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State Disclaimers of Jurisdiction over Indians: A Bar to the McCarran Amendment

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COMMENT

STATE DISCLAIMERS OF JURISDICTION OVER INDIANS: A BAR TO THE McCARRAN AMENDMENT?

INTRODUCTION AND SETTING

The Constitution of the State of Wyoming includes a seldom referred to clause which disclaims the state's "right and title" to the unappropriated public lands and to all lands owned by any Indian or Indian tribe.[1] Additionally, the Wyoming Constitution declares that Indian lands shall remain under the "absolute jurisdiction and control" of the United States Congress.[2] The Wyoming disclaimer is substantially similar to clauses found in the Constitutions of ten other western states.[3] Collectively, these disclaimers were the result of negotiations between the federal government and territorial representatives, and generally mirrored provisions in the various Enabling and Statehood Acts which authorized statehood.[4]

On February 22, 1982, the United States Court of Appeals for the Ninth Circuit held in *Northern Cheyenne v. Adsit*[5] that the State of Montana's constitutional disclaimer[6] left Montana state courts without subject matter jurisdiction to adjudicate Indian water rights.[7] The Indian water rights at issue in *Adsit* were among those the State of Montana sought to adjudicate in state court along with all other

1. The Wyoming Constitutional provision reads: The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States and that said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States; WYO. CONST. art. XXI, § 26.
2. *Id.*
3. Those states are: Alaska (art. XII, § 12); Arizona (art. XX, §4); Idaho (art. XXI, § 19); Montana (art. I); New Mexico (art. XXI, § 2); North Dakota (art. III, § 1); Oklahoma (art. I, § 3); South Dakota (art. XXII); Utah (art. III); Washington (art. XXVI, § 2).
4. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. REV. 535, 567 (1975).
5. 668 F.2d 1080 (9th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3218 (U.S. Oct. 4, 1982) (No. 81-2188).
6. MONT. CONST. art. I.
7. 668 F.2d at 1085.

non-Indian rights to the use of water from the Tongue River and Rosebud Creek.[8] The state claimed jurisdiction over the federal rights involved, both Indian and non-Indian, pursuant to the McCarran Amendment.[9] The Amendment, passed in 1952, granted the consent of the United States to be joined as a "defendant in any suit . . . for the adjudication of rights to the use of water of a river system . . . where it appears that the United States is the owner of . . . water rights . . . and the United States is a necessary party to such suit."[10] The Amendment does not mention federally reserved Indian rights, but the United States Supreme Court determined in the 1976 case *Colorado River Water Conservancy District v. United States*[11] that the Amendment's language, policy, and legislative history dictated that the federal consent to suit must be construed as reaching federal water rights reserved on behalf of Indians.[12]

In *Adsit*, however, the Ninth Circuit distinguished *Colorado River* on the grounds that Colorado's Constitution, unlike Montana's contained no disclaimer of subject matter jurisdiction over Indian lands.[13] In *Colorado River*, according to the *Adsit* court, the McCarran Amendment operated only to give Colorado personal jursidiction over the United States.[14] The Amendment, in the *Adsit* court's view, could not be interpreted as granting subject matter jurisdiction over Indian water rights in a state like Montana, where the state constitution disclaimed jurisdiction over Indian lands.[15] The *Adsit* court concluded: "The appearance that subject matter jurisdiction is lacking in a state court in a disclaimer state would only be defeated by a finding that the disclaimer had been validly repealed."[16]

Significantly, the *Adsit* decision is in direct conflict with the Tenth Circuit case *Jicarilla Apache Tribe v. United*

8. *Id.* at 1082-83.
9. 43 U.S.C. § 666 (1976).
10. 43 U.S.C. § 666(a) (1976).
11. 424 U.S. 800 (1976).
12. *Id.* at 810-11.
13. 688 F.2d at 1084.
14. *Id.* at 1084.
15. *Id.*
16. *Id.*

States.[17] *Jicarilla*, a case arising in New Mexico, involved a similar McCarran Act proceeding in state court involving federally reserved Indian water rights. Notably, the Tenth Circuit held that New Mexico's Constitutional disclaimer provision did not bar a McCarran Amendment proceeding in state court.[18] The grounds for this decision will be discussed below.

Suffice it to say that *Adsit* and *Jicarilla* are of great interest to those currently involved in Wyoming's Big Horn Adjudication.[19] The Big Horn Adjudication involves the *Adsit* and *Jicarilla* facts: a McCarran Amendment proceeding involving the determination of federally reserved water rights in state court in a disclaimer state. The tribes, of course, look to *Adsit* as a way of escaping state court with its elected judges whom the tribes view as vulnerable to political pressures from a citizenry often hostile to Indian interests.[20] The State, of course cites *Jicarilla* as necessary to permit states to continue to control their own water destinies, in their own ways, in their own courts.[21]

In view of the *Adsit-Jicarilla* conflict, this comment will examine state constitutional disclaimers in the hope of shedding light on their proper interpretation. Attention will be focused on both the United States Supreme Court's interpretation of the meaning of disclaimers and the Court's view as to the particular relationship of disclaimers to other general principles of federal Indian law. Finally, the com-

17. 601 F.2d 1116 (10th Cir. 1979).
18. *Id.* at 1131.
19. The Big Horn Adjudication was commenced on January 24, 1977, when the State of Wyoming filed a complaint in the District Court of the Fifth Judicial District for the determination of all rights to the use of water in the Big Horn River System and Water Division 3. On March 22, 1979, the district court referred the litigation to special Master Teno Roncalio pursuant to Rule 53 of the Wyoming Rules of Civil Procedure. The first phase of the litigation, involving claims to federally reserved Indian water rights, has been completed and the parties now await Special Master Roncalio's Findings of Fact and Conclusions of Law, which will be submitted to the district court for review. This portion of the adjudication alone created a mass of over 18,000 pages of transcript and a mountain of legal fees running into many milions of dollars.
20. *See* Brief for Appellant Northern Cheyenne Tribe at 9, Northern Cheyenne Tribe v. Adsit, 668 F.2d 1080 (9th Cir. 1982).
21. *See* Brief for Amicus state of Wyoming in Support of Petition for Writ of Certiorari at 9-10, Northern Cheyenne Tribe v. Adsit, 668 F.2d 1080 (9th Cir. 1982).

ment will return to the *Adsit-Jicarilla* conflict. Both decisions will be discussed in light of the principles developed in the comment with the intention of determining which court reached the proper result.

