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RECENT DEVELOPMENTS


Over the years, the policy of the federal government toward American Indians has vacillated between attempts to assimilate them into American society on the one hand and efforts to preserve their independence and cultural identity on the other. Like a pendulum, this policy, as expressed in congressional legislation, has swung from efforts in 1887 to break up the reservations by transferring tribal lands to individual Indians in fee,¹ to the halting in 1934 of further such alienation,² and then back again since the 1950s to renewed efforts to end tribal existence.³ The legal theories and canons of construction generated by a century and a half of judicial attempts to interpret and accommodate these inconsistent and conflicting federal policies collide on the question of a state's jurisdiction to tax Indians.

The conflict is reflected in three opinions delivered by the United States Supreme Court last term. In McClanahan v. Arizona State Tax Commission,⁴ Arizona attempted to apply its personal income tax to a full-blooded member of the Navajo tribe whose entire income was derived from activities on the reservation where she lived and worked. The Court held that the federal government had preempted this

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sphere of taxation and struck down application of the personal income tax; furthermore, since the state had failed to comply with relevant federal statutes, it lacked jurisdiction over the Indians it sought to tax. In *Mescalero Apache Tribe v. Jones*, the tribe constructed and operated ski resort facilities on off-reservation property leased by a tribal corporation from the United States Forest Service. New Mexico attempted to apply a gross receipts tax to the facilities and a use tax to materials purchased out of state for construction of the ski lifts. The Court upheld the gross receipts tax because of the off-reservation situs of the resort; it struck down application of the use tax to materials used to construct permanent improvements on the land, however, as inconsistent with the tribe's statutory exemption from land taxation. Finally, in *Tonasket v. Washington*, the Court considered Washington's attempt to impose an excise tax upon cigarettes sold by an Indian on a reservation over which the state had previously assumed civil and criminal jurisdiction. Tonasket, a full-blooded member of the Colville tribe, conducted a retail trade on his allotted lands on the Colville Indian reservation, purchasing brand name cigarettes from out of state distributors and selling them tax-free to non-Indians. The Colville tribe had consented to the state's assumption of jurisdiction over the reservation in 1957 pursuant to Public Law 83-280. In a per curiam opinion, the Court vacated the Washington Supreme Court decision upholding the state tax and remanded for reconsideration in light of *McClanahan*.

These cases provide an opportunity for reassessing the extent of a state's power to tax Indians. The Court has jettisoned prior Constitutional theories and charted a new course which this note will analyze: federal preemption of Indian affairs as viewed against an historical backdrop of Indian sovereignty. An important element of the Court's new approach is its emphasis on evaluating Congress's intent in

6. Development of facilities was made possible by loans from the United States under the authority of the Indian Reorganization Act, 25 U.S.C. § 465 (1970). The facilities were built and operated by the corporation subject to federal approval of plans for initial facilities, construction of improvements and arrangements for subleasing, budgeting and accounting. See note 29 infra.
10. See note 7 supra.
drafting the federal legislation pertinent to the facts of each case, rather than on applying abstract judicial doctrines. The Court reserved judgment in McClanahan on whether Congress in providing for state assumption of criminal and civil jurisdiction over reservations in P.L. 83-280 intended to allow the states to tax Indians. The remand of Tonasket is explicable as an invitation to the Washington court to reach a decision on the key issue of the scope and purpose of P.L. 83-280. This note appraises various categories of state taxes as applied to Indians in light of the Court's new approach; included in this discussion will be an examination of considerations relevant to the Washington court's interpretation of P.L. 83-280 on the Tonasket remand.

I. THE COURT'S NEW THEORY

Prior inconsistent interpretations of Indian policy required the Supreme Court to confront and reconcile competing theories of Indian Law. In McClanahan and Mescalero, the Court charted a new constitutional approach in which it relied on the doctrine of federal preemption, it preserved but limited the test which focuses on protection of Indian self-government from state encroachment, rejected the theory that Indian individuals or tribes are federal instrumentalities and ignored the concepts of Indian wardship and benefit-burden balancing. The Court summarized its theory in McClanahan:


12. See text accompanying notes 38-40 infra.

13. See text accompanying note 35 infra.

14. The idea that Indians are "wards" subject to the "guardianship" of the federal government hails from the days when the United States made treaties promising protection to conquered and subdued nations. It antedates the United States citizenship of Indians and the promotion of tribal self-government and economic self-sufficiency. To argue that the guardian-ward relationship places any Indian function, whatever it may be, under the protection of the federal government is equitably appealing since most tribes feel that they paid taxes for all time when they gave up some two billion acres of land to the United States, but it ignores the complex body of Indian law which has struggled with the status of a "domestic dependent nation" for years and the imminent problems arising from the externalities of reservation development. It is a concept too vague to be determinative of the tax litigation before the Court this term.

15. A frequently urged theory in the cases concerning Indian taxation is the ben-
The State has interfered with matters which the relevant treaty and statutes leave to the exclusive province of the Federal Government and the Indians themselves.

While endorsing the continued importance of the concept of Indian sovereignty, the Court added a caveat: 17

The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read.

When Congress occupies a field, determining the scope of its preemption is primarily a matter of ascertaining its intention; 18 the Court, therefore, in reaching its decisions, focused on congressional intent as expressed in the particular statutes and treaties involved in the cases. In McClanahan, the Court read the Navajo Treaty, 19 the

eff-burden theory found in Warren Trading Post Co. v. Arizona Tax Commission. 380 U.S. 685 (1965). The specific language is:

And since federal legislation has left the state with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the state the privilege of levying this tax.

Id. at 691. It would be a denial of equal protection under the fourteenth amendment of the United States Constitution for a state to deny reservation Indians benefits which it extended to other citizens of the state, Acosta v. San Diego County. 126 Cal. App. 2d 455, 272 P.2d 92 (1954). Furthermore, due process requires that the state power to tax a foreign entity bear some relation to the protection, services and benefits conferred by the state on the taxed entity, Wisconsin v. T. C. Penny Co., 311 U.S. 435 (1940). Principles of tax administration supported in use tax collection cases, see, e.g., Scripto, Inc. v. Carson, 362 U.S. 207 (1960), allow the state to put the burden of collecting excise taxes on absentee vendors. The states justify taxation of Indians by showing the commingling of other residents with the Indians and a level of services as high as that provided non-Indians. The tribes argue in reply that state services are minimal and that the federal government meets the bulk of the costs of expenditures on the reservation.

The doctrine of Indian sovereignty