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The Developing Test for State Regulatory Jurisdiction in Indian Country: Application in the Context of Environmental Law

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The extent of state jurisdiction over Indians and Indians lands has created conflicts between the federal, state, and tribal governments since the nation's inception.[1] Congressional responses to this inveterate problem have fluctuated significantly.[2] At times, Congress has favored the assimilation of Indians into the majority society and the destruction of tribal identities,[3] with consequent increases in state jurisdiction. At other times, Congress has favored separatism for Indians and the preservation of tribal cultures and governments.[4]

Despite congressional fluctuations, states have consistently attempted to exercise jurisdiction in Indian country.[5] In 1832, the Supreme Court,

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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); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

[2] *See* S. TYLER, A HISTORY OF INDIAN POLICY (1973); Wilkinson & Biggs, *The Evolution of Termination Policy*, 5 AM. INDIAN L. REV. 139 (1977). *See generally* P. MAXFIELD, M. DIETRICH & F. TRELEASE, NATURAL RESOURCES LAW ON AMERICAN INDIAN LANDS 17–38 (1977). Congressional fluctuations such as "[r]emoval, allotment, reorganization, and termination [have] coincided with significant historical trends in the demand for and availability of natural resources." R. BARSH & J. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 289 (1980).

[3] *See, e.g.,* General Allotment (Dawes) Act, Act of Feb. 8, 1887, ch. 119, 24 Stat. 388; H.R. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132 (1953) (Congress adopted a "termination" policy).

[4] *See, e.g.,* Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450–450n (1976); Indian Financing Act of 1974, 25 U.S.C. §§ 1451–1543 (1976); Indian Reorganization (Wheeler-Howard) Act, Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461–492 (1976)); Indian Removal Act, Act of May 28, 1830, ch. 148, 4 Stat. 411; The Non-Intercourse Act, Act of July 22, 1790, ch. 33, 1 Stat. 137 (for a list of other Non-Intercourse Acts, see P. MAXFIELD, M. DIETRICH & F. TRELEASE, *supra* note 2, at 20 n.15).

[5] *See* Note, *Taxation: State Transaction Privilege Tax: An Interference With Tribal Self-Government*, 7 AM. INDIAN L. REV. 319, 332 (1979).

> Congress defined Indian country in 1948:
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> [T]he term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United

in the seminal case of *Worcester v. Georgia*,[6] held that state laws had no effect within Indian reservations. Since *Worcester*, the Court has allowed increasingly significant state incursions into tribal sovereignty in response to state pressures.[7] In two landmark cases, *Williams v. Lee*[8] in 1959 and *McClanahan v. Arizona State Tax Commission*[9] in 1973, the Court attempted to resolve a morass of decisions[10] into a coherent doctrine of state jurisdiction in Indian country. Each case not only upheld greater state incursions into tribal sovereignty than permissible under previous decisions but also heralded even further incursions. In the wake of the most recent decisions regarding state regulatory jurisdiction,[11] the case law is once again in disarray.[12] The potential for further unprecedented state incursions into tribal sovereignty exists despite the professed current congressional policy to encourage tribal self-determination.[13]

States are likely to seek these unprecedented incursions in the context of environmental law. Some Indian lands are rich in mineral resources.[14] With the current emphasis on the discovery and development

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States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (1976). Although the definition was a part of a criminal code, the Court has extended the definition to civil judicial and regulatory jurisdiction. DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975).

[6] 31 U.S. (6 Pet.) 515 (1832).

[7] *Compare Worcester, id., with* United States v. McBratney, 104 U.S. 621 (1881); *compare McBratney, id., with* Washington v. Confederated Tribes of Colville, 447 U.S. 134 (1980).

[8] 358 U.S. 217 (1959).

[9] 411 U.S. 164 (1973).

[10] *See generally* R. BARSH & J. HENDERSON, *supra* note 2, at 137–202 (discussion of the Court's confusion of the tribal sovereignty and state jurisdiction doctrines).

[11] Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Washington v. Confederated Tribes of Colville, 447 U.S. 134 (1980).

[12] "For the past thirty years, however, [the courts] have confused the issues so thoroughly that case outcomes and congressional declarations of policy bear little relation to one another." R. BARSH & J. HENDERSON, *supra* note 2, at 137.

[13] *See, e.g.*, Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450–450n (1976); Indian Financing Act of 1974, 25 U.S.C. §§ 1451–1543 (1976). *See also* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143, 143 n.10 (1980).

[14] Reservations contain deposits of coal, oil, gas, phosphate, uranium, and iron. *See* FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION, TASK FORCE SEVEN: RESERVATION AND RESOURCE DEVELOPMENT AND PROTECTION 46–47 (1976) [hereinafter cited as TASK FORCE SEVEN REPORT]; Note, *Balancing the Interests in Taxation of Non-Indian Activities on Indian Lands*, 64 IOWA L. REV. 1459, 1459 (1979).

of domestic energy sources, the potential for extensive mining exists on some reservations.[15] Moreover, the present congressional policy of tribal self-determination encourages economic development and independence and, therefore, possibly industrial and resource development. Consequently, Indian reservations may become sources of increasing pollution.[16]

Some states already have attempted to enforce their environmental protection laws on Indian reservations,[17] and more states will attempt

[15] "[R]ecent mineral discoveries and the increased prices of energy resources have made many reservations viable locations for real economic development." TASK FORCE SEVEN REPORT, *supra* note 14, at 132; *see also id.* at 146; COUNCIL OF STATE GOVERNMENTS, STATE ENVIRONMENTAL ISSUE SERIES: INDIAN RIGHTS AND CLAIMS 26 (1977) [hereinafter cited as COUNCIL].

In the state of Washington, there have been two major mineral developments within Indian reservations over the last five years. A uranium enrichment operation was developed on the Spokane Reservation and an open-pit molybdenum mining operation is being developed on the Colville Reservation. If the mine is fully developed, it would be the tenth largest open-pit mining operation in the world. Non-Indians would operate the mine. Letter from Charles B. Roe, Jr., Senior Assistant Attorney General, Olympia, Washington (Feb. 4, 1982) [hereinafter cited as Roe].

In Idaho, the Simplot Corporation and the FMC Corporation have phosphate mines and plants located within the Fort Hall Reservation of the Shoshone-Bannocks. Letter from Jack Hockberger, Deputy Attorney General, Natural Resources Division, Boise, Idaho (Feb. 5, 1982) [hereinafter cited as Hockberger].

[16] For example, air emissions from phosphate plants on the Fort Hall Reservation drift downwind over Pocatello, Idaho. Hockberger, *supra* note 15. *See* Schaller, *The Applicability of Environmental Statutes to Indian Lands*, AM. INDIAN J., Aug., 1976, at 15, 15.

[17] *See, e.g.*, Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 658 (9th Cir. 1975) (California wanted a state environmental impact report prepared); United States v. County of Humboldt, No. C-74-2526 RFP (N.D. Cal. Sept. 22, 1977) (held that the California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000-21176 (West 1976), was not enforceable against the Hoopa Valley Tribe, the Hoopa Valley Housing Authority, or non-Indian contractors and employees); Norvell v. Sangre De Cristo Development Co., 372 F. Supp. 348, 352 (D.N.M. 1974), *rev'd on other grounds*, 519 F.2d 370 (10th Cir. 1975) (New Mexico sought to enforce its Water Quality Act, N.M. STAT. ANN. §§ 75-39-1 to 75-39-12 (1953), against non-Indian lessees); ARIZ. REV. STAT. ANN. §§ 36-1865, 36-1901 (1974) (Arizona's legislature asserts that its air and water pollution laws apply to tribal lands); COUNCIL, *supra* note 15, at 35 n.48 (the North Dakota Attorney General's office has concluded that the state's Air Pollution Control Legislation, Water Pollution Control Legislation, Solid Waste Management Program, Pesticide Control, Strip-Mine Reclamation, and Water Appropriation laws apply to Indians and Indian lands); Comment, *The Applicability of the Federal Pollution Acts to Indian Reservations: A Case for Tribal Self-Government*, 48 COLO. L. REV. 63, 86 n.126 (1977) (New Mexico's Attorney General has concluded that the state's air pollution regulations apply to reservations); Memorandum on State Jurisdiction Over Indian Reservations from Stephen C. Pohl, Legal Intern, Mont. St. Dep't of Nat. Resources & Conservation to Donald

to do the same. In some situations, states clearly have a legitimate interest in controlling pollution on Indian reservations.[18] Most types of pollution, by nature, cannot be confined within the political boundaries of a reservation.[19] The spread of pollution from an on-reservation source may be of considerable concern to a state. Furthermore, current federal environmental protection programs strongly encourage state participation,[20] and in the future, independent state and local environmental protection programs may be emphasized.[21] Hence, the extent of state regulatory jurisdiction in Indian country is likely to be tested in the context of environmental law.[22]

Part I of this Comment will trace the development of state jurisdictional doctrine from the *Worcester* tribal sovereignty doctrine through the *Willams* infringement test to the *McClanahan* preemption analysis. Part II will then explore the recent cases involving state regulatory jurisdiction. Based on those cases, this Comment will project what test the Court is developing for state regulatory jurisdiction. Part III will then apply the projected test to four hypothetical situations within an

D. MacIntyre, Chief Legal Counsel (Aug. 12, 1980) (concludes that the Montana Major Facility Siting Act, MONT. REV. CODES ANN. §§ 75-20-101 to 75-20-1105 (1978), applies to reservations). *See also* note 22 *infra*.