The Supreme Court and Disclaimers

In 1832 the Supreme Court in *Worcester v. Georgia*[22] laid out the basic principle that Indian nations are "distinct communities" in which the laws of the states can have no force "but with the assent of the [tribes] themselves, or in conformity with treaties, and with the acts of Congress."[23] *Worcester* has thus long been cited for the proposition that state jurisdiction over Indian territory is absolutely preempted by the federal government.[24] This principle has endured some twisting and pulling over the years, but, nonetheless, its basic thrust has remained largely intact.

As early as 1885, the Supreme Court recognized that *Worcester* should not be read as prohibiting every assertion of state power within the territory of the reservation. In *Utah and Northern Railroad v. Fisher*,[25] the Court recognized that the Territory of Idaho had a legitimate interest in regulating the activities of its non-Indian citizens, even when those activities took place within a reservation. Thus, the Court upheld the authority of the Territory to tax the non-Indian railroad company operating on the Fort Hill Indian reservation.[26] "The authority of the Territory," held the Court, "may rightfully extend to all matters not interfering with [federal treaty] protection."[27] The Court indicated, however, that if the territorial tax had in some way

22. 10 U.S. 214, 6 Pet. 515 (1832). *Worcester* dealt with an attempt by the state of Georgia to assert criminal jurisdiction over the Cherokee reservation.
23. *Id.*, 10 U.S. at 243.
24. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 168 (1973). *Worcester* has been cited as the Supreme Court's first explication of the tribal sovereignty doctrine. This doctrine recognizes an independent origin of tribal power deriving, not from the federal government, but from the tribes' status as sovereign governments. *See* COHEN, HANDBOOK OF FEDERAL INDIAN LAW 233-35 (1982 ed.).
25. 116 U.S. 28 (1885).
26. *Id.* at 32.
27. *Id.* at 31.

affected the rights of Indians it would not have been allowed to stand.[28]

In 1896, the Supreme Court decided *Draper v. United States*,[29] a case arising in Montana state court involving the murder of a non-Indian by a non-Indian on an Indian reservation. *Draper*, in allowing state court jurisdiction, relied upon an earlier Supreme Court case, *United States v. McBratney*,[30] which established the general proposition that a state court could assert jurisdiction over crimes committed by a non-Indian against a non-Indian by virtue of the state's admission into the union on equal footing with the original states. As did *Fisher*, *McBratney* subtly modified the *Worcester* principle by allowing some extension of state jurisdiction onto Indian lands without the express permission of Congress.

Draper, however, differed from *McBratney* in that *Draper* involved a state constitutional disclaimer.[31] Yet, the *Draper* Court held this difference was inconsequential, that Montana could exercise the same jurisdiction over non-Indian crimes on the reservation as did New York in *McBratney*.[32] The purpose of Montana's disclaimer, in the *Draper* Court's view, was "to prevent any *implication* of the power of the state to frustrate the *limitations imposed by the laws of the U.S.* upon title of lands once in an Indian reservation. . . ."[33] Montana's disclaimer, the *Draper* Court indicated, could not be read to leave Montana with any lesser jurisdictional power than any other state.[34] In other words, the disclaimer did not specially limit Montana's power, but merely prevented the implication that Montana, by virtue of its statehood, gained new power over Indians. This conclusion suggests that the *Draper* Court viewed disclaimer

28. *Id.* at 31-32.
29. 164 U.S. 240 (1896).
30. 104 U.S. 621 (1882).
31. 164 U.S. at 243-44.
32. *Id.* at 247.
33. *Id.* at 246 (emphasis added).
34. The *Draper* Court held that since "equality of statehood is the rule, the words relied on here to create an exception cannot be construed as doing so, if, by any meaning, they can be otherwise treated." *Id.* at 244.

provisions as merely maintaining the status quo in regard to state jurisdiction over Indian lands.

That status quo, as *Fisher* and *McBratney* had previously indicated, allowed for certain extensions of state jurisdiction onto Indian land for the purpose of regulating non-Indian activity. To the extent that allowing such jurisdiction modified *Worcester's* absolute preemption principle, *Draper* indicated that state disclaimer provisions should be interpreted in such a way as to facilitate this modification.

Several Supreme Court decisions after *Draper* generally support the view alluded to above that state constitutional disclaimers neither add to nor subtract from the jursidictional power a state could otherwise assert over Indian lands.[35] These cases, which prohibited state extension of jurisdiction onto Indian lands for various purposes, stressed the exclusive preemptive power of Congress over the affairs of Indians; state constitutional disclaimers, when mentioned at all, were generally cited merely as affirmations of this principle of federal preemption in Indian affairs. Research indicates no cases where the Supreme Court has prohibited otherwise allowable state jurisdiction solely because of the state's disclaimer provision. To the contrary, the cases, at least until 1959, indicate that disclaimer provisions have made no difference at all in the Court's decisions.[36] Indeed, as one commentator has noted, "as a general

35. *See* United States v. Chavez, 290 U.S. 357 (1933) (State had no authority to prosecute non-Indian defendants charged with larceny committed on reservation because of United States Constitutional authority over its Indian wards and their property. *Id.* at 362. State constitutional disclaimer in no way changes this principle. *Id.* at 365); United States v. Sandoval, 231 U.S. 28 (1913) (Congressional regulation of introduction of liquor onto reservation a legitimate exercise of federal power. *Id.* at 49. Such regulation not in conflict with state disclaimer. *Id.* at 38); United States v. Sutton, 215 U.S. 291 (1909) (State prohibited from regulating introduction of liquor onto reservation primarily because of federal statute. *Id.* at 295. State disclaimer provision supports this result. *Id.* at 295-96); United States v. Rickert, 188 U.S. 432 (1903) (Constitutional power vesting in Congress the power to dispose of and make all needful rules for property belonging to the United States prohibited state tax on Indian lands. *Id.* at 439. State constitutional disclaimer supports this conclusion. *Id.* at 441).

