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COMMENT

TRIBAL POWER TO TAX NON-INDIAN MINERAL LESSEES

I. INTRODUCTION

A. Scope

As energy resources become more scarce and expensive, interest in those remaining resources increases. This presents special problems in the field of Indian law because large deposits of oil, gas, uranium, and coal have been found or are being explored on various Indian reservations. Because of the limited quantity and escalating value of these resources, a variety of competing parties have become more concerned about their interests in the resources. Oil, gas and mineral lessees are concerned about protecting old leases which provide them with a resource at a lower price than they could obtain in today's market. Indian tribes are concerned that they are not obtaining as much money under old leases as they could obtain under new leases. They are further concerned that these resources are non-renewable, and that these sources of tribal income will dry up in the future. States are concerned about any taxing power they may have over these leases which could provide a significant source of income for state coffers. Thus, the stage is set for litigation in this area as the parties attempt to protect their interests. The scope of this comment is to determine the extent of tribal authority to regulate their interests through taxation measures.

B. Sovereign Powers of Tribes

There is no doubt that American Indian tribes and pueblos have a certain amount of inherent sovereignty over reservation and pueblo lands and the people on them. This inherent sovereignty has been found by the United States Supreme Court to extend to the right of tribes to adopt and operate under self-government, to define conditions of tribal membership, to regulate domestic relations of members, to regulate property within the jurisdiction of the tribe, to levy taxes, and to establish and proceed under their own civil and criminal judicial system.[1] This sovereignty may, in some instances, spread

1. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1971) at 122. Mr. Cohen's monumental treatise on Indian law is considered the foremost treatise by many scholars of Indian law, though it is undeniably slanted in favor of Indians in many situa-

over more than the reservation itself to include "Indian country." Indian country may include land owned in fee by non-Indians within Indian reservations, or areas "checker boarded" by reservation and non-Indian lands.[2] These are broad generalizations to which there are exceptions. The limits of this inherent sovereignty are continually being tested in the courts as tribal laws and decisions conflict with individual Indians, individual non-Indians, other tribes, states and the federal government.

C. Historical Background

Historically, American Indians were on this continent long before Europeans; many Indian tribes roamed over large territories, obtaining sustenance primarily by reaping an area's natural abundance of fish, game and vegetation. Each tribe had its own political/governmental structure and this structure was the absolute authority over the individual members. This is not to imply that most tribes had any sort of formal judicial process; offenses by one Indian against another "were usually handled by social and religious pressure."[3] Nonetheless, this system within each tribe was "sovereign" in the sense that there was no appeal beyond this tribal structure.

As Europeans moved across the continent, the Indians were forced into ever smaller territories, until they were placed within finite reservations established by the United States government. There are two kinds of reservations, treaty reservations and Executive Order reservations.

Treaty reservations were set aside for Indians by Congress and involved treaties between the particular Indians and the Congress. Often these "treaties" were nothing more than unilateral creations of Congress. The earliest treaties between the Europeans and Indians were between somewhat equally powerful peoples, though the Indians were still at a great disadvantage due to language problems and lack of understanding of the European legal system. As the United States government became dominant, these treaties did not even attain that status. They became instead agreements between conquering and conquered peoples. In fact, after 1871, Congress no longer

tions. Mr. Cohen wrote this book for the U.S. Department of the Interior while he was chairman of the Board of Appeals for that department. It was published out of the Office of the Solicitor in 1942. This book was "updated" by the same office in 1958, by Frank B. Horne and others. The "updated" version, however, was considerably less favorable to Indians in several areas, and has even been called a "bastard" version of Cohen's original work. *See, e.g.*, Kury, Book Review (God is Red), 14 NAT. RES. J. 305 (1974).

2. *Seymour v. Superintendent*, 368, U.S. 351, 358 (1962) (interpreting the language of 18 U.S.C. §1151 (1948)).

3. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 197 (1978).

made treaties with Indian tribes[4] but merely created reservations by congressional act. This gradual shift in roles between the treating parties may have some bearing on the degree of sovereignty of any particular Indian tribe.

Executive Order reservations are merely reservations designated by the President of the United States for certain Indian tribes. These reservations did not involve treaties or congressional acts at all, though treaties or congressional acts may have subsequently ratified them. Such reservations are no longer possible since in 1919 Congress decided the President was acting in its exclusive realm, and it halted creation of these reservations.[5]

The distinction between treaty and Executive Order reservations has become quite important in many areas of Indian law, because subsequent statutes of Congress have often applied to only one type of reservation, though as one reads judicial interpretations of statutory enactments, it often appears quite illogical that Congress meant to create these distinctions. At any rate, the type of reservation involved in the controversy may well have a bearing on the outcome of any litigation between a sovereign tribe and other parties.[6]

D. General Rules of Construction

There are several other basic propositions which set a backdrop for controversies between tribes and others; probably the only absolute proposition is that Congress has plenary power over Indian tribes and tribal property, even to the extent of abrogating any treaties the United States may have with those tribes.[7] Somewhat more tenuous rules of construction include the rule that "statutes passed for the benefit of dependent Indian tribes or communities are to be liberally

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4. 16 Stat. 566 (25 U.S.C. §71 (1976)):

> "Future Treaties with Indian Tribes."
>
> "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired."

While Congress thereafter created reservations by statute, for purposes of this Comment, the distinction makes no difference and "treaty reservations" includes all Congressionally authorized reservations.

5. *See* Act of June 30, 1919, §27, 41 Stat. 34. Congress further provided in 1927 that boundaries on those reservations could no longer be made except by Act of Congress. Act of March 3, 1927, §4, 44 Stat. 1347 (25 U.S.C. §398d (1976)).

6. *See* GETCHES, ROSENFELT & WILKINSON, CASES AND MATERIALS ON FEDERAL INDIAN LAW (1979) at 68, for an explanation of one area where the distinction is quite important.

7. *See, e.g., United States v. Kagama,* 118 U.S. 375 (1886); and *United States v. Rogers,* 45 U.S. (4 How.) 567 (1846).

construed, doubtful expressions being resolved in favor of the Indians."[8] This rule also applies to construction of treaties.[9] Furthermore, any congressional abrogation of a tribe's rights "will not be lightly imputed to the Congress."[10] This is sometimes stated even more strongly: "Rights secured by treaty will not be deemed to have been abrogated or modified absent a clear expression of Congressional purpose . . ."[11] These treaty rights will be generally implied in favor of the Indians where a treaty does not specifically grant a particular power.[12]

E. The Present Climate

Within the above general framework, one will find many nuances and specific exceptions. The degree of a tribe's sovereignty, as determined by its own historical background, must be examined. Application of treaties and statutes to specific tribes must be determined. Tribal relationships with competing interests, especially states, must be scrutinized.

While Indian tribes were once considered "domestic dependent nations . . . in a state of pupilage . . . who addressed the President as their great father,"[13] they are no longer weak and defenseless. They have become quite sophisticated in advocating and defending their legal positions, with the financial resources to hire high-quality legal counsel.[14] It is also clear that states and oil companies are able to secure highly qualified legal counsel to represent their interests. Thus, as the value of these parties' interests increases, the stage is set for litigation concerning their various rights in relation to each other.

It is therefore necessary to examine the extent of these competing interests when an Indian tribe imposes a tax on non-Indian mineral, oil and gas lessees. The Jicarilla Apache Tribe and the Navajo Nation have imposed taxes upon non-Indian oil and gas lessees in an attempt to provide greater income for their tribes from leases. The Crow Tribe in Montana has imposed a tax on mineral lessees of coal. The

8. *See, e.g., Alaska Pacific Fisheries v. United States,* 248 U.S. 78, 79 (1918).

9. *United States v. Winans,* 198 U.S. 371 (1905).

10. *Menominee Tribe of Indians v. United States,* 391, U.S. 404, 413 (1968).