[18] *See* text accompanying notes 146–51 *infra*.

[19] *See* Will, *Indian Lands Environment—Who Should Protect It*, 18 NAT. RESOURCES J. 465, 471 (1978).

[20] *See, e.g.*, Water Pollution Control Act, 33 U.S.C. §§ 1251–1376 (1976); Clean Air Act, 42 U.S.C.A. §§ 7401–7642 (West 1980). *See* COUNCIL, *supra* note 15, at 24; Brecher, *Federal Regulatory Statutes and Indian Self-Determination: Some Problems and Some Proposed Legislative Solutions*, 19 ARIZ. L. REV. 285, 309–10 (1978); Will, *supra* note 19, at 474.

[21] Of the Clean Air Act's 133 existing sections, the Reagan administration proposes to repeal 70 and relax 58. Hayes, *Coalition to Fight Pollution, Safety Cuts*, The Oregonian, Oct. 2, 1981, § C, at 1, col. 1. If federal involvement in environmental protection lessens, state environmental programs will increase in importance.

[22] "Extensive state involvement in state and federally initiated environmental programs has increased the incidence of conflicting state and tribal claims to jurisdiction." COUNCIL, *supra* note 15, at 12. Also, the recognition of the importance of natural resources on tribal lands increases the possibility of state and tribal jurisdictional conflicts. Note, *State Jurisdiction on Indian Reservations*, Moe v. Confederated Salish and Kootenai Tribes, 13 LAND AND WATER L. REV. 1035, 1046 (1978). For example, Washington's Office of the Attorney General has stated that state pollution control laws, implemented consistently with federal pollution laws, apply to mineral developments within reservations. A large open-pit molybdenum mine is being developed on the Colville Reservation in Washington. The Tribe contends that state water laws and state pollution control laws are not applicable to the mine. Roe, *supra* note 15. Idaho's Attorney General believes that the phosphate mines and plants on the Fort Hall Reservation may create a state regulatory jurisdiction problem. There may also be jurisdictional problems over development on the Duck Valley Reservation in Southwest Idaho *and* Northern Nevada. Hockberger, *supra* note 15.

environmental regulation context. The Comment finally will examine the implications of the test in the environmental context and will suggest how tribes may avoid increased state incursions.

I

THE HISTORICAL DEVELOPMENT OF STATE REGULATORY JURISDICTION DOCTRINES

A. Worcester v. Georgia*: Tribal Sovereignty*

Although *Worcester v. Georgia*[23] involved state criminal jurisdiction, its doctrines, like those of many other criminal and civil jurisdiction cases, were subsequently applied in the context of state regulatory jurisdiction.[24] In *Worcester*, the defendants were non-Indians who resided within the reservation boundaries. The state charged that the defendants had violated a state criminal statute directed at on-reservation activities. The issue was whether the state criminal statute was repugnant to the Constitution, laws, and treaties of the United States.[25]

Writing for the Court, Chief Justice Marshall established that the Indian tribes, although subject to federal authority, were sovereigns independent of the states.[26] The United States, in its treaties with the Indian tribes, sought the preservation of the Indian sovereign nations.[27] Because the federal treaties were the supreme law of the land, state laws could have no effect within Indian reservations.[28] In establishing the basic doctrine of tribal sovereignty, *Worcester* effectively built a wall around Indian reservations, apparently impenetrable by state laws.

The *Worcester* wall stood undisturbed for nearly fifty years.[29] In 1881, the Court held, in *United States v. McBratney*,[30] that the state had criminal jurisdiction over a non-Indian defendant for the murder of another non-Indian on the reservation.[31]

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[23] 31 U.S. (6 Pet.) 515 (1832).

[24] *See, e.g.*, Williams v. Lee, 358 U.S. 217 (1959); The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866) (state could not tax lands belonging to an Indian tribe).

[25] Worcester v. Georgia, 31 U.S. (6 Pet.) at 537–42.

[26] *Id.* at 552, 559–61.

[27] *Id.* at 557.

[28] *Id.* at 559–61.

[29] *See* note 24 *supra*. *See generally* R. BARSH & J. HENDERSON, *supra* note 2, at 31–134 (the historical development of the tribal sovereignty doctrine).

[30] 104 U.S. 621 (1881).

[31] *See generally* P. MAXFIELD, M. DIETRICH & F. TRELEASE, *supra* note 2, at 81–82 (criticism of the *McBratney* modification of *Worcester*); Dolan, *State Jurisdiction Over Non-Indian Mineral Activities on Indian Reservations*, 21 ROCKY MTN. MIN. L. INST. 475, 486–87 (emphasizes the unusual facts of *McBratney*; the creation of the territory or state preceded the creation of the reservation).

After *McBratney*, the Court upheld many further state incursions into tribal sovereignty.[32] Unfortunately, the Court decided these subsequent cases without any clear doctrinal development. Hence, the once clear *Worcester* doctrine of tribal sovereignty was left in disarray.[33]

B. Williams v. Lee*: The Infringement Test*

The Court decided the landmark case of *Williams v. Lee*[34] in 1959, 127 years after *Worcester*. In *Williams*, a non-Indian plaintiff brought a civil action against an Indian defendant to collect for goods sold on the reservation. The Court noted that the basic policy of *Worcester* remained, although modified.[35] Synthesizing the post-*Worcester* cases, the Court articulated a test for state jurisdiction on a reservation—the now famous *Williams* infringement test: "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."[36] Moreover, the Court recognized that, in any event, if only Indians are involved in an on-reservation dispute, the states have no jurisdictional power to intercede.[37]

In *Williams*, the Court concluded that state civil jurisdiction would

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[32] *See, e.g.*, Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342 (1949) (the Court upheld a state tax on the activities of non-Indian mineral lessees); Thomas v. Gay, 169 U.S. 264 (1898) (the Court allowed a state to impose a tax on the cattle (as property) of non-Indian lessees who grazed the cattle on the leased reservation lands); Utah & Northern Ry. Co. v. Fisher, 116 U.S. 28 (1885) (the Court upheld a state tax on non-Indian fee land located within a reservation).

"As the tribes moved from an isolated reservation existence and became involved in exchanges with surrounding state communities, a large area of uncertainty evolved. Increased interaction between tribes and state citizens raised taxation issues that had not been specifically addressed by Congress." Note, *supra* note 5, at 319.

[33] Post-*Worcester* cases developed "a hodgepodge of law that offers little guidance for either the state or the tribe." Note, *supra* note 5, at 319; *see* Barsh, *Issues in Federal, State and Tribal Taxation of Reservation Wealth: A Survey and Economic Critique*, 54 WASH. L. REV. 531, 533 (1979). *See generally* Dolan, *supra* note 31, at 486–92. For example, the Court, ignoring the *Worcester* tribal sovereignty doctrine, held that a state could not tax a non-Indian mineral lessee because of the federal instrumentality doctrine. Under that doctrine, which is closely related to the doctrine of intergovernmental immunities, the lessee was considered to be an instrumentality or agent of the federal government. The state tax, therefore, would interfere with the functioning of the federal government. Choctow & Gulf R.R. v. Harrison, 235 U.S. 292 (1914), *overruled*, Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342, 365 (1949). When the Court then rejected the federal instrumentality doctrine in Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342 (1949), it was able to uphold a state tax on the activities of non-Indian mineral lessees. *Id.*

[34] 358 U.S. 217 (1959).

[35] *Id.* at 219.

[36] *Id.* at 220.

[37] *Id.*

"no doubt" infringe on the right of the Indians to govern themselves.[38] In support of its conclusion, the Court offered only one unexplained assertion: state jurisdiction would undermine the tribal court's authority over reservation affairs.[39] The poorly supported conclusion may have indicated that any infringement, however minor, on a tribal government's domain would bar state jurisdiction. The Court also failed to state whether or not any "governing Acts of Congress" existed.

