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Indian Law - State Jurisdiction on Indian Reservation, Moe v. Confederated Salish and Kootenai Tribes

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INDIAN LAW—State Jurisdiction on Indian Reservations, Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976).

Two members of the Confederated Tribes who had been operating "smoke shops" on trust land inside the Flathead Indian reservation in western Montana were arrested by deputy sheriffs of Missoula and Lake Counties and charged with failure to possess a cigarette retailer's license and selling non-stamped cigarettes. Both offenses were misdemeanors under the laws of Montana.[1] These individuals, the Tribes and the tribal chairman then filed suit in Federal District Court seeking declaratory and injunctive relief against the State's cigarette tax and vending license statutes as applied to members of the Tribes.[2]

By a divided opinion, the three judge District Court[3] held that in light of *McClanahan v. Arizona State Tax Commission*[4] these taxing and licensing schemes could not be imposed on reservation Indians.[5] The court did hold, however, that the State could require the Indian retailer to add the tax on cigarettes to the sales price with respect to sales to non-Indians.[6] The Supreme Court of the United States in *Moe v. Confederated Salish and Kootenai Tribes*[7] upheld the holdings of the lower court on every issue. The refusal to allow the imposition of the taxing and licensing schemes on Indians was virtually dictated by cases such as *McClanahan* and *Kennerly v. District Court of Montana*.[8] However, the approval of the holding that Montana can require Indian retailers to precollect the cigarette tax is somewhat more controversial, and thus, it will be the primary topic of this note.

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1. MONT. REV. CODES ANN. § 84-5606.31 (Supp. 1977).
2. In a later action the Tribe and four enrolled members challenged Montana's assessment and collection of personal property taxes, especially taxes on motor vehicles owned by tribal members living on the reservation. The district court held that such taxes could not be levied against the Indians. Confederated Salish & Kootenai Tribes v. Mont. Dep't. of Revenue, 392 F. Supp. 1325 (D. Mont. 1975). The Supreme Court upheld that decision as well in this case.
3. 28 U.S.C. § 2281 (1970) provided that an interlocutory or permanent injunction restraining the enforcement, operation or execution of a state statute on grounds of unconstitutionality should not be granted unless the application has been heard by a three-judge district court. This section has since been repealed. Act of Aug. 12, 1976, Pub. L. No. 94-381, § 1, 90 Stat. 1119.
4. 411 U.S. 164 (1973).
5. Confederated Salish & Kootenai Tribes v. Moe, 392 F. Supp. 1297 (D. Mont. 1974).
6. *Id.* at 1311.
7. 425 U.S. 463 (1976).
8. 400 U.S. 423 (1971).

HISTORICAL BACKGROUND OF TRIBAL SOVEREIGNTY AND STATE JURISDICTION

In *Worcester v. Georgia*[9] the Supreme Court laid down the foundation for the concept of exclusive tribal sovereignty on Indian reservations, subject only to federal control.[10] The Court held per Chief Justice Marshall that the laws of the state of Georgia had no effect whatsoever inside the boundaries of the Cherokee Indian reservation.[11] He recognized that the authority of the tribe was inherent, in that the presence of its sovereignty on the reservation was assumed unless an affirmative act of the tribe or the federal government by treaty or statute, had limited it.[12] The case, at the same time, recognized the plenary power of the federal government over the Indians, based on such constitutional provisions as the commerce and treaty clauses.[13]

Nearly fifty years later, the Court began the erosion of this doctrine of exclusive tribal sovereignty by holding in *United States v. McBratney*[14] that the state court, and not the federal courts, had jurisdiction over a non-Indian defendant who had murdered another non-Indian on the Ute Reservation. The Court's decision was based on the fact that the Colorado enabling legislation did not contain an express disclaimer of jurisdiction over Indian territory, and thus, the state had criminal jurisdiction over non-Indians throughout the state, including Indian reservations.[15] In *Utah and Northern Ry. Co. v. Fisher*[16] and *Thomas v. Gay*[17] the Supreme Court moved further away from *Worcester* by allowing the states to tax the property of non-Indians which was located on Indian reservations. Finally, the Court in *Draper v. United States*[18] held that even where the state of Montana had disclaimed jurisdiction through its Enabling Act,[19] it could still

9. 31 U.S. (6 Pet.) 515 (1832).
10. Barsh, *The Omen: Three Affiliated Tribes v. Moe and the Future of Tribal Self-Government*, 5 AM. INDIAN L. REV. 1, 2 (1977).
11. Worcester v. Georgia, *supra* note 9, at 561.
12. Canby, *Civil Jurisdiction and the Indian Reservation*, 1973 UTAH L. REV. 206, 207.
13. Dolan, *State Jurisdiction Over Non-Indian Mineral Activities on Indian Reservations*, 52 N.D.L. REV. 265,268 (1975).
14. 104 U.S. 621 (1881).
15. Canby, *supra* note 12, at 208.
16. 116 U.S. 28 (1885).
17. 169 U.S. 264 (1897).
18. 164 U.S. 240 (1896).
19. Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676. The Act applied as well to North Dakota, South Dakota and Washington.

exercise jurisdiction over non-Indians who had committed crimes against other non-Indians on the Crow Reservation.

