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Federal Preemption of State Authority to Tax Non-Indian Mineral Development on Indian Lands

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COMMENTS

Federal Preemption of State Authority to Tax Non-Indian Mineral Development on Indian Lands

I. INTRODUCTION

The extent of state power on Indian reservations has been a continuous source of conflict and litigation from the time the United States first entered into treaties with Indian tribes.[1] State authority to tax non-Indian developers extracting minerals from Indian lands is of increasing importance because of a growing demand for energy and an increased desire of states and Indian tribes to get their share of the revenues from these resources before they are depleted. Determining who ultimately controls revenues generated from mineral development on Indian lands will have long range effects on the development of Indian mineral resources, the relationship between tribal, federal, and state governments, and the direction of tribal development and self-government.[2]

The federal preemption doctrine has become critical to a

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1. *See, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

2. For the effects of state taxation on the relationship between the states and tribes, see generally Comment, *The Case for Exclusive Tribal Power to Tax Mineral Lessees of Indian Lands*, 124 U. PA. L. REV. 491 (1975).

The impact on tribal self-government will be substantial if state mineral severance taxes are held to be valid as to non-Indian mineral developers on reservations. If the tribes are not allowed to keep revenues generated through taxation or royalties, they may have to set a price on Indian minerals which will discourage non-Indian capital investment. *See* Note, *Balancing the Interests in Taxation of Non-Indian Activities on Indian Lands*, 64 IOWA L. REV. 1459, 1494-98 (1979). Underlying this controversy is the federal government's commitment to promote Indian self-determination, *see* 25 U.S.C. § 450a(b) (1976). Without control over the development of their natural resources, the Indian people will not be able to establish economic self-sufficiency. Merrion v. Jicarilla Apache Tribe, 102 S. Ct. 894, 901 (1982). *See also*, Comment, *The Case for Exclusive Tribal Power to Tax Mineral Lessees of Indian Lands*, 124 U. PA. L. REV. 491 (1975); Note, *Indian Coal Authorities: The Concept of Federal Preemption and Independent Tribal Coal Development on the Northern Great Plains*, 53 N.D.L. REV. 469 (1977).

determination of who may tax non-Indian development on reservations. However, the application of the preemption doctrine to Indian law has been a source of confusion since preemption was first used to analyze conflicting state and tribal claims.[3] This Comment will show that the development and current application of the preemption doctrine in Indian law precludes state taxation of non-Indian mineral development on Indian reservations.

II. History of the Indian Preemption Doctrine

The unique relationship between the United States and Indian tribes governs the application of the federal preemption doctrine in Indian law and requires special analysis apart from traditional federal preemption principles.[4] The preemption doctrine must be tailored to accommodate the tribe's peculiar status—sovereign in some respects, yet still a trust responsibility of the federal government. In discussing the unusual application of the preemption doctrine to Indian tribes, the United States Supreme Court has said,

> The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law. Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other.[5]

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3. *See, e.g.*, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170 n.6 (1973); Kennerly v. District Court, 400 U.S. 423 (1971); Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965); Fort Mojave Tribe v. County of San Bernardino, 543 F.2d 1253 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977); Crow Tribe of Indians v. Montana, 469 F. Supp. 154, 162-64 (D. Mont. 1979), *rev'd*, 650 F.2d 1104 (9th Cir. 1981). *See also*, Taylor, Ayer, & Parker, *Development of Tripartite Jurisdiction in Indian Country*, 22 U. Kan. L. Rev. 351, 353-58 (1979).

In 1980, the Supreme Court decided three cases that clarify some of the confusion which has surrounded this doctrine: Washington v. Confederated Tribes, 447 U.S. 134 (1980); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); and Central Mach. Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980). *See also infra* notes 7-17 and accompanying text.

4. General federal preemptive authority exists because of the power vested in Congress and the President by the supremacy clause of the Constitution. This authority has traditionally been used to evaluate conflicting regulations of states and the federal government. *See generally*, D. Getches, D. Rosenfelt & C. Wilkinson, Federal Indian Law, 295-99 (1979); J. Nowak, R. Rotunda & J. Young, Constitutional Law, 267-69 (1978); L. Tribe, American Constitutional Law, 376-401 (1978).

5. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980). *See also*

Federal authority to deal with Indian tribes was originally viewed by the Supreme Court as plenary and exclusive, and states were precluded from governing the Indians and activity on their reservations.[6] The Court in *Worcester v. Georgia* stated, "The treaties and law of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the Union."[7] The federal government's exclusive power to deal with Indian tribes arises under the authority vested in Congress and the President by the Constitution and federal statutes to make treaties and regulate commerce with the Indians.[8] This power is also derived from the special authority of the federal government over reservation land.[9]

Since *Worcester*, the states have made inroads into jurisdiction over tribal lands, eroding the plenary power of the federal government on reservations.[10] These changes have occurred gradually, resisted all along by the Indian tribes and more recently by Congress and the federal courts.[11] The inroads have

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Note, *Balancing the Interests in Taxation of Non-Indian Activities on Indian Lands*, 64 IOWA L. REV. 1459, 1474-80 (1979).

6. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 558-61 (1832).

7. *Id.* at 557.

8. Constitutional justification for congressional authority over Indian tribes has been found in the general welfare clause, the commerce clause, and the supremacy clause. Of these three, the commerce clause has been the primary source of federal regulatory power. *See* United States v. Mazurie, 419 U.S. 544, 554-55 (1975); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 159 (1973) (Douglas, J., dissenting); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 89-90 (1971).

9. F. COHEN, *supra* note 8, at 90-91.

10. This erosion was, in part, fostered by a series of congressional enactments aimed at assimilation of Indian tribes. *See, e.g.*, Indian General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-334, 339, 341-342, 348, 349, 381 (1976)); Act of Aug. 15, 1953, Pub. L. No. 280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (1976) and 28 U.S.C. § 1360 (1976)). These statutes, enacted to encourage non-Indians to settle on reservations, extended state jurisdiction to some areas of reservation activity. These Acts resulted in a confusing checkerboard pattern of Indians and non-Indians living, owning land, and doing business on reservations and left uncertain the scope of state versus Indian tribal jurisdiction over Indian lands. For a discussion of the problems inherent in multiple sovereignty see Taylor, Ayer, & Parker, *supra* note 3.

Not only did Congress, in its attempts to dissolve reservations, allow significant inroads of state jurisdiction, but the Supreme Court contributed to the same end by significantly modifying the *Worcester* doctrine at about the same time. *See* Draper v. United States, 164 U.S. 240 (1896); Utah & N. Ry. v. Fisher, 116 U.S. 28 (1885); United States v. McBratney, 104 U.S. 621 (1881).

11. In the last forty years both Congress and the Court have shifted from an assimilation policy to a policy of recognizing and encouraging the independence of tribal gov-

qualified the plenary federal authority outlined in *Worcester* and have required the courts to develop a new standard for evaluating the tripartite jurisdiction (federal, state, and tribal) which exists on Indian reservations.

In 1973, after struggling for many years to find a proper standard of review, the Supreme Court, in *McClanahan v. Arizona State Tax Commission*,[12] used the preemption doctrine to determine the degree of permissible state taxation on Indian reservations.[13] Since *McClanahan*, preemption has been one of the primary tests used by the Supreme Court in determining the scope of permissible state taxation on Indian reservations.

In three 1980 cases, the Supreme Court reaffirmed the primacy of the preemption doctrine in analyzing permissible state taxation.[14] The 1980 trilogy used a three-step approach in applying the preemption doctrine. The Court first identified the activity being taxed on the Indian reservation and the degree of federal regulation of that activity. Second, it determined the economic and political impact of state taxation on the tribe.

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ernments. *See, e.g.*, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) (denial of state authority to tax Indian income earned on Indian land); Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685 (1965) (denial of state authority to impose a gross receipt tax on a federally licensed business enterprise operating on the reservation); Arizona *ex rel.* Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969) (denial of state authority to arrest an Indian within a reservation for purposes of extradition), *cert. denied*, 396 U.S. 1003 (1970); Annis v. Dewey County Bank, 335 F. Supp. 133 (D.S.D. 1971) (denial of state authority to execute court orders affecting an Indian or his property).

12. 411 U.S. 164 (1973).

13. *Id.* at 170-72. In *McClanahan* the Court recognized the preemption doctrine as the primary mode of analysis in reviewing conflicts between states, Indian tribes, and the federal government. Although not the dominant theory in earlier cases, the preemption doctrine had long been used as part of the analysis of the proper role of the states on Indian reservations. *See, e.g.*, Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685, 688-92 (1965); *Worcester*, 31 U.S. (6 Pet.) at 561.

Other theories which have been used to determine the degree of permissible state intervention are the federal instrumentality doctrine and the noninterference test. The federal instrumentality doctrine appears to have been first set forth in United States v. Rickert, 288 U.S. 432, 439 (1903). It was a viable theory in the early 1900's but fell into disuse beginning with Helvering v. Mountain Producers Corp., 303 U.S. 376, 387 (1938). Although attempts have been made to ressurrect the theory, the courts have not responded. *See* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 150-51 (1973). The second theory, the noninterference test of Williams v. Lee, 358 U.S. 217 (1959), remains a valid theory today, but the courts predominantly use preemption to analyze tribal-state conflicts. *See, e.g.*, United States v. Mazurie, 419 U.S. 544, 556-59 (1975); *McClanahan*, 411 U.S. at 172.