Williams not only reaffirmed *Worcester*'s basic policy of tribal sovereignty in Indian country, but it also attempted to enunciate a clear test for state jurisdiction. The test, in light of the continuing vitality of *Worcester*, recognized a presumption that the states lack jurisdiction in Indian country; a state law would not apply unless the state proved the law would not infringe on tribal self-government.[40]

Williams, however, left two important questions unanswered. First, the Court did not adequately define "infringement," and to this day, the Court has not resolved this question satisfactorily.[41] Second, the Court did not discuss what congressional actions would constitute a "governing Act of Congress." The Court subsequently has answered, though not always explicitly, this second question. One "governing Act of Congress" is the comprehensive federal regulatory scheme that leaves

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[38] *Id.* at 223.

[39] *Id.*

[40] *See* Dolan, *supra* note 31, at 492–95. *But see* text accompanying notes 108–09 *infra* (the presumption arguably has shifted in favor of state jurisdiction).

[41] Perhaps because of this ambiguity, the Court confused the infringement test just three years after *Williams*. Organized Village of Kake v. Egan, 369 U.S. 60 (1962), involved the state regulation of fishing by nonreservation Indians. The Court, going beyond the facts in *Kake*, misread the *Williams* test and overbroadly restated it: "[E]ven 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." *Id.* at 75. Hence, *Kake* extended the infringement test to situations involving only Indians on a reservation, while *Williams* had said that states did not have jurisdiction over disputes between Indians on the reservation. More significantly, the Court in *Kake* disregarded *Worcester*'s basic policy of tribal sovereignty in Indian country and instead created a presumption of state jurisdiction. *See* Dolan, *supra* note 31, at 494–95.

In Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) (companion case to McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973)), New Mexico wanted to impose a gross receipts and use tax on a tribally operated off-reservation ski resort. In upholding the state tax, the Court repeated the infringement test as stated in *Kake*. *Mescalero*, 411 U.S. at 148.

Both *Kake* and *Mescalero* arguably are consistent with *Williams* if limited to their facts; both involved state jurisdiction in an off-reservation context, while *Williams* involved on-reservation jurisdiction. *See McClanahan*, 411 U.S. at 176 n.15. *See generally* Dolan, *supra* note 31, at 494–95. Nevertheless, both cases not only failed to clarify what constituted an "infringement" but also added to the obscurity of the infringement test by misstating it. *See* Dolan, *supra* note 31, at 494–95.

no room for a state to impose additional burdens upon licensed non-Indians who trade with Indians on a reservation.[42] The Court also has held that Public Law 280[43] is a "governing Act of Congress";[44] if a state has not complied with the Act's procedures, the state cannot have the criminal and civil judicial jurisdiction[45] that the Act authorizes.[46]

C. McClanahan v. Arizona State Tax Commission: *The Preemption Analysis*

In *McClanahan v. Arizona State Tax Commission*,[47] decided in 1973, the state sought to impose an income tax on an Indian who derived her income from on-reservation sources. The Court held that the treaty that recognized the reservation preempted the extension of state law, including the state income tax, to Indians on the reservation. The treaty, a general federal action establishing Indian country, was a "governing Act of Congress"; therefore, the Court did not need to analyze possible infringements on tribal self-government.

McClanahan further clarified *Williams* by delineating another "governing Act of Congress."[48] At the same time, *McClanahan* was a new landmark, a step beyond *Williams*. After discussing the *Worcester* tribal sovereignty doctrine[49] and quoting the *Williams* infringement test,[50] the Court stated: "Finally, the trend has been away from the idea

[42] Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965). The comprehensive federal regulations apparently were a "governing Act of Congress," although the Court did not identify the regulations as such. The Court mentioned *Williams* only in a footnote. *Id.* at 687 n.3.

[43] Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1976)).

[44] Kennerly v. District Court of Montana, 400 U.S. 423 (1971). The Court clearly identified a "governing Act of Congress." *Kennerly*'s facts were similiar to the facts in *Williams*; a non-Indian brought an action against an Indian defendant to recover a debt for an on-reservation transaction. Unlike *Williams*, the tribe in *Kennerly* had attempted to unilaterally transfer concurrent jurisdiction to the state. The tribe's action, however, was not in accordance with Public Law 280. *See* note 43 *supra*. The Court never discussed any infringement of tribal self-government because of the "governing Act of Congress."

[45] In dicta, the Supreme Court has indicated that Public Law 280 did not transfer regulatory jurisdiction to the designated states. Bryan v. Itasca County, 426 U.S. 373 (1976); *see* Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (5th Cir. 1981); Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975).

[46] Kennerly v. District Court of Montana, 400 U.S. at 426–27. Public Law 280 was not a "governing Act of Congress" in Williams v. Lee, 358 U.S. 217 (1959), because the amended complaint was filed on November 25, 1952, Record at 1, *id.*, while Public Law 280 was not passed until 1953. *See* note 43 *supra*.

[47] 411 U.S. 164 (1973).

[48] *See id.* at 179–80, 180 n.21; notes 42–46 and accompanying text *supra*.

[49] 411 U.S. at 168–71.

[50] *Id.* at 171–72.

of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption."[51]

McClanahan de-emphasized the tribal sovereignty doctrine of *Worcester*, yet indicated that the doctrine remained important as a "backdrop against which the applicable treaties and federal statutes must be read."[52] Most significantly, *McClanahan* emphasized the importance of a federal preemption analysis when determining state jurisdiction.[53] In any preemption analysis, congressional intent determines whether state laws have been preempted or precluded. *McClanahan*, however, recognized the difference between ordinary preemption and Indian preemption. In ordinary preemption, if Congress does not expressly preempt the state law, the presumption is that the state has jurisdiction. In Indian preemption, any general federal action that establishes Indian country may be a source of preemption and creates a strong presumption against state jurisdiction.[54]

McClanahan also gave new vitality to *Williams*. The Court reasserted that in Indian country, state laws generally do not apply to Indians absent congressional consent. The question of infringement arises only when a state has a legitimate interest in regulating non-Indians in Indian country.[55]

Nevertheless, *McClanahan* planted seeds that have grown into greater state incursions on tribal sovereignty. *McClanahan* was the first case to suggest that the determination of state jurisdiction in Indian country may require the consideration of legitimate state interests when non-Indians are involved.[56] Furthermore, the Court's de-emphasis of the

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[51] *Id.* at 172.

[52] *Id.*

[53] *See id.*; Bryan v. Itasca County, 426 U.S. at 376 n.2.

[54] *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143–44 (1980); D. GETCHES, D. ROSENFELT & C. WILKINSON, FEDERAL INDIAN LAW 295–99 (1979).

The creation of Indian country by executive order, instead of congressional action, is a general federal action. Because Congress has plenary power over Indian affairs, an executive order reservation exists only through congressional acquiescence. Consequently, even for executive order reservations, congressional intent is determinative, but it can be determined only through an examination of the executive order. *See generally id.* at 296. *See also* Merrion v. Jicarilla Apache Tribe, 102 S. Ct. 894, 899 n.1 (1982).

[55] 411 U.S. at 170–71, 179–80. *McClanahan* also established that state interference with the rights of an individual Indian is an infringement of tribal self-government. *Id.* at 181.

[56] "[N]otions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians." *Id.* at 171. "In [situations involving non-Indians], both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected." *Id.* at 179; *see* Dolan, *supra* note 31, at 501–02.

tribal sovereignty doctrine opened the reservations to even greater extensions of state jurisdiction.

II

RECENT DOCTRINAL DEVELOPMENTS AND DIRECTIONS

A. Recent Cases and the Developing Doctrines

The cases after *McClanahan* have left the rapidly evolving law on state regulatory jurisdiction in disarray. In a series of decisions, the Court has further de-emphasized tribal sovereignty while emphasizing state interests. The Supreme Court, in a 1976 decision, *Moe v. Confederated Salish and Kootenai Tribes of Flathead Indian Reservation*,[57] held that a state can impose a sales tax on non-Indians who purchase cigarettes from on-reservation Indian smoke shops. Furthermore, the state can require the Indian seller to collect the sales tax. The Court reasoned that the collection requirement was only a "minimal burden" on the Indian seller, yet the requirement aided the state's collection of a tax validly imposed on non-Indians. This "minimal burden" did not frustrate tribal self-government.[58]

Moe is significant because the Court seized the "legitimate state interest" dictum of *McClanahan* and injected it into the *Williams* infringement test.[59] State regulatory jurisdiction was not solely a question of infringement on tribal self-government, rather it was a question that involved a balance of legitimate tribal and state interests. *McClanahan* had indicated that the infringement test did not apply to on-reservation Indians; a state could not regulate on-reservation Indians without congressional consent.[60] Nevertheless, by finding legitimate state interests, *Moe* allowed the state to regulate on-reservation Indian sellers indirectly, through a tax collection requirement, despite the absence of congressional consent.