A major reason for the Court's ignoring the Enabling Act was its belief that the Act had been superseded by other expressions of Congressional policy, in particular, the General Allotment Act of 1887,[20] also known as the Dawes Act.[21] The Dawes Act was designed to allot the reservations to individual tribal members, first to be held in trust by the United States, and then, after twenty-five years, to be conveyed in fee to the Indians.[22] Once the Indians were granted title they became subject to the laws of the state in which they resided.[23] This Congressional policy was itself reversed, however, with the passage in 1934 of the Indian Reorganization Act.[24] The Act allowed for the organizing of tribal governments,[25] the incorporating of tribes for the purpose of conducting business,[26] the end of the allotment policy[27] and the extension of existing trust periods indefinitely.[28] The purpose of the Act was to preserve Indian government and the Indian land base and in effect severely limited the applicability of *Draper*.[29] But Congress' indecision on Indian affairs meant this policy was to be short-lived as well.[30]

In the 1950's Congress adopted the policy of termination, which was designed to end the Indians' status as wards of the federal government and in turn make them subject to the same laws as other citizens of the United States.[31] As a means

20. Act of Feb. 8, 1887, Ch. 119, 24 Stat. 358 (codified as amended at 25 U.S.C. §§ 331-34, 339, 341, 342, 348, 349, 381 (1970).
21. Draper v. United States, *supra* note 18, at 247.
22. 25 U.S.C. § 348 (1970).
23. 25 U.S.C. § 349 (1970).
24. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-479, 492 (1970)). The Court in Moe also acknowledged that the Indian Reorganization Act had limited the effect of the General Allotment Act. Montana had argued that since the latter Act had never been explicitly repealed, Montana still had taxing jurisdiction on the reservation. The Court noted that the result of the state's argument would be that Indians living on trust land would not be subject to the state's tax laws, while Indians living on fee-patent land in the reservation would. This argument was rejected because the Court felt such a "pattern of checkerboard jurisdiction" was contrary to the intent of the present federal law. The Court further noted that in Mattz v. Arnett, 412 U.S. 481 (1973) it was held that the Dawes Act had been repudiated by the Indian Reorganization Act. Moe v. Confederated Salish & Kootenai Tribes, *supra* note 7, at 478-79.
25. 25 U.S.C. § 476 (1970).
26. 25 U.S.C. § 477 (1970).
27. 25 U.S.C. § 461 (1970).
28. 25 U.S.C. § 462 (1970).
29. Barsh, *supra* note 10, at 14.
30. Canby, *supra* note 12, at 211.
31. *See* H.R. Con. Res. 108 of August 1, 1953, 67 Stat. B132.

of carrying out this policy, Public Law 280[32] was enacted by Congress in 1953. It represented a compromise between abandoning the Indians to the states and maintaining them as federally protected wards.[33] The Act transferred civil and criminal jurisdiction to five states[34] and gave all other states the option of asserting such jurisdiction, regardless of the preference of any Indian reservation for continued autonomy.[35] States without disclaimers in their enabling acts could exercise jurisdiction by legislative action pursuant to Section 7 of the Act, while those states with disclaimers had to repeal them by constitutional amendments.[36]

The Supreme Court, however, failed to follow in Congress' footsteps. Instead, just five years later it handed down its first in a series of decisions that seemed to run counter to the termination policy.[37] In *Williams v. Lee*[38] the Court held that Arizona courts had no jurisdiction over a suit brought by a non-Indian store owner on the Navajo Reservation to recover amounts due on credit sales to reservation Indians. The Court stated for the first time the rule by which the extent of state jurisdiction over non-Indians on reservations was to be determined[39] when it said: "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."[40] Justice Black also noted that the exclusive sovereignty rule of *Worcester* had been modified over the years "in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized."[41] Nevertheless, the Court felt that allowing state jurisdiction here would infringe on the rights of the Indians to govern themselves even though the respondent was a non-Indian.[42] The Court further noted that

32. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended, 18 U.S.C. § 1162 (1970), 28 U.S.C. § 1360 (1970)).
33. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians.* 22 U.C.L.A.L. REV. 535, 537 (1975).
34. The five were California, Minnesota, Nebraska, Oregon and Wisconsin. Alaska was added in 1958. Act of Aug. 8, 1959, Pub. L. No. 85-615, § 2, 72 Stat. 545.
35. Goldberg, *supra* note 33, at 538.
36. Act of Aug. 15, 1953, ch. 505 §§ 6,7, 67 Stat. 588, 590.
37. Canby, *supra* note 12, at 212.
38. 358 U.S. 217 (1959).
39. Dolan, *supra* note 13, at 278.
40. Williams v. Lee, *supra* note 38, at 220.
41. *Id.* at 219.
42. *Id.* at 223.

Congress had provided Arizona with a means of asserting jurisdiction through PL 280, but the State had failed to accept it.[43]

In *Organized Village of Kake v. Egan*,[44] decided in 1962, the Court appeared to limit the holding of *Williams*. Although only *dicta*, Justice Frankfurter took *New York ex rel. Martin v. Ray*,[45] *Thomas* and *Williams* to say that state laws may be applied to Indians unless they "would interfere with reservation self-government or impair a right granted by federal law."[46] This statement seemed to substitute a presumption of state jurisdiction for one of Indian sovereignty on reservations.[47] The possible confusion caused by *Kake* was eliminated, however, in a series of later Supreme Court decisions,[48] the first of which was *Warren Trading Post Co. v. Arizona Tax Commission*.[49] The Court in *Warren* held that the federal government had pre-empted the area of trading with the Indians such that Arizona could not levy its income tax on the non-Indian owner of a business being conducted with Indians on the Navajo Reservation.[50] The Court found that the all-inclusive regulations and statutes showed a congressional intent to totally pre-empt this area and that the imposition of any state laws would frustrate the congressional purpose of having no burden placed on trading with Indians except those authorized by acts of Congress.[51]

The next two cases in the series involved attempts by states to exercise jurisdiction directly over reservation Indians. Before they were decided, however, Congress made important changes in PL 280 by enacting Title IV of the Civil Rights Act of 1968.[52] Among other things, the Act involved two amendments, the first of which was the requirement of consent by the tribe before a state could assume PL 280 jurisdic-

43. *Id.* at 222-23.
44. 369 U.S. 60 (1962).
45. 326 U.S. 496 (1946). The Court held in this case that a New York state court had jurisdiction to try one non-Indian for the murder of another on an Indian reservation inside the state. It found no statutes or treaties which prohibited the exercise of such jurisdiction.
46. Organized Village of Kake v. Egan, *supra* note 44, at 75.
47. Dolan, *supra* note 13, at 279.
48. *Id.* at 279.
49. 380 U.S. 685 (1965).
50. MAXFIELD, DIETERICH, & TRELEASE, NATURAL RESOURCES LAW ON AMERICAN INDIAN LANDS, 90 (1977) [hereinafter cited as MAXFIELD].
51. Warren Trading Post Co. v. Arizona Tax Comm'n, *supra* note 49, at 690-91.
52. Act of April 11, 1968, Pub. L. No. 90-284, tit. IV, §§ 401-406, 82 Stat. 73, (codified at 25 U.S.C. §§ 1321-1326 (1970)).

tion.[53] Such consent could be given only through means of a majority vote of the adult Indians affected.[54] The second provision allowed the states to give their PL 280 jurisdiction back to the federal government.[55] In the first of the two cases referred to above, *Kennerly v. District Court of Montana*, the Court held that failure of the tribe itself to vote on giving the state concurrent jurisdiction as required by the Act meant that the State could have no authority at all over reservation Indians.[56] The Court seemed to be saying that PL 280 pre-empted all other means by which a state could assert jurisdiction over reservation Indians,[57] and thus, failure to follow the proper procedure in enacting it meant the state lacked any jurisdiction.[58]

In the second case, *McClanahan v. Arizona State Tax Commission*, the Court held that the imposing of an income tax on a reservation Indian's income earned on the reservation "interfered with matters which the relevant treaty and statutes leave to the exclusive province of the federal government and the Indians themselves."[59] Justice Marshall noted that there had been a switch from the concept of Indian sovereignty being a bar to state jurisdiction toward a reliance on federal pre-emption based on applicable treaties and statutes.[60] Following this line of reasoning, the Court looked at the treaty establishing the Navajo Reservation,[61] the State's Enabling Act[62] and the State's failure to enact PL 280 as proof that Arizona had exceeded its authority in attempting to collect the tax in question.[63]

