example, 25 C.F.R. § 17.2 (1975).
245. Decision of the Secretary of the Interior in Response to Petition of the Northern Cheyenne Tribe, June 4, 1974.
246. H.R. 25, 94th Cong., 1st Sess. (1975).
247. *Id.* at Section 710.

have to be made on a case by case basis, considering the specific state statute involved and the degree and nature of tribal governmental activity.