In *Washington v. Confederated Tribes of Colville*,[61] decided in 1980, a state again sought to tax on-reservation purchases of cigarettes by nonmembers.[62] In *Colville*, however, the tribes themselves, not just individual tribal members, were deeply involved in the cigarette sales. The tribes were wholesalers and retailers, and the tribes imposed their own taxes on the sales. Furthermore, the federal government had approved the tribal taxes.[63] If the case had been resolved as simply a

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[57] 425 U.S. 463 (1976).

[58] *Id.* at 482–83.

[59] *Id.*

[60] *See* note 55 and accompanying text *supra*.

[61] 447 U.S. 134 (1980).

[62] *See* note 73 *infra*.

[63] 447 U.S. at 172 (Brennan, J., concurring and dissenting).

question of infringement, the state taxes probably would have been invalidated. But despite congressional support of tribal self-determination and self-government,[64] the Court held that federal and tribal interests must be accommodated with legitimate state interests.[65] Emphasizing that the primary tribal interest involved was merely the marketing of a state tax exemption to tribal nonmembers,[66] the Court upheld the state taxes on nonmembers. Moreover, the Court apparently applied a presumption of state jurisdiction.[67]

Colville severely undercut the *McClanahan* emphasis on federal Indian preemption. No longer must state regulatory jurisdiction be consistent with *McClanahan*'s basic notions of Indian preemption: federal power and tribal self-government.[68] The *Colville* Court instead articulated a balance of interests test—federal and tribal interests, on the one hand, and state interests, on the other hand.[69]

The *Colville* balancing test reduces the *Worcester* doctrine of tribal sovereignty to shambles. Under the *Williams* infringement test, *Worcester* lived in the presumption that the state lacked jurisdiction.[70] Under *McClanahan, Worcester* lived because the tradition of tribal sovereignty remained an important backdrop when reading federal treaties and statutes.[71] But under *Colville*, the *Worcester* doctrine is nearly eliminated. Deep infringements on tribal sovereignty might be upheld if compelling state interests exist.

Agreeing with *Moe*, the *Colville* Court asserted that a state can impose "at least" minimal burdens on the Indians.[72] Then, by applying the

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[64] *See* note 13 *supra.*

[65] 447 U.S. at 156. *Contra id.* at 177 (Rehnquist, J., concurring and dissenting) (congressional intent alone should determine state jurisdiction; the Court should not attempt to accommodate or balance legitimate interests).

[66] *Id.* at 155.

[67] The Tribes, and not the State as the District Court supposed, bear the burden of showing that the recordkeeping requirements which they are challenging are invalid. The District Court made the factual finding, which we accept, that there was no evidence of record on this question. Applying the correct burden of proof to the District Court's finding, we hold that the Tribes have failed to demonstrate that the State's recordkeeping requirements for exempt sales are not reasonably necessary as a means of preventing fraudulent transactions.

Id. at 160. *Contra id.* at 174 (Brennan, J., concurring and dissenting) (the state should show the necessity or utility of state jurisdiction).

Arguably, the majority presumed the validity of the recordkeeping requirements only because they were *incidental* to a validly imposed state tax. Perhaps, if a state regulation were viewed in isolation, the Court would presume that the state lacked jurisdiction to impose the regulation.

[68] *See* note 54 and accompanying text *supra.*

[69] 447 U.S. at 156, 161.

[70] *See* note 40 and accompanying text *supra.*

[71] *See* note 52 and accompanying text *supra.*

[72] 447 U.S. at 151, 159.

balance of interests test apparently in light of a presumption of state jurisdiction, the Court not only upheld the state sales tax on all tribal nonmembers,[73] but more significantly, going far beyond *Moe*'s minimal burdens, the Court also upheld three exercises of state regulatory jurisdiction over the tribes: (1) a requirement that the tribes, not merely individual Indians, collect the sales tax for the state; (2) recordkeeping requirements, even for nontaxable sales to tribal members; and (3) the state's seizure of tribal cigarette shipments before they reached the reservation to ensure tax payments, even though the state tax was not due on cigarettes still in transit.[74]

Colville can be read in two ways. First, *Colville* may be read narrowly to hold that the infringement test has evolved into a balance of interests test.[75] Under this reading, a court will use the *Colville* balancing test only when the court must determine whether a state law infringes on tribal sovereignty, that is, in the absence of a governing act of Congress.[76] Second, *Colville* may be read broadly to hold that a court should balance federal, tribal, and state interests whenever a state seeks to regulate in Indian country, even if a governing act of Congress exists and no question of infringement is reached. Subsequent cases, though unclear and inconclusive, indicate that the Supreme Court will give *Colville* the broader interpretation.

In *White Mountain Apache Tribe v. Bracker*,[77] decided in 1980, a tribal timber enterprise contracted with non-Indian corporations to perform logging operations on the reservation. The state sought to impose its motor carrier license and use fuel taxes on the non-Indian corporations. The Court stated that Congress's broad power to regulate tribal affairs, together with the tribe's semi-independent position, gave rise to "two independent but related barriers" to state regulatory power: federal preemption and the infringement of tribal self-government.[78] The two are related because self-government not only depends ultimately on congressional power but also provides a backdrop for the interpretation of federal treaties and statutes.[79]

Focusing on the preemption barrier, the Court noted that, under Indian preemption law, an express congressional statement is not re-

[73] *Id.* at 159. The Court distinguished tribal members from Indians on the reservation who were not tribal members. The state could tax all nonmembers, whether Indian or non-Indian. *Id.* at 160–61.

[74] *Id.* at 159–62.

[75] *See, e.g.*, 447 U.S. at 156–57, 161; *accord* Mescalero Apache Tribe v. New Mexico, 630 F.2d 724, 733 (10th Cir. 1980), *vacated and remanded*, 101 S. Ct. 1752 (1981).

[76] *See* text accompanying notes 41–46 *supra*.

[77] 448 U.S. 136 (1980).

[78] *Id.* at 142.

[79] *Id.* at 143.

quired to preempt state jurisdiction.[80] But in lamentable dicta, the Court added: "At the same time any applicable regulatory interest of the State must be given weight,"[81] even when the state seeks to regulate on-reservation tribal members.[82] Thus, the Court seemingly grafted the legitimate state interest factor onto the preemption barrier just as the *Moe* and *Colville* Courts had grafted it onto the infringement barrier.

Turning to the facts at issue, the *White Mountain* Court held that comprehensive federal regulation of Indian timber harvesting left no room for state regulation; the state taxes would obstruct federal policy and were therefore preempted.[83] Although previously accepted notions of Indian preemption were sufficient to resolve the case, the Court unnecessarily returned to its legitimate state interest reasoning[84] and added in dictum: "And equally important, [the state has] been unable to identify any regulatory function or service performed by the State that would justify the assessment of taxes for activities on Bureau [of Indian Affairs] and tribal roads within the reservation."[85] In other words, even if a comprehensive federal regulatory scheme strongly evidences implied congressional intent to preempt state law, sufficient state interests might nevertheless justify state jurisdiction. Previous cases had balanced federal, tribal, and state interests only if there was a question of infringement, not if there was a governing act of Congress.[86] Thus, by balancing interests even in the presence of a governing act of Congress, *White Mountain* further eviscerated the preemption analysis of *McClanahan*.

Although *White Mountain* indicates that the Court will read *Colville* broadly, the Court surprisingly failed even to mention legitimate state interests in another 1980 case. In *Central Machinery Co. v. Arizona State Tax Commission*,[87] the state sought to tax an on-reservation sale of farm machinery by a non-Indian corporation to a tribe despite a

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[80] *Id.* at 144.

[81] *Id.*

[82] "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." *Id.*

[83] *Id.* at 145–49.

[84] *See* notes 81–82 and accompanying text *supra*.

[85] 448 U.S. at 148–49. The Court subsequently stated: "[T]his is not a case in which the State seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall. Nor have respondents been able to identify a legitimate regulatory interest served by the taxes they seek to impose." *Id.* at 150.

[86] *See* notes 68–69 and accompanying text *supra*; *see, e.g., Colville*, 447 U.S. 134; Moe v. Confederated Salish and Kootenai Tribes of Flathead Indian Reservation, 425 U.S. 463 (1976).

[87] 448 U.S. 160 (1980).

comprehensive federal regulatory scheme for Indian trading. Apparently, the Court found the previous case of *Warren Trading Post Co. v. Arizona Tax Commission*,[88] although factually distinguishable on two points, to be controlling.[89] In striking down the state tax, the *Central Machinery* Court may have failed to mention legitimate state interests because the Court's reliance on *Warren Trading Post* obviated the need for further analysis.

