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State Jurisdiction over Indian Land Use: An Interpretation of the Emcumbrance Savings Clause of Public Law 280

Patrick E. Hacker

Dennis C. Meier

Dan J. Pauli

COMMENTS

STATE JURISDICTION OVER INDIAN LAND USE: AN INTERPRETATION OF THE "ENCUMBRANCE" SAVINGS CLAUSE OF PUBLIC LAW 280

The question of the proper scope of state jurisdiction over Indian affairs has been a topic of dispute for nearly a century and a half. Ranging from an attempt to prohibit a missionary from entering Indian lands,[1] to a proposed tax on ski resort equipment belonging to a modern, business-minded Indian tribe,[2] states have persisted in challenging the federal government's claim to plenary jurisdiction over its Indian wards.

Of significant importance in this jurisdictional dispute was the passage in 1953 of Public Law 280,[3] the first com-

1. Worcester v. Georgia, 31 U.S. 515 (1832).
2. Mescalero Apache Tribe v. Jones, ____ U.S. ____, 93 S.Ct. 1267 (1973).
3. Pub. L. No. 83-280, 67 STAT. 588 (1953) as amended by and codified in 25 U.S.C. § 1322 (1970). Public Law 280 in its original form conferred criminal and civil jurisdiction over actions to which Indians are parties to five particular states: California, Minnesota, Nebraska, Oregon and Wisconsin. Public Law 90-284 repealed section 7 of Public Law 280 under which Congress gave its consent to any other state not having such jurisdiction to gain it by proper state initiated action and added an Indian consent provision. 25 U.S.C. § 1322(a) is the present embodiment of Congress' consent to the states to assume civil jurisdiction. It provides:

> The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part theerof as they have elsewhere within that State.

25 U.S.C. § 1326 adds the requirement of Indian consent to this assumption of state jurisdiction:

> State jurisdiction acquired pursuant to this sub-chapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call for such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults. (Pub. L. 90-284, title IV, § 406, Apr. 11, 1968, 82 STAT. 80.)

For purposes of this article all references will be to the codified version of this act as set forth in 25 U.S.C. § 1322 and will be referred to generally as P.L. 280 unless otherwise appropriate.

prehensive congressional attempt to turn some jurisdictional power over to the states. While P.L. 280 provides generally for the assumption of civil and criminal jurisdiction by the states over the affairs of Indians, it was obviously not a complete abdication of the field by the federal government. State jurisdiction under this act is limited by a "savings clause" which provides in essence that nothing contained in P.L. 280 is to be taken as authorizing "the alienation, *encumbrance,* or taxation of Indian property."[4] (emphasis added.)

Due to recent increased legislation in the areas of zoning, land use planning, pollution control, and natural resource development, the need for a clear definition of state authority over Indian lands is obvious. Furthermore, as states attempt to legislate in these and similar areas, the question of what constitutes an "encumbrance" of Indian lands within the meaning of P.L. 280 may likely arise as the key to the solution of these problems.

The goal of this article, then, is to formulate a proper approach to the interpretation of the "encumbrance" exclusion.

Two contrary views have recently developed concerning the meaning of the restriction against encumbering Indian lands. One of these views is presented in *Snohomish v. Seattle Disposal Co.*[5] There the Supreme Court of Washington held that "encumbrance" was a broad term including in its scope actions which merely depreciate property in value, even though they in no way restrict its alienability. Utilizing this broad definition, the court held that a zoning ordinance requiring a land use permit to maintain a sanitary land fill

4. The provision imposing the limitations on such civil jurisdiction set out in P.L. 280 § 4 (b) is also the present provision as set out in 25 U.S.C. § 1322 (b). That provision states:

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

5. Snohomish v. Seattle Disposal Co., 70 Wash.2d 668, 425 P.2d 22 (1967), *cert. denied,* 389 U.S. 1016 (1967).

could not apply to a sanitary land fill maintained on Indian land.[6]

The contrary view is set forth in *People v. Rhoades,*[7] where a California court rejected the *Snohomish* interpretation and applied a more restrictive meaning of "encumbrance," holding that the term should be limited to mortgages, liens, and similar legal claims against property. Using this narrow definition, the court upheld the application of a state statute requiring the clearing of specified areas surrounding houses built upon forest lands to an Indian living on reservation lands neighboring the forest.[8]

To determine whether "encumbrance" should be given the broad interpretation of *Snohomish* or the narrower one applied in *Rhoades,* this article will combine three approaches. It will first focus upon the legislative history of P.L. 280 in an attempt to discover the congressional intent behind the act as a whole. Second, attention will be given to the proper statutory construction to be applied to the term itself. And finally, an attempt will be made to put this "savings clause" into perspective by an analysis of its relationship to other doctrines relating to the scope of state jurisdiction over Indian affairs.[9]

P.L. 280: Historical Perspective and Analysis

Among the considerations which bear upon any effort to interpret the meaning of "encumbrance" as it is used in P.L. 280 are the dominant trends embodied in congressional efforts to resolve the so-called "Indian problem." Faced with the question of what to do with the conquered Indian tribes, Congress early recognized that control and regulation of Indian lands were fundamental aspects of any effort to establish a "civilizing" process.[10]

6. *Id.* at 26.
7. People v. Rhoades, 12 Cal.App.3d 720, 90 Cal.Rptr. 794 (1970).
8. *Id.* at 797.
9. State jurisdiction of Indians in general, the history of federal Indian policy, developments in the concept of tribal sovereignty and the taxation of Indians are generally outside the scope of this article. Nevertheless, these topics, along with a number of other considerations will be discussed to the extent they relate to the purpose of this article.
10. M. Price, Law And The American Indian 525 (1973) (hereinafter cited as Price).

Although a detailed historical analysis of congressional land policies in regard to Indians is outside the scope of this article, it is important to note that two contradictory philosophies have been alternately employed by Congress throughout history, and that these philosophical approaches must influence any consideration of P.L. 280. The earliest viewpoint was grounded on the belief that Indians ought to be assimilated into the dominant national culture. This assimilationist viewpoint is accurately reflected by a speech delivered by Thomas Jefferson in which he urged a group of assembled Delawares, Mohicans, and Muncies to forego deer and buffalo and to cultivate the land and acquire property in order "to form one people with us, and we shall all be Americans."[11]

This idea of transforming "savages" into "regular" American citizens led to a series of "termination" acts which sought to end both the unique status of Indians and the federal government's responsibility for the affairs of Indians.[12] Typical of these acts is the General Allotment Act of 1887, also known as the Dawes Act, which provided for the distribution of tribal lands to individual Indians in 160-acre allotments.[13]

The alternate philosophy, which has from time to time been implemented by Congress, is exemplified by the Reorganization Act of 1934 and similar acts which put an end to the allotment process and attempted to foster tribal self-government.[14] This contrary view is that, by virtue of the unique status of Indians as sovereign nations prior to the Indian wars as recognized by the treaties which ended them, the Indian stands in a special relationship with the federal government. Given the fact that the federal government has conquered the Indians and taken them under its protection, the government owes a duty to protect and assist Indians until such time as they are economically, socially, and

11. W. WASHBURN, RED MAN'S LAND/WHITE MAN'S LAW 61 (1971).
12. PRICE, *supra* note 10, at 531.
13. 25 U.S.C. § 331 (1970). Washburn notes the practical effect of the termination-inspired allotment act was to reduce tribal land holdings from 138 million acres in 1887 to 48 million acres in 1934.
14. 25 U.S.C. § 461 (1970), popularly known as the Wheeler-Howard Act.

politically capable of either effective integration into the dominant culture or successful self-government.[15]

Considering the fact that these two contrary philosophies have both been reflective of the majority sentiment in Congress at various times, it is not surprising that consideration of the legislative history of P.L. 280 has been largely in terms of whether the act should be considered a "termination" act or as some sort of protective legislation which would preserve some form of tribal sovereignty. It has been argued by some critics that the legislative history of P.L. 280 clearly demonstrates that termination was not the purpose of the act.[16] On the other hand, at least one court appears inclined to the view that the encumbrance restriction is little more than congressional protection against the Indian profligacy during the process of termination.[17]