11. *United States v. Winnebago Tribe of Nebraska,* 542 F.2d 1002, 1005 (8th Cir. 1976). *See also, DeCoteau v. District County Court,* 420 U.S. 425 (1975). Note that this proposition was overruled in *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978), wherein the Court ruled that inherent rights may have been *impliedly* abrogated.

12. *See, e.g., Ex Parte Crow Dog,* 109 U.S. 556 (1883).

13. *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 17 (1831).

14. Tribes are generally represented by the Solicitor General's Office, which has a section specifically devoted to Indian legal affairs. Tribes also have the right and finances to hire outside legal counsel whenever their interests conflict with those of the U.S. *See State of New Mexico v. Aamodt,* 537 F.2d 1102 (1976), *cert. denied,* 429 U.S. 1121.

Jicarilla case is presently on appeal in the Tenth Circuit.[15] A challenge to the Navajo Possessory Interest Tax and the Business Activity Tax is presently on appeal in the Ninth Circuit. Several other cases involving Navajo taxes are in the pleading stage before United States District Courts in Utah and New Mexico,[16] The *Crow* case is also on appeal in the Ninth Circuit from the U.S. District Court in Montana.[17]

II. INHERENT SOVEREIGNTY

A. General Historical Case Law

The initial question raised is whether a tribe has the authority to levy such taxes on non-Indian mineral, oil and gas leases. If not, then all other issues are disposed of. Cohen took the position that:

> One of the powers essential to the maintenance of any government is the power to levy taxes. That this power is an inherent attribute of tribal sovereignty which continues unless withdrawn or limited by treaty or by Act of Congress is a proposition which has never been successfully disputed.[18]

This proposition is, however, hardly an unequivocal statement that tribal power to tax non-Indians on a reservation is grounded in inherent sovereignty. In fact, it is equally correct that the power to tax non-Indians on reservation lands has never been successfully upheld by the United States Supreme Court solely as an attribute of tribal sovereignty. But, both of the above statements must be qualified. While the United States Supreme Court has never unequivocally based a decision on whether tribes have the power to tax non-Indians as an inherent attribute of tribal sovereignty, lower courts have.[19] Furthermore, the United States Supreme Court has made statements which lend credibility to Cohen's statement in several situations.

In 1832, Justice Marshall handed down the decision in *Worcester*

15. *Merrion & Bayless v. Jicarilla Apache Tribe,* Civ. No. 77-292 P, 77-343 P, consolidated.

16. *Texaco Oil Co. v. McDonald,* No. C-79-0296 (D.C. Utah, Central Div.); *Superior Oil Co. v. Navajo Tribe,* No. (D.C. Utah, Central Div.); *Phillips Petroleum Co. v. Navajo Tribe,* No. C-79-0153 (D.C. Utah, Central Div.); *Southland Royalty Co. v. Navajo Tribe,* No. C-79-0140 (D.C. Utah, Central Div.); *Arizona Public Service Co. v. Navajo Tribe,* No. Civ 78-238 (D.C. N.M.); and *Amoco v. McDonald,* No. Civ 79-155-13 (D.C. N.M.). All of the above cases were filed in 1979.

17. No. CV-78-110-BLG.

18. COHEN *supra* note 2. For an interesting comment on what Mr. Cohen meant by this, *see The Right of Tribal Self-Government and Jurisdiction of Indian Affairs,* 1970 UTAH L. REV. 291.

19. *See, e.g., Iron Crow v. Oglala Sioux Tribe,* 231 F.2d 89 (8th Cir. 1956). *But see, United States v. Blackfeet Tribe,* 364 F. Supp. 192, 194 (D.C. Mont. 1973).

v. Georgia.[20] He determined that Georgia had no power to enforce its laws over non-Indians within the Cherokee Nation. Justice Marshall stated that the United States had acknowledged the Cherokees to be a sovereign nation by treaty,[21] and that they were distinct, independent, political communities, retaining their original natural rights as the "undisputed possessors of the soil."[22] He went on to explain that the settled doctrine of the law of nations applied: "a weaker power does not surrender its independence—its right to self-government—by association with a stronger nation, staking its protection on that nation." Therefore, the citizens of Georgia had no right to enter the reservation absent assent by the Cherokees, Georgia laws did not have any force within the reservation, and these inherent powers could only be removed by treaties or acts of Congress.[23]

However, the Supreme Court soon made it clear that these independent sovereign nations were completely subject to federal law. In *United States v. Rogers,* a white man who had been adopted by the Cherokee Tribe was indicted for a murder committed on the reservation. He argued that he was not subject to the U.S. judicial system. While the court determined that he could not escape federal jurisdiction by such an artificiality, it went on to say:

> We think it too firmly and clearly established to admit of dispute, that the Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of one of the States, Congress may by law punish any offense committed there, no matter whether the offender be a white man or an Indian.[24]

B. Early Tax Cases

The first tax cases involved a state's right to tax within reservations. Obviously, any right of states to tax within reservations placed a limit on the tribe's sovereignty and would have some bearing, when the question finally arose, on the tribe's power to tax. As early as 1866, the Supreme Court held, in two cases, that reservation Indians were immune from state property taxation.[25] In the *New York Indians,* the court stated that "the exercise of this authority over [the Indians] is an unwarranted interference, inconsistent with the

20. 31 U.S. (6 Pet.) 515 (1832).
21. *Id.* at 538.
22. *Id.* at 559.
23. *Id.* at 561.
24. 45 U.S. (4 How.) 567, 572 (1846).
25. *See The Kansas Indians,* 72 U.S. (5 Wall.) 737 (1866), and *The New York Indians,* 72 U.S. (5 Wall.) 761 (1866).

original title of the Indians, and offensive to their tribal relations."[26] The Supreme Court later qualified this position by holding that ordinarily an Indian reservation is part of the territory of a state,[27] and that where non-Indian lands are within a reservation, the owner of that land is subject to state taxes on it, even though the land is subject to a right of reverter in the Indians.[28]

Thomas v. Gay,[29] in 1898, involved the question of whether states or territories could tax cattle owned by non-Indians and grazed on leased Indian lands. In this case, the defendants argued that the Indians were

> directly and vitally interested in the property sought to be taxed, that their rights of property and person [were] seriously affected by the legislation complained of; that the money contracted to be paid for the privilege of grazing [was] paid to the Indians as a tribe, and [was] used and expanded by them for their own purposes and that if by reason of this taxation, the conditions existing at the time the leases were executed were changed, or could be changed by the legislature of Oklahoma at its pleasure, the value of the lands for such purposes would fluctuate or be destroyed altogether according to such conditions.[30]

However, the Court held that it was "obvious that a tax put upon the cattle of the lessees [was] too remote and indirect to be deemed a tax upon the lands or privileges of the Indians."[31] Thus, tribes did not have all of the attributes of a sovereign vis-a-vis a state's taxing powers over certain lands and individuals within their reservations. With this the stage was set for the question of whether Indian tribes have the power to impose certain types of taxes upon individuals.

Maxey v. Wright, (1900), a lower federal court case,[32] was apparently the first case to address this issue directly.[33] Because Maxey,

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26. *The New York Indians, Id.* at 771. However, this question was not disputed in the lower court.

27. Absent a denial of this in the State's Enabling Act, Constitution or laws.

28. *Utah & N. Ry. Co. v. Fisher*, 116 U.S. 28 (1885). In *Maricopa & Phoenix R.R. Co. v. Arizona*, 156 U.S. 347 (1895), the court explained the process as follows: Congress authorized the railroad to locate, construct, own, equip, operate, use and maintain a railway through a reservation situated in Arizona. [The necessary effect of this] was . . . to withdraw the land from the operation of the . . . act [withdrawing the land for the reservation, the immediate effect of which] was to reestablish the full sway and dominion of the *territorial authority* (Arizona)." (emphasis supplied). 156 U.S. 347, 351.

29. 169 U.S. 264 (1898).

30. *Id.* at 273.