In *Montana v. United States*,[90] decided in 1981, the Court did not specifically address the question of state jurisdiction. The issue was whether the tribe had the power to regulate hunting and fishing by non-Indians on non-Indian fee land located within the reservation boundaries.[91] Holding that the tribe lacked that power, the Court stated that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."[92] If maintained, the *Montana* Court's restrictive view of tribal sovereignty may affect state jurisdiction cases, particularly when a court balances a tribe's interest in self-government against a state's legitimate interests. *Montana*'s vitality, however, is questionable. In a 1982 case, *Merrion v. Jicarilla Apache Tribe*,[93] the Court ignored *Montana* and upheld the tribe's power to impose a severance tax on minerals extracted by non-Indian lessees.[94]

B. A Projection of Developing Doctrine for State Regulatory Jurisdiction: A Threefold Test

Since *Williams* and *McClanahan*, state regulatory jurisdiction doctrine has evolved considerably and is still evolving. The Court, however,

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[88] 380 U.S. 685 (1965); *see* note 42 and accompanying text *supra*.

[89] There are only two distinctions between *Warren Trading Post* . . . and the present case: appellant is not a licensed Indian trader, and it does not have a permanent place of business on the reservation. The Supreme Court of Arizona concluded that these distinctions indicated that federal law did not bar imposing the transaction privilege tax on appellant. We disagree.

Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160, 164 (1980) (footnote omitted).

[90] 450 U.S. 544 (1981).

[91] *Id.* at 557.

[92] *Id.* at 564. This language apparently reinforces the presumption of state jurisdiction.

[93] 102 S. Ct. 894 (1982).

[94] *But cf. id.* at 919 (Stevens, J., dissenting) (the dissent relied extensively on *Montana* in reasoning against tribal power to impose the severance tax on non-Indian lessees). Lower court cases have read *Montana* narrowly or have ignored it. *See, e.g.*, Crow Tribe of Indians v. Montana, 650 F.2d 1117 (9th Cir. 1981); Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981).

has not clearly articulated this development. Other courts and interested parties are faced with a confusing mass of diverse decisions. The Court needs to enunciate a new test to clarify its inconclusive recent cases. Based primarily on the trends of those recent cases, this section will project how the Supreme Court might enunciate such a new jurisdictional test.

The mode of analysis of the new test is still federal preemption.[95] Despite the *White Mountain* dichotomy of the preemption analysis and the infringement analysis,[96] a fundamental issue in the determination of state jurisdiction is always whether the state law would conflict or interfere with federal policies or purposes. Although the infringement test is seldom identified as a form of preemption, the first step in the infringement analysis is to determine whether a federal action has created Indian country. This first step is often unmentioned because cases rarely arise where there has not been a federal action creating Indian country;[97] if no such federal action occurred, then no infringement controversy could arise because no tribal government exists. If a federal action created Indian country, then a state law that infringes on tribal self-government interferes with federal policy and may therefore be preempted.[98]

The *Williams* infringement test and the *McClanahan* preemption analysis still have vitality,[99] but the Court has skewed its analysis to favor increased state power when faced with difficult regulatory jurisdiction cases.[100] Those cases reveal a developing threefold test for state regulatory jurisdiction: first, what, if any, sources of potential preemption exist; second, what is the maximum possible extent of preemption; and finally, if the state law is not explicitly preempted but could be implicitly preempted, on balance, do state interests outweigh federal and tribal interests and thus justify state regulatory jurisdiction.

The first question in the projected threefold test is what, if any, sources of potential preemption exist. Three types of sources are pos-

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[95] *See* notes 51–54 and accompanying text *supra*. *See also White Mountain*, 448 U.S. at 145; *Colville*, 447 U.S. at 167 (Brennan, J., concurring and dissenting); *id.* at 176–77 (Rehnquist, J., concurring and dissenting).

[96] *See* text accompanying notes 78–79 *supra*.

[97] *See McClanahan*, 411 U.S. at 172 n.8.

[98] *See* D. GETCHES, D. ROSENFELT & C. WILKINSON, *supra* note 54, at 296–97. The Court in *White Mountain* admits that the "right of tribal self-government is ultimately dependent on and subject to the broad power of Congress." 448 U.S. at 143. The Court also recognizes the importance of a federal action that creates Indian country by noting the "significant geographical component to tribal sovereignty." *Id.* at 151.

[99] *See* text accompanying notes 57–94 *supra*.

[100] *See, e.g., Colville*, 447 U.S. 134; Moe v. Confederated Salish and Kootenai Tribes of Flathead Indian Reservation, 425 U.S. 463 (1976).

sible: (1) jurisdictional statutes such as Public Law 280;[101] (2) comprehensive federal regulatory schemes such as the Indian trading laws;[102] and (3) general federal actions, such as treaties, creating Indian country.[103]

If a source of potential preemption does exist, then the second question is what is the maximum possible extent of preemption. If the source of potential preemption is a jurisdictional statute and it has not been complied with, then all state laws, to which the statute applies, may be preempted.[104] For example, Public Law 280, which applies only to state criminal and civil jurisdiction, can operate to preempt state criminal and civil laws but not state regulatory laws.[105] If the source of potential preemption is a comprehensive federal regulatory scheme, then all state laws that regulate the same field of activity may be preempted.[106] If the source of potential preemption is merely a general federal action, then for a particular state law to be preemptible, the tribe must show that the state law infringes on tribal self-government.[107] In light of *Colville* and *Montana*, a presumption of state jurisdiction arguably would exist.[108]

Even if any of the above potential sources could preempt state law, absent express congressional intent to preempt, the state still might assert a legitimate state interest. Hence, the third question is whether, on balance, state interests outweigh federal and tribal interests and thus justify state regulatory jurisdiction. If a state demonstrates any legitimate interest in regulation, then, once again, a presumption of state jurisdiction arguably would exist.[109]

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[101] *See, e.g.*, Kennerly v. District Court of Montana, 400 U.S. 423 (1971); notes 43–46 and accompanying text *supra*. Public Law 280 does not provide for the transfer of regulatory jurisdiction. Bryan v. Itasca County, 426 U.S. 373 (1976).

[102] *See, e.g., Central Machinery*, 448 U.S. 160; *White Mountain*, 448 U.S. 136 (1980); Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 684 (1965); text accompanying note 42 *supra*.

[103] *See, e.g., McClanahan*, 411 U.S. 164; text accompanying notes 47–48 *supra*.

[104] *See, e.g., Kennerly*, 400 U.S. 423.

[105] *See* notes 44–45 *supra*.

[106] *See* note 102 *supra*.

[107] *See, e.g.*, Williams v. Lee, 358 U.S. 217 (1959). Even in a case involving on-reservation Indians, the tribe would have to show infringement, but in such a case, the burden of proof would be met easily. *See White Mountain*, 448 U.S. at 144.

[108] *See* notes 67 & 93 *supra*.

[109] In *White Mountain*, the Court asserts that the state has "been unable to identify *any* regulatory function or service" that would justify state jurisdiction. 448 U.S. at 148–49 (emphasis added). The Court also asserts that the state has been unable "to identify *a* legitimate regulatory interest." *Id.* at 150 (emphasis added). Arguably, if the state shows any legitimate interest, then the burden falls onto the tribe to show that the tribal and federal interests outweigh the state interests. *See* notes 67 & 93 and accompanying text *supra*.

The Court already has applied the balancing test in upholding state jurisdiction in cases where the only source of potential preemption was a general federal action.[110] Although the Court has not yet used the balancing test to uphold state jurisdiction after first finding that a comprehensive federal scheme applied, *White Mountain* indicates that a state could justify its jurisdiction in such a case.[111] An opportunity for the Court to discuss the balancing test in a case that involves a jurisdictional statute has not yet arisen, but the trend of the cases strongly suggests that the Court would apply the balancing test.

Whether the source of potential preemption is a general federal action, a comprehensive federal scheme, or a jurisdictional statute, congressional intent to preempt state law is nearly always implicit.[112] The balancing test allows a state to rebut the inference of congressional intent. In other words, when determining whether Congress intended to preempt state law, the Court will consider legitimate state interests if it deems congressional intent unclear. More than likely, the Court will not apply the balancing test only if Congress has expressly stated its intent to preempt state law.

Although the *White Mountain* Court acknowledged the distinction between ordinary preemption and Indian preemption,[113] that Court's application of the Indian preemption doctrine narrowed the distinction. In the past, Indian preemption law had operated with a strong presumption against state jurisdiction.[114] This strong presumption no longer exists; instead, a presumption favoring state jurisdiction arguably now exists absent express congressional intent to preempt in both ordinary and Indian preemption.[115] Hence, the vitality of the *Worcester* tribal sovereignty doctrine is negligible. Even though the tradition of tribal sovereignty still provides a backdrop for the interpretation of ambiguous congressional actions,[116] unless congressional preemptive intent is express, the balancing test and the arguable presumption of state jurisdiction may permit deep state incursions into tribal sovereignty. Thus, the Court's movement toward the threefold test for state regulatory

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[110] *See, e.g., Colville*, 447 U.S. 134; *Moe*, 425 U.S. 463.