36. One striking example of this appears in the Supreme Court cases of *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867), and *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867). These cases, decided in the same year, involved the authority of the states of Kansas and New York to tax reservation Indians. The Organic Act, Statehood Act and Constitution of Kansas all disclaimed jurisdiction over Indian land within the state, yet the Su-

matter these clauses were not necessary, since the Supreme Court has sustanied the same federal and tribal authority in states admitted without such clauses."[37]

Williams v. Lee: The Tribal Infringement Test

In 1959 the Supreme Court decided the landmark case of *Williams v. Lee.*[38] Arising in Arizona, *Williams* involved a non-Indian merchant operating on the Navajo Reservation who sued in state court for the collection of a debt owed by Navajo customers. In denying Arizona state court jurisdiction, the *Williams* Court relied primarily upon *Worcester's* preemption principle: "Significantly, when Congress has wished the states to exercise this power it has *expressly granted* them the jurisdiction which *Worcestor v. Georgia* had denied."[39] This principle, the *Williams* Court noted, had come "to be accepted as law."[40]

As earlier cases had foreshadowed,[41] the disclaimer provision in Arizona's Constitution was unimportant to the *Williams* Court. Indeed, the existence of the provision was mentioned only in passing in a footnote.[42] In this respect, *Williams* fit squarely within the string of Supreme Court precedents establishing federal preemption as the principle limitation of state jurisdiction over Indians.

Williams, however, went beyond a restatement of the *Worcester* doctrine by also discussing those situations where the *Worcester* doctrine had been "modified" to allow an asser-

preme Court in *The Kansas Indians* declared that the taxing question should be resolved by "the construction of treaties, the relations of the general government to the Indian tribes, and the laws of Congress." 72 U.S. (5 Wall.) at 752. In denying Kansas' power to tax, the Court held that, "[a]s long as the United States recognizes [tribal] national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws." *Id.* at 757. In spite of New York's lack of a disclaimer provision, the Court in *The New York Indians* reached the same result. 72 U.S. (5 Wall.) at 771-72. Again, the Court relied on Congressional laws and treaties.

37. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 268 (1982 ed.).
38. 358 U.S. 217 (1959).
39. *Id.* at 221 (emphasis added).
40. *Id.* at 219.
41. *See supra* text accompanying notes 35-36.
42. 358 U.S. at 222 n. 10.

tion of state jurisdiction over Indians or their land.[43] Thus, the *Williams* Court pointed out that a state court could hear suits brought by *non-Indians* against *non-Indians* for actions *arising on a reservation.*[44] Additionally, the Court noted, a state's regulatory jurisdiction could extend *onto a reservation* for the purposes of regulating *non-Indians.*[45] Finally, the Court approved state jurisdiction when invoked by an *Indian* in an action brought against a *non-Indian.*[46] State jurisdiction in these situations, according to the *Williams* Court, was not preempted by any governing acts of Congress.[47] In addition, such jurisdiction did not interfere with "essential tribal relations" or the "rights of Indians."[48] The *Williams* Court concluded: "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.*"[49]

This "tribal infringement test", as it has come to be called, did not truly "modify" *Worcester's* preemption principles in regard to a state's power over Indian affairs.[50] As has been pointed out, some state power touching Indians or their land had always been allowed as a legitimate exercise of state jurisdiction over its territory and citizens. The "tribal infringement test" merely purported to clarify in a general way when a state, if not preempted from doing so, could assert power which in some way touched Indians or Indian land.

43. *Id.* at 219. More accurately, the court described situations where a state has been allowed to assert jurisdiction over *non-Indians* on reservation lands. It pointed out only one situation where the state could assert jurisdiction over an Indian: When an Indian invoked the power of the state court against a non-Indian. *Id.*
44. *Id.* at 220.
45. *Id.*
46. *Id.* at 219.
47. *Id.* at 220.
48. *Id.* at 219.
49. *Id.* at 220 (emphasis added).
50. One could argue that the test also affirmed a tribe's inherent sovereignty as an additional bar to state power. Whether this is true or not, it would not seem to change the outcome in cases involving a question of permissible state power. In this context, general preemption principles would seem to prohibit any state power which interfered with a tribe's sovereignty. This is not to say, however, that the concept of inherent tribal sovereignty would not have significance in other contexts. Inherent tribal sovereignty, for example, might be asserted against federal actions which interfered with that sovereignty.

Nonetheless, as will be discussed, some courts interpreted the *Williams* test as somehow broadening a state's power over Indians. This interpretation was encouraged for a time by the Supreme Court's careless application of the test in *Organized Village of Kake v. Egan*.[51] In *Kake*, the Supreme Court upheld the power of Alaska to prohibit the non-reservation use of fish traps by the Thlinget Indians. Such a conservation measure, the Court noted, was not preempted by any federal law,[52] nor did it interfere with reservation self-government because its application was "off-reservation."[53] *Kake* went on, however, to hold that "*even on reservations* state laws may be applied to *Indians* unless such application would interfere with reservation self-government. . . ."[54]

This language in *Kake* prompted many state courts to apply *Williams*' tribal infringement test in situations not anticipated by the *Williams* Court. For example, the Supreme Court of North Dakota held in *Fournier v. Roed*[55] that a state sheriff could arrest an Indian member of the Sioux tribe by entering the reservation without a warrant.[56] In upholding the sheriff's action, the North Dakota court held that "the arrest did not interfere with the reservation self-government nor impair any right granted or reserved to the petitioner by federal law or treaty."[57] Similarly, other state courts allowed various other assertions of state power over reservation Indians or reservation land by holding that such assertions did not interfere with tribal self-government.[58] These courts, finding no *explicit* federal law or treaty *pro-*