While P.L. 280 may not be solely a termination act, the legislative history seems to indicate that termination of federal responsibility was an important purpose. House Report No. 848, which was adopted by the Senate in Senate Report No. 699, explains the purpose of the legislation as viewed by the House Committee on Interior and Insular Affairs.[18] The report states that the committee in cooperation with the Secretary of the Interior has legislated in five major areas affecting Indians:

> This legislation, whether before the House or presently under committee consideration, has two coordinate aims: First, withdrawal of federal responsibility for Indian affairs wherever practicable; and second, termination of the subjection of Indians to Federal laws applicable to Indians as such.[19]

It is significant that the other bills which were under consideration by the committee and the Congress at the time were all clearly termination acts removing federal responsibility and services in a number of areas.[20]

15. PRICE, *supra* note 10, at 596-99.
16. Israel and Smithson, *Indian Taxation, Tribal Sovereignty, and Economic Development*, 49 N.D.L.R. 267, at 271 (1973) (hereinafter cited as Israel and Smithson).
17. People v. Rhoades, *supra* note 7, at 797.
18. H.R. REP. No. 848, 83d Cong., 1st Sess 3 (1953)
19. *Id.*
20. *Id.* at 5.

P.L.280 was also characterized as a termination act by the Secretary of the Interior. As House Report No. 848 observes, officials from the Department of the Interior were intimately involved in formulating this legislation and their views are therefore helpful.[21] In his 1953 Annual Report, the Secretary of the Interior discussed the necessity of terminating federal responsibilities for Indian affairs and the economic development of 50 million acres of tribal land, although he cautioned that the process must not operate too quickly.[22] In the 1954 Annual Report, which was the first report issued after the passage of P.L. 280, federal efforts at termination were noted and praised.[23] The language of the report can leave little doubt that the Department of the Interior considered the act, at least in part, a termination act. Glenn L. Emmons, Commissioner of the Bureau of Indian Affairs observed in that report: "One of the first major developments contributing to a reduction of federal responsibilities in Indian affairs was the passage of Public Law 280, approved August 15, 1953."[24]

It is apparent that these references to termination were not incidental or unintentional. The prevalent mood of Congress at the time of the enactment of P.L. 280 was in favor of a rapid termination of federal involvement in Indian affairs. On July 1, 1952, the House passed a resolution directing the Committee on Interior and Insular Affairs to conduct a detailed investigation to determine the ability of Indian tribes to manage their own affairs without federal supervision.[25] Just two weeks prior to the approval of P.L. 280, the Senate passed by voice vote House Concurrent Resolution No. 108, which had previously been passed by the House.[26] That resolution declared it to be the policy of the United States government to make Indians, as rapidly as possible, "subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the

21. *Id.* at 3.
22. 1953 SEC. INT. ANN. REP. 34-37.
23. 1954 SEC. INT. ANN. REP. 227.
24. *Id.*
25. H.Res. 706, 82d Cong., 2d Sess. 98 CONG. REC. 8782 (1952).
26. 67 Stat. B132 (1953).

United States and to grant them all of the rights and prerogatives pertaining to American citizenship."[27]

From the above it can be seen that P.L. 280 was clearly motivated at least in part by a termination sentiment. The concept of surrendering civil and criminal jurisdiction to the states quite obviously reduces federal responsibility and eliminates legal distinctions between Indians and non-Indians. The act was written by a committee charged with the duty of fashioning a termination procedure and passed by a Congress which had already declared termination to be its official policy. P.L. 280 was passed, at least to some degree, as a result of these sentiments.

However, those who argue that the motivation for the act was not termination, but enhancement of law and order, may not be entirely incorrect. House Report No. 848 observes:

> As a practical matter, the enforcement of law and order among the Indians in Indian country has been left to the Indian groups themselves. In many States, tribes are not adequately organized to perform that function; consequently, there has been created a hiatus in law-enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility.[28]

Putting these purposes together, it appears that the Congress, out of a strong desire to terminate federal responsibilities and in an effort to secure more effective law enforcement in Indian territories, provided for the assumption of state jurisdiction. If the act as a whole is to be read as a termination act seeking to grant powers to the state to correct defective legal machinery in the reservations, it would seem that the act should be construed liberally to afford a broad grant of power to the states. Such an approach would dictate a very restricted application of the "encumbrance" exclusion to situations where the Indian was in need of protection from his own profligacy. Using such an approach, the view presented in *Rhoades* would seem proper.

27. 67 Stat. B132 (1953).
28. H.R.REP. No. 848, 83d Cong., 1st Sess. 6 (1953).

Although such a reading of the overall act would be consistent with what is known of the legislative history, it is not entirely satisfactory or dispositive of the meaning of "encumbrance." First, although the primary purpose and tenor of the act are clear, the exact purpose for the withholding of state authority to encumber Indian land is not entirely clear.

If the act is indeed an effort to provide states with broad jurisdiction over Indians, there would seem to be little purpose in withholding jurisdiction over taxation, fishing, and alienation and encumbrance of land. Such a reservation either represents a congressional reluctance to afford complete termination and assimilation in these areas, or a desire to honor treaties which had generally reserved these subjects to Indian self-government. The view that these restrictions are a protection of the Indian against his own profligacy does not entirely fit with the actual language of the act, inasmuch as the authority which is limited is not the authority of the Indian to govern his own affairs, but the authority of the state governments to exercise jurisdiction in certain areas. If the exclusions were designed to protect the Indian from anyone, they would appear intended to protect the Indian from the power of *state governments.* Therefore, although P.L. 280 might be properly characterized as a termination act, such a characterization does not entirely resolve the meaning of the encumbrance exclusion.

Second, although an interpretation finding a broad grant of power to the states might be consistent with the original national policy behind the act, such a reading is inconsistent with more modern approaches to the problem. The trend of modern thinking appears to be away from a complete termination approach and more toward the principles of the 1934 act. In a speech delivered to Congress on July 8, 1970, President Nixon unilaterally declared a change in governmental policy concerning Indian affairs which he encouraged Congress to follow.[29] In that speech, the President declared: "Self-determination among Indian people can and must be

29. 116 CONG REC. 23131 (1970).

encouraged without the threat of eventual termination."[30] The trend of judicial thinking likewise appears to be in favor of preserving the unique legal status of Indians despite frequent efforts of state and local governments to assume control.[31]

In short, the termination philosophy which originally aided in the passage of P.L. 280 is to some extent an anachronism. Given the fact that much of current governmental policy is aimed at fostering the economic independence of Indian tribes and promoting tribal self-government, interpreting P.L. 280 in such a way as to decrease Indian autonomy only serves to render governmental policy inconsistent.

Therefore, although the act was originally grounded in termination theory, that theory has been sufficiently dissipated by recent developments that it ought not to govern the act. Even if the act as a whole is to be viewed as requiring a broad grant of power to the states, the limitation on encumbrances should not necessarily be interpreted in such a manner. There is sufficient ambiguity to require further consideration of the proper meaning of "encumbrance" and an examination of the policies which would be furthered by the different approaches.

ENCUMBRANCE: DEFINITIONAL ANALYSIS

As pointed out by the discussion of the legislative history of P.L. 280 set out above, congressional intent as to the characterization to be given this statute as a whole, as well as the proper interpretation to be given the particular use of the term "encumbrance" is at least somewhat doubtful.

By approaching the problem from a different angle, however, *i.e.,* by critically focusing upon the term "encumbrance" used in this statute in the light of a unique maxim of statutory construction applicable to "Indian legislation"

30. *Id.*
31. State efforts at securing jurisdiction through various procedures have been generally refuted. *See,* Israel and Smithson, *supra* note 16, at 267-70; McClanahan v. State Tax Comm'n of Arizona, ____ U.S. ____, 93 S.Ct. 1257 (1973).

and by analytically comparing and weighing the definitions given this term by various courts in both "Indian" and "non-Indian" contexts, perhaps a better understanding of the congressional purpose in employing the word "encumbrance" can be gained.