[111] *See* notes 83–86 and accompanying text *supra*. The Court in *Central Machinery*, however, did not use a balancing test after concluding that there was a comprehensive federal regulatory scheme. While dissenters in *Central Machinery* suggested that a balancing test was appropriate, 448 U.S. at 170 (Stewart, J., dissenting), the majority disagreed, not because it rejected the balancing test but because it found that *Warren Trading Post* was controlling, and no further analysis was needed. *See* notes 87–89 and accompanying text *supra*.

[112] *See* D. GETCHES, D. ROSENFELT & C. WILKINSON, *supra* note 54, at 296.

[113] *See* note 53 and accompanying text *supra*.

[114] *See, e.g., McClanahan*, 411 U.S. 164.

[115] *See* note 109 *supra*.

[116] *See White Mountain*, 448 U.S. at 143; text accompanying note 52 *supra*.

jurisdiction apparently contravenes professed congressional support of tribal self-determination and self-government.[117] Furthermore, the test introduces great uncertainty into state regulatory jurisdiction disputes. When a court determines congressional intent by balancing state interests against federal and tribal interests, the court can exercise great discretion. Consequently, future cases are likely to be a confusing and often inconsistent mass of ad hoc decisions.[118]

III

THE THREEFOLD TEST IN THE CONTEXT OF ENVIRONMENTAL LAW

As previously discussed, state regulatory jurisdiction is likely to be tested in the field of environmental law. Possible mineral and industrial development in Indian country make reservations potential sources of increased pollution. At the same time, state interest and involvement in environmental regulation probably will increase.[119] Therefore, this section will apply the projected threefold test for state regulatory jurisdiction in the context of environmental law.

Because state, federal, and tribal interests may vary with the circumstances, four specific situations will be examined: (1) non-Indians[120] on fee land within a reservation; (2) non-Indian lessees within a reservation; (3) non-Indian contractors within a reservation; and (4) Indians within their own reservation.[121] For convenience, the first situation will be examined in depth, and then the three other situations will be examined together, with an emphasis placed on their similarities and distinctions.

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[117] *See* note 13 *supra*. Congressional support of tribal self-government may be specious. In light of judicial developments, Congress's failure to expressly preempt state law arguably is tantamount to approval of expansive state regulatory jurisdiction and contravenes professed congressional policy.

[118] The Court already has reasoned that state interests should be considered in the regulatory jurisdiction context. *See* notes 56–69 & 77–86 and accompanying text *supra*. If legitimate state interests are to be a factor, then a balancing test may be inevitable. If a balancing test is deemed necessary, then perhaps, the best context for balancing is the theefold test with its underlying preemption analysis.

[119] *See* notes 14–22 and accompanying text *supra*.

[120] As used in these four situations, non-Indians will include all tribal nonmembers, whether Indian or non-Indian. *See* note 73 *supra*.

[121] In the second, third, and fourth situations, assume that the land is Indian owned trust land. *See* note 155 *infra*.

Tribal interest in self-government is least in the first situation, *see* text accompanying notes 152–54 *infra*, progressively increases in the second and third situations, and is the greatest in the fourth situation. *Compare* Montana v. United States, 450 U.S. 544 (1981), *with White Mountain*, 448 U.S. at 144. Under the *Williams* infringement test, state law would not apply in at least the second, third, and fourth situations. *See* Dolan, *supra* note 31, at 528–33; Will, *supra* note 19, at 494–99; Comment, *supra* note 17, at 83.

A. Non-Indians on Fee Land Within a Reservation

Assume that non-Indians own and operate a coal-fired power plant on fee land within a reservation.[122] Further assume that the state attempts to enforce its pollution regulations on the plant and the tribe challenges the state's regulatory jurisdiction.[123] Under these circumstances, a court would apply the threefold test.

Under the threefold test, the first question for the court is what, if any, sources of potential preemption exist. Whenever a state seeks to exercise jurisdiction in Indian country, the general federal action that created Indian country is a source of potential preemption.[124] The possibility of preemption increases, however, if Congress has passed a general jurisdictional statute, such as Public Law 280, or if a comprehensive federal regulatory scheme exists. At present, no general jurisdictional statute provides for the transfer of regulatory jurisdiction.[125] Also, no comprehensive federal regulatory scheme for environmental protection applies solely and specifically to Indian country. General federal laws, however, apply to Indians, absent conflicting treaty provisions.[126] Therefore, many federal environmental statutes may apply to Indians and Indian country.[127]

Nevertheless, those federal environmental statutes probably are not a source of potential preemption for state environmental laws in Indian country. The Environmental Protection Agency has adopted the policy that federal environmental statutes neither increase nor decrease state jurisdiction in Indian country.[128] Furthermore, the Court has held that

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[122] *See* Will, *supra* note 19, at 497.

[123] The non-Indian owners and operators might also challenge the state's regulatory jurisdiction, especially if the state's pollution regulations would economically burden the operation.

[124] *See* text accompanying note 54 *supra*.

[125] *See* note 45 *supra*.

[126] *See* Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960); D. GETCHES, D. ROSENFELT & C. WILKINSON, *supra* note 54, at 203.

> General laws do apply to Indians unless a *special* Indian right is involved. Some courts have ignored the fact that no treaty or trust land was involved in *Tuscarora*. Thus the trust relationship, and the canons of construction which accompany it, were not called into play in *Tuscarora*. When a special right is involved, however, Indian law principles dictate that the specific right will govern over general legislation.

Id.; *see id.* at 200–04; Brecher, *supra* note 20, at 292–95.

[127] *See, e.g.*, Davis v. Morton, 469 F.2d 593 (10th Cir. 1972) (National Environmental Policy Act applies to Indian country). The Court's reasoning in *Davis* has been criticized. *See* Brecher, *supra* note 20, at 302–07.

See generally Schaller, *supra* note 16 (notes the mention of Indian tribes in the various statutes that the Environmental Protection Agency enforces). *See also* Nance v. Environmental Protection Agency, 645 F.2d 701 (9th Cir. 1981) (tribe can redesignate air quality standards under Clean Air Act).

[128] *See* P. MAXFIELD, M. DIETRICH & F. TRELEASE, *supra* note 2, at 76–80; Will, *supra* note 19, at 477, 480, 482, 483–87.

a comprehensive federal regulatory scheme left no room for state laws only where the federal laws have applied specifically to Indians.[129] A court readily may infer congressional intent to preempt where a comprehensive federal regulatory scheme is specific to Indians and Indian country; a court is less likely to infer similar congressional intent from a federal law of general applicability. Moreover, because most federal environmental laws encourage active state participation in pollution control,[130] courts are unlikely to find congressional intent to preempt state law. Even if the present federal environmental laws could be a potential source of preemption in Indian country, a strong possibility exists that the federal pollution controls will be severely curtailed in the near future, and state pollution controls, consequently, will increase in significance.[131] Accordingly, in the situation of a non-Indian owned and operated coal-fired power plant on fee land within a reservation, probably the only source of potential preemption is the general federal action that created Indian country.[132]

Having determined the source of potential preemption, the second question for the court is what is the maximum possible extent of preemption. Because the source of potential preemption is a general federal action, to invalidate the state environmental laws, the tribe must show that the laws infringe on tribal self-government.[133] In this situation of a non-Indian on fee land, *Montana*'s[134] holding, that a tribe lacked power over the non-Indian on fee land[135] weakens the tribe's position. *Montana* does suggest, however, that tribal sovereign power may extend to non-Indian activities if the health or welfare of the tribe is affected.[136]

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[129] *See, e.g., Central Machinery*, 448 U.S. 160; *White Mountain*, 448 U.S. 136; Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965).

[130] *See* note 20 *supra*.

[131] *See* note 21 *supra*.

[132] *See* text accompanying note 54 *supra*.

[133] *See* note 107 and accompanying text *supra*.

[134] 450 U.S. 544 (1981).

[135] *See* text accompanying notes 90–94 *supra*.

[136] "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566; *accord* Colville Confederated Tribes v. Walton, 647 F.2d 42, 52 (9th Cir. 1981). The Court recently has held that a tribe has the inherent power to impose a severance tax on non-Indian mineral lessees. Merrion v. Jicarilla Apache Tribe, 102 S. Ct. 894 (1982).

If the tribe can and does regulate the non-Indian on fee land, the tribe can argue persuasively that the state cannot regulate. *Colville* distinguishes taxes from other regulations and implies that, for regulations other than taxes, tribes and states cannot have concurrent jurisdiction. 447 U.S. at 158–59; *see* Mescalero Apache Tribe v. New Mexico, 630 F.2d at 730, *vacated and remanded*, 101 S. Ct. 1752 (1981). *Colville* distinguishes taxes, however, not because they are inherently different from other regulations, but only because a sovereign's interest in tax

Because pollution is transient in nature and pollution originating on non-Indian fee land within the reservation is very likely to affect the health and welfare of the tribe, tribal sovereign power may extend to the non-Indian activities. Therefore, the tribe may be able to show that state laws regulating this pollution are an infringement of tribal self-government, with the consequent possibility of implied congressional intent to preempt those state laws.