The Court, however, did recognize that the State had an interest in asserting its jurisdiction over non-Indians and could do so, according to *Williams*, up to the point where tribal sovereignty was affected.[64] Thus, with the *McClanahan* decision the Court seemed to be saying that it still recognized the power of a state to assert jurisdiction over non-Indians on res-

53. 25 U.S.C. §§ 1321, 1322 (1970).
54. 25 U.S.C. § 1326 (1970).
55. 25 U.S.C. § 1323 (1970).
56. Kennerly v. Dist. Court of Montana, *supra* note 8, at 427.
57. MAXFIELD, *supra* note 50, at 84.
58. Kennerly v. Dist. Court of Montana, *supra* note 8, at 427.
59. McClanahan v. Arizona State Tax Comm'n, *supra* note 4, at 165.
60. *Id.* at 170.
61. 15 Stat. 667, 668.
62. Act of June 20, 1910, ch. 310, § 20, 36 Stat. 557, 569.
63. McClanahan v. Arizona State Tax Comm'n, *supra* note 4, at 172.
64. *Id.* at 179.

ervations as long as there was no infringement on tribal self-government, but that this rule had no effect where reservation Indians were involved.[65] Instead, the issue there was federal pre-emption, or the extent to which the federal government had authorized such assertions of jurisdiction by the states in statutes and treaties.[66] Based on *Kennerly* and *McClanahan* it would appear that this means the state would have to follow the provisions of PL 280 or have no jurisdiction over reservation Indians at all.[67]

THE COURT'S REASONING

As mentioned earlier in the factual background, the Court's holding in *Moe* that Montana could not directly tax, or regulate by licensing, Indian retailers amounted to a mere following in the footsteps of *McClanahan* and *Kennerly*.[68] The rationale for the holding in the second part of the case, however, is not so clear, nor is its effect. The Court held in the second part of *Moe* that the state could require the Indian retailer to precollect taxes on sales of cigarettes to non-Indians. Justice Rehnquist accepted the finding of the District Court that the cigarette tax was presumed to be a direct tax on the retail consumer,[69] a finding apparently based solely on the words of the Montana statute.[70] Furthermore, the nonpayment of the tax by the consumer was a misdemeanor according to the statutes. Justice Rehnquist appeared troubled by the fact that an Indian retailer would receive a competitive advantage over his non-Indian counterpart because a non-Indian consumer was "willing to flout his legal obligation to pay the tax."[71] The only way to enforce the law was to require the retailer to collect the tax.[72]

65. Canby, *supra* note 12, at 215.
66. Dolan, *supra* note 13, at 284.
67. MAXFIELD, *supra* note 50, at 84.
68. Before the Court was able to reach the substative issues of the case it had to decide whether the district court was prohibited from exercising jurisdiction. 28 U.S.C. § 1341 (1970) forbade district courts from enjoining the levying or collection of taxes authorized by state law where a speedy and efficient trial could be had in the state's courts. The Court held that neither the United States or its instrumentalities were barred from proceeding in federal court by this statute. It also found that 28 U.S.C. § 1362 (1970) gave the district courts original jurisdiction over actions brought by Indian tribes that had been recognized by the Secretary of Interior. The Court then held that while the tribes were not instrumentalities of the federal government, based on § 1362 and based on the fact that the government could have brought this action for the tribes, they were to be treated as if the United States had sued on their behalf and thus, the district court had jurisdiction.
69. Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Moe, *supra* note 5, at 1308.
70. MONT. REV. CODES. ANN. § 84-5606.1 (Supp. 1977).
71. Moe v. Confederated Salish & Kootenai Tribes, *supra* note 7, at 482.
72. *Id.*

The Tribe argued that *Warren Trading Post v. Arizona Tax Commission* controlled because making the retailer an involuntary agent of the state was an interference with its freedom from state regulation,[73] but the Court rejected that argument. Justice Rehnquist said that *Warren* did not bar the taxing of the receipt of sales on reservations to non-Indians.[74] Further, he found that the burden being placed on the retailer was "minimal" and "not, strictly speaking, a tax at all."[75] Then, in reference to the *Williams* test he found nothing in the requirement which infringed on tribal self-government.[76] In addition, he found no conflicting federal laws.[77]