31. *Id.*

32. 54 S.W. 807 (C.A. Ind. Terr. 8) *aff'd* 105 F. 1003 (8th Cir. 1900).

33. Actually, this question was apparently first addressed in *Crabtree v. Madden*, 54 F. 426 (8th Cir. 1893). The court never reached the merits of this case, though its reasoning for not reaching the merits is instructive. The court held that it did not have jurisdiction in

the plaintiff, was a non-Indian attorney who was living and practicing law on the Creek Reservation, he was allowed access to federal courts on his claim against the tribe's tax. This in itself was an incursion into tribal sovereignty. The court, however, held that the tribe had such a right to tax the plaintiff: "The Creek Nation has the power to impose this condition or occupation tax, if it may be so called, upon attorneys at law residing and practicing their profession in the Indian territory (unless this right has been abrogated by Congress)."

In arriving at this conclusion, the court quoted the Supreme Court in *Beecher v. Wether*[34] which had stated that "[t]he right of the Indians to their occupancy is as sacred as that of the U.S. to the fee." The *Maxey* court continued: "So far as the United States recognizes political organizations amongst Indians, the right of occupancy is a right in the tribe or nation."[35] While the court appeared to base its holding on the inherent sovereignty of the tribe, it also based its holding on power *conferred* by the United States in Article XV of a treaty with the Creeks, which gave them the right to remove all "intruders found within [the reservation] limits."

In 1904, the Supreme Court considered the Indians' right to tax. In *Morris v. Hitchcock*[36] a tax imposed by the Chickasaw upon livestock of non-Indians grazing on lands leased by the tribe was upheld. The tax had been expressly approved by the President of the United States. One commentator explained the tax as follows: "This, it will be noted, was only in form a taxation measure; it was actually a police measure for a purpose distinctly approved by the federal government."[37] However, there is language in the opinion that supports the inherent sovereignty theory also:

> We are of opinion that one of the objects occasioning the adoption of [the Curtis Act] by Congress, having in view the peace and welfare of the Chickasaws, was to permit the *continued exercise, by the legislative body of such tribe, of such power as is here complained of* [the power to tax], subject to a veto power in the President [of the United States]....[38]

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the case, because if a tribe could bring such an action, "the extraordinary spectacle will be presented of a political society, authorized to impose taxes for the support of its government and the protection of its subjects, appealing to the courts of another sovereignty to enforce the collection of its taxes against persons and property within its own territory." The Tribe taxes a U.S. citizen who resided within Indian territory; the tax was a permit tax for allowing this non-Indian to live on the reservation. It was by implication then, that the tribe could exclude the non-Indian from the reservation if he did not pay the tax.

34. 95 U.S. 517.

35. 54 S.W. 807, 809.

36. 194 U.S. 384 (1904).

37. Brown, *Taxation of Indian Property*, 15 MINN. L. REV. 182, 195 (1930).

38. 194 U.S. 384, 393 (emphasis added).

Unfortunately then, it is unclear what the basis of the Court's holding really was—inherent sovereignty, treaty right, or executive order with right of veto. It should be noted that the tax upheld was again a license or permit tax imposed upon non-Indians for the privilege of being within, or conducting business within, reservation borders.

Nonetheless, the Court of Appeals for the Eighth Circuit was quick to place its interpretation upon the tribal power to tax. In *Buster v. Wright* (1905),[39] a lower federal court case, the Creek Nation had imposed an annual permit tax upon non-Indians for the privilege of trading within the reservation. Upholding the tax, the court explained the Creek's taxing authority:

> The authority of the Creek Nation to prescribe the terms upon which non-citizens may transact business within its borders did not have its origin in act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of the people indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement power of the republic it is taken from it.[40]

The holding, however, was necessarily limited by the facts of the case: a tax is on the privilege of doing business within the reservation. The case had an additional important aspect: the non-Indians being taxed were holders of their own fee lands located within tribal boundaries. Thus, the Creeks could not exclude them from the reservation, because this would have violated the non-Indian's constitutional rights. The only sanction the tribe could impose, apparently, would have been to close down the non-Indian businesses. This holding expanded tribal authority to tax non-Indians within the reservation even though the lands did not belong to the tribe itself, and even though the tribe could not expel the non-Indians from Indian country.

Through the course of the *Buster* opinion, the court covered its broad assertion of tribal inherent sovereignty by stating: "This law of the Creek Nation was in legal effect a law of the United States, because it was authorized by treaties, acts of Congress and judicial decisions of this nation."[41] Thus, while expanding tribal taxing authority in two areas, one cannot state that the basis for such expansion was solely inherent sovereignty of the tribe.

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39. 82 S.W. 855 (C.A.I.T. 1904), 135 F. 947, 950 (8th Cir. 1905), *appeal dismissed,* 203 U.S. 599 (1906).
40. 135 F. 947, 950.
41. *Id.* at 956.

C. The Instrumentality Doctrine

Cases disappeared from the courts not long after this, because of a Supreme Court ruling that Indian reservations were instrumentalities of the federal government, and were thus exempt from state taxation. The instrumentality doctrine became an umbrella for lessees of tribal lands. *Choctaw, Oklahoma, and Gulf Railroad v. Harrison*[42] extended the doctrine to include immunity of a railroad from taxation upon gross sales of coal mined on Indian land. Several similar rulings followed. *Gillespie v. Oklahoma,*[43] held that a lessee of oil and gas leases on Indian land was immune from state tax on net income it derived from sale of the oil and gas. The rationale of this doctrine was stated as: "A tax upon the leases is a tax upon the power to make them and could be used to destroy the power to make them."[44] Under such a rationale, tribes could not have taxed the lessees either, even if they otherwise had such a power. The demise of the doctrine began when *Gillespie* was specifically overruled in *Helvering v. Mountain Producers Corp.*[45] Finally in 1949, the Supreme Court overruled the cases which had granted lessees of Indian land immunity from state taxation.[46] However, during this period Congress had given states the express right to tax mineral, oil, and gas lessees of Indian reservations, in direct opposition to the instrumentality doctrine. This express grant may have removed any possible taxing powers from the tribes because states obtained the express right to tax oil and gas lessees, but tribes did not. Therefore, under the instrumentality doctrine, tribes could not tax mineral and oil and gas lessees. The exclusive right of states to tax will be discussed in detail in Part III, infra.

D. Recent Case Law

In recent times, the Supreme Court has not considered whether a tribe can tax or regulate activities of non-Indian lessees on a reservation as an aspect of the tribe's "inherent sovereignty" although it has made statements concerning this sovereignty in other situations. The lower federal courts have, however, addressed the question.

In *Iron Crow v. Oglala Sioux Tribe of the Pine Ridge Reserva-*

42. 235 U.S. 292 (1914).
43. 257 U.S. 501 (1922).
44. *See Indian Territory Illuminating Oil Co. v. Oklahoma,* 240 U.S. 522, 530 (1916).
45. 303 U.S. 376 (1938).
46. *Oklahoma Tax Commission v. Texas,* 336 U.S. 342 (1949). See this case generally for a history of the development of the doctrine. *See also* Note, *The Ninth Circuit's Federal Instrumentality Doctrine–A Threat to Tribal Sovereignty,* 53 NOTRE DAME L., 358 (1977) for an interesting discussion of possible vestiges of the doctrine.

tion,[47] Iron Crow, an enrolled member of the Oglala Sioux Tribe, was leasing his alloted lands to non-Indians. The tribe assessed a tax upon the leases for the privilege of grazing stock within the reservation. The primary issue of the case involved the jurisdiction of tribal courts to criminally punish members of their tribe for adulterous living. The court carried this jurisdictional power into taxation of non-Indians also and upheld the tax, stating: "Inasmuch as it has never been taken from it, the defendant Oglala Sioux Tribe possesses the power of taxation which is an inherent incident of its sovereignty."[48] The court relied on *United States v. Kagama*[49] for the proposition that the tribe had a "possessory right to the soil" and "as a separate people, . . . the power of regulating their internal and social relations"[50] and concluded: "[From] the original precept of tribal sovereignty and the fact that the power . . . to impose the tax or license . . . has not been pretermitted by any federal statute . . . but, to the contrary, has been implemented by the Indian Reorganization Act, . . . such power still exists."[51] The court, however, could only rely upon Cohen's *Handbook of Federal Indian Law* for the proposition that this inherent power included the power to tax non-Indians.