The most relevant section of P.L. 280's "exclusionary savings clause" provides:

> Nothing in this section shall authorize the alienation, *encumbrance,* or taxation of any real or personal property, including water rights, belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.[32] (Emphasis added).

Assuming P.L. 280 was intended as a rather broad grant of jurisdiction to the states in at least some areas, the importance of the above clause lies in the fact that it stands as a delineation of the boundaries of that grant. Furthermore, while the limitations imposed by the prohibitions on state jurisdiction over "alienation" and "taxation" of Indian property seem, on their face at least,[33] to be rather self-evident, the scope of the limitation imposed by the term "encumbrance" seems inherently unclear. Yet, because of the potential variety of proposed state actions which eventually might fall within the penumbra of this restrictive phraseology, a clear definition of its scope is paramount to any rational understanding of the present status of the tripartite federal-state-Indian jurisdictional relationship.

Standing alone, the term "encumbrance" has been subjected to such dictionary definitions as:

> A burden or charge upon property: a claim or lien upon an estate that may diminish its value: *specif.*; any interest or right in land existing to the diminution of the value of the fee but not preventing the passing of the fee by conveyance.[34]

32. 25 U.S.C. § 1322(b) (1970).
33. This is not to indicate that these other terms have not also been the focus of a good deal of controversy. *See, e.g.*, Mescalero Apache Tribe v. Jones, *supra* note 2. These problems, however, are beyond the scope of the present article.
34. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 747 (1971).

Black's Law Dictionary describes it as "[a]ny right to, or interest in, land which may subsist in another to the diminution of its value, but consistent with the passing of fee."[35] It cites case law for various examples, including:

> A claim, lien, charge, or liability attached to and binding real property. . . . An incumbrance may be a mortgage . . .; a judgment lien . . .; an attachment . . .; an inchoate right of dower . . .; a mechanics lien . . .; a lease . . .; restriction in deed . . .; encroachment of a building . . .; an easement or right of way . . .; accrued and unpaid taxes . . .; the statutory right of redemption . . . .[36]

Courts seem to have some difficulty in applying these standard definitions to actual situations. The two leading cases in interpretating the meaning of the word encumbrance in the "savings clause" are *Snohomish County v. Seattle Disposal Co.*,[37] and *People v. Rhoades*.[38]

Snohomish presents the view that this term should be constructed in a broad sense. "This court has said in the past that any 'burden upon land depreciative of its value, such as a lien, easement, or servitude, which, though adverse to the interest of the landowner, does not conflict with his conveyance of the land in fee' constitutes an encumbrance."[39] The court determined that the application of a zoning ordinance which would limit the commercial use of the land in question definitely reduced its value and therefore should be considered an encumbrance within the scope of P.L. 280. This decision would imply that any restriction on land held in trust by the United States for Indians which would be adverse to their interests and diminish the value of the property to them would be invalid under this limitation.

Judge Hale, in voicing the dissent in that case, set forth the opposite view in interpreting the meaning of encumbrance for purposes of P.L. 280. He used the term as a word of art

35. BLACK'S LAW DICTIONARY 908 (4th ed. 1968).
36. *Id.*
37. Snohomish County v. Seattle Disposal Co., *supra* note 5.
38. People v. Rhoades, *supra* note 7.
39. Snohomish County v. Seattle Disposal Co., *supra* note 5, at 26, citing a prior Washington case Hebb v. Severson, 32 Wash.2d 159, 167, 201 P.2d 156, 160 (1948).

stating, "The term 'encumbrance' should be given its more definitive and precise meaning—one denoting a burden on the land and affecting the title thereto or one impairing the power of alienation such as a mortgage, lien, easement, lease, or other disability to fee ownership."[40] He stated that case law has held that municipal restrictions on the use of land are not encumbrances for purposes of letting a purchaser avoid the contract claiming title is unmerchantable because of the restriction.[41] In fact, the dissent argued, "although zoning laws do impair the uses to which one may put his land, from their inception they have not been deemed an encumbrance on real estate."[42]

The dissent in *Snohomish* espoused the theory upon which *People v. Rhoades* was decided. That case stressed the interpretation of encumbrance given by the *Snohomish* dissent, adding that even a definition as broad as the one used by the majority opinion of *Snohomish* would not cover the particular California land use law applied to *Rhoades* because, "as we view it ,it would not be a burden upon Rhoades' land 'depreciative of its value' to require that it be so maintained as to not be a hazard to forest lands in general and to Rhoades' land in particular."[43] This holding rejected the contention made in the brief of amicus curiae to the California Court of Appeals that:

> Encumbrances need not be financial burdens, however. California Courts have previously defined encumbrances as including whatever obstructs and impairs a traditional Indian's use of his land. Accordingly—under the rule requiring federal laws to be construed in the Indian's favor—section 4291 must be ruled an encumbrance that cannot be applied to Indian reservations.[44]

These two opposing cases represent the problem created by the limitations in P.L. 280 which is, in the words of the *Rhoades* court, "one of statutory interpretation. By the use of the word 'encumbrance' in 18 United States Code, section

40. Snohomish County v. Seattle Disposal Co., *supra* note 5, at 28.
41. *Id.* citing Lohmeyer v. Bower, 170 Kan. 442, 227 P.2d 102 (1951).
42. Snohomish County v. Seattle Disposal Co., *supra* note 5, at 28.
43. People v. Rhoades, *supra* note 7, at 797.
44. Brief for Amicus Curiae at 5, People v. Rhoades, *supra* note 7.

1162, what did Congress intend?"[45] It is asserted here that for the several reasons to be discussed below, the word "encumbrance should be construed broadly and in a light most favorable to the Indians. This conclusion is reached upon examination of the clause in its statutory context, evaluation of the two opposing views and traditional attitudes of statutory construction toward the Indian people.

1. The broad view put forth in *Snohomish* actually adheres more closely to the language used in the standard definitions of "encumbrance." In viewing that language objectively, it is not difficult to view a restriction against the use of land as being depreciative of its value. As the brief of amicus curiae in the *Rhoades* case contended, depreciation in value need not be necessarily in monetary terms.[46] Certainly the inability to use the land as desired would lessen, if not negate, the value of that land to the owner. In light of the current attempts of the Indian peoples to maintain their culture and heritage it would be ludicrous to argue that the only value of their land to them is in its sale price or market value.

2. The term should be viewed in its statutory context. The phrasing of the limitation in P.L. 280 in its "trilogy" form would indicate that each term is intended to cover an area over which states do not assume jurisdiction. If the narrow interpretation of "encumbrance" is followed as espoused by the *Rhoades* case and the dissent in *Snohomish,* then the word would describe only restrictions on land which affect the title or impair the power of alienation.[47] With such an interpretation the "trilogy" might as well be "alienation, alienation or taxation" rather than "alienation, encumbrance or taxation." If the narrow interpretation is applied, and encumbrance is construed as including only restrictions affecting alienability, the language of the statute becomes redundant. The court in *Rhoades* seemed to think that the fact "alienation" and "encumbrance" were used in the same series indicated the intention for them to be synonymous in meaning.[48]

45. People v. Rhoades, *supra* note 7, at 796.
46. Brief for Amicus Curiae at 5, *supra* note 44.
47. Snohomish County v. Seattle Disposal Co., *supra* note 5, at 28.
48. People v. Rhoades, *supra* note 7, at 797.

This is no more logical than to say "taxation" also means "alienation" because it is in the same series as well. As the court in *Rincon Band of Mission Indians v. County of San Diego* pointed out, "In construing a statute, courts whenever possible avoid a construction which renders part of the statute superfluous."[49] The use of "alienation" would render "encumbrance as useless surplusage if the narrow interpretation is applied.