51. 369 U.S. 60 (1962).
52. *Id.* at 63.
53. *Id.* at 75.
54. *Id.* (emphasis added). This holding is particularly striking in light of the *Williams* Court's statement that "[c]ongress has also acted consistently upon the assumption that *the States have no power* to regulate the affairs of *Indians on a reservation*." 358 U.S. 217, 220 (1959) (emphasis added).
55. 161 N.W.2d 458 (N.D. 1968).
56. Signifciantly, North Dakota had not assumed criminal jurisdiction over Indian country pursuant to a federal law which authorizes such assumption upon proper action by the state legislature. Pub. L. No. 83-280, 67 Stat. 588 (1953) codified at 18 U.S.C. § 1162 (1976).
57. 161 N.W.2d at 467.
58. *See* State v. Danielson, 149 Mont. 438, 427 P.2d 689 (1967); Powell v. Farris, 94 Wash. 782, 620 P.2d 525 (1980).

hibiting the state action in question, held that a simple finding of "non-infringement" authorized that action.

Such an extension of the tribal infringement test to include situations involving reservation Indians and their lands was not intended by *Williams*. The Supreme Court finally made this clear in *McClanahan v. Arizona Tax Commission*.[59] In *McClanahan*, the Court held that Arizona's personal income tax could not extend to Indians on the Navajo reservation. *McClanahan* noted that no treaty or federal law *explicitly prohibited* such a tax, yet the "backdrop" of Indian sovereignty demanded that the Navajo treaty and federal laws be interpreted to preclude the extension of state laws to Indians on the reservation.[60]

McClanahan went on to hold that since the appellant was an Indian and her income was derived wholly from reservation sources, her activity was *totally* within the sphere which the relevant treaty and statutes left for the Federal Government and the Indians themselves.[61] The Court stated bluntly: "[W]e reject the suggestion that the Williams test was meant to apply in this situation. It must be remembered that cases applying the Williams test have dealt principally with situations involving *non-Indians*."[62] There were *no* cases, according to the *McClanahan* Court, which held that federal legislation and treaties could be ignored "simply because tribal self-government has not been infringed."[63] *Kake*, the Court clarified, was not such a case.[64]

McClanahan, then, in a sense brought the law back to where it had been before the confusion engendered by *Kake* and *Williams*. "State laws," according to the *McClanahan* Court, "generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly pro-

59. 411 U.S. 164 (1973). *But see infra* note 67.
60. *Id.* at 174-77.
61. *Id.* at 179-80.
62. *Id.* at 179 (emphasis added).
63. *Id.* at 180.
64. *Id.* at 180 n. 20.

vided that State laws shall apply."[65] This principle generally echoed the 150-year-old doctrine stated in *Worcester:* "The Cherokee nation . . . is a distinct community, occupying its own territory . . . in which the laws of Georgia can have no force . . . but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress."[66] *McClanahan,* along with other post-*Worcester* cases, "modified" this principle only by recognizing that in cases involving *non-Indians,* or *non-reservation land* a state may sometimes extend its power over Indians or their property without explicit tribal or Congressional permission. In these situations, where "essential tribal relations" were not involved, or where the protections of federal laws or treaties were not impaired, or where tribal sovereignty was not infringed upon, state power was authorized.

Perhaps it is more helpful to view the "tribal infringement" test not so much as a "modification" of the *Worcester* principle, but as a clarification of the scope and limit of the principle. The test, as a basic proposition, stands for the idea that federal preemption has boundaries. The further the focus of state power moves away from Indians and their property, the weaker grows the bar of federal preemption. Federal preemption does not necessarily bar state power when non-Indians or non-reservation land are involved. This is quite different, however, from saying that federal preemption is not an absolute bar to state power when only Indians on Indian land are involved. In such a situation, there is only one "unmodified" rule: the state is preempted from asserting its power.[67]

65. *Id.* at 170-71 (quoting U.S. DEP'T OF THE INTERIOR, FEDERAL INDIAN LAW 845 (1958)).
66. 10 U.S. at 243, 6 Pet. at 561.
67. *But see* Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976). In *Moe,* the Supreme Court upheld a Montana state law which required reservation Indians to add a sales tax onto the price of cigarettes sold to non-Indians. Such a tax appears to be state regulation of reservation Indians. The Court held, however, that the tax was more properly viewed as a regulation of non-Indians with a concomitant incidental burden on Indians. *Moe* may be an aberration limited to its specific facts, but it does seem to place a small cloud over the freedom of reservation Indians from state regulation. *See* Note, *State Jurisdiction on Indian Reservations,* 13 LAND & WATER L. REV. 1036 (1978).

Kake v. Egan and Constitutional Disclaimers

The *McClanahan* Court appeared to clarify that the tribal infringement test was not intended to apply in situations involving Indians on a reservation. In those situations *McClanahan*, and even *Williams*, noted that state power was preempted by federal treaties and statutes. *Kake v. Egan*, however, took a more limited view of preemption under those circumstances and appeared to approve of broad exercises of state power over Indians if that power did not interfere with reservation self-government. Although *McClanahan* seemed to cut back on *Kake's* broad implications, those implications have nonetheless lived on through their impact upon the interpretation of constitutional disclaimers.

As has been noted earlier, the Supreme Court has generally interpreted disclaimer provisions as supporting its views on preemption. These disclaimers, it appears, have amounted to nothing more nor less than the state's constitutional echo of the principle of federal preemption of Indian affairs. In this light, it is not surprising that *Kake*, with its more limited view of federal preemption, includes an extensive discussion limiting the scope of Alaska's constitutional disclaimer.