Thus, this court restated general propositions dating back nearly 100 years that the tribe, at least in some cases, could impose a license tax on a non-Indian. Though the court based its determination primarily on inherent tribal authority, such a holding could have been based on other equally applicable and equally dispositive grounds such as a treaty right, which may explain why certiorari was denied in the case. Nevertheless, this case is probably the strongest appellate court statement made to date favoring grounding tribal taxing powers upon inherent sovereignty.

Another Eighth Circuit case, *Barta v. Oglala Sioux Tribe*,[52] was decided two years later, in 1958. The court resolved the question of whether non-Indian lessees could raise constitutional claims of deprivation of property and due process limitations upon tribal taxing powers. It dismissed these contentions by stating that Indian tribes are not states of the United States government. Therefore Indian tribes could deny these constitutional rights, while states and the federal government could not. While this would appear to demon-

47. 231 F.2d 89 (8th Cir. 1956).
48. *Id.* at 99.
49. 118 U.S. 375 (1886).
50. 231 F.2d 89, 92.
51. 231 F.2d 89, 99.
52. 259 F.2d 553 (8th Cir. 1958) *cert. den.*, 358 U.S. 932 (1959).

strate a considerable amount of inherent sovereignty, it must be remembered that the case was limited to an assertion of tribal power to tax non-Indian lessees as a condition of grazing their cattle on tribal lands; the sovereignty found was actually only a finding that neither the federal government nor state action was involved.[53]

Through 1958 then, the federal courts were in general agreement that Indian tribes could impose licensing and business activity taxes upon their reservations. In the case of liquor establishment licensing, this authority was extended to Indian country, at least where such authority had been delegated by Congress.[54]

Recent lower federal court decisions are of little help in determining the extent of this inherent sovereignty remaining in tribes today. For instance, in *Salt River Project v. Navajo Tribe,*[55] the court made a broad assertion relating to tribal power to tax coal transportation facilities and electrical transmission lines: "Every court and commentator who has faced the issue has concluded that the power to tax is one of the attributes of sovereignty retained by the Indians."[56] The court had apparently not seen an opposing position taken in *United States v. Blackfeet Tribe,* in which the United States District Court for Montana stated:

> . . . the [Tribe] urge[s] that [it] is sovereign and that jurisdiction of the tribal court flows directly from that sovereignty. No doubt the Indian tribes were at one time sovereign and even now the tribes are

53. Nonetheless, this presents a nagging question. After enactment of the Indian Civil Rights Act, it was thought that persons dealing with tribes must at least be accorded the rights specified therein, especially a "due process" right. However, *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978), stated that tribes are not required to follow the ICRA, in that there is no review of their decisions available in the federal courts. If this decision applies to Indians and non-Indians alike, it effectively means that the governing bodies in a substantial portion of the United States and the western states especially, are immune from the U.S. Constitution. Thus, a substantial number of U.S. citizens have no U.S. Constitutional rights within large areas of this country regardless of whether these citizens are Indian or non-Indian. One hopes that this possibility will not be realized. The decision in *Martinez* will probably be clarified in two ways by the Supreme Court: first, it may limit the meaning of inherent tribal sovereignty still further; second, it may apply the *Martinez* rationale only in cases involving Indians. In any case, because of *Martinez,* it is likely that tribal powers will be further limited.

54. *United States v. Mazurie,* 419 U.S. 544 (1975).

55. No. Civ. 78-352 Phx. WPC (D.C. Ariz., July 11, 1978).

56. *Id.* at 14. The court cites *Morris v. Hitchcok, Barta v. Oglala Sioux Tribe, Iron Crow v. Oglala Sioux Tribe* and *Buster v. Wright* as court authorities. Only *Morris v. Hitchcock* is a Supreme Court decision, and as discussed above, it is not an unambiguous authority for the proposition. Law review commentators cited are Goldburg, *A Dynamic View of Tribal Jurisdiction to Tax Non-Indians,* 40 LAW & CONT. PROB., 166 (1966) and Comment, *The Case for Exclusive Tribal Power to Tax Mineral Lessees of Indian Lands,* 124 U. PA. L. REV. 491 (1975). Both of these commentators openly argue in favor of this authority, though neither can point to express statutory or Supreme Court authority agreeing with it.

> sometimes described as being sovereign. The blunt fact, however, is that an Indian tribe is sovereign to the extent the United States permits it to be sovereign—neither more nor less.[57]

The United States District Court for New Mexico expressly held that this did not extend to a sovereign power to tax oil and gas leases.[58]

E. Recent Supreme Court Decisions

Since lower court determinations appear to offer little guidance, one must attempt to glean whether tribes have the sovereign power to tax mineral lessees from Supreme Court decisions. Although many people, including Justice Blackmun,[59] have stated doubts about the continuing vitality of tribal inherent sovereignty, there is no doubt that it is alive to some extent: the United States Supreme Court upheld a claim of sovereign immunity in *Santa Clara Pueblo v. Martinez* in 1978.[60] The next question then, must go to the limits of this sovereignty.

In *United States v. Mazurie* (1975),[61] the Court stated that it had "consistently guarded the authority of Indian governments over their reservations."[62] The "reservation" referred to in this case apparently did not refer to reservation lands, but rather to the right of reservation Indians to retain immunity from state income taxes earned on reservation lands. This decision may have also been grounded in congressionally given power, as noted above. This could make the statement concerning tribal sovereignty in *McClanahan v. State Tax Commission*[63] important. Speaking for a unanimous Court, Justice Marshall stated:

> Finally, the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption. See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145. The modern cases thus tend to avoid reliance on platonic

57. 364 F. Supp. 192, 194 (D.C. Mont. 1973). This position is followed by legal commentators generally. *See* Oliver, *The Legal Status of American Indian Tribes*, 38 ORE. L. REV. 193 at 230 (1959); Martone, *American Indian Self-Government in the Federal System: Inherent Right or Congressional License?*, 51 NOTRE DAME L., 600, 626 (1976); Kerr, *Constitutional Rights, Tribal Justice, and the American Indian*, 16 J. of PUB. L., 311 (1969); and Note, *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818, 1821 (1968).

58. No. 77-292-P Civil (D.C. N.M. 1978).

59. *Puyallup Tribe v. Department of Game*, 433 U.S. 165, 178-79 (1977).

60. 436 U.S. 49 (1978).

61. 419 U.S. 544 (1975).

62. *Id.* at 558, quoting *Williams v. Lee*, 358 U.S. 217 (1959).

63. 411 U.S. 164 (1973).

> notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power.[64]

While this test was offered to explain tribal powers vis-a-vis state powers, it may ring true any time questions of inherent tribal sovereignty arise. The court also stated in the same context: "Over the years this Court has modified [the *Worcester* principle] in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized."[65]

Inherent tribal authority does not extend to criminal jurisdiction over non-Indians on reservations.[66] In *Oliphant v. Suquamish Indian Tribe,* the Court noted that tribes had not historically exercised formal judicial processes, and that Congress had certainly not granted any such authority—by its silence, Congress expressed the view that "tribal courts were without jurisdiction to try non-Indians."[67] The Court also explicitly stated that Indian tribes, in exercising their "quasi-sovereign" authority, were "proscribed from exercising both those powers of autonomous states . . . expressly terminated by Congress *and* those powers 'inconsistent with their status.' "[68] Thus, tribes are restricted from exercising certain "inherent powers," even if those powers have not been expressly terminated by Congress.