14. Washington v. Confederated Tribes, 447 U.S. 134 (1980); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Central Mach. Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980).

Third, the Court balanced these factors against the asserted state interest in imposing the tax.

From these cases it appears that states are preempted from taxing income derived from tribal land or commerce so long as the tribes do not enjoy an artificial competitive advantage.[15] A comprehensive federal scheme regulates these tribal sources of revenue,[16] and the imposition of a state tax would restrict the tribes' ability to generate income to govern themselves.[17]

Thus far, however, the lower federal courts have not applied this analysis to state taxation of non-Indian mineral development on tribal lands[18] and have been reluctant to recognize that tribes have the power to tax.[19] An example of a lower federal court's reluctance to recognize federal preemption in this area is

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15. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, at 150; *McClanahan*, 411 U.S. at 179-81 (1973). *Cf. Confederated Tribes*, 447 U.S. at 156-57.

16. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145-53 (1980); Central Mach. Co. v. Arizona State Tax Comm'n, 448 U.S. 160, 163-66 (1980); Washington v. Confederated Tribes, 447 U.S. 134, 154-59 (1980); Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685, 691 n.18 (1965).

17. In Merrion v. Jicarilla Apache Tribe, 102 S. Ct. 894 (1982), the Supreme Court declined to decide whether an apparent congressional grant of state authority to tax mineral extraction was preempted by a tribal or a comprehensive federal taxing scheme. *Id.* at 917, n.17. The Court may have been indicating that the statutory grant of state authority to tax mineral development on executive order reservations would be enough to override both the preemptive power of a general federal scheme on these reservations and adverse effects on tribal governments. On the other hand, it has also been persuasively argued that 25 U.S.C. § 398a (1976) was not intended to grant states a general power to reservation lessees. *See*, Comment, *supra* note 2. A second argument is that the Indian Mineral Leasing Act of 1938, ch. 198, 52 Stat. 347 (codified at 25 U.S.C. 396a (1976)), repealed § 398a by implication.

It has been suggested that the purpose of the Indian Mineral Leasing Act was to create a unified system for the leasing of tribal lands consistent with the Indian Reorganization Act, repealing by implication prior inconsistent acts. *See* 25 U.S.C. § 396 (1976). Further, the continued application of § 398a is inconsistent with the other purposes of the Indian Mineral Leasing Act. *See infra* note 30. However, the Court appeared reluctant to extend state taxing authority of mineral development beyond areas in which Congress has specifically allowed it.

18. *See* Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971) (the court allowed the state to impose a possessor use tax on non-Indian lessees of land for commercial development absent specific preemption by federal regulations), *cert. denied*, 405 U.S. 933 (1972) Crow Tribe of Indians v. Montana, 469 F. Supp. 154 (D. Mont. 1979), *rev'd*, 650 F.2d 1104 (9th Cir. 1981).

19. *See* Crow Tribe of Indians v. Montana, 469 F. Supp. 154 (D. Mont. 1979), *rev'd*, 650 F.2d 1104 (9th Cir. 1981). In 1982 the Supreme Court settled this issue conclusively as to executive order reservations and, by dicta, as to other Indian lands. Merrion v. Jicarilla Apache Tribe, 102 S. Ct. 894 (1982). In this landmark decision the Court recognized tribal taxing authority as an inherent power of the tribe subject only to limitations imposed upon it by Congress. *Id.* at 901, 903, 907.

Crow Tribe of Indians v. Montana.[20]

In *Crow Tribe,* the United States District Court for the District of Montana was required to determine whether Montana could tax the non-Indian development of coal deposits on the Crow Indian Reservation. The court found that federal statutes and regulations governing mineral development were silent on both the method of taxing reservation coal and the immunization of non-Indian lessees from state taxation.[21] Therefore, absent an express tax exemption, Montana could impose a tax on non-Indians who entered Montana reservations to do business so long as the tax created no direct conflict with Indian sovereignty. After examining the effect of the tax on tribal sovereignty, the court concluded that there was no overriding harm to Crow self-government and no direct adverse economic effect which would preclude state taxation of non-Indian development.[22]

On appeal, the Ninth Circuit reversed the district court's ruling that the Crow Tribe's complaint failed to state a claim upon which relief could be granted.[23] The Montana severance tax was held to conflict with the policies underlying the Indian Mineral Leasing Act of 1938.[24] The court expressly declined, however, to address the issue of whether regulations governing mineral development on Indian reservations are so broad that there is no room for state involvement.[25]

III. Analysis

An analysis of the preemption doctrine in light of recent Supreme Court decisions indicates that the lower courts have failed to understand completely the scope of federal policies regulating the development of Indian mineral resources and the impact of state taxation on those policies. The result of this misunderstanding is the extension of state taxation into an area preempted by federal law.[26]

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20. 469 F. Supp. 154 (D. Mont. 1979), *rev'd,* 650 F.2d 1104 (9th Cir. 1981).