Kake's Proprietary/Regulatory Distinction: The Alaska Statehood Act, like the constitutional disclaimers of the other Western states, disclaims "all right and title" to Indian lands and provides that such lands shall remain subject to the "absolute jurisdiction and control" of the United States.[68] After reviewing the relevant legislative history pertaining to Alaska statehood, the *Kake* Court concluded that the above language disclaiming "right and title" to Indian lands placed a limitation only upon a state's "proprietary" authority — not its "governmental" or "regulatory" authority.[69] This language, held *Kake*, was intended

68. Pub. L. No. 85-508, § 4, 72 Stat. 339 (1958). Alaska's constitutional disclaimer differs slightly in that it subjects Indian lands to the "absolute disposition" of the United States. ALASKA CONST. art. XII, § 13.
69. 369 U.S. at 69.

to insure that statehood would neither extinguish nor establish Indian land claims against the United States.[70]

The Court went on to note that there was scant attention paid in Congress to the disclaimer's language vesting "absolute jurisdiction and control" over Indian lands in the United States.[71] The Court cited legislative history indicating that the words "absolute jurisdiction" were not intended to mean "exclusive jurisdiction,"[72] and were not intended "to oust the state completely from regulation of Indian property."[73] Although the Court did not expressly so hold, it indicated that the disclaimer's "absolute jurisdiction and control" language was similarly intended to limit only the state's "proprietary" and not its "regulatory" authority.[74]

Kake's interpretation of the Alaska disclaimer has been cited extensively by other courts interpreting various other state disclaimers.[75] This, however, is unfortunate because the *Kake* Court's interpretation appears to be, at best, only partly accurate. A close reading of the legislative history, for example, indicates substantial disagreement over the meaning of the Alaska disclaimer. Ralph Barney, the then Chief of the Indian Claims Branch of the Justice Department who drafted the Alaska disclaimer for the Statehood Act, testified during Senate Hearings that the disclaimer was intended to preserve the status quo in regard to state jurisdiction over Indians.[76] That status quo, in Barney's view, included the retention of police power over reservations in the federal government.[77] The disclaimer, added Barney, "would take the jurisdiction to operate such

70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 71.
74. The Court cited, for example, the remark of Senator Jackson: "All that you are doing here is a disclaimer [sic] of proprietary interests . . . ." *Id.* at 69 (quoting *Alaska Statehood: Hearings on S. 50 Before the Senate Comm. on Interior and Insular Affairs*, 83d Cong., 2d Sess. 286 (1954) (remarks of Senator Jackson).
75. *See* Arizona v. Manypenny, 445 F. Supp. 1123 (D. Ariz. 1977); State v. Danielson, 149 Mont. 438, 427 P.2d 689 (1967); State v. District Court of Ninth Judicial District, 617 P.2d 1056 (Wyo. 1980).
76. *Alaska Statehood: Hearings on S. 50 Before the Senate Comm. on Interior and Insular Affairs*, 83d Cong., 2d Sess. 284 (1954) (remarks of Ralph Barney, Chief, Indian Claims Branch, U.S. Justice Dept).
77. *Id.* at 286.

lands as were not turned over to the State, retaining those authorities to the Federal Government. You would operate just as you now operate the territory."[78] This testimony would seem at odds with the view expressed in *Kake* that the disclaimer limited only the state's "proprietary" interest in Indian lands.

Such a view also conflicts with Supreme Court precedent involving state disclaimers. Many Supreme Court decisions, as noted earlier, have cited state disclaimers as support for the prohibition of state power over Indians in clearly *nonproprietary* areas.[79] In *United States v. Sutton*,[80] for example, the Supreme Court prohibited the state of Washington from regulating the introduction of liquor onto a reservation by holding that such regulation was properly within the realm of the federal government. The Court cited Washington's disclaimer provision as support for its holding.[81] It could hardly be argued that the regulation of liquor constitued anything but a "nonproprietary" power within the meaning of *Kake*, yet the Supreme Court in *Sutton* indicated that Washington had disclaimed this power in its enabling Act.

Finally, Congress' enactment of Public Law 280,[82] which granted states the authority to assume criminal and civil jurisdiction over reservation Indians, indicates that state disclaimers extend to more than a mere proprietary interest in Indian lands. In authorizing the states' assumption of jurisdiction, Congress specifically set apart those states with constitutional disclaimers, assuming that those states would have to repeal their disclaimers by constitutional amendment before Public Law 280 jurisdiction could be validly accepted.[83] Public Law 280, then, illustrates the Congressional view that state disclaimers constitute general obstacles to the assertion of state jurisdiction. Presumably, if state dis-

78. *Id.*
79. *See supra* text accompanying note 35.
80. 215 U.S. 291 (1909).
81. *Id.* at 295-96.
82. Pub. L. No. 83-280, 67 Stat. 588 (1953) codified at 18 U.S.C. § 1162 (1976).
83. Pub. L. No. 83-280, 67 Stat. 590 (1953), *repealed by* Pub. L. No. 90-284, § 404, 82 Stat. 79 (1968) codified at 25 U.S.C. § 1324 (1976).

claimers were deemed to limit only a state's "proprietary" interest in Indian lands, their repeal would be unnecessary to the state's assumption of civil and criminal jurisdiction over those lands.

In setting forth the above discussed proprietary-regulatory distinction, the *Kake* Court was apparently elaborating upon the principle that "absolute" federal jurisdiction does not necessarily mean "exclusive" federal jurisdiction. In this respect, the Court was merely restating the old idea that in some circumstances a state may assert its sovereign power over its citizens and territory in a way that touches Indians on their lands. As has been discussed, this idea was the basis for "modifications" of the absolute preemption principle of *Worcester*, and was at the heart of the *Williams* Court's "tribal infringement tests". Unfortunately, however, the *Kake* Court's proprietary-regulatory distinction overstated the idea in an apparent attempt at clarifying it.

Again, the *McClanahan* decision seems to have corrected the misleading implications of *Kake*. In denying Arizona the authority to tax reservation Indians, *McClanahan* cited Arizona's constitutional disclaimer along with other federal statutes and treaties as supporting the proposition that the taxation of reservation Indians was totally within the province of the federal government and the Indians themselves.[84] Thus, the *McClanahan* Court treated Arizona's disclaimer not as a special, isolated limitation upon the state, but as an aspect of preemption that could not be viewed apart from preemption principles.