It would appear from the foregoing that unless a tribe can show that essential tribal relations are involved, such as a right to govern the members of the tribe[69] or to regulate the business of non-Indians on the reservation, it may not have the required inherent sovereignty. As was noted in *McClanahan,* the trend is away from such a view. The Supreme Court has recently stated that a tribe does not have inherent sovereignty inconsistent with its status. It has also stated that this analysis may be appropriate any time the tribe has not traditionally exercised this power.

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64. *Id.* at 172.

65. *Id.* at 171. This was a quote from a 1959 U.S. Supreme Court decision, *Williams v. Lee,* 358 U.S. 217 at 219. The Court specifically applied this modifying principle by addressing state rights vis-a-vis tribal rights: "Notions of Indian sovereignty have been adjusted to take account of the state's legitimate interests in regulating affairs of non-Indians." 411 U.S. at 171. An excellent example of inherent tribal authority over the members of the tribe may be found in *Fisher v. District Court,* 424 U.S. 382 (1976). That case involved a contest by tribal members over adoption of an Indian child. The Court found no state jurisdiction in this civil matter because "the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." 358 U.S. at 220.

66. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978).

67. *Id.*

68. *Id.* at 208.

69. A right expressly found in *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978).

F. Conclusion

Granting mineral leases may be different from allowing non-Indians to enter or conduct business upon the surface of Indian reservations. All tribal land was ceded to the United States government. This undoubtedly included subsurface land. The United States then gave tribes back certain lands to be held in trust by the United States. Unless that land has been deeded, in fee simple, to individual Indians or tribes, the land is still owned by the United States government. Historically, the tribes have used the surface of these lands to sustain themselves. Most have not imposed formal tax structures on their people, though they have imposed taxes on non-Indians using the surface of their lands, which seems entirely appropriate to compensate the tribes for loss of surface use or business.

A problem arises, however, when a tribe imposes a tax on non-Indians who are not impairing the tribe's traditional use of its surface lands. Do tribes have an inherently sovereign power to tax non-Indians who are not impairing their traditional surface use? One cannot escape the question by stating that tribes have a right to impose a tax on their property. First, the subsurface property may not be held in trust for the exclusive use of the tribe. Evidence supporting this position may be found in 25 U.S.C. § 398, wherein Congress provided that states could tax royalties on subsurface leases. Second, a property tax on fugacious minerals, such as oil and gas, may not be supportable in some states where the minerals are classified as "incorporeal hereditaments" rather than real property. It would be a strange anomaly indeed if tribes could tax subsurface leases in some states and could not in others.

If the tax is based on licensing non-Indians or on regulating businesses within the reservation, the tribe's position is stronger, but the only such taxes which have been upheld directly involved and conflicted with the Indians' traditional surface use of their lands. With the trend away from recognition of inherent tribal sovereignty, especially in areas inconsistent with tribe's status, a tax on subsurface leasing may not fall within their inherent sovereignty.

Certainly, such a distinction may be overly fine, and since tribes have been upheld in imposing business and license taxes, a tax on subsurface lessees may also be appropriate. Yet, one must remember that no Supreme Court opinion upholding these taxes has been grounded solely on inherent tribal sovereignty. A tribe may therefore have to look to the federal Constitution, treaties and statutes in order to support a claim of right to tax subsurface lessees.

III. FEDERAL STATUTES GOVERNING MINERAL, OIL AND GAS LEASES ON INDIAN LANDS

Assuming the Supreme Court would not make such a fine distinction between surface lessees and subsurface lessees, it would probably find that tribes have the authority to tax subsurface lessees just as they can tax surface lessees. This authority may be based on inherent sovereignty, the United States Constitution,[70] treaties, or statutes, or any combination of these, just as the Court found in *Morris v. Hitchcock.*[71] The question then becomes whether this authority has been "withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."[72]

A. Congressional Acts

The statutes applicable to Indian leases generally are codified as 25 U.S.C. § § 396, 397, and 398. In order to analyze the legal effects of these statutes, they must be examined in depth.

In 1887, the General Allotment Act[73] became law. Under this act, Native American family heads were to be allotted lands for their families. Each allotment would be held in trust for 25 years, during which time the land could not be alienated or encumbered. If an allottee was found to have adopted "the habits of civilized life," he could obtain both a fee simple title and U.S. citizenship prior to completion of the 25-year term. At the end of that time, the allottee would obtain a fee simple title to the land, regardless. In either case, allottees would become American citizens holding property in the same manner as all other Americans.

The purposes of this act were several. One such major purpose was to assimilate Indians into American culture by forcing the American system of property-holding upon them. Another was to open up reservations to non-Indians in three ways. First, during the trust period an allottee could lease any land he did not wish to use himself. Second, once he obtained all of the incidents of a fee simple owner, non-Indians could purchase lands. Third, because of the allotment program, the government was able to designate "surplus lands"

70. It is highly unlikely that any such power could be grounded in Constitution authority, as the only mention of Indians therein is Art. 1, § 8, where Congress is given the power "to regulate Commerce with foreign nations, and among the several states, and with the Indian tribes." This does not appear to confer any authority or powers upon the Indian tribes. *See,* Martone, *American Indian Self-Government in the Federal System: Inherent Right or Congressional License?,* 51 NOTRE DAME L. 600, 603 (1976).

71. 194 U.S. 384 (1904).

72. *United States v. Wheeler,* 435 U.S. 313, 323 (1978).

73. 24 Stat. 388 (1887), frequently referred to as the Dawes Act.

which were not allotted, and sell them. It has even been stated that the "most powerful force motivating the allotment policy was the pressure of the land-hungry western settlers."[74] Clearly, land was opened up to non-Indians in significant amounts. Prior to the allotment period, the total Indian land holdings were 138 million acres. By 1934, they were cut to 48 million acres, 20,000 acres of which were exempt from the allotment law.[75]

With Congress' expressed intent to assimilate American Indians into the "melting pot" as a background, one can turn to the congressional enactments concerning leases of Indian lands. In 1891, Congress enacted 25 U.S.C. §397 entitled, "Leases of Lands for Grazing or Mining." This act was directed towards unallotted lands:

> Where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the council speaking for such Indians, for a period not to exceed five years for grazing, or ten years for mining purposes in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior.[76]

Undoubtedly, the purposes of this statute included making use of lands the tribes did not wish to use, and providing for a profit on that use for the tribe. Likewise, non-Indians were in favor of such a statute because some of them could then make use of land from which they had been previously excluded. Perhaps because Congress thought that reservation lands were soon to be phased out, the statute was not particularly comprehensive or flexible. For instance, it did not answer taxing authority questions, nor did it address royalty payments or recognize the special circumstances of individual tribes. As a result, it was followed by piecemeal legislation dealing with various specific tribes and problems.[77]

In 1909, Congress enacted a general statute concerning leasing of allotted lands for mining purposes.[78] It provided that allottees could lease their lands for any term of years "deemed advisable by the Secretary of the Interior." It too did not include any taxation provisions. Perhaps Congress thought none were needed since allotted

74. D. Otis, *History of the Allotment Policy, Hearings on H.R. 7902 Before the House Committee on Indian Affairs,* 73 CONG. REC. 428-89 (1934).

75. *Hearings on H.R. 7902 Before the House Committee on Indian Affairs,* 73 CONG. REC. 16-18 (1934).

76. 26 Stat. 795 (Feb. 28, 1891), codified at 25 U.S.C. §397 (1976).

77. *See, e.g.,* 42 Stat. 857, 25 U.S.C §400 (1976); and 43 Stat. 111, 25 U.S.C. §401 (1976).

78. 35 Stat. 781 (1909), 25 U.S.C. §396 (1976).

land was considered only temporary. Yet, several years later, as Congress became aware that tribal property might be around for many more years, it did provide for state taxation of that property in certain instances, as will be discussed. By then, it was too late to provide for taxation of allotted land in the same way, because this land had been given to individual Indians in trust. While tribal rights in the land could be abrogated by Congress,[79] the same was not true of allotted land. Individual allottees received tax-free allotments for so long as the property remained in trust.[80] Thus, allotted land continues to retain the tax-free status originally given to it.