The court in *Rincon* argued:

> Later in the same statute it is provided that nothing in the section "shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto." If all state laws regulating were made inapplicable by the earlier language describing encumbrances, then this language would be totally unneeded.[50]

Upon further examination of that language this phrase is also found: "or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the *ownership or right to possession of such property* or any interest therein."[51] (Emphasis added). If the rationale of the *Rincon* court is followed then the use of the term "alienation" in any sense would render this language unnecessary as well. Carrying the *Rincon* analysis through, it would seem that all of the language of the second part would become superfluous. As the language pertaining to regulation of the use of property relates to encumbrance, so does the language pertaining to ownership of such property or interest therein relate to alienation. It would seem more appropriate to attribute these provisions as definitions of the terms in the first part of the limitation. The second part of the section would seem to be specific enumerations of the limitations imposed by the broad terms "alienation" and "encumbrance."

The definite correlation of these two phrases to "alienation" and "encumbrance" separately would indicate that

49. Rincon Band of Mission Indians v. County of San Diego, 324 F. Supp. 371, 376 (S.D. Cal. 1971), citing Consolidated Flower Shipments Inc. v. Civil Aeronautics Board, 205 F.2d 449 (9th Cir. 1953).
50. Rincon Band of Mission Indians v. County of San Diego, *supra* note 49.
51. 25 U.S.C. § 1322(b) (1970).

these words were intended, in fact, to be interpreted separately, each with its own precise meaning. Only through the broad interpretation of encumbrance can this be effectuated.

3. Throughout the case law on the relationship of the United States with the Indian people one concept has remained clear. That is that provisions in federal Indian laws must be construed broadly and in a light most favorable to Indians. Both *Snohomish* and *Rhoades* concede this fact. *Snohomish* applies the concept directly to their application, citing *Squire v. Capoeman,*[52] saying,

> In that case the Court concluded that the words 'charge or encumbrance,' as they appear in the General Allotment Act of 1887, should be interpreted broadly, and any doubt should be resolved in favor of the Indians for whose benefit that legislation, as well as the legislation before us, was intended. We, therefore, hold that Snohomish County Zoning Ordinance No. 7 . . . constitutes an encumbrance. . . .'"[53]

The court in *Rhoades* begins its analysis of the word "encumbrance" with this language, "Starting with the premise that this law like all Federal Indian laws must be construed *in the manner most favorable to Indians.*"[54] (Emphasis added). The court then proceeds to interpret "encumbrance" in its narrow sense and in the manner most unfavorable to the Indians involved. The *Squire* case cited in *Snohomish* makes it quite obvious that the term "encumbrance" is to be construed broadly. Since *Rhoades* acknowledges this position, it seems strange that it would then turn its back, construing the term narrowly. The recent 1973 Supreme Court case of *McClanahan v. State Tax Commission of Arizona*[55] indicates that this concept is very much in effect and adhered to today.

> It is circumstances such as these which have led this Court in interpreting Indian treaties, to adopt the general rule that "Doubtful expressions are to be resolved in favor of the weak and defenseless

52. Squire v. Capoeman, 351 U.S. 1 (1956)
53. Snohomish County v. Seattle Disposal Co., *supra* note 5, at 26.
54. People v. Rhoades, *supra* note 7, at 796, citing Elser v. Gill Net Number One, 246 Cal. App. 2d 30, 36, 54 Cal. Rptr. 568 (1966).
55. McClanahan v. State Tax Commission of Arizona, ___ U.S. ___, 93 S.Ct. 1257 (1973).

> people who are the wards of the nation, dependent upon its protection and good faith."[56]

That the use of "encumbrance" in P.L. 280 is such a "doubtful expression" is not considered here, but as such it should then be resolved in favor of the Indians.

4. The dissent in *Snohomish* argued that "were zoning regulations regarded as encumbrances on land in the legal sense, the courts at their inception would have held them to constitute a taking or damaging of real estate under the state's power of eminent domain and not simply an expression of the police power."[57] That opinion and the majority opinion in *Rhoades* argued that even if a regulation concerning land use would impair the use of the land to the Indian owner, it should be upheld because Indians are entitled to equal protection of the laws. This would mean that they should be subjected to the duties as well as enjoy the rights and privileges. As the majority in *Snohomish* indicated, "We have already determined that this state has no jurisdiction to control either directly or indirectly the use of the Indian lands in question. Where there is no jurisdiction, there can be no denial of equal protection."[58]

It should be noted at this point that a substantial portion of the argument in *Rhoades* and in the *Snohomish* dissent was dedicated to the idea that there was a necessity for the application of police power. This necessitates pointing out that some regulations can be imposed through other statutory provisions. 25 U.S.C. section 231 provides that a state has jurisdiction to inspect and regulate health, sanitation, and related matters on Indian tribal lands.[59] 25 C.F.R. section 1.4 provides that state laws which limit, govern, regulate or control the use of real property are inapplicable to lands held in trust for Indians unless the Secretary of the Interior makes them applicable.[60] In *Donahue v. California Justice Ct. for Klamath Trinity Judicial District,*[61] a 1971 California

56. *Id.* at 1263, citing Carpenter v. Shaw, 280 U.S. 363 (1930).
57. Snohomish County v. Seattle Disposal Co., *supra* note 5, at 28
58. *Id.* at 27.
59. 25 U.S.C. § 231 (1970).
60. 25 C.F.R. § 1.4 (1973).
61. Donahue v. California Justice Ct. for Klamath Trinity Judicial District, 25 Cal.App. 3d 557, 93 Cal. Rptr. 310 (1971).

case, dealing with a fishing violation on Indian land by an Indian, the court concludes, "(t)he facts presently before us do not indicate the necessity for the legitimate exercise of police power, as in *Rhoades*."[62] This expression that *Rhoades* presented a "necessity" for police power would indicate that perhaps the court in *Rhoades* could have based its decision that state power existed to deal with the problem presented in that case upon a broad reading of 25 U.S.C. section 231 rather than hinging its decision upon an unnecessarily restrictive reading of "encumbrance."

As to 25 C.F.R. section 1.4, F.R. Doc. 65-7193, 30 Fed. Reg. 8722 conferred the required consent of the Secretary of the Interior for the state of California to apply its laws, ordinances, regulations, etc. to Indian lands, but only as to Indian land that is leased or held under similar agreement. Therefore, this provision is applicable only to leased land and not to tribal land occupied by Indians.[63]

It can be seen, therefore, that some arguments for state regulation of land use may be based on other means of acquiring jurisdiction than P.L. 280. These, however, are restricted in their scope by the above described limitations just as P.L. 280 is restricted by its "savings clause."

5. A brief look at the Supreme Court's treatment of other limiting language of P.L. 280 might be helpful in determining how "encumbrance" should be interpreted. In the limitation under the criminal jurisdiction section the following language is found:

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real property, . . . or shall deprive any Indian or any Indian tribe, band or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.[64]

In the *McClanahan* case,[65] where the state was attempting to impose a personal income tax on a reservation Indian whose

62. *Id.* at 314.
63. Brief for Amicus Curiae at 8, People v. Rhoades, *supra* note 7.
64. 25 U.S.C. § 1321(b) (1970).
65. McClanahan v. State Tax Comm'n of Arizona, *supra* note 55.

income was derived from reservation sources, the state was found to be unable to enforce that tax. That decision was not based squarely on P.L. 280 since the state had not adopted that provision. By way of footnote that court indicated, "We do not suggest that Arizona would necessarily be empowered to impose this tax had it followed the procedures outlined in 25 U.S.C. section 1322 *et. seq. Cf.* 25 U.S.C. section 1322 (b). That question is not presently before us and we express no views on it."[66] The Washington Supreme Court in *Tonasket v. State,*[67] where P.L. 280 was in effect, held a state cigarette tax applicable to an Indian selling cigarettes on Indian land. This was vacated by the U.S. Supreme Court. The Supreme Court simply stated:

> The judgment of the Supreme Court of Washington is vacated, and the case is remanded to that court for reconsideration in light of . . . this Court's decision in *McClanahan v. Arizona State Tax Comm'n,* .... U.S. ...., 93 S. Ct. 1257, 36 L.Ed. 2d .... (1973).[68]

This gives rise to the implication that McClanahan would then, in fact, be decided the same under P.L. 280, the state being unable to impose the tax.