Even if a tribe were able to show infringement, under the third prong of the threefold test, a court would balance the federal and tribal interests against the state interests to determine if the state laws should apply despite the infringement.[137] Unfortunately, the tribes and the states are likely to have conflicting values as well as conflicting interests in economic development and environmental protection.[138]

The fundamental federal and tribal interest is the promotion of tribal self-government,[139] which includes the tribal right to control the health or welfare of its members[140] and the tribe's right to control its economic development.[141] Inherent in these rights is the tribe's freedom to control the use of its land and other resources.[142] Generally, tribal interest in self-government is strongest when a tribal resource is involved and when the tribe itself is involved in the activity.[143] In the case of environmental regulation, the significant tribal resources of land, air, and water are involved. Tribes may become involved in the activity by enacting their own environmental protection laws.[144] Federal involvement in the

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revenue is not, alone, a sufficient interest to justify jurisdiction. *See, e.g., White Mountain*, 448 U.S. 136. Taxes are just one type of regulation, the same method of analysis may be used in all regulatory jurisdiction cases, including tax cases. *See id.* at 141; Bryan v. Itasca County, 426 U.S. at 384, 384 n.10, 384–85 n.11, 388, 390.

[137] *See* text accompanying notes 109–10 *supra*.

[138] *See* Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 664 (9th Cir. 1975).

[139] *See Colville*, 447 U.S. at 168 (Brennan, J., concurring and dissenting).

[140] *See* Montana v. United States, 450 U.S. at 566.

[141] *See generally id.*; *Colville*, 447 U.S. at 168 (Brennan, J., concurring and dissenting); TASK FORCE SEVEN REPORT, *supra* note 14, at 22.

[142] *See* Comment, *supra* note 17, at 85.

[143] *See Colville*, 447 U.S. at 155–57. *See also White Mountain*, 448 U.S. 136; *Moe*, 425 U.S. 463.

[144] The Navajo Nation has enacted ordinances that establish a Navajo Tribal Environmental Protection Commission with the purpose and authority to protect and enhance the environment within the Navajo Nation. 2 N.T.C. §§ 3401–3407 (1977).

> The Commission has been very active. It recently adopted a regulation which established a tax on excess sulphur emissions from power plants within the reservation. The Crow Tribe, by Resolution No. 76–22 B, adopted a comprehensive Environmental Health and Sanitation Ordinance (Jan. 31, 1976). On June 6, 1977, the Secretary of the Interior approved the environmental regulations of the Cheyenne River Sioux

activity also strengthens the federal and tribal interests.[145]

States have a strong interest in economic development within their borders. State interests also include the protection of the health and welfare both of non-Indians on the reservation and of citizens outside the reservation.[146] Hence, state interests may be strong if the reservation is near an urban area.[147] State interests also will vary with the magnitude of the pollution.[148] If transient pollution is not controlled at its reservation source, state environmental programs could be frustrated[149] not only because pollution may spread beyond reservation boundaries, but also because local governments would be discouraged from enforcing state programs when nearby Indian reservations could ignore the programs.[150] Because of their interests in controlling both economic development and the health and welfare of their citizens, states have an interest in the control of land use and natural resources.[151]

Of the four situations described above,[152] the tribal interest is the least in the situation of non-Indians on fee land.[153] Although the land is Indian country, neither the tribe nor its members own the land. On the other hand, the state interest is greatest here because the state is seeking to regulate a non-Indian on non-Indian owned land. In light of the Court's de-emphasis of tribal sovereignty, the arguable presumption of state jurisdiction, and the Court's *Montana* decision,[154] the state environmental laws probably would be upheld.

Tribe enacted by the tribe to govern mineral development and oil and gas leasing activities on tribal and allotted land within the reservation. This was the first time a tribe's environmental regulations had been accepted in place of the Department's general regulations.

Will, *supra* note 19, at 465 n.2. *See* Jurisdiction of Indian Tribes to Prohibit Aerial Crop Spraying Within the Confines of a Reservation, 78 Interior Dec. 229 (1971) (Department of Interior opinion upheld the Shoshone-Bannock Tribes of the Fort Hall Reservation of Idaho in their regulation of crop spraying on the reservation); Will, *supra* note 19, at 499–503.

145 *See generally White Mountain*, 448 U.S. 136.

146 *See* Comment, *supra* note 17, at 85–86.

147 *See* note 16 *supra*.

148 *See* Comment, *supra* note 17, at 85–86.

149 *See* Snohomish County v. Seattle Disposal Co. 389 U.S. 1016, 1018–19 (1967) (Douglas, J., dissenting); COUNCIL, *supra* note 15, at 4–5; Will, *supra* note 19, at 471.

See also R. BARSH & J. HENDERSON, *supra* note 2, at 152. "The ability of each state to maintain environmental conditions . . . consistent with its public policy declines in proportion to the number of persons within its territory that it cannot fully control." *Id.*

150 *See* COUNCIL, *supra* note 15, at 4–5.

151 *See id.*; Dolan, *supra* note 31, at 475.

152 *See* text accompanying notes 120–21 *supra*.

153 Tribal interest would, of course, be less if the land were not within Indian country. *See* note 5 *supra*.

154 *Montana* involved non-Indian owned land. *See* text accompanying notes 90–92 *supra*.

B. Three Other Situations

Now assume that the coal-fired power plant is located on Indian owned trust land within the reservation.[155] Jurisdictional disputes may arise whether non-Indian lessees, non-Indian contractors, or tribal members operate the plant. In all three situations, the analysis begins with what, if any, sources of preemption exist. The general federal action that created Indian country is a source of potential preemption in all the situations.[156] Moreover, if the plant were located at the mouth of a coal mine on the reservation[157] and non-Indian lessees operated the mine, the comprehensive federal regulations that control pollution by mineral lessees in Indian country[158] would be an additional source of potential preemption.[159]

The second question is what is the maximum possible extent of preemption. In the specific situation of mineral lessees, because of comprehensive federal regulation, all state laws concerning the environmental protection of air, water, and land resources may be preempted. For all the other situations, where the only source of potential preemption is a general federal action, to invalidate the state environmental laws, the tribe must show that the imposition of state environmental laws would infringe on tribal self-government.[160]

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[155] Whether the land is communally held by a tribe or is individually held by Indian allottees, almost all Indian owned land is held in trust. The United States holds the legal title, and the tribe or the individual allottees hold the beneficial interest. W. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 231–34 (1981).

[156] *See* text accompanying note 54 *supra*.

[157] *See* Will, *supra* note 19, at 497.

[158] 25 C.F.R. §§ 177.1, 177.108 (1980). *See generally* Mineral Leasing Act of 1938, 25 U.S.C. §§ 396–396g (1976). Before approving any type of lease, the Secretary of the Interior must be satisfied that adequate consideration has been given to the relationship between the proposed use of the leased land and the uses of neighboring lands and to the environmental effects of the proposed use. 25 U.S.C. § 415(a) (1976).

[159] *See* Dolan, *supra* note 31, at 527.

A recent Ninth Circuit case involved the imposition of a state severance tax on mineral development by non-Indian lessees. Crow Tribe of Indians v. Montana, 650 F.2d 1104 (9th Cir. 1981). Although an environmental law was not at issue, the state tax still would affect the tribe's development of its natural resources. The court remanded the case with the following instructions:

> We find that the Tribe's complaint adequately states a claim that the Montana taxes infringe on its right to govern itself. To support the claim at trial, the Tribe must show that the taxes substantially affect its ability to offer governmental services or its ability to regulate the development of tribal resources, and that the balance of state and tribal interests renders the state's assertion of taxing authority unreasonable.

Id. at 1117. *See* Blackfeet Tribe of Indians v. Montana, 507 F. Supp. 446 (D. Mont. 1981) (held that state could tax oil and gas production of non-Indian lessees).

[160] *See* note 107 and accompanying text *supra*.

In the three situations, the tribe probably could argue successfully that state laws would infringe on tribal self-government at least minimally. Even where the tribe's interest is the least—in the case of non-Indian lessees—the tribe can argue persuasively that environmental effects are frequently long-lasting. When the leased land reverts to the tribe, the tribe will be saddled with the environmental effects of the lessee's activities. Moreover, because of its transient nature, pollution on leased land could affect the health and welfare of the tribe. Because of these environmental effects, the tribe could argue convincingly that state regulatory laws would infringe on tribal self-government.