By 1924, Indian supporters were beginning to have second thoughts about allotments. It was obvious that the primary result of the Allotment Act was divestment of lands from the Indian allottees. The allotment process was slowing down and fewer fee simple patents were being given. Also, some lands remained unallotted, and would, perhaps remain as such. The need for a more comprehensive act governing oil and gas leases on unallotted land was apparent. Thus, in 1924, Congress enacted the following:

> Unallotted land on Indian reservations . . . subject to lease for mining purposes for a period of ten years under Section 397 of this title may be leased at public auction by the Secretary of the Interior, with the consent of the council speaking for such Indians, for oil and gas mining purposes for a period of not to exceed ten years, and as much longer as oil or gas shall be found in paying quantities . . . *Provided* that the production of oil and gas and other minerals on such lands may be taxed by the state in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands; *provided, however,* that such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner.[81]

This act included the following provisions: (1) that the Secretary could create the leases; (2) that the extended term of producing leases could be indefinite; and (3) that states could tax production. Although it is not expressly stated, this act apparently also allowed

79. *The Kansas Indians,* 72 U.S. (5 Wall.) 737 (1869).

80. *See, Choate v. Trapp,* 224 U.S. 665 (1912); and *Carpenter v. Shaw,* 280 U.S. 363 (1930). *But, c.f. Northern Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649 (1976), wherein the Court found that a mineral allotment had never been expressly given to all others, and even though some of the allottees owned fee simple patents when the suit was brought, the Court held it Constitutional to abrogate those rights because they were still held by the Tribe.

81. 43 Stat. 244 (1924), 25 U.S.C. §398 (1976).

the tribes to obtain the royalties, though the Secretary would receive the royalties from the lessees. Furthermore, the Congress intended a tax on "production" to include a tax on royalties, because the act directed the Secretary to pay any tax so assessed from the royalties collected.

The act was not meant to apply to Executive Order reservations. Congress had considerably greater difficulty in passing an act providing for them, though such a bill was introduced in the same year. The original Executive Order Reservation bill was essentially tailored after the act covering treaty reservations, except that it made no provision for tax assessments.[82] A number of members of the House felt that states should be allowed to tax production on Executive Order reservations in the same manner as they could on treaty reservations, and the House amended the bill to give the states the right to tax production.[83] The Senate then amended the House amendment to provide 37½ percent of the royalties to the states, 52½ percent to the federal government and 10 percent to the tribes, with no taxation provisions.[84] The bill went to a joint conference committee. According to the committee report, the primary objection in the Senate concerned the House's taxation provision. Senators had expressed the concern that "there [was] no limitation in the House Amendment upon the tax that might be levied except that it shall be general, and the power to tax is the power to destroy."[85] No mention is made of why this did not create problems for the senators when the tax on treaty royalties was passed. The joint committee then proposed that the Indians should receive 62½ percent of the royalties from the lessees, and the states would get 37½ percent, as a compromise, "in lieu of taxes to the state."[86] This proposition was killed

82. S. 1653. *See,* 66 CONG. REC. 999 (1924).
83. 66 CONG. REC. 2234 (1924).
84. 66 CONG. REC. 2799 (1925).
85. 66 CONG. REC. 5311 (1925).
86. *Id.* This division of royalties had a basic reason behind it. On February 25, 1920, Congress passed the General Leasing Act, 41 Stat. 437, 30 U.S.C. §§181-287 (1976), which allowed private citizens or companies to prospect for and mine minerals, including oil and gas, on federal lands. This Act provided that the states would receive 37½% of the royalties received under such leases and the federal government would receive 62½%. Originally, prospective lessees had sought, and 22 had obtained, leases on Executive Order reservations, purportedly under this Act. *See* 68 CONG. REC. 4573 (1927). Then on May 27, 1924, Attorney General Stone (later Justice Stone) held that the Executive Order reservations were not "public lands" within the meaning of the Act, and therefore not subject to it. Obviously, in such a situation, neither the state nor the federal government would tax the other, so the result under this Act was that the Indians could receive nothing under the leases. It might be thought that they could tax the lessees, but it must be remembered that the instrumentality doctrine was in full effect at this time, and certainly Congress and the states were aware of it. *But see* an exchange between Senator Wheeler and Senator Bratton, 68 CONG. REC. 10919 (1926), wherein a tax by the *states* upon the lessees was thought to be permissible.

in the House.[87] In 1926, the bill was reintroduced, giving all royalties to the tribe and not mentioning taxation. It passed both the House and the Senate, but was vetoed by President Coolidge.[88] Apparently, the veto had nothing to do with the taxation issue, but rather the President was awaiting a decision in the Supreme Court as to whether the General Leasing Act of 1920[89] applied to Executive Order reservations.[90] If it did, then this bill became unnecessary. Also, if it did, states would receive 37½ percent of the royalties obtained under such leases. By 1927, it appeared that Executive Order reservations would not come within the General Leasing Act and the bill was introduced still a third time.[91] It is obvious that Congress felt the need for such a bill, and the primary contention remained the states' right vis-a-vis the tribe's rights.[92] Generally, it appears that the representatives from the western states wished to give nothing to the Executive Order reservation Indians because they were already well-off through the grace of the federal government.[93] On the other hand, although no one contended that the tribes would or could have any power to tax, several congressmen thought that the tribes should be allowed to receive the royalties. The comments of Representative Carter in summing up the bill are instructive, if tongue-in-cheek:

> I want to confine my remarks . . . to a discussion of just one phase of this question and that is the moral right of an Indian tribe to such royalties as may accrue from a development on an Executive Order Reservation. Some gentlemen seem inclined to view this question in an entirely too narrow and technical way. They tell us that the Navajo Indians have no legal right to any of these royalties.
>
> I am not so much concerned with the legal rights of these Indians as I am with the Government's moral obligation to them. They further-

87. 66 CONG. REC. 5433-34 (1925).
88. 67 CONG. REC. 10912, 11397.
89. 41 Stat. 437; *See supra* note 86.
90. 68 CONG. REC. 4575 (1927).
91. 68 CONG. REC. 4569 (1927).
92. 41 Stat. 437. *See supra,* note 86. Many Congressmen felt that the tribes on Executive Order Reservations should receive nothing. The remarks of Senator (later 10th Circuit Judge) Bratton ellucidate this view:

> My position is that as to treaty reservations, Indians have some equitable rights under a contract; their rights are predicated upon a contractual relation with the United States; but as to the Executive Order reservations, they have merely the right of occupancy, running at the will of the government and nothing more. 67 CONG. REC. 10915 (1926).

93. 68 CONG. REC. 4574-75 (1927). Representative Sproul of Kansas, also pointed out that these tribes had "... no title whatsoever ... so far as the oil and gas in the land is concerned," because the tribes had been granted the land "illegally" by thyPresident out of the public domain lands.

> more tell us that if the Navajos receive royalties, they will be made very rich by oil development under this bill and that excessive wealth is a menace and not a benefit to any man or set of men. There may be some virtue in this latter contention, but I have always cherished an insatiable yearning to test it out by having myself placed in the immensely wealthy class.[94]

The congressmen compromised and the bill was passed; it was codified as 25 U.S.C. § § 398a-e.[95] Subsection b states:

> The proceeds from rentals, royalties, or bonuses of oil and gas leases upon lands within Executive Order Indian reservations or withdrawals shall be deposited in the Treasury of the United States to the credit of the Tribe of Indians for whose benefit the reservation or withdrawal was created or who are using and occupying the land, and shall draw interest at the rate of 4 per centum per annum and be available for appropriation by Congress for expenses in connection with the supervision of the development and operation of the oil and gas industry and for the use and benefit of such Indians: *Provided* that said Indians, or their tribal council, shall be consulted in regard to the expenditure of such money, but no per capita payment shall be made except by Act of Congress.