21. *Id.* at 163.

22. *Id.* at 161-63.

23. 650 F.2d 1104 (1981).

24. *Id.* at 1114.

25. *Id.* at 1111-12.

26. Federal statutes and policies apparently prohibit state taxation of Indian income and activities on reservations as well as taxation of Indian land. *See, e.g.,* Bryan v. Itasca County, 426 U.S. 373, 376-79 (1976); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 475-81 (1976); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973).

The preemption analysis used by the Supreme Court in deciding questions of federal Indian law should be applied in reviewing the scope of federal policies regulating the development of Indian mineral resources and the impact of state taxation on those policies. This analysis requires a balancing of the state interest in imposing the tax against the federal regulatory involvement in managing the development of Indian mineral resources and the impact of state taxation on tribal self-government in order to determine if the state's authority to tax is preempted.

A. Federal Regulatory Scheme

As early as 1891 Congress began regulating Indian minerals by authorizing the lease of certain Indian lands.[27] This authorization was enlarged by four later statutes.[28]

The next major legislative effort to establish federal policy for Indian mineral development came in 1938.[29] Congress enacted legislation which was designed to obtain royalties for the Indian tribes from the leasing of tribal lands for mining purposes and to harmonize mineral leasing matters with the Indian Reorganization Act.[30] The Indian Mineral Leasing Act gave the tribal council the authority to negotiate and enter into contracts for mineral development on the reservations subject to the ap-

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See also D. GETCHES, D. ROSENFELT & C. WILKINSON, FEDERAL INDIAN LAW 428-50 (1979); Craig, *The Indian Tax Cases—A Territorial Analysis*, 9 N.M.L. REV. 221, 223-38 (1979). The Supreme Court's decision in Washington v. Confederated Tribes, 447 U.S. 134 (1980), allowing the state to collect sales and cigarette taxes for sales on the reservation to nontribal purchasers, represents the greatest intrusion of state taxing jurisdiction yet allowed by the Court. *See* Clinton, *State Power Over Indian Reservations: A Critical Comment on Burger Court Doctrine*, 26 S.D.L. REV. 434 (1981).

27. Act of Feb. 28, 1891, ch. 383, 26 Stat. 795 (codified at 25 U.S.C. § 397 (1976)).

28. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 327 (1976). *See* Act of June 30, 1919, ch. 4, 41 Stat. 3, 31 (codified as amended at 25 U.S.C. § 399 (1976)); Act of May 29, 1924, ch. 210, 43 Stat. 244 (codified at 25 U.S.C. § 398 (1976)); Act of April 17, 1926, ch. 156, 44 Stat. 300 (codified at 25 U.S.C. § 400a (1976)); Act of March 3, 1927, ch. 299, 44 Stat. 1347 (codified as amended at 25 U.S.C. §§ 398a-398e (1976)).

29. Indian Mineral Leasing Act, ch. 198, 52 Stat. 347 (1938) (codified as amended at 25 U.S.C. §§ 396a-396g (1976)).

30. S. REP. No. 985, 75th Cong., 1st Sess. 2, 3 (1937). The stated purposes of the Indian Mineral Leasing Act are (1) "to obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes," (2) "to bring all mineral leasing matters in harmony with the Indian Reorganization Act," and (3) "to give the Indians the greatest return from their property." S. REP. No. 985, 75th Cong., 1st Sess. 2, 3 (1937) (Letter from Charles West, Acting Secretary of the Interior, to the President of the Senate, June 17, 1937); H. REP. No. 1872, 75th Cong., 3d Sess. 1, 3 (1938) (Letter from Charles West, Acting Secretary of the Interior, to Speaker of the House of Representatives, June 17, 1937).

proval of the Secretary of the Interior. The Act also gave the Secretary regulatory authority over all mining operations on land leased by the tribes.[31]

Pursuant to the authority given him under the Indian Mineral Leasing Act, the Secretary of the Interior promulgated rules under which tribal mineral lands may be leased.[32] It is not yet clear whether these regulations are comprehensive enough to preempt state intrusion into this area.[33]

A common argument used by lower federal courts in cases involving mineral development is that state taxation is not preempted since there is no body of federal law either governing the taxation of minerals underlying Indian land or immunizing non-Indian lessees from state taxation.[34] However, none of the federal regulations that the Supreme Court has held to preempt state taxation of Indian related activities contains specific language governing the taxation of non-Indians.[35] The lower federal courts appear to have accepted the argument advanced by respondents in *White Mountain Apache Tribe v. Bracker*: a state "may assess taxes on non-Indians engaged in commerce on the

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31. Indian Mineral Leasing Act, ch. 198, 52 Stat. 347 (codified as amended at 25 U.S.C. §§ 396a-396g (1976)).