From this perspective, the *McClanahan* Court could agree with the holding in *Kake* that a state disclaimer vesting "absolute jurisdiction" over Indian lands in the federal government did not invariably dictate "exclusive" federal jurisdiction.[85] The Court in *McClanahan*, however, was quick to note that *Kake's* authorization of residual state power "came in the context of a decision concerning the fishing

84. 411 U.S. at 172-78.
85. *Id.* at 176 n. 15.

rights of *non-reservation* Indians."[86] *Kake's* holding that "absolute" was not invariably "exclusive" did not, according to *McClanahan*, "purport to provide guidelines for the exercise of state authority *in areas set aside by treaty for the exclusive use and control of Indians.*"[87] In those areas, *McClanahan* indicated that the jurisdiction of the federal government was indeed exclusive. This conclusion is consistent with *McClanahan's* holding that *Williams'* tribal infringement test was not meant to apply in situations involving reservation Indians because of the federal government's total preemption of state power in these situations.[88]

Thus *McClanahan* appears to have clarified what many of the pre-*Williams* decision indicated: state disclaimer provisions neither add to nor subtract from preemption principles. Just as these principles do not always demand exclusive federal jurisdiction, state disclaimers may be interpreted to allow some assertions of residual state power. The Court in *McClanahan* emphasized, however, that in situations involving reservation Indians state power was totally preempted by the federal government. Thus, in these situations the Court indicated that a disclaimer's language vesting "absolute" control in the federal government should be interpreted as meaning "exclusive" federal control.

Public Law 280 and Disclaimers

The above discussion has generally suggested that state constitutional disclaimers should not be viewed apart from principles of federal preemption. That is, the disclaimers mean nothing more than that in regard to Indians and their lands, federal law is the governing law. In this respect, disclaimer provisions do not as a matter of federal law constitute separate, independent bars to the assertion of state power over Indians; rather, disclaimers merely reaffirm that federal law controls the extension of state power over Indians.

86. *Id.* (emphasis in original).
87. *Id.* (emphasis added).
88. *See supra* text accompanying notes 58-60.

This conclusion is not made doubtful by the provisions of Public Law 280 requring states with disclaimers to amend their constitutions before accepting civil and criminal jurisdiction over reservation Indians. As was earlier pointed out, Congress apparently feared that state constitutional disclaimers constituted independent obstacles to the state's assumption of jurisdiction.[89] Such a fear, however, was clearly unfounded. The Supremacy Clause of the United States Constitution provides that the Constitution "and the laws of the United States" shall be the supreme law of the land, *any thing in the Constitution or Laws of any State to the Contrary notwithstanding.*"[90] Thus, Congress had the obvious power to grant the states jurisdiction over reservation Indians regardless of state constitutional disclaimer provisions.

Congress' conditioning of the state's acceptance of jurisdiction by requiring state constitutional amendments was a result more of caution than of legal requirements. Legislative history indicates that Congress was concerned that "any legislation in [this] area should be on a general basis, making provisions for all affected States to come within its terms. . . ."[91] Congress apparently intended to make certain that disclaimer states were not excluded from the terms of Public Law 280 through the uncertain legal ramifications of state constitutional provisions. As the Supreme Court pointed out in *Washington v. Yakima Indian Nation*,[92] Public Law 280 "was intended to facilitate, not to impede, the transfer of jurisdictional responsibility to the States."[93]

Interestingly, the *Yakima* Court held that Public Law 280 did not necessarily require state constitutional amend-

89. *See* S. REP. No. 699, 83d Cong., 1st Sess. 6 (1953). Perhaps this fear was more a result of speculation as to the opinion state courts would have towards their disclaimers in deciding whether the state could accept P.L. 280 jurisdiction. The counsel for the Indian Affairs Committee noted that federal permission to the states to amend their constitutions "may be unnecessary, but by some state courts it may be interpreted as being necessary." *Hearings on H. R. 1063 Before the House Comm. on Interior and Insular Affairs*, 83d Cong., 1st Sess. 8 (1953) (*quoted in* Washington v. Yakima Nation, 439 U.S. 463, 492 n. 36 (1978)).

90. U.S. CONST. art. VI (emphasis added). In addition, the Commerce Clause grants Congress the power to regulate commerce "with the Indian tribes." U.S. CONST. art. I, § 8.

91. S. REP. No. 699, 83d Cong., 1st Sess. 5 *reprinted in* 1953 U.S. CODE CONG. & AD. NEWS 2409, 2414.

92. 439 U.S. 463 (1978).

93. *Id.* at 490.

ment to accept jurisdiction.[94] Whether the amendment process was necessary to accept Public Law 280 jurisdiction was, in the *Yakima* Court's view, purely a question of state law.[95] In *Yakima*, the Court upheld a decision of the Washington Supreme Court that state *legislative* action accepting partial Public Law 280 jurisdiction constituted sufficient positive state action to comply with the conditions of Public Law 280.[96] *Yakima* thus emphasized that state constitutional disclaimers do not, as a matter of federal law, constitute independent barriers to the assertion of state power over reservation Indians.

Adsit, Jicarilla: Indian Water and Disclaimers

As was pointed out at the beginning of this article, *Jicarilla Apache Tribe v. United States* and *Northern Cheyenne Tribe v. Adsit* involved McCarran Amendment proceedings for the adjudication of rights to the use of water in New Mexico and Montana.[97] The 10th Circuit in *Jicarilla* held that New Mexico's disclaimer provision did not negate the jurisdiction of Arizona state courts to adjudicate Indian water rights pursuant to the McCarran Amendment. *Adsit*, however, held that Montana's disclaimer provision prevented Montana state courts from asserting subject matter jurisdiction over Indian claims to the use of water.