The primary point that strikes one in this subsection is that even though the tribes were nominally allowed to receive the royalties, in reality it was the Department of the Interior, their guardian, who received and distributed the monies. When Representative Hayden of Arizona introduced this bill in the House, he explained that it did nothing more than to create a "trust fund" for the tribes.[96]

Subsection c of the act provides:

> Taxes may be levied and collected by the State or local authority upon improvements, output of mines or oil and gas wells, or other rights, property, or assets of any lessee upon lands within Executive Order Indian reservations in the same manner as such taxes are otherwise levied and collected, and such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties, and the Secretary of the Interior is hereby authorized and directed to cause such taxes to be paid out of the tribal funds in the Treasury: *Provided,* that such taxes shall not become a lien or charge of any kind against the land or other property of such Indians.[97]

In explaining this subsection, Congressman Hayden stated that it

94. 68 CONG. REC. 4578 (1927).
95. Act of March 3, 1927, 44 Stat. 1347 (1927).
96. 68 CONG. REC. 4570 (1927).
97. Act of March 3, 1927, 44 Stat. 1347 (1927).

> provides a means whereby taxes may be paid to the States, but does not impose any federal tax.... The sums so levied and collected are not to be paid from any Federal money, *but tribal funds or by the lessees.*[98] (Emphasis supplied).

Thus the act concerning Executive Order reservations, as finally passed, is substantially the same as the act related to treaty reservations. It is clear that as to Executive Order reservations, Congress intended the tribes to have the exclusive right to royalties through their guardian. It is equally clear that Congress intended the states to have the exclusive right to tax.[99] Congressional intent not to grant Indian tribes the power of taxation is strengthened in both 25 U.S.C. §398 and 25 U.S.C. §398c by the prohibition against the taxes becoming a lien upon Indian property.

B. Judicial Interpretations

In 1936, the Supreme Court of Montana had occasion to consider the application of the above statutes. In *Santa Rita Oil & Gas Co. v. Board of Equalization,*[100] the court was required to determine whether a production tax, which included a tax on Indian royalties, was allowable. In determining which statutes were applicable, the court decided that it was necessary to determine whether the reservation was an Executive Order reservation or a treaty reservation.[101]

98. 68 CONG. REC. 4570 (1927).

99. There have been some imaginative arguments made that the tribes were given the taxing power. For instance, in Comment–*The Case for Exclusive Tribal Power to Tax Mineral Lessees of Indian Lands,* 124 U. of PENN. L. REV. 491, 516-20, the author attempts to make much of the provisions in §398 which states that "the Secretary of the Interior is authorized and directed to cause to be paid the tax so assessed against the royalty interests." The author explains that the statute must mean that only the Indians' royalty may be taxed, and therefore the tribes may tax the lessees. Obviously, the author chose to ignore the preceding language in the statute, "that the production of oil and gas in other minerals on such lands may be taxed by the state in which said lands are located *in all respects the same as production on unrestricted lands*..." (emphasis supplied). Even Carole Goldberg, a noted pro-Indian advocate, could not swallow this argument. In *A Dynamic View of Tribal Jurisdiction to Tax Non-Indians,* 40 L. & CONTEMP. PROB. 166 (1976), she notes the above article, but states: "Federal law does appear to authorize state taxation of mineral extraction on Indain trust lands." *Id.* at 184. Finally, it should be noted that Congress recently submitted a Conference Report which defined State severance taxes to include "any tax imposed by a local government unit under authority of State law or by an Indian tribe ...," though the conferees went on to state that they "[did] not intend to prejudge the outcome of cases on appeal before the Tenth Circuit Court of Appeals respecting the right of Indian tribes to impose taxes on persons or organizations other than Indians who are engaged in business activity on Indian reservations..." H.R. REP. NO. 95-1126, 95th Cong., 2nd Sess. 91 (1978). The effect of modern Congressional pronouncements such as this upon the courts is yet to be determined.

100. 54 P.2d 117 (Mont. 1936).

101. Basically, the court determined that if the reservation owed its existence to an order made by the President withdrawing the land within its boundaries from settlement or making other disposition of it under the public land law of the U.S. without any specific or

Upon determining that it was the latter, the court then found that the lands involved in the leases were allotted lands. Since 25 U.S.C. § 396 did not provide for taxation of allotted lands, and since states could not tax reservation property absent some congressionally-given right, the production tax was held invalid.[102]

In another case decided the same day,[103] the court found that 25 U.S.C. § 398 applied "not only to ordinary taxes, but to taxation of royalty interests on the lands."[104] The court did not attempt to make any distinction between the taxing power granted in § 398, applicable to treaty reservations, and the taxing power granted in § 398c, applicable to Executive Order reservations.

In *Oklahoma Tax Commission v. Texas Co.*,[105] the United States Supreme Court destroyed any vestige of the instrumentality doctrine as it applied to non-Indian oil and gas lessees on reservation lands. Citing *Santa Rita* with approval, the Court held that the State of Oklahoma had a right to impose and collect a production tax upon the leases. And in *McClanahan v. State Tax Commission*, the Court stated:

> [N]arrower statutes authorizing States to assert tax jurisdiction over reservations in special situations are explicable only if Congress assumed that the States lacked the power to impose the taxes without special authorization.[106]

The Court then specifically referred to 25 U.S.C. § 398 in a footnote.

Without looking further, it would appear that by enacting § 398 and § 398c, Congress expressly gave the states the right to tax lessees' production and Indian lessors' royalty in all unallotted reservation lands. By looking at congressional intent in the enactment of § § 398a-e, Executive Order reservation tribes appear to be foreclosed from taxing these lessees and, by inference, so are treaty reservation tribes. According to the case law, states have the authority to impose

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general law enacted by Congress authorizing the withdrawal, the land was an Executive Order reservation. Here, the final disposition of the lands may have been made by Executive Order, but since all of the lands were within the boundaries of previous reservations made by Congress the reservation was *not* an Executive Order reservation. 54 P.2d at 121-22.

102. 54 P.2d at 124. The court specifically stated:

> It will be noted that no Congressional consent to the imposition of state taxes is found in this section, although [it is] in Section 398 . . . with reference to the leasing of unallotted lands . . . and also in Sections 398a, 398b, and 398c relating to lands in Executive Order Indian reservations.

Did the court mean to imply that even allotted lands in Executive Order reservations were subject to a royalty tax imposed by a state?

103. *British-American Oil Producing Co. v. Board of Equalization*, 54 P.2d 129 (Mont. 1936).

104. *Id.* at 133.

105. 336 U.S. 342 (1949).

106. 411 U.S. 164, 177 (1977).

these taxes.[107] The federal district court in *Merrion and Bayless v. Jicarilla Apache Tribe,*[108] expressly held that the tribe lacked any authority to impose a tax on non-Indian lessees. Another federal district court reached the opposite conclusion, as to non-mineral lessees, but only in dicta.[109] From virtually all indications, states have exclusive authority to tax oil and gas lessees on unallotted lands.

C. The Solicitor General's Position

A relatively recent and more serious argument has been made, however, and if correct, it would mean that states no longer have the right to tax lessees under § 398 and § § 398a-e. This argument is that another statute, the 1938 Mineral Leasing Act,[110] has nullified the earlier acts. If states do not have this authority, perhaps the effect is to give tribes the power to tax these lessees.

The Solicitor General's Office in the Department of the Interior recently took this position.[111] That this view should be scrutinized carefully is obvious in light of the fact that the Solicitor's Office had to overrule five previous opinions in making its determination.[112]

In viewing the 1938 Act, it is first important to note the Indian Reorganization Act was passed in 1934.[113] This act signified a turning point in congressional assimilationist policies. It began by prohibiting future allotments to individual Indians. It proceeded to

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107. See the cases cited in note 16, *supra.* All of these cases were filed in 1979. Note, however, that a U.S. District Court in Montana recently decided that states have the inherent authority to tax non-Indian mineral lessees of Indian lands *solely as an attribute of state sovereignty. Crow Tribe v. Montana,* D.C. Mont., #Civ-78-110-BLG.