32. *See* 25 C.F.R. §§ 1.4(a), 171.1-171.30, 173.1-173.29, 177.1-177.12 (1981). Congress has expressed a desire to give Indians full authority over mineral development and regulation. The scope of the regulations will be determined when a "study report" ordered by statutes is completed. *See* 30 U.S.C. § 1300 (Supp. III 1979). The proposed study will "include proposed legislation designed to allow Indian tribes to elect to assume full regulatory authority over the administration and enforcement of regulation of surface mining or coal on Indian lands." *Id.*

33. One court has recognized the pervasive nature of federal regulation of Indian mineral development. The court stated:

> Obviously, the United States, acting to safeguard the Indians in the conduct of their affairs, has established a comprehensive statutory and regulatory scheme covering mineral leasings on tribal lands. Such action, of course, is consistent with the historical relationship of guardian and ward existing between the United States and Indian tribes.

United States v. 9,345.53 Acres of Land, 256 F. Supp. 603, 605 (W.D.N.Y. 1966), *rev'd on other grounds sub nom.* United States v. Devonian Gas & Oil Co., 424 F.2d 464 (2d Cir. 1970). *See also* Dolan, *State Jurisdiction Over Non-Indian Mineral Activities on Indian Reservations*, 52 N.D.L. Rev. 265, 297-301 (1975).

34. Crow Tribe of Indians v. Montana, 469 F. Supp. 154, 163 (D. Mont. 1979), *rev'd*, 650 F.2d 1104 (9th Cir. 1980).

35. *See, e.g.*, White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Kennerly v. District Court of Montana, 400 U.S. 423 (1971); Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965). The Supreme Court in *White Mountain Apache* addressed this argument and rejected the proposition that an express congressional statement of preemption is required in order to preempt a particular state law. 448 U.S. at 150-51.

reservation whenever there is no express congressional statement to the contrary."[36] However, the Supreme Court responded tersely to that argument: "That is simply not the law."[37] Rather, the Court stated that the appropriate test is to evaluate the general federal regulatory scheme in the area to see if there is room for further state involvement.[38]

Examination of the regulations which have been held to preempt state taxation schemes in Indian law provides valuable insight into the scope of state intervention in non-Indian mineral development on reservations. By comparing federal regulations covering Indian mineral development with those federal regulations that have been held by the Supreme Court to preempt state taxing schemes, one can see compelling reasons justifying the preemption of state taxation of non-Indian mineral development on reservations.

The two regulatory schemes that have been held by the Supreme Court to preempt minimal state intervention through taxation are those covering tribal forestry development and non-Indian trading on reservations.[39] In *Warren Trading Post Co. v. Arizona Tax Commission,*[40] the Supreme Court refused to allow the State of Arizona to impose a two percent sales tax on non-Indian revenue generated from sales in a retail trading post on the Navajo Indian reservation. The Court pointed to the detailed federal regulations controlling the actions of traders on reservations and to traditional practice as evidence of an exclusive federal regulatory scheme.[41] The Court concluded that "Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders,"[42] particularly where the state has no duties to, or responsibilities over, the Indians on the

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36. 448 U.S. 136, 150-51 (1980). This argument has found solid support in the lower courts. *See, e.g.,* Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184, 1186-87 (9th Cir. 1971), *cert. denied,* 405 U.S. 933 (1972); Crow Tribe of Indians v. Montana, 469 F. Supp. 154, 158 (D. Mont. 1979), *rev'd,* 659 F.2d 1104 (9th Cir. 1981). *See also* Craig, *supra* note 26, at 251-52.

37. 448 U.S. at 151.

38. *Id.*

39. *Id.* at 145-49 (discussion of federal forestry regulations); Central Mach. Co. v. Arizona State Tax Comm'n, 448 U.S. 160, 163-66 (1980) (discussion of federal regulation of regulated business on reservations); Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 686-91 (1965) (discussion of federal regulation of Indian traders).

40. 380 U.S. 685 (1965).

41. *Id.* at 687-88.