In light of the above discussion regarding the relationship of disclaimer provisions to general principles of federal preemption, it appears that the Tenth Circuit reached the correct result in *Jicarilla*. This result, however, was arguably reached through the application of partially incorrect analysis.

The Jicarilla Decision

The *Jicarilla* court based its conclusion that New Mexico's disclaimer did not prohibit the adjudication of Indian

94. *Id.* at 493. The Supreme Court noted that the express terms of Public Law 280 required constitutional amendment only "where necessary." 25 U.S.C. § 1324 (1976).
95. 439 U.S. at 493.
96. *Id.*
97. *See supra* text accompanying notes 5-18.

water rights primarily on three different theories. First, the court held that New Mexico's disclaimer could be *interpreted* in such a way as to allow the assertion of state jurisdiction in this area.[98] Second, the court held that the McCarran Amendment, as interpreted by the Supreme Court in *Colorado River Water Conservancy District v. United States*, implicitly modified the New Mexico disclaimer to allow the state to accept jurisdiction over the adjudication of Indian water rights.[99] Third, the court held that there was ultimately no conflict between a McCarran Amendment adjudication of Indian rights and the New Mexico disclaimer provision.[100]

Interpretation of the Disclaimer: The *Jicarilla* court accepted the Supreme Court's interpretation of disclaimer provisions as expressed in *Kake v. Egan*.[101] Thus, the *Jicarilla* court held that New Mexico disclaimed only a "proprietary" interest in Indian lands.[102] The court viewed a state action involving a general water rights adjudication as a non-proprietary action.[103] Further, the court accepted *Kake's* broad application of the tribal infringement test by generally approving of non-proprietary state action when such actions did not interfere with reservation self-government or federal rights.[104] Citing *Kake*, the *Jicarilla* Court noted that such "noninfringing" state action could apply even to reservation Indians.[105]

As has been suggested, *Kake's* narrow interpretation of state disclaimers was at best misleading, and at worst incorrect.[106] Such a narrow view of disclaimers was not supported by previous case law and only weakly supported, if at all, by Congressional understanding of the provisions. Further, *McClanahan* noted that the "tribal infringement" test was not intended to apply to situations involving reservation Indians. In these situations, *McClanahan* indicated that

98. 601 F.2d at 1131-35.
99. *Id.* at 1131.
100. *Id.*
101. *Id.* at 1133-35.
102. *Id.* at 1135.
103. *Id.* at 1133.
104. *Id.* at 1135.
105. *Id.* at 1134.
106. *See supra* text accompanying notes 75-82.

state disclaimers vesting "absolute jurisdiction" in the federal government should be interpreted as supporting "exclusive" federal jurisdiction.

It is suggested that the use of water on Indian lands by Indians is clearly the type of situation which the *McClanahan* Court held to be totally within the jurisdictional sphere of Congress and the Indians. State constitutional disclaimers, it has been argued, should be interpreted to support the basic proposition of exclusive federal preemption in situations involving reservation Indians. *Jicarilla's* narrow interpretation of the New Mexico disclaimer is inconsistent with this notion.

McCarran Amendment Modification of Disclaimers: As a secondary grounds for its decision, the *Jicarilla* Court held that the McCarran Amendment worked an implicit "modification" of the New Mexico disclaimer so as to allow state jurisdiction over the adjudication of Indian water rights.[107] The court's reasoning on this point appears to have been prompted by the Jicarilla Tribe's argument that Public Law 280 procedures were required for a state to assume the civil jurisdiction necessary to adjudicate Indian water rights.[108] Such procedures, the Tribe argued, were not satisfied by the enactment of the McCarran Amendment; the McCarran Amendment simply did not "amend, modify or repeal New Mexico's disclaimer" as required by Public Law 280.[109]

The *Jicarilla* court, however, disagreed with this argument. The McCarran Amendment, held the court, dictated that "subject matter jurisdiction should be recognized as allowable in the state courts of the general water rights adjudication proceeding."[110] In recognition of this principle, the court held that the McCarran Amendment implicitly modified "as necessary" New Mexico's Enabling Act disclaimer provision.[111] Although the court did not so expressly

107. 601 F.2d at 1131.
108. *Id.* at 1130.
109. *Id.*
110. *Id.* at 1131.
111. *Id.* The court did not indicate that the state *constitutional* disclaimer, based upon and required by the Enabling Act disclaimer, was also modified by the

hold, it appears that the court presumed that such an implicit modification of New Mexico's disclaimer provision satisfied the requirements of Public Law 280.

It is suggested, however, that the court's recognition of an implicit modification of New Mexico's disclaimer, presumably in accordance with Public Law 280 procedures, merely served to confuse the issues. The court could have avoided the subject by noting that the express terms of Public Law 280 do not apply to a state's assumption of civil jurisdiction for the purposes of adjudicating Indian water rights.[112] By venturing into the murky world of Public Law 280, the *Jicarilla* court diverted its attention from the central issue of the case: Do disclaimer provisions conflict with the McCarran Amendment's federal grant of jurisdiction to the states to adjudicate Indian water rights?

The McCarran Amendment and Disclaimers: The *Jicarilla* court answered the above question in the negative.[113] The answer, however, was given almost as an "aside"; further, the answer was given only after the court had eviscerated the New Mexico provision through its narrow interpretation and by its holding that the McCarran Amendment had implicitly "modified" the disclaimer. It is suggested that the court, by relying upon preemption analysis, could have reached the same conclusion without stripping state disclaimer provisions of their intended meaning.

It has been the premise of this comment that state disclaimer provisions exist only to reaffirm the principle that federal law is controlling law in regard to Indians and their

McCarran Amendment. It did, however, suggest that the modification of the Enabling Act provision authorized New Mexico to assert jurisdiction over Indian water pursuant to state statute. Presumably, New Mexico's state statue granting exclusive jurisdiction to the state court in which a general adjudication was initiated, was viewed by the *Jicarilla* court as the necessary modification of the state constitutional disclaimer. *See id.*

112. Public Law 280 reads in pertinent parts as follows:
> (b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or 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. . . .