AN ANALYSIS OF THE OPINION

The brevity of Justice Rehnquist's opinion on this aspect of the case makes analysis somewhat difficult. One effect of this conciseness is that the Court cites almost no other cases in support of its holding. Two of the cases cited, *Warren* and *Mescalero Apache Tribe v. Jones*,[78] were distinguished by the Court. *Warren* was distinguished because the tax there was imposed on a seller directly, whereas here the tax was imposed on a non-Indian source.[79] The Court also held that the pre-emption issue which was central to *Warren* did not apply in this case.[80] Later the Court dismissed the pre-emption problem again with a brief quote from *United States v. McGowan*[81] and a citation to *Thomas v. Gay*.[82]

It would seem the problem is somewhat more involved than Justice Rehnquist's opinion indicates. For instance, it is not clear that this issue simply represents a question of Mon-

73. *Id.*
74. *Id.*
75. *Id.* at 483.
76. *Id.*
77. *Id.*
78. 411 U.S. 145 (1973). Mescalero, a companion case to McClanahan, held that off-reservation activities by reservation Indians may be less protected by federal pre-emption than activities conducted on the reservation. In particular, New Mexico was trying to collect taxes on a ski resort run by the Mescalero Apache Tribe off the reservation. The Court held that the Indian Reorganization Act of 1934 prohibited collection of a use tax on permanent improvements to the resort, but the Court found that this same Act did not prohibit the state from levying a tax on the gross receipts of this Indian-run enterprise.
79. Moe v. Confederated Salish & Kootenai Tribes, *supra* note 7, at 482.
80. *Id.*
81. 302 U.S. 535 (1938). In this case the Supreme Court held that the Reno Indian Colony was Indian country and thus, the regulations of the federal government on the sale of intoxicants to Indians applied to it. It also held that the state of Nevada could exercise jurisdiction within the colony as long as it did not conflict with federal enactments.
82. Moe v. Confederated Salish & Kootenai Tribes, *supra* note 7, at 483.

tana's right to tax non-Indians on the reservation as was the issue in *Thomas*. While it may be true that this tax is being imposed on the non-Indian buyer, there is an added element here in that the State is imposing its taxing powers through the involuntary offices of a reservation Indian. Furthermore, it is the Indian himself who is the party before the Court.[83] Thus, the question appears to be the same on this issue as it was on the other issues of the case; in particular, whether the state can exercise jurisdiction over Indians on reservations.

Justice Rehnquist avoids use of words such as jurisdiction and instead characterizes the state's requirement as a "burden."[84] An examination of the possible immediate ramification of his holding, however, will show that the state has been given power to do much more than merely impose a burden. Besides having power to require the precollection of the sales tax, the state must also have power to impose penalties for the failure of the Indian retailer to do so. Montana statutes provide criminal penalties for the sale of cigarettes without the tax stamp on the package.[85] This would seem to apply to the Indian retailer, and thus, the effect of the Court's holding is to give Montana criminal jurisdiction over reservation Indians.

The Court in previous decisions has held that PL 280 is the sole way by which states can obtain criminal jurisdiction over Indians residing on reservations.[86] Although Justice Rehnquist did not even mention this statute in his holding, the district court noted that Montana had enacted PL 280 in respect to the Flathead reservation so that it had complete criminal and limited civil jurisdiction over the Indians.[87] The lower court held, however, that even though the taxing statutes were subject to enforcement by criminal penalties they were nonetheless "civil revenue collecting provisions."[88] Since the limited civil jurisdiction the state had assumed did not include taxation, the court felt these statutes could not be applied directly to the Indians through PL 280.[89] In fact, PL

83. *Id.* at 466.
84. *Id.* at 483.
85. MONT. REV. CODES ANN. § 84-5606.18,.31 (Supp. 1977).
86. Kennerly v. Dist. Court of Montana, *supra* note 8; McClanahan v. Arizona State Tax Comm'n, *supra* note 4.
87. Confederated Salish & Kootenai Tribes v. Moe, *supra* note 5, at 1306.
88. *Id.*
89. Montana had assumed jurisdiction in the following areas: compulsory school atten-

280 does not ever authorize the taxation of Indians as the Supreme Court has recognized in *Bryan v. Itasca County of Minnesota*.[90] In that case the Court held that PL 280 did not empower the states to impose their taxing and regulatory schemes on the states, but rather that the primary intent of Congress when it granted civil jurisdiction under PL 280 was simply to give the state courts authority to hear private litigation involving reservation Indians.[91]