The Supreme Court, in the 1973 case *Department of Game of the State of Washington v. The Puyallup Tribe,*[69] reversed the lower court decision that Washington State Game Department's regulation against net fishing was binding against the Puyallups. The court, through Mr. Justice Douglas, delivered the unanimous decision that the rights of the Indians as enumerated under the applicable treaty should be accommodated and the regulation should not be applicable to them. It is significant to note the Court's discussion of the police power. It stated:

> We do not imply that these fishing rights persist down to the very last steel head in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a

66. *Id.* at 1265.
67. Tonasket v. State, 70 Wash.2d 607, 488 P.2d 281 (1971).
68. Tonasket v. State, ... U.S. ....., 93 S.Ct. 1941 (1973).
69. Department of Game of the State of Washington v. The Payallup Tribe, 42 U.S.L.W. 4001 (U.S. Nov. 19, 1973).

> steel head is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The *police power of the State is adequate* to prevent the steel head from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steel head until it enters their nets.[70] (emphasis added)

Such language seems to approach the "necessity" of police power concept expressed in *Donahue*.[71]

These decisions indicate that the courts have generally interpreted the other limitations in P.L. 280 in favor of the Indians. The "encumbrance" limitation should then be likewise interpreted, as the court did in *Snohomish*.

6. Congressional intent is all important in interpreting this provision. A footnote in *McClanahan*[72] implied that the court still accepts the general principle that when Congress intends to grant states specific jurisdiction over the affairs of Indians on reservation it will do so expressly. The rationale of requiring a clear expression of intent is explained in *Bennett County, South Dakota v. United States:*[73]

> To assure the utmost fairness in transactions between the United States and its Indian wards, any intent to deprive Indian tribes of their rights in land, or otherwise bring about the extinguishment of Indian title, either by grants in abrogation of existing treaties or through other congressional legislation *must be clearly and unequivocally stated* and language appearing in such grants and statutes is *not* to be construed to the prejudice of the Indians.[74] (emphasis added)

Since there is no such clear and unequivocal language granting jurisdiction over land use under P.L. 280 and since a narrow construction of the savings clause would appear to be to the prejudice of the Indians, it would seem that a broad interpretation should be employed.

70. *Id.* at 4003.
71. *See* text *supra* p. 17.
72. McClanahan v. State Tax Comm'n of Arizona, *supra* note 55, at 1264 n.13.
73. Bennett County, South Dakota v. United States, 394 F.2d 8 (8th Cir. 1968).
74. *Id.* at 11-12.

Although the considerations reviewed above provide substantial cause for adopting the *Snohomish* definition of encumbrance, an evaluation of the question solely in terms of definitions and the rationale of related cases, even considered in light of the legislative-historical analysis provided in the first section of this article, would be incomplete. The broader context of the effect of P.L. 280 as related to other jurisdictional bases must be considered in order to arrive at a comprehensive view of the present scope of state jurisdiction over Indian lands, and the ramifications of either a broad or narrow definition of "encumbrance."

PUBLIC LAW 280 AND THE "ENCUMBRANCE" SAVINGS CLAUSE VIS-A-VIS CONTEMPORARY JURISDICTIONAL DOCTRINES.

While the primary purpose of this article is to focus upon the term "encumbrance" in P.L. 280 and to suggest its proper interpretation, this task cannot be carried on in isolation. To appreciate the significance of this savings clause it is necessary to look at the question of state jurisdiction over Indians on a somewhat broader level. In recent years, the "official word" to the states as to their proper jurisdictional role regarding Indians has been embodied basically in three commands. First, as discussed above, P.L. 280 stands as the latest official position taken by Congress as to the extent of state jurisdiction. The source of the second and third directives has been the United States Supreme Court which has attempted to interpret Congressional intent in this area in two landmark decisions: *Williams v. Lee,*[75] and *McClanahan v. State Tax Commission of Arizona.*[76] Paradoxical situations have arisen, however, when states have attempted in good faith to follow these directives. For instance, when states have attempted to rely upon *Williams* as a basis for their jurisdictional claim they have been told they should have relied upon P.L. 280.[77] When they have attempted to rely upon P.L. 280, however, they have been told that they are still without jurisdictional power under

75. Williams v. Lee, 358 U.S. 217 (1959).
76. McClanahan v. State Tax Comm'n of Arizona, *supra* note 55.
77. Kennerly v. District Court of Montana, 400 U.S. 423 (1971).

McClanahan.[78] Yet, *McClanahan* can be read as implying that the state could have relied upon *Williams* as a basis for jurisdictional power in the first place.[79]

It is the purpose of this discussion, then, to attempt an explanation of how this paradoxical merry-go-round arose, how these three directives to the states can be harmonized, and how "encumbrance" might fit into the total scheme of state jurisdiction over Indian lands.

In 1959, the Supreme Court in *Williams v. Lee*[80] held that an Arizona state court did not have jurisdiction to decide a suit brought by a non-Indian against a Navajo Indian for a debt arising out of a transaction which took place on the Indian reservation. This case has generally been noted as espousing two principles: first, it supposedly reaffirmed the Court's position taken in *Worcester v. Georgia*[81] that Congress holds plenary jurisdiction as to Indian affairs and consequently that states have no jurisdiction over Indians except that expressly granted; second, the Court formulated, perhaps unintentionally, the following so-called "infringement" test as to state jurisdiction: "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."[82]

A brief review of the problems inherent in attempting to rationalize *Williams* with P.L. 280 follows, however, in summary, it can be observed that the basic difficulties are these: first, there would appear to be an inconsistency between the adherence in *Williams* to the basic philosophy of *Worcester v. Georgia* on the one hand and its own definition of state power on the other; second, *Williams* apparently did not accept P.L. 280 (at least as to those states where its acceptance is optional) as a governing act of Congress, yet the most recent Supreme Court cases would view it as clearly such an act; third, the fact that these recent cases have found that P.L. 280 is a governing act of Congress and hence the sole

78. Tonasket v. State, *supra* note 68.
79. State Ex Rel. Iron Bear v. District Court, 512 P.2d 1292 (Mont. 1973).
80. Williams v. Lee, *supra* note 75.
81. Worcester v. Georgia, 31 U.S. 515 (1832).
82. Williams v. Lee, *supra* note 75, at 220.

basis for jurisdiction places those states which have not yet acted under P.L. 280 or cannot obtain tribal consent in the paradoxical position of being stripped of jurisdiction by an act that was intended to grant more jurisdiction to the states.

The apparent inconsistency between the two principles enumerated in *Williams* is readily observable. On the one hand, the Court ostensibly adheres to the *Worcester* principle that there can be absolutely no state jurisdiction over Indians unless expressly granted by Congress, while on the other hand, a plain reading of the test formulated by the Court would lead to an inference that states have some "inherent" type of jurisdiction over Indians limited only to the extent it comes into conflict with a vague notion of tribal sovereignty.

Beyond this primary difficulty, however, the waters are further muddied by any attempt to rationally harmonize *Williams* with P.L. 280. If the infringement test is truly a recognition of some non-statutory power in state courts over Indians, it might be argued in states which have not adopted P.L. 280 that the infringement test still applies and that these courts are free to exercise jurisdiction over Indians so long as there is no interference with tribal sovereignty. This was in fact the argument made in *Kennerly v. District Court of Montana*[83] and *McClanahan v. State Tax Commission of Arizona.*[84]

In *Kennerly,* the Montana legislature, pursuant to the 1953 version of P.L. 280, had extended its criminal jurisdiction to some Indian tribes, but had not taken steps to extend civil or criminal jurisdiction over Indians on the Blackfoot reservation. Relying on *Williams,* the state maintained that its courts nevertheless had jurisdiction to hear a suit on a debt arising from a transaction on the reservation, due to an enactment of the Blackfoot Tribal Council (not a consent sufficient under P.L. 280) which authorized the state concurrent jurisdiction over all suits wherein the defendant was a member of the tribe. Despite the fact that Montana had not gained jurisdiction over Indians pursuant to P.L. 280, the state supreme court viewed this action by the Tribal

83. Kennerly v. District Court of Montana, *supra* note 77.
84. McClanahan v. State Tax Comm'n of Arizona, *supra* note 55.