Consequently, in all of the situations, state environmental laws arguably could be preempted. Nevertheless, even in the mineral lessee situation, a court then, under the third prong of the threefold test, would determine whether, on balance, state interests outweigh federal and tribal interests and thus justify state regulatory jurisdiction despite the potential preemption.[161]

In the non-Indian lessee's situation, where either the tribe or its members own the land, tribal interest is greater than in the non-Indians on fee land situation. Moreover, the federal government is involved because it approves all Indian leases.[162] Strong state interests, however, also exist. Non-Indians are directly involved in the use of the land, and, as already discussed, on-reservation pollution has off-reservation impacts. This case is harder than the non-Indian on fee land case, but the consistent trend of the cases in favor of state jurisdiction and the arguable presumption of state jurisdiction would probably cause a court to uphold the validity of the state laws. In the specific situation of mineral lessees, however, the extensive federal involvement in environmental protection[163] may tip the balance again state jurisdiction.

In the situation of non-Indian contractors, tribal interest is much greater than in the first two situations: non-Indians on fee land and non-Indian lessees. The tribe is deeply involved in the activity that produces pollution; the non-Indian contractors merely assist in the tribal activity.[164] Furthermore, the tribe owns the resources involved. The state interest in regulation, meanwhile, is much less than in the first two situations. Non-Indians are only peripherally involved in the tribal activity. The state's only strong interest is to prevent the off-reservation effects of on-reservation pollution. In this situation, the state environmental laws probably would not be applicable.

Of all the situations, tribal interest is the greatest and state interest

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[161] *See* text accompanying notes 109–11 *supra*.

[162] *See* 25 U.S.C. § 415(a) (1976).

[163] *See* note 158 and accompanying text *supra*.

[164] *See, e.g., White Mountain*, 448 U.S. 136; Mescalero Apache Tribe v. O'Cheskey, 625 F.2d 967 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 1417 (1981).

is the least when the source of pollution is an Indian owned and operated enterprise within the Indians' own reservation.[165] State regulation of on-reservation tribal members would interfere with the basic tribal interest in self-government. Therefore, state environmental laws probably would not be applicable.[166] Even in this situation, however, state jurisdiction is possible. Before the Court decided *Moe*[167] in 1976, the state unquestionably could not have exercised jurisdiction. But in *Moe* and again in *Colville*,[168] the Court allowed the state to impose an affirmative duty on the on-reservation Indians to aid the state in the collection of taxes.[169] In the area of environmental protection, the Court could reason that the state interest in the protection of the public's health and welfare is so great that state laws should apply.[170] *Moe* and *Colville*, however, may be distinguished from the environmental situation involving on-reservation Indians. In both *Moe* and *Colville*, the states were directly regulating only non-Indians; the states could force the Indians merely to help regulate the non-Indians. In the environmental context, the state would be regulating the Indians directly.[171]

C. Implications of the Threefold Test in Environmental Law

The application of the threefold test does not yield categorical results in any of the four hypothetical situations, and in an actual case, the unique facts may be determinative. Nonetheless, in the context of environmental law, states undoubtedly could exploit the threefold test to validate increased state regulatory jurisdiction in Indian country.

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165 *See* note 82 *supra*.

166 Some authors, however, have discussed the possibility that the statutes that the Environmental Protection Agency enforces delegate regulatory authority over Indian country to the states. *See* COUNCIL, *supra* note 15, at 25; Schaller, *supra* note 16, at 16; Will, *supra* note 19, at 474–76. The generally accepted view, however, is that the EPA statutes do not affect state regulatory jurisdiction. *See* note 128 and accompanying text *supra*.

167 425 U.S. 463.

168 447 U.S. 134.

169 *See* text accompanying notes 57–58 & 72–74 *supra*.

170 *See generally* State v. Red Lake DFL Comm., 303 N.W.2d 54 (Minn. 1981). A political committee, composed entirely of reservation Indians, was held subject to state regulation because its activities led to dissemination of information outside the reservation. This fact situation could be analogized to the pollution situation. In *Red Lake*, however, the Indians, though performing all activities solely on the reservation, intended the information to be conveyed off the reservation. In the pollution situation, although the pollution may spread off the reservation, the Indians certainly do not intend it to do so.

171 If the Court were to uphold a state's power to apply its environmental laws to non-Indians in Indian country, the state would have a strong argument, based on *Moe* and *Colville*, that the tribe would have to aid the state's enforcement activities.

Precedents set in environmental disputes in turn would forebode other significant state incursions into tribal sovereignty. Furthermore, the uncertainty of case-by-case adjudications probably would increase checkerboard jurisdiction[172] in Indian country. Checkerboard jurisdiction is unworkable in the context of environmental protection because of the transient nature of pollution.[173] Moreover, checkerboard jurisdiction creates animosity between Indians and non-Indians, especially if economic advantages would result from different regulatory controls.[174] Both on-reservation and off-reservation development, by Indians and non-Indians, could proceed more smoothly if all parties knew what law was applicable.[175] Only express congressional statements could clarify the jurisdictional morass,[176] yet, in the past, Congress has allowed the Court broad discretion in the determination of state regulatory jurisdiction.[177]

That the Court has not yet clearly enunciated the threefold test may encourage Indians and Indian advocates. The formulation of the threefold test in this Comment is based primarily on both the *Colville* holding and the *White Mountain* dicta. Indians and Indian advocates may hope that the Court never announces the threefold test. But to remain inactive while hoping for such a judicial turn would be both fruitless and dangerous—fruitless because of the consistent trend of the cases toward increasing state incursions on tribal sovereignty over the past 100 years and dangerous because states will continue to make further incursions on tribal sovereignty in the courts. Therefore, tribes must take steps to avoid the grave consequences of the threefold test.

Obviously, in any of the four hypothetical situations, a tribe that wishes to escape state regulatory jurisdiction would be wise to avoid a

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[172] Checkerboard jurisdiction means that the different sovereigns—state, federal, and tribal—have jurisdiction in different parts of Indian country. In other words, a jurisdictional map of Indian country would look vaguely like a checkerboard. Checkerboard jurisdiction leads to legal uncertainty and weakens the power and effectiveness of the sovereigns. *See* R. BARSH & J. HENDERSON, *supra* note 2, at 152; Will, *supra* note 19, at 471. Moreover, the Supreme Court has found that Congress has sought to avoid the creation of checkerboard jurisdiction in Indian country. Seymour v. Superintendent, 368 U.S. 351, 358 (1962).

True checkerboard jurisdiction, with clearly defined, squared, and alternating checkerboard blocks, rarely occurs in Indian country but frequently occurs in the context of public land law. To induce railroad development in the nineteenth century, the federal government granted to railroad companies the odd-numbered lots on both sides of the railroads' right-of-ways, but the government reserved to itself the even-numbered lots. *See* Leo Sheep Co. v. United States, 440 U.S. 668 (1979).

[173] *See* Will, *supra* note 19, at 471.

[174] *See id.*

[175] *See* COUNCIL, *supra* note 15, at 4–5; Dolan, *supra* note 31, at 475.

[176] *See* Note, *supra* note 5, at 319 n.2.

[177] *See* Will, *supra* note 19, at 480 n.79, 483–87.

judicial determinaton. Under the threefold test, with its balancing component, only an express statement of congressional intent to preempt state environmental laws would assure a tribe of freedom from state environmental regulation.[178] If a tribe must judicially challenge state regulatory jurisdiction, however, the tribe can improve its chance of success by seeking increased federal involvement and by increasing tribal involvement.[179] For example, the tribe could lobby for a comprehensive federal regulatory scheme for environmental protection, specific to Indian country, similar to the Indian trading regulations. Another possibility is for tribes to seek congressional approval of tribal preemption of state laws;[180] then tribal environmental laws would preclude state regulation. Even without congressional approval of tribal preemption, tribal environmental laws would improve a tribe's chance of successfully challenging state environmental regulation.[181]

Conclusion

Despite fluctuating congressional policy since the nation's inception, the Supreme Court consistently has allowed increasing state incursions into tribal sovereignty. Although Congress presently supports tribal self-determination, the Court now is developing a threefold test for state regulatory jurisdiction that favors state power and de-emphasizes tribal sovereignty. Under the threefold test, the first question is what, if any, sources of potential preemption exist. If a source of potential preemption does exist, then the second question is what is the maximum possible extent of preemption. If the state law is not explicitly preempted but could be implicitly preempted, then the third question is, on balance, do state interests outweigh federal and tribal interests and thus justify state regulatory jurisdiction. In the context of environmental law, where state interest in protecting the public's health and welfare is particularly strong, tribes should be wary of states that are likely to exploit the threefold test to exercise unprecedented control in Indian country.

Stephen M. Feldman*

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[178] *See* text accompanying notes 112–17 *supra*.

[179] *See* notes 143–45 and accompanying text *supra*.

[180] *See Colville*, 447 U.S. at 156.

[181] *See* note 144 and accompanying text *supra*. Many factors, however, may prevent a tribe from enacting its own environmental laws. *See* Will, *supra* note 19, at 500.

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