It is unclear, therefore, by what authority the state will seek to enforce its statutes against the Indian retailer so that he will be compelled to precollect the tax on sales to non-Indians. The district court never decided this issue and instead opted to wait until after the Supreme Court had handed down its decision.[92] *Utah and Northern Ry. Co. v. Fisher* presents a basis on which the state could build an argument. In this case the Supreme Court refused to enjoin the tax collector of Oneida County, Idaho from enforcing a tax deficiency against the railroad by selling that part of its roadbed which ran through the Fort Hill Indian Reservation.[93] Montana has recently expanded on this by actually enforcing its process on the reservation against a reservation Indian. In *Little Horn State Bank v. Stops* the Montana Supreme Court held that where the state court had the authority to enter a judgment against a reservation Indian, it also has the authority to come on the reservation to enforce the judgment.[94] Similarly, in the *Moe* situation the state could argue that the existence of the duty of the retailer to collect the state's use tax implies that the state has the right to enforce its penal sanctions for failure to perform the duty. The holding of the Montana Supreme Court, however, is not universally accepted. The federal district court for South Dakota refused to allow the state to enforce a judgment against a reservation Indian in *Annis v. Dewey County Bank*.[95]

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dance; public welfare; domestic relations (except adoptions); mental health, insanity, care of the infirm, aged and afflicted; juvenile delinquency and youth rehabilitation; adoption proceedings; abandoned, dependent, neglected, orphaned or abused children; and operation of motor vehicles upon the public streets and highways. *Id.*

90. 426 U.S. 373 (1976).
91. *Id.* at 383.
92. Brief for appellee at 12, Moe v. Confederated Salish & Kootenai Tribes, *supra* note 7.
93. Utah & Northern Ry. Co. v. Fisher, *supra* note 16, at 29.
94. 3 Indian L. Rep. h-60 (Mont. 1976).
95. 333 F. Supp. 133 (D.S.D. 1971). In this case the federal court was able to give the

Another argument the state might make use of on PL 280 reservations, is that even though *Bryan* would not allow them to collect the tax on sales to Indians, nevertheless, under the criminal jurisdiction the states have assumed, they may be able to enforce the penal provisions of the statutes against the Indian retailer so that the taxes they are entitled to from sales to non-Indians will be collected. One problem with such an argument is that *Moe* did not seem to be based in any way on the special jurisdictional situations of PL 280 reservations. Rather, the holding seems to apply across the board to all Indian reservations, whether PL 280 is in effect or not. For that reason, the holding would seem to conflict with the pre-emption principles of *Kennerly* because it appears to give the states powers of enforcement against Indians without federal statutory authorization.

Justice Rehnquist also applied the *Williams v. Lee* test in determining the validity of the imposition of the precollection duty on the Indian retailer.[96] In *McClanahan*, the Supreme Court stated that the *Williams* test is generally used in situations involving non-Indians,[97] and thus, it would appear to be the proper test here, especially since the Court found that there was pre-emption of state jurisdiction by federal statutes or treaties.[98] However, Justice Rehnquist applied the test in a cursory fashion by simply stating that there was no infringement on tribal self-government, without giving the least indication of how he arrived at this decision.[99]

As with the pre-emption issue, the infringement question was not so clear as Justice Rehnquist's manner of handling it indicated. The shops in question here were operated on trust land leased from the tribe.[100] Therefore, the continuing profitable operation of these businesses was certainly a matter of concern to the tribe. The profitability of these shops was directly related to the lower price they could charge consumers

defendant the relief he sought in that it authorized the bank to attach the plaintiff's livestock which had been pledged as security for the loan in question. The court in Little Horn State Bank, however, noted that if the state court couldn't enforce the judgement the bank would not be able to get relief because it was unable to meet the requirements to invoke federal jurisdiction. Little Horn State Bank v. Stops, *supra* note 94 at h-64.

96. Moe v. Confederated Salish & Kootenai Tribes, *supra* note 7, at 483.
97. McClanahan v. Arizona State Tax Comm'n, *supra* note 4, at 179.
98. *See id.* at 180 n.21.
99. Moe v. Confederated Salish & Kootenai Tribes, *supra* note 7, at 483.
100. Confederated Salish & Kootenai Tribes v. Moe, *supra* note 5, at 1301.

because the cigarettes were not taxed.[101] The district court held that it was the consumer who reaped the benefit of the tax exemption, but in the next sentence it also acknowledged the competitive advantage the Indian retailer received because of the tax exemption.[102] It is this competitive advantage which makes the operation profitable and also keeps a profitable, operating business on tribal trust lands. Certainly this is a matter of concern to the tribal government in that the ending of the competitive advantage constitutes an infringement, indirect perhaps, but nevertheless substantial.