Council as an alternative basis for the assertion of state civil jurisdiction, for under *Williams* there could surely be no infringement of tribal sovereignty where the tribe itself had agreed to the state's assumption of jurisdiction.

Similarly, in *McClanahan* it was argued that, even though it had not taken advantage of P.L. 280, the state of Arizona still had power to impose a state income tax on an Indian's personal income earned totally on a reservation, since such tax under *Williams,* arguably at least, would not infringe on tribal sovereignty but would rather merely infringe on plaintiff's rights as an individual Navajo Indian.

In both *Kennerly* and *McClanahan* the Supreme Court's answer to these contentions of inherent state jurisdiction arising from *Williams* was the same. In both cases the court apparently recognized the validity of the infringement test but held that the test was not applicable by its own terms since P.L. 280 was in fact a "governing act of Congress." These cases therefore require that for a state to assume any jurisdiction over Indians it must follow precisely the procedure set out in P.L. 280.

The court in *Kennerly* implies that even in *Williams* there was a tacit recognition that P.L. 280 was a governing act of Congress.[85] However, if it was clearly apparent that P.L. 280 was a governing act of Congress it is worth pondering why the *Williams* court did not base its decision on that ground, rather than going on to find "there can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves."[86] Under the rationale in *Kennerly* and *McClanahan* the fact that P.L. 280 was in existence and that Arizona had not assumed jurisdiction under it should have been dispositive of the case without any

85. The court was apparently referring to the following passage: "In a general statute (P.L. 280) Congress did express its willingness to have any State assume jurisdiction over reservation Indians if the State Legislature or the people vote affirmatively to accept such responsibility. To date, Arizona has not accepted jurisdiction . . . ." Williams v. Lee, *supra* note 75, at 222.

86. William v. Lee, *supra* note 75, at 223.

need to arrive at the question of whether the state action did in fact interfere with tribal sovereignty.

In *McClanahan* and *Kennerly* it seems apparent that the Court is holding P.L. 280 out to be a governing act of Congress for all states whether they have sought jurisdiction under it or not. In this regard it is interesting to note that the *Williams* court classified those parts of P.L. 280 which *directly granted* jurisdiction to California, Minnesota, Nebraska, Oregon, and Wisconsin as examples of Congress expressly granting to states the jurisdiction which *Worcester* had denied,[87] (and presumably constituting, therefore, governing acts for the purpose of the infringement test) while it separated out those parts of P.L. 280 which presented a choice to the states to assume jurisdiction by enactment of legislation or change in constitution and classified these merely as examples of Congress' willingness to "have any State assume jurisdiction . . . ."[88] From this classification differentiation and from the fact that the *Williams* court went on to look at whether tribal sovereignty had been infringed, it would seem that the *Williams* court did not view the general enabling act section of P.L. 280 as a "governing act of Congress."

Furthermore, if P.L. 280 is a governing act of Congress, then a paradox is presented. The purpose of P.L. 280 was to grant more power to the states over Indian affairs; yet if it is a governing act of Congress, those states which cannot get Indian consent to the assumption of jurisdiction have less jurisdiction than they possessed prior to the passage of the act. If P.L. 280 is a governing act of Congress, then whatever jurisdiction was claimed on the basis of *Williams* has disappeared.[89]

It has been suggested[90] that some of the problems noted above can be resolved by the following analysis. First, the court in *Williams* never intended that the test suggested in that case be used to imply that there existed any sort of "inherent" state power over Indians. Rather, the test was

87. *Id.* at 221.
88. *Id.* at 222.
89. Sullivan, *State Civil Power over Reservation Indians*, 33 MONT. L. REV. 291 (1972).
90. Israel and Smithson, *supra* note 16.

simply meant to be reflective of the principle that state courts may have jurisdiction over peripheral Indian affairs such as suits by Indians against outsiders, or suits between non-Indians who committed crimes against each other on a reservation[91] and was never meant to be taken to mean that states may have power to apply their laws to Indians on reservations even if there was no interference with tribal sovereignty. Second, as to the latter power, the Williams court, it is argued, never challenged the fact that this could come only by way of an express grant from Congress. Acceptance of this view would clear up at least two of the problems pointed out above. It would mean, first of all, that the *Williams* court's acceptance of *Worcester* was not in conflict with its proposed test since the latter, being applicable only to the *non-internal* affairs of Indians, is consistent with the notion that states have no jurisdiction over Indian affairs unless expressly granted. Furthermore, this analysis would also solve the seemingly paradoxical situation of P.L. 280 taking away power from those states which have not or could not obtain Indian consent, since if *Williams v. Lee* did not recognize any inherent state power to control *internal* Indian affairs, then there was no power for P.L. 280 to take away. Under this view, P.L. 280 is the only logical basis for a state's claim to jurisdiction over the internal affairs of Indians.

While the above interpretation of the *Williams v. Lee* test is probably theoretically the most logical since it does not call for a break with the *Worcester* principle of "no jurisdiction unless expressly granted" which the *Williams* court claimed to adhere to, it is simply not the interpretation which the most recent Supreme Court and state supreme court decisions have given it. Therein lies the basis of the current conceptual difficulties in harmonizing the "infringement" test with P.L. 280.

As pointed out above, if the *Williams* court truly meant to say that its test should never be interpreted as recognizing the possibility of state power existing to regulate internal Indian affairs unless that power was expressly granted (re-

91. These two situations were in fact listed as examples of state action permissible under the infringement test. Williams v. Lee, *supra* note 75, at 220.

gardless of whether such exercise of power would interfere with tribal sovereignty), then why didn't the Court decide the case on this basis? This case clearly involved "the affairs of Indians on a reservation" and could have been summarily dismissed since the state lacked any specific grant of power from Congress. Instead, however, the court insisted upon holding the challenged state action up to the test of infringement, thereby basing its opinion on the fact that the state action infringed on tribal sovereignty.

Admittedly, it might seem rather inconsequential whether a proposed state action is struck down due to its being an infringement on tribal sovereignty (and thereby failing the *Williams* test) or whether it is struck down because there has not been an express grant of power which is needed for *any* state action affecting Indians on reservations (and thereby failing without regard to the *Williams* test). For all practical purposes, even if the *Williams* test is given its plain meaning[92] (*i.e.*, that *any* state action is permissible so long as it does not interfere with tribal sovereignty) any state action which in fact attempted to control *internal* Indian affairs would not only fail for lack of "express authority" under the one view, but would also undoubtedly fail the *Williams* test as being an "infringement" on tribal sovereignty.

If, then, in practical terms, the state will be able to exercise no greater jurisdiction under one theory than the other, why make the distinction? The answer has been alluded to above but seems worth reiterating here. If the *Williams v. Lee* test was not a recognition of any possible "inherent" or "reserved" state jurisdiction over *internal* Indian affairs then it should be clear to the states that this case was not a departure from the traditional *Worcester* rule. Once it is admitted, then, that *Williams v. Lee* did not recognize such jurisdiction, P.L. 280 can logically be viewed as the first and only offer by Congress of this type of jurisdiction to the

92. *See*, for example, Frankfurter's opinion in Kake Village v. Egan, 369 U.S. 60, 75 (1961): "These decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law."

states and they cannot complain of being forced to follow its procedures.

On the other hand, if the *Williams v. Lee* test is viewed as a recognition of the propriety of *any* state action which does not infringe on tribal sovereignty, *i.e.*, that it was somehow a change from the traditional rule of *Worcester,* then, even though this "inherent" state power is practically limited to jurisdiction over the *non-internal* affairs of Indians, some states are likely to feel that *Williams v. Lee* is another route to gaining state jurisdiction apart from P.L. 280 and will resent any attempted assertion that adoption of P.L. 280 is an absoute prerequisite to state jurisdiction. Under this view it is hard for the states to believe that the mere availability of P.L. 280 was intended to undercut the power that the Supreme Court in *Williams v. Lee* apparently recognized they possessed.