108. Civ. No. 78-1154 (D.C. N.M. 1978).

109. Civ. No. 78-352 (D.C. Ariz. 1978). It should be noted that the primary basis of the Court's determination of inherent power to tax was *Morris v. Hitchcock,* 194 U.S. 384 (1904) discussed earlier in this Comment, and the two 8th Circuit cases, *Barta v. Oglala Sioux Tribe,* 259 F.2d 553 (1958), and *Iron Crow v. Oglala Sioux Tribe,* 231 F.2d 89 (1956), which are both far more willing to find inherent power to tax than the U.S. Supreme Court has ever been. Furthermore, the Court did to even consider 25 U.S.C. § § 396-398, since it dealt with non-mineral lessees.

110. 52 Stat. 347 (1938), 25 U.S.C. § § 396a-g (1976).

111. M-36896, November 7, 1977, "The Tax Status of the Production of Oil and Gas From Fort Peck Tribal Lands."

112. 58 I.D. 535 (1943) (This opinion is superseded to the extent that it is inconsistent with M-36896); M-36345, May 4, 1956, "State Production Taxes on Tribal Royalties From Leases Other Than Oil and Gas"; M-36318, October 13, 1955, "Oil and Gas Privilege and License Tax, Fort Peck Reservation, Under Laws of Montana"; October 27, 1966, Opinion of Assistant Secretary on applicability of Montana tax to oil and gas leases of Fort Peck lands; and December 2, 1966, Opinion of Deputy Assistant Secretary affirming October 27, 1966 opinion of Assistant Secretary.

113. 48 Stat. 984 (1934) (25 U.S.C. § § 461-492 (1976)). For an interesting account of the history surrounding this Act, *see* Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934,* 70 MICH. L. REV. 955 (1972).

eliminate the " 'absolutist' executive discretion previously exercised by the Interior Department and the Office of Indian Affairs"[114] and to give the Indians themselves greater control over their own affairs. Thus, it was obvious that Indian reservations would not become extinct.

With this setting, the Department of the Interior proposed the 1938 Mineral Leasing Act. In the Secretary's transmittal letter, he stated:

> There is at present no law under which Executive Order lands may be leased for mining (outside an Act applying to only a few reservations), except for oil and gas mining purposes, unless the tribes are hereafter qualified under sections 16 and 17 of the Indian Reorganization Act (these are very general provisions explaining certain tribal powers which tribes adopting the IRA have. Generally, section 16 merely enumerates that such tribes have the power to lease). One of the purposes of the legislation now proposed, therefore, is to obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes.[115]

Section 9a provided that all tribes not specifically excepted could lease unallotted lands themselves, with the consent of the Secretary of the Interior. It also provided that the term of the leases could extend "as long thereafter as minerals are produced in paying quantities."[116] This section of the Mineral Leasing Act then, was in line with the tribal autonomy granted in the Indian Reorganization Act, and provided for Executive Order reservations–an already-mentioned weakness in the old leasing Act of 1891.[117]

Section b provided public auction requirements for oil and gas leases. These requirements had never been enumerated in the 1924 act.[118] Sections c through g likewise merely elaborated upon certain provisions which had not been fully explained in previous acts.[119]

114. *Id.*, 70 MICH. L. REV. 955, 966. This was Senator Wheeler's remark during the Hearings on the bill. The debate on this bill was quite interesting, with Congressmen expressing views that it would vest the tribes with real, though limited authority, 78 CONG. REC. 11123 (1934), and others stating that this was fine, so long as "every tribe, wherever located, [was] encouraged to assume full responsibility and obligations of citizenship and be subject to state and federal laws and courts." 78 CONG. REC. 11739 (1934).

115. Letter of June 19, 1937, from Acting Secretary West to the Speaker of the House of Representatives, H.R. REP. No. 1812, 7th Cong., 2nd Sess., also quoted in F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW, at 328, n. 468 (1940 ed.).

116. 52 Stat. 347 (1938), 25 U.S.C. §396(a) (1976).

117. 26 Stat. 795 (1891), 25 U.S.C. §397 (1976).

118. 43 Stat. 244 (1924), 25 U.S.C. §398 (1976).

119. Section C required lessees to furnish bonds guaranteeing compliance with the terms of their lease. Section d gave the Secretary power to make regulations concerning leases, with which lessees must comply. Section e allowed the Secretary to delegate his responsibilities. Section f excepted certain tribal lands from these provisions, because those tribes already had comprehensive leasing statutes. Section g provided for subsurface storage of oil or gas.

The Solicitor's Office, however, has stated that this act was meant to preempt the previous acts, and since it does not provide for taxing, states can no longer tax mineral and oil and gas production on Indian lands. No authority is cited for this proposition, however, and in fact the only part of the act which refers to previous acts is Section 7. It provides that "All Acts or parts of Acts inconsistent herewith are hereby repealed." One would think that the plain meaning of the provision is that only inconsistent provisions were repealed. The Solicitor's Office, however, goes on to state that an ambiguity has been created, and thus "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians."[120] If an ambiguity is created here, which is doubtful, one may find difficulty in showing that these statutes were passed solely for the "benefit of dependent Indian tribes." On their face, they also provide benefits for lessees and states, rather than Indians.

Finally, it seems highly unlikely that a Congress so concerned about dividing benefits among the federal government, states and tribes in 1925, 1926 and 1927, would pass the 1938 act without a word of debate. In light of this and subsequent Supreme Court recognition of the validity of § 398, it seems that the Solicitor's opinion lacks sufficient legal foundation.[121]

IV. CONCLUSION

It is possible that Indian tribes may be able to use inherent sovereignty powers to support a tax on non-Indian lessees. It is more likely, however, that tribes must look to some statute or treaty to support any right to tax non-Indian lessees (though the Supreme Court may use the historical background of inherent sovereignty to determine ambiguities in such governmental pronouncements). It is probable that if the tax may be posed as a license tax or a business activity tax, tribal power to impose the tax will be found absent a treaty, statute, or express contract to the contrary. Other kinds of taxes, not related to tribal powers to exclude or regulate business, are less likely to succeed.

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120. M-36896, November 7, 1977, "The Tax Status of the Production of Oil and Gas From Fort Peck Tribal Lands," p. 5. The author here is quoting from *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 79 (1918).

121. Court decisions in addition to those mentioned previously include *Industrial Uranium Co. v. State Tax Commission*, 95 Ariz. 130, 387 P.2d 1013 (1963). *Cf. G.M. Shupe, Inc. v. Bureau of Revenue*, 564 P.2d 935 (1976). *See also, Federal Indian Law*, P.652 and Rees-Jones, *Problems in the Development of Mineral Resources on Indian Lands*, 7 ROCKY MTN. L. INST., 661 at 694-5 (1962).

Concerning underground mineral leases and oil and gas leases on unallotted tribal lands, tribes simply do not have any power to tax. Congress has specifically preempted this field by giving states the exclusive power to tax. Tribes may, however, have a case for taxing open pit mining, since this includes a surface use. They may also be able to tax mineral and oil and gas lessees on allotted tribal lands; there has been no preemption by Congress concerning allotted lands, and the burden on tribes is therefore only to show a proper legal foundation for their right to impose such a tax. Thus, even today, tribes and states are confronted with piecemeal legislation concerning taxation of mineral and oil and gas lessees. Many people may be dissatisfied with this arrangement, but "whether justified or not . . . if criticism is to be leveled at this result, it must be directed at the power which created this . . . and the sole power which has the authority to destroy it, namely, the Congress of the United States."[122]

JIM NOBLE, JR.

122. *Santa Rita Oil & Gas Co. v. Board of Equalization*, 54 P.2d 117, 126 (Mont. 1936).