There were several other factors which the Court failed to examine. One was the fact the Court in earlier cases had recognized that tribes are made up of individuals and thus, direct infringement on their rights amounts to direct infringement on the rights of the tribe.[103] The infringement of the rights of the Indian retailer, therefore, could conceivably be a direct infringement on the right of self-determination of the tribe. Another factor was the question of who really bore the tax. The Court accepted, without comment, the presumption of the Montana statute that it was a user tax.[104] Justice Black, in *Warren*, noted that the tax in question there would in effect be imposed both on the consumer and the seller whom the state claimed to be taxing.[105] A sales tax such as that being imposed here could also be considered as falling on both the consumer and the seller in actual economic practice.[106] If this were true, then the tax would clearly be banned for the same reasons the other taxes in this case were.

THE EFFECT OF THE HOLDING

As the tribes' quest for economic and political autonomy takes shape, and as the importance of the natural resources on tribal lands is recognized, the possibilities of state and tribal jurisdictional conflicts grow greater.[107] This is especially true considering the likelihood that non-Indians may actually mine the resources or may just begin to move on the reserva-

101. *See id.* at 1311.
102. *Id.* at 1308.
103. McClanahan v. Arizona State Tax Comm'n, *supra* note 4, at 181.
104. Moe v. Confederated Salish & Kootenai Tribes, *supra* note 7, at 481.
105. Warren Trading Post Co. v. Arizona Tax Comm'n, *supra* note 49, at 691.
106. Barsh, *supra* note 10, at 30.
107. Israel, *Reemergence of Tribal Nationalism*, in INSTITUTE ON INDIAN LAND DEVELOPMENT, 10-39 (Rocky Mtn. Min. L. Fdn. 1975).

tion in increasing numbers. At the same time it is also likely that the tribes will be involved, to a greater degree, in the control and ownership of some of the mining and business ventures than they have been in the past.[108] Therefore, when the state seeks to assert its authority over non-Indians on the reservation there will also be an impact on the Indian, thus raising the same pre-emption and infringement issues as were involved in *Moe*.

One possible area of conflict involves mining enterprises where Indian and non-Indian developers act as co-venturers. If they operate under a lease given by authority of the 1938 Mineral Leasing Act[109] they apparently would not be subject to state tax.[110] However, authority does exist for the state's taxation of non-Indian lessees of minerals owned by individual Indians.[111] It is possible *Moe* may also allow state taxation of minerals mined from lands owned by the tribe itself.[112] Taxation of the venture in question here would amount to taxation of an Indian, which *McClanahan* would not permit.[113] But, at the same time the venture reaps an added benefit because of the non-Indian's willingness to avoid his obligation to pay the tax, similar to the non-Indian purchasing cigarettes in *Moe*. Thus, a court might apply a *Moe* rationale to impose a tax on the venture, at least equal to the non-Indians share in it, even though it causes an increase in the value of the raw material.

There are other areas where taxation policies of the states could interfere with tribal plans for mineral development. One such area is where an Indian himself is the sole developer of the natural resource. Clearly state attempts to impose royalty taxes on him would be invalid if he was acting under the Act of 1938. However, based on *Moe* the state could apparently place a tax on his product which would be statutorily defined as a user's tax, thus sidestepping other federal government and Supreme Court prohibitions.[114] The effect of this would

108. Ziontz, *Indian Self-Determination: New Patterns for Mineral Development*, in INSTITUTE ON INDIAN LAND DEVELOPMENT, 13-5 (Rocky Mtn. Min. L. Fdn. 1975).
109. Act of May 11, 1938, ch. 198, 52 Stat. 348 (codified at 25 U.S.C. § 396A-G (1970)).
110. Santa Rosa Oil and Gas v. Bd. of Equalization, 110 Mont. 268, 54 P.2d 117 (1936). *rev'd in part*, 112 Mont. 359, 116 P.2d 1012 (1941).
111. Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342 (1949).
112. Isreal, *supra* note 107, at 50 n.73.
113. *Id.* at 37.
114. Barsh, *supra* note 10, at 48.

be to take away a tax shelter which the tribe may have intended to operate to the advantage of the Indian entrepreneur. Another area of conflict would arise if the tribe itself wished to levy a tax. By allowing the state to impose its user tax in the above situation, and in the factual situation in *Moe* as well, the effect of the tribe's tax is to price the Indian developer or businessman out of the market. Thus, the state tax infringes directly on the tribal self-government, yet it is conceivable that *Moe* would uphold the state's tax. This may force the tribe to implement its tax as soon as possible in order to establish infringement when the state later attempts to impose its tax.[115]