The Supreme Court in *Kennerly* and *McClanahan*[93] gave little in the way of guidance to the states to get around the conceptual difficulties outlined above. In *Kennerly,* for instance, it was clearly stated that P.L. 280 was a governing act of Congress and was the only avenue open for the states to obtain jurisdiction over the internal affairs of Indians. However, by reason of the court's failure to adequately explain away the apparent recognition of "inherent" powers under *Williams v. Lee* and why this test no longer applied even to states which had not adopted P.L. 280, this area of the law was left in a confused condition. Three Montana cases decided subsequently to *Kennerly* reflect this confusion most clearly.

Shortly after the *Kennerly* decision the Montana Supreme Court seemed quite content, in *Crow Tribe of Indians v. Deernose,*[94] to accept the United States Supreme Court's decision on its face, for without any discussion of *Williams v. Lee* it simply held:

> It is abundantly clear that state court jurisdiction in Indian affairs on reservations does not

93. Kennerly v. District Court of Montana, *supra* note 77; McClanahan v. State Tax Comm'n of Arizona, *supra* note 55.
94. Crow Tribe of Indians v. Deernose, 487 P.2d 1133 (Mont. 1971).

> exist in the absence of an express statutory grant of such jurisdiction by Congress together with strict compliance with the provisions of such grant . . . (citing *Kennerly*) where as here, Congress has not expressly granted jurisdiction to state courts except under procedures specified in (P.L. 280) . . . and where the procedures . . . have (not) been complied with, state court jurisdiction over real estate mortgage foreclosure actions on Indian trust lands situate on Indian Reservations does not exist.[95]

Two years later, in *Security State Bank v. Pierre,*[96] the court, faced with a debt action arising from a transaction which took place within the exterior boundaries of the Flathead Indian Reservation, held that the state court did not have jurisdiction since under the *Kennerly* ruling the state had not taken action sufficient to obtain jurisdiction. However, instead of simply holding that *Kennerly* was controlling, the court could not resist the temptation of slipping something extra into its conclusion: "*Kennerly* is controlling and the *state cannot exercise civil jurisdiction where it interferes with the self-government of the Flathead Tribe . . .* (citing *Williams v. Lee*) (emphasis added)."[97]

There seems to be at least an inference here that even under *Kennerly* the state court could have had jurisdiction if it had not been for the fact that this action would have infringed on tribal sovereignty.

Finally, at the time the Montana court decided *State Ex Rel. Iron Bear v. District Court,*[98] which was decided after *McClanahan,* the circle seems to have become complete. For, ignoring its lesson in *Kennerly,*[99] the court once again attempted to base its jurisdiction on *Williams v. Lee* rather than upon P.L. 280:

> The guidelines are set down in *Williams* and as long as the state does not violate those guide lines and does not attempt to exercise jurisdiction over

95. *Id.* at 1136.
96. Security State Bank v. Pierre,511 P.2d 325 (Mont. 1973).
97. *Id.* at 329-30.
98. State Ex Rel. Iron Bear v. District Court, *supra* note 79.
99. The dissenting Justice pointed out the fallacy of the majority's reasoning. Note his caveat: "continued adherence to the *Williams* test has previously resulted in reversals in the judgments of this court." *Id.* at 1299.

> areas of the law where there is either a governing Act of Congress or an infringement on reservation self-government, it may continue to exercise jurisdiction . . .[100] the *residual jurisdiction* of the state over divorces on the Fort Peck Indian Reservation remains valid.[101] (emphasis added)

If the United States Supreme Court truly is of the opinion that P.L. 280 is today the only avenue to state assumption of jurisdiction over Indian affairs it has clearly failed to make manifest this opinion to the state courts.

To clear up the difficulties noted above, the following scheme is suggested. The Supreme Court should clearly state that *Williams,* consistent with the *Worcester* principle, never recognized the possibility of inherent or residual powers in the states to control *internal* Indian affairs, that any other reading of *Williams* is wrong, and that therefore the only avenue open to the states to acquire the jurisdiction denied *Worcester* is by means of P.L. 280.

Instead of this, the Supreme Court in *McClanahan* merely added more confusion to the area by its simple dismissal of *Williams v. Lee* on the basis that P.L. 280 was a governing act of Congress. By not directly getting rid of the notion of "inherent" state power over the internal Indian affairs under *Williams,* the Court has encouraged those states which have not adopted P.L. 280, such as Arizona in *McClanahan* and Montana in *Iron Bear,* to attempt to assume jurisdiction via *Williams* by simply weaseling around the tribal sovereignty bar of the infringement test, rather than by taking affirmative action under P.L. 280.

For P.L. 280 to logically stand as a governing act of Congress in a comprehensive scheme of federal-state-tribal jurisdiction, as was apparently the intent of Congress at the time of its passage, there should be allowed to exist no other "short cut" avenues for the state to assert its jurisdiction, especially under a test relying on ad hoc determinations of "infringement on tribal sovereignty," a test which would allow no predictability as to the extent of state jurisdiction.

100. *Id.* at 1297.
101. *Id.* at 1298-99.

Finally, to put the above analysis into perspective as to the "encumbrance" restriction in P.L. 280, one further point must be made. It seems clear that it was the intent of Congress that P.L. 280 take a position as the exclusive means of acquiring state jurisdiction over Indian affairs. Furthermore, while not stating the proposition very clearly, the Supreme Court in *Kennerly* and *McClanahan* seems to have accepted P.L. 280 as it was intended, *i.e.,* as the first broad grant of jurisdiction over Indian affairs to the states to the exclusion of state claims of residual power under *Williams v. Lee.* However, if the *Williams* test is now no longer applicable (either because P.L. 280 is a "governing Act of Congress" and hence the test is no longer applicable by its own terms or because the test itself never recognized the possibility of residual state powers over *internal* Indian affairs) then it must be recognized that the demise of this test did more than bring to an end a possible ground for the assertion of state jurisdiction; it also meant the end of an "outside limit" on the exercise of state jurisdiction. Loosely paraphrased, *Williams* has usually been taken to stand for the proposition that the states could, in the absence of congressional acts, exercise any jurisdiction which did not interfere with tribal sovereignty. By labeling P.L. 280 an act of Congress and thereby nullifying this basis for a state claim to jurisdiction, the "non-interference with tribal sovereignty" restriction has also fallen. Since Congress has plenary powers over Indian affairs, its exercise of those powers is not restricted by any notion of tribal sovereignty. It could, in its discretion, grant total jurisdiction to the states over Indian affairs or any lesser amount of jurisdiction as it wished. P.L. 280 on its face is a broad grant of jurisdiction to the states and contains no explicit embodiment of a restriction of state jurisdiction comparable to the "non-interference with sovereignty" limit applicable under *Williams v. Lee.* Instead, Congress' only limit on state jurisdiction seems to exist in those enumerated restrictions of section 1322(b).[102] It is in light of the possibility that Congress did not intend P.L. 280 as a complete grant of jurisdiction to the states and

102. 25 U.S.C. § 1322(b) (1970).

perhaps not even as a grant of jurisdiction over *all* matters other than those few expressly enumerated restrictions in section 1322(b), that the term "encumbrance" might loom large as the successor to "tribal sovereignty" as an outside limit on state assumption of jurisdiction over Indian affairs.

P.L. 280 AND THE STATUS OF TRIBAL SOVEREIGNTY

The current approach of the Supreme Court of considering issues of state jurisdiction over Indians in terms of P.L. 280 has modified traditional concepts of sovereignty which have dominated jurisdiction questions for more than 140 years.

Although it has been argued that no new legal principle or formulation is necessary to define the limits of state jurisdiction, *Kennerly* and *McClanahan* operate to reduce the significance of the sovereignty concept in the consideration of such questions and enlarge the role to be played by the "encumbrance" limitation in P.L. 280.