42. *Id.* at 690.

reservation.[43]

Federal forestry regulations have also been held by the Supreme Court to preempt state intervention. The Court held in *White Mountain Apache Tribe v. Bracker* that Arizona could not impose a motor carrier license and fuel use tax on the activities of non-Indian timber developers who limited their commercial activities to the reservation.[44] Like government regulation of Indian trading, "[f]ederal policies with respect to tribal timber have a long history."[45] The Court also found extensive congressional statutes and detailed regulations covering the area of timber development.[46] Because of comprehensive regulations, the impact on the tribe, and the limited state use of the taxes, the Court did not allow the State of Arizona to tax the non-Indian loggers.

Like forestry and trading regulations, the laws governing mineral development are created by acts of Congress and include detailed regulations promulgated by federal officials to whom broad regulatory authority is given under those acts. As with forestry regulations, the Secretary of the Interior has been given regulatory power over mining activities on Indian reservations.[47] Using this authority, the Secretary has outlined the terms and conditions of bids for mineral leases. He may reject any bid he believes not to be in the best interest of the tribe. If a bid is accepted, the Secretary must also approve the resulting lease before it becomes valid.[48] When the lease has been accepted and the work begins, the Secretary and his agents have

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43. *Id.* at 691.

44. 448 U.S. 136, 139-40 (1980). The statute imposed a two and one-half percent tax on the gross receipts of the carrier, and a fuel use tax which amounted to eight cents per gallon of fuel used. *Id.*

45. *Id.* at 145 n.12.

46. The Court specifically noted that the United States owned the timber for the benefit of the tribe, that congressional consent is necessary to harvest the trees, that "the Secretary of the Interior is granted broad authority over the sale of timber on the reservation," that extensive regulations have been enacted to control timber development, and that the Bureau of Indian Affairs exercises "literally" daily supervision over the harvesting of the timber. *Id.* at 138-39, 145-47.

47. *Compare* 25 U.S.C. §§ 396a-396e, 399 (1976) (Secretary of the Interior's authority over Indian mineral development) *with* 25 U.S.C. §§ 406, 407, 466 (1976); 25 C.F.R. §§ 141.13, .14, .4 (1981) (Secretary of the Interior's authority over Indian forestry development); *and* 25 U.S.C. §§ 261, 262, at 25 C.F.R. §§ 251.14, .16-.19, .21-.25 (1971) (Commissioner of Indian Affairs' authority to regulate Indian traders).

48. *Compare* 25 U.S.C. § 396a (1976) (Secretary of Interior's authority to determine which leases will be accepted) *with* 25 C.F.R. § 141.13 (1981) (Secretary of Interior's authority to determine the terms and conditions of timber sales).

the right to examine the books and records of the lessees.[49]

The Secretary has also been given complete control over lessee operations pursuant to such leases. This control extends to "[a]ll operations under any oil, gas, or other mineral lease issued pursuant to the terms of any act affecting restricted Indian lands."[50] The Secretary has outlined extensive regulations which govern mineral development on reservations. These regulations include, among other things, the authority to inspect the premises; to determine royalties and schedules for payment of those royalties; to oversee production and, whenever possible, prevent the waste of Indian land and resources; to receive the reports and payments of revenue generated from development; to impose penalties on those who violate the regulations; and to regulate all aspects of mineral leasing.[51] Clearly the regulations covering the development of minerals on Indian reservations are as extensive as those dealing with Indian trading and forest management on Indian lands.

These statutes and regulations provide a substantial basis for federal preemption because of their comprehensive application to the field of mineral development on Indian land. Such statutes, coupled with the authority of the Secretary of the Interior to extend the regulations where necessary, supply a strong argument in favor of the preemption of state taxation. An even more compelling argument arises, however, from the adverse effects of state taxation on tribal self-government.

B. Impact on Tribal Self-government

In addition to the pervasive federal regulatory scheme, another factor to be considered in analyzing the preemption doctrine is the substantial economic burden imposed on tribal governments when states tax natural resources extracted from Indian lands. Preemption aside, the economic and political impact of state interference with the tribes' right to govern themselves may be enough to preclude state taxation.[52] Certainly the

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49. *Compare* 25 U.S.C. § 399 (1976) (Secretary of Interior's authority to supervise all aspects of leasing and production) *with* 25 C.F.R. § 141.4 (1981) (Secretary of Interior's authority to supervise forestry procedure where necessary) *and* 25 C.F.R. § 251.22 (1981) (Commissioner of Indian Affairs' authority to insure that Indians are charged equitable prices).

50. 25 U.S.C. § 396d (1976).

51. 25 C.F.R. § 171.1-.3, .13, .18, .19, .22 (1981).

52. *Crow Tribe*, 650 F.2d at 1115-17.

impact is also a major factor in determining application of the federal preemption doctrine to Indian tribes.