18 U.S.C. § 1162(b) (1976).

113. 601 F.2d 1131.

lands. The McCarran Amendment's waiver of the federal government's sovereign immunity in state proceedings for the adjudication of water rights was intended to vest state courts with the necessary jurisdiction for the proper and efficient disposition of those rights.[114] The Supreme Court held in *Colorado River Water Conservancy District v. United States*, that the language and underlying policy of the McCarran Amendment dictated "a construction including Indian [water] rights in its provisions."[115] Thus, the McCarran Amendment, as interpreted by the Supreme Court, constitutes federal law allowing the exercise of state court jurisdiction over the adjudication of Indian water rights as part of a general stream adjudication. As a matter of federal law, state constitutional disclaimers vesting "absolute jurisdiction and control" over Indian lands in the federal government should not be viewed as creating additional legal obstacles to the state's acceptance of federally granted jurisdiction. By accepting such jurisdiction, a state has not run afoul of its own constitutional provision providing for absolute federal control over Indian affairs. Such an acceptance, to the contrary, is authorized, defined, and limited by federal law and is, therefore, consistent with the principle of absolute federal control expressed in disclaimer provisions.

The Adsit Decision

The Ninth Circuit in *Adsit* agreed with the *Jicarilla* Court that the Supreme Court's construction of the McCarran Amendment allowed states to assert jurisdiction over Indian

114. In the administration of and the adjudication of water rights under state laws the state courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order of action affecting one right affects all such rights. Accordingly, all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a state court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the state courts. S. REP. No. 775, 82d Cong., 1st Sess. 4-5 (1951).

115. 424 U.S. at 810.

water rights.[116] This allowable jurisdiction, however, in the *Adsit* court's view included only assertions of *personal* jurisdiction and not subject matter jurisdiction.[117] The *Adsit* court went on to hold that Montana's constitutional disclaimer provision left Montana state courts without subject matter jurisdiction over Indian lands.[118] Since the *Adsit* court could not read the McCarran Amendment to amend Montana's disclaimer, it held that the Montana state court lacked the "jurisdictional prerequisites" to adjudicate Indian water rights.[119]

The *Adsit* court's holding that Montana's disclaimer provision effected a waiver of state subject matter jurisdiction over Indian lands represented a novel approach to the interpretation of disclaimers. Such an approach, however, is ripe with serious theoretical problems. First, if a state disclaimer provision waives state subject matter jurisdiction over Indian lands, it would also seem to waive personal jurisdiction over Indian tribes.[120] If this were true, then by the *Adsit* court's analysis, a state court would also lack personal jurisdiction over Indian tribes in a McCarran Amendment proceeding because the McCarran Amendment could not be read to amend a state constitution. Yet, the *Adsit* court conceded that, indeed, the McCarran Amendment granted state courts personal jurisdiction over Indian tribes in McCarran Amendment proceedings.

A second, more serious problem lies in the *Adsit* court's implication that if the Montana constitution contained no disclaimer, then Montana would possess subject matter jurisdiction over Indian lands. This conclusion, however, is simply incorrect. The Supreme Court in *McClanahan* made it quite clear that the limits of state power over Indians and their lands are to be defined by federal statutes and

116. Northern Cheyenne Tribe v. Adsit, 668 F.2d 1084 (9th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3218 (U.S. Oct. 4, 1982) (No. 81-2188).
117. *Id.* at 1085.
118. *Id.*
119. *Id.*
120. The *Adsit* court gave no reason why the state's waiver should be limited to subject matter jurisdiction.

treaties—[121] not by state constitutional provisions. Further, the *Yakima* decision clearly indicated that Public Law 280 was intended to confer "subject matter" and "geographic" jurisdiction upon both disclaimer and non-disclaimer states.[122] The message is clear: Regardless of disclaimer provisions, states have no subject matter jurisdiction over Indian affairs absent federal law conferring such jurisdiction.

In this light, the Supreme Court's interpretation of the McCarran Amendment in *Colorado River Water Conservancy District v. United States* must be read as granting the states subject matter as well as personal jurisdiction to adjudicate Indian water rights. If the McCarran Amendment did not grant such subject matter jurisdiction then the states would clearly lack that jurisdiction — regardless of a disclaimer provision in the state's constitution. Although the *Colorado River* decision spoke only in terms of the McCarran Amendment's general grant of jurisdiction to the states,[123] it is a necessary implication of the decision that this general grant of jurisdiction included subject matter jurisdiction. Such a federal grant of jurisdiction, subject matter and personal, is not defeated by a state disclaimer provision which points to federal law as the source of state jurisdiction over Indians.

CONCLUSION

The *Adsit* and *Jicarilla* decisions indicate the confusion currently surrounding the interpretation of state disclaimer provision. This confusion was bound to occur. For too long courts had expressed only a vague understanding of disclaimers and their relationship to preemption doctrines. Hence, some courts promulgated the mistaken view that disclaimers could be viewed in a vacuum, independent of preemption. By distinguishing and limiting the meaning of disclaimers to reach individual results, these courts have

121. 411 U.S. at 172.
122. Washington v. Yakima Nation, 439 U.S. 463, 465, 472-74, 493, 498 (1979).
123. 424 U.S. at 809.

diverted attention from the fundamentally symbiotic relationship between disclaimers and preemption.

It should be remembered that disclaimer provisions generally resulted from the demands of the federal government. As a condition to statehood, the states relinquished their jurisdiction and control over lands held by the federal government. In light of these beginnings, it would be ironic if a state were unable to accept federally granted jurisdiction due to its federally compelled disclaimer provision. Such a result would seem to lose the forest for the trees.

The McCarran Amendment, as interpreted by the Supreme Court in *Colorado River*, represents the intention of the federal government that states possess the necessary jurisdiction to adjudicate Indian water rights. To interpret state disclaimer provisions in such a way as to negate such jurisdiction would seem to run counter to federal Indian policy. To thwart federal Indian policy was surely not the intended purpose of state disclaimers.

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