The traditional sovereignty approach had its beginnings in Chief Justice Marshall's opinion in *Worcester v. Georgia.*[103] In that 1832 case, the Court reversed the conviction of a minister found guilty of being present within Indian territory without the permission of Georgia state officials. The Court based its reversal on the doctrine that Indian tribes constituted "distinct political communities, having territorial boundaries, within which their authority is exclusive . . . ."[104] The Court found that the Cherokees constituted a separate nation "with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter. . . ."[105]

This basic formulation of the sovereignty principle has been the primary doctrine utilized to review questions of state jurisdiction until quite recently.[106] The Supreme Court de-

103. Worcester v. Georgia, *supra* note 81.
104. *Id.* at 557.
105. *Id.* at 561.
106. *See, e.g.*, Ex Parte Crow Dog, 109 U.S. 556 (1883); Rice v. Olson, 324 U.S. 786 (1945); United States v. Rickert, 188 US. 432 (1903); Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965).

cisions in *Kennerly* and *McClanahan* appear to have modified traditional concepts of sovereignty and de-emphasized them.

Kennerly modified what would seem to be the plain language of *Worcester* in holding that Indians could not consent to state jurisdiction except through P.L. 280.[107] In reviewing the question of the minister who was present on Indian territory in *Worcester,* Chief Justice Marshall had voiced no objection to the presence of non-Indians in Indian territory so long as the Cherokee had consented.[108] In fact, Marshall states that "the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity . . . with the acts of congress."[109] The effect of *Kennerly* is that state jurisdiction cannot be had even with Indian consent, absent compliance with P.L. 280 or similar acts despite indications to the contrary in *Worcester* or other cases.

A more substantial modification of the sovereignty doctrine appears in *McClanahan.*[110] It is the clear meaning of that case that jurisdictional questions will no longer be analyzed in terms of inherent sovereignty, but in terms of congressional acts or authorization. In explaining the new role of the sovereignty concept, the Court observed:

> Finally, the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption. . . . The modern cases thus tend to avoid reliance on Platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power.[111]

Thus the Court further explains that the sovereignty doctrine will no longer provide a "definitive resolution of the issues" but will serve as "a backdrop against which the applicable treates and federal statutes must be read."[112]

Although *McClanahan* makes it clear that the *Worcester* sovereignty doctrine will no longer be controlling, the opinion

107. Kennerly v. District Court of Montana, *supra* note 77.
108. Worcester v. Georgia, *supra* note 81.
109. *Id.* at 561.
110. McClanahan v. State Tax Comm'n of Arizona, *supra* note 55.
111. *Id.* at 1262.
112. *Id.*

relies on *Worcester* in establishing the basic policy that state governments lack jurisdiction over Indian affairs absent congressional consent.[113] The Court is also quite definite in asserting that sovereignty has not been abolished when it states:

> But it would vastly oversimplify the problem to say that nothing remains of the notion that reservation Indians are a separate people to whom state jurisdiction, and therefore state tax legislation, may not extend.[114]

Despite the Court's insistence that the doctrine of sovereignty exists, it frankly admits that questions of "residual Indian sovereignty" will be "of little more than theoretical importance" inasmuch as most cases will be resolved entirely in terms of the scope of federal jurisdictional grants.[115]

The practical consequence of the new approach which considers sovereignty only as a backdrop is that P.L. 280 and similar jurisdictional grants from the federal government will form the battle ground for future jurisdictional wars. Since P.L. 280 is the only general grant of state jurisdiction which has been enacted, future controversies are certain to center on defining the scope of the act.

If limitations are to be imposed on the powers of state governments over the affairs of Indians under this new approach to jurisdiction, those limitations will arise in the form of a failure on the part of a given statute to secure P.L. 280 jurisdiction, or by the application of the exclusionary language provided in that act. Thus, the restrictions on taxation, alienation and encumbrance have become, in a sense, a new formulation of sovereigty or at a minimum, a substitute for the sovereignty doctrine.

Although the concept of sovereignty is no longer directly applicable, the flexibility which was afforded by that general concept need not disappear. To the extent that courts choose to employ a broad interpretation of the exclusionary language of P.L. 280 as in the *Snohomish* case, they will continue to

113. *Id.* at 1260.
114. *Id.* at 1261.
115. *Id.* at 1262 n.8.

exercise control over problems of state jurisdiction. Furthermore, by utilizing such an approach, courts will be able to adapt jurisdiction answers to the wide variety of state legislation which can raise such questions. If such a judicial approach is implemented, P.L. 280 can serve as an effective tool for resolving the disputes between Indians and state governments which are certain to continue to arise.

However, if the very limited approach represented by the *Rhoades* case is employed, courts will have little ability to monitor or influence the continuing problem of state jurisdiction. To the extent that courts restrict themselves to a narrow view of the P.L. 280 exclusions, they limit their own ability to review the actions of state government, and preclude themselves from the ability to protect reservation Indians in situations of exercise of unreasonable state power. Such a narrow construction would operate to sanction a sweeping grant of jurisdiction to state governments.

Applying these considerations to the question of interpreting "encumbrance," the fundamental question appears to be whether courts are somehow willing to abdicate protection of Indian lands, conceding to those states which have adopted P.L. 280 a greater ability to control Indian land than has heretofore existed under *Williams v. Lee* or the sovereignty approach. The Supreme Court decisions in *McClanahan* and *Kennerly* do not sanction any such broad grant to the states, but rather represent a very strict view of state jurisdiction, albeit in a new form. It would be bitterly ironic if somehow the Supreme Court's efforts to redefine the legal *basis* for denying jurisdiction to the states resulted in an expansion of state jurisdiction because courts took a myopic view of the exclusionary language contained in P.L. 280. It would seem apparent then that the efficient functioning of P.L. 280 and the need to preserve a flexible system of adjudication of jurisdictional questions would weigh heavily in favor of a broad construction of "encumbrance."

CONCLUSION

As the discussion of *Williams v. Lee* demonstrates, questions of state jurisdiction over Indians have been resolved

in a generally confused atmosphere in recent years. Properly interpreted, the more recent Supreme Court cases can serve to dispel the confusion and lead to a relatively uniform and simple approach to such questions.

In order to implement such can approach, courts will have to resist the temptation to rely on *Williams v. Lee* and the concept of inherent or residual state power to regulate Indian land use. Continued reliance on that doctrine is unjustified in light of the discussion presented earlier.

Likewise, courts should no longer use the concept of Indian sovereignty to strike down state jurisdictional efforts. Although the doctrine has not been abolished, it should not be the determining element in such questions. Questions of state jurisdiction are now to be resolved in terms of federal preemption.

The preemption approach involves two steps. First, it must be determined whether the state has properly invoked jurisdiction under P.L. 280. Unless the state has such jurisdiction under P.L. 280 or one of the more limited jurisdictional grants, the state is entirely without power to act. Second, assuming that jurisdiction has been properly invoked under P.L. 280 it must be determined whether the act in question is within the scope of P.L. 280. That is, it must be determined whether the act attempts to do that which is forbidden through the exclusionary language of P.L. 280. It is at this second step that the nature of the encumbrance exclusion will be determined.

The policies and precedents which have been reviewed to this point indicate that a broad construction of the term "encumbrance" would be desirable. The broad definition insures continued judicial scrutiny of a serious and continuing problem, and provides a flexible tool to be used by courts to fairly adjust the interests of Indians in their own autonomy with the interests of state government in controlling Indian lands. A broad definition would afford an opportunity to develop the law in relation to the extremely varied issues which will arise on a case-by-case basis.

Although such a broad view of "encumbrance" is somewhat at odds with the termination history of P.L. 280, such an interpretation would provide for more consistency with current governmental policy. Such a view would also be appropriate in terms of consistency with interpretations of the taxing and fishing exclusions. The discussion of the definitional aspects of the terms presents further reasons for adopting the broad view.

In the last analysis it is apparent that P.L. 280, along with its encumbrance and other restrictions, occupies the position which formerly belonged to the sovereignty doctrine. This shift in legal approach can lead to a less complex, but equally effective procedure for resolving jurisdictional questions. The flexibility of the sovereignty doctrine can be preserved while at the same time the confusion of *Williams v. Lee* is removed, provided that the broad view is adopted Whether such an approach will be taken remains to be seen.

PATRICK E. HACKER

DENNIS C. MEIER

DAN J. PAULI