In *Washington v. Confederated Tribes*,[53] the Supreme Court recognized the validity of the economic impact argument, but found it inapplicable to the specific facts of that case.[54] The Indian tribes in *Confederated Tribes* attempted to profit from their sales tax exemption by bringing cigarettes onto the reservation and selling them to non-Indians at a reduced price. The Court allowed the state to tax the cigarette sales since cigarette sales had no substantial connection with reservation land, the tax did not burden the commerce that would have existed on the reservation in the absence of the tax exemption, the tax did not have a significant effect on the tribe's right to self-government, and there were no comprehensive federal regulations that covered the area.[55] However, the Supreme Court made clear that when a state tax imposes a significant economic burden on a tribe and is contrary to federal policy, then the effects of that tax will be a major factor in the court's application of the preemption doctrine.[56]

In mineral development, the economic impact of the state tax on Indian tribes is evident. The vast mineral deposits found on Indian reservations provide a major souce of potential tribal revenues. But until the tribes achieve the financial stability and technological expertise to develop their own mining operations, they are dependent on non-Indian developers.[57] State taxation of non-Indian developers, therefore, will limit tribal revenues that could be used to improve economic conditions on reservations and to encourage tribal development. The tribes are marketing nonrenewable resources that belong to them, that are a part of their land, and which, once mined, are no longer a part of the tribes' resource base. Unlike the tribes in *Confederated*

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53. 447 U.S. 134 (1980).

54. *Id.* at 156-57.

55. *Id.* at 154-59.

56. *Id.* at 155-58. *See also, White Mountain Apache Tribe,* 448 U.S. at 151 n.15.

57. To understand the conflict facing Indian mineral developers, one need only look at the costs of developing coal. For example, since 1975, Westmoreland Resources, Inc., a developer of coal on Crow tribal mineral lands in Montana, has committed more than $80 million to its efforts to develop Crow Reservation coal. This tremendous outlay of resources and technology could not be undertaken by the Crow Tribe when viewed in light of the current $5.5 million the tribe receives in royalties, its annual budget of less than $1.3 million, and the fact that tribal members have completed an average of 9.4 years of school. Reply Brief of Appellant at 3, Crow Tribe of Indians v. Montana, 650 F.2d 1104 (9th Cir. 1981).

Tribes, Indian tribes selling rights to develop their minerals are not marketing a state tax exemption; they are marketing their land. Mineral developers have come to the reservations because of the tribes' own vast mineral resources. These reserves are tribal assets and should be used to supplement the tribal funds necessary for self-government.

In *Confederated Tribes,* the tribe was competing with the state for revenues derived from the sale of cigarettes, goods not produced on the reservation.[58] Non-Indians were coming to the reservations to profit from the lower prices the Indians were able to offer because of their sales tax exemption. In the development of mineral resources, however, this artificial competition does not exist. Instead, both the tribe and the states are competing for the same economic rents to be obtained from the production of minerals owned by the tribes, and the tax is imposed on revenues derived from minerals extracted from tribal lands. Thus, if the states impose heavy taxes on the revenue from mineral production, the tribes must either settle for reduced royalties or risk forcing business off the reservations by charging a higher price for the right to develop minerals than the developers are willing to pay.[59] Such a noncompetitive posture is not consistent with the overriding federal objectives concerning the development of Indian resources and the maximization of revenues from that development.[60]

A state mineral tax also inhibits tribal self-government by decreasing the tribes' ability to negotiate and enter into contracts with mineral developers. State taxation limits the tribes' flexibility in negotiating the terms of their contracts with developers. Traditionally, tribes have used their bargaining position

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58. 447 U.S. at 156-58.

59. *Crow Tribe,* 650 F.2d at 1116.

60. 25 C.F.R. § 1.4(a) (1981) limits state action over the development of tribal property. This section provides in part:

> Except [where expressly made applicable by secretarial action for the benefit of affected Indians], 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, 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 . . . .

Id. The Ninth Circuit upheld the preemptory power of this regulation in Santa Rosa Band of Indians v. King County, 532 F.2d 655, 664-65 (9th Cir. 1975), *cert. denied,* 429 U.S. 1038 (1977).

with developers to ensure tangential benefits for the tribes and individuals living on the reservations.[61] The imposition of a state tax on mineral development and the resulting decreased profit margin places the tribes in a less favorable negotiating stance—the tribes must make more concessions to developers to entice them to develop tribal resources.

Since a state tax conflicts not only with tribal self-government but also with federal policy covering the area of mineral development, only the third step of the Supreme Court's preemption analysis remains as a possible justification for the tax. For the tax to be valid, the state's interest in the tax would have to outweigh the other two factors.