The Ninth Circuit Court of Appeals has had a chance to apply the *Moe* holding in yet another context. In *Fort Mojave Tribe v. San Bernardino County*[116] the court held that the County could levy a possessory interest tax on a non-Indian lessee of land held in trust by the federal government for reservation Indians. The court believed *Moe* was analogous because it was possible that the non-Indian was the sole beneficiary of the tax exemption.[117] The court gave no basis for its finding that the lessee was the sole beneficiary, but it did go on to say that even if the tribe did receive some benefit, the closing of the exemption would constitute only a minimal burden to it.[118] The court also rejected arguments that the taxation by the County interfered with the tribe's taxing ability and that tribal revenues would be reduced because it would no longer be able to market tax exemptions through lower prices for its leases.[119] The court was unsure, however, how the state would enforce a tax deficiency against the non-Indian lessee, suggesting that perhaps it could seize the lessee's personal property or maybe even proceed directly against him.[120] The court also dismissed the Indians' fears that their lands would be subject to tax sales, mentioning that federal statutes were designed to prevent this from happening.[121] In the end, the court said that they were not required to "trace

115. Ziontz, *supra* note 108, at 32.
116. 543 F.2d 1253 (9th Cir. 1976), *cert. denied*, ___ U.S. ___, 97 S.Ct. 1678 (1977).
117. *Id.* at 1258.
118. *Id.*
119. *Id.*
120. *Id.* at 1259.
121. *Id.*

out precisely the accommodations which the county and the lessee must make to protect the Indians in the event the lessee defaults in payment of the tax here being challenged."[122]

Another area of possible state-tribal conflict is that of regulation. Although the Supreme Court has held that states were given no regulatory power over Indian reservations under PL 280,[123] the conflict exists because of state attempts to impose environmental or zoning regulations on non-Indians living or operating businesses inside the reservations. Development of sub-divisions by the tribes through the selling of long term leases to non-Indians is one example of an activity that could accentuate this conflict.[124] Further jurisdictional disputes could occur when industrial enterprises lease tribal lands located next to off-reservation property zoned for family residences. Although the states cannot regulate the tribes directly to prevent the above from occurring, the state may still be able to regulate the business itself, since *Moe* preserves state regulatory power over non-Indians.[125] Once again the state could claim that the business receives an economic advantage from its willingness to flout zoning requirements or environmental regulations. By citing *Thomas* or *Utah and Northern Ry. Co.* for the validity of its interest in non-Indians and *Moe* for the principle that the state needs this regulatory power to prevent violations of its laws by people over whom it has jurisdiction, the zoning and economic development schemes of the Indians could possibly be sidestepped. The result is considerable state control over economic development on the reservation itself.

CONCLUSION

From *Williams* to *McClanahan* the Supreme Court appeared to be following a pattern of limiting state jurisdiction and expanding the areas of federal pre-emption and tribal sovereignty, even though the fifteen years represented by those opinions have not always followed a straight course, as evidenced by the *Kake* holding. Nevertheless, by 1973 the

122. *Id.*
123. Bryan v. Itasca County, Minn., *supra* note 90.
124. For a discussion of this problem *see*, Gonzales, *Indian Sovereignty, and the Tribal Right to Charter a Municipality for Non-Indians: A New Perspective for Jurisdiction on Indian Land*, 7 N.M.L. REV. 153 (1977).
125. MAXFIELD, *supra* note 50, at 111.

Court had made any state jurisdiction over reservation Indians totally dependent on authority derived through federal statutes. Also, the state's exercise of jurisdiction over non-Indians was conditioned on a strict requirement of no infringement on the tribe or its aggregate members. The Court's holding in *Moe* has brought this development to an abrupt and somewhat surprising halt.

Without saying so, *Moe* presents the possibility that the states may be able to exercise jurisdiction over reservation Indians, in certain cases, without any authorization at all from the federal government. Because of the states' authority to regulate the affairs of non-Indians on the reservation, they may indirectly be able to impose their zoning, taxing, environmental and other regulations on the reservation even though there is an effect upon the Indians. The limits of this power are reached when the regulation conflicts with tribal self-government, but *Moe* neither establishes where these limits lie nor does it give any guidance as to how to find the limits. The tribes will suffer somewhat because the reservations may lose tax and regulatory shelters which would compensate new businesses for the other disadvantages of locating on the reservation. It could also affect possible competitive advantages the tribes would have in developing their natural resources, as well as cutting into their potential tax revenues. Only time will tell what the limits of *Moe* are, but the holding in *Fort Mojave* seems to indicate that the decision may represent more than a small gain for the states.

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