C. *State Interest*

An overview of state severance taxes shows the absence of a compelling state interest to justify the imposition of a severance tax on Indian reservations. The Montana severance tax on minerals extracted within its boundaries offers a good example of the general purpose of most severance taxes.[62] The legislative history of the Montana severance tax statute shows that the main purpose of the tax is to generate income for the state and to stabilize and restructure methods of obtaining state revenues.[63] The statute contains neither specific provisions for using the revenues to regulate mineral development within the state nor provisions for aiding Indian reservations or regulating the companies doing business on the reservations.[64] While it is true that a state tax does not necessarily need to be used to benefit

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61. For example, the Navajo Tribal Code emphasizes the need for preferential treatment of tribal members by business developers on the reservations. *See* 5 NAVAJO TRIBAL CODE Title 5 (1969).

62. *See* MONT. CODE ANN. §§ 15-35-101 to -110, 15-23-70 to -74.

63. MONT. CODE ANN. § 15-35-101(2) (1981) outlines the following purposes of the tax:

> (a) allow the severance taxes on coal production to remain a constant percentage of the price of coal;
> (b) stabilize the flow of tax revenue from coal mines to local government through the property taxation system;
> (c) simplify the structure of coal taxation in Montana, reducing tax overlap and improving the predictability of tax projections; and
> (d) accomplish the foregoing purposes by establishing categories of taxation which recognize the unique character of coal as well as the variations found within the coal industry.

Id.

64. MONT. CODE ANN. § 15-35-108 (1981).

or regulate those who are taxed,[65] the absence of these factors shows that the primary purpose of the Montana tax is to generate revenues for the state.[66]

Generation of revenues alone has not been deemed a state interest sufficient to overcome preemption challenges.[67] Rather, there must be some significant regulatory or equitable purpose for the tax.[68] For example, in *Oklahoma Tax Commission v. Texas Co.*,[69] the Court validated Oklahoma's tax, stating,

> [The Oklahoma tax is a] small tax . . . exact[ed] to satisfy [the taxpayers'] shares of the state's expense in maintaining and administering its proration program. That system works for [the taxpayers'] benefit in performing their producing function . . . by stabilizing production, eliminating waste, and preventing runaway competition . . . .[70]

This tax, in contrast to the Montana severance tax, had a legitimate regulatory function and provided a service for those being taxed. In addition, the tax had only a minimal impact on those taxed.[71]

On the other hand, in *White Mountain Apache Tribes v. Bracker*,[72] the Court considered a state tax imposed for the principal purpose of raising revenues and concluded,

> Where, as here, the Federal Government has undertaken comprehensive regulation of the harvesting and sale of tribal timber, where a number of the policies underlying the federal regulatory scheme are threatened by the taxes respondents seek to impose, and where respondents are unable to justify the taxes except in terms of a generalized interest in raising revenue, we believe that the proposed exercise of state authority is impermissible.[73]

In summary, when a state tax has aided some state regulatory function or benefitted the person or group taxed without placing an unjustifiable burden on that person or group, the Su-

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65. Thomas v. Gay, 169 U.S. 264, 280 (1898).

66. *See White Mountain Apache Tribe*, 448 U.S. at 150; *Colville*, 447 U.S. at 156-58.

67. *See White Mountain Apache Tribe*, 448 U.S. at 150-51; Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342, 351 (1949).

68. *White Mountain Apache Tribe*, 448 U.S. at 150-51.

69. 336 U.S. 342 (1949).

70. *Id.* at 351.

71. *Id.*

72. 448 U.S. 136 (1980).

73. *Id.* at 151.

preme Court has allowed state taxation. The Court has never allowed state taxation of non-Indians on reservations for the mere purpose of generating state revenues when extensive federal regulations cover the area and taxation would adversely affect the tribe. The state interest in generating revenues is too weak to overcome the federal regulatory scheme for mineral development on reservations and the federal policies promoting Indian development of minerals and expanded self-government. The balance is against imposition of state severance taxes on non-Indian lessees.

IV. Conclusion

The application of the preemption doctrine in Indian law bars state imposition of severance taxes on non-Indian lessees developing and extracting minerals from recognized Indian lands. Preemption is based on the pervasiveness of federal regulation in a particular area, not on the existence of language explicitly addressing taxation. The courts should therefore recognize the extensive federal involvement in Indian mineral development and the negative impact state severance taxes would have on tribal self-government. After balancing these interests against the state's principal objective of raising revenues, the courts should invalidate current attempts by states to tax mineral development on Indian lands. Admittedly, this will reduce state revenues, but until the states can show an overriding state interest justifying taxation on non-Indian lessees, or until Congress expressly allows such taxation, state intrusion in the area of tribal mineral development should not be permitted.

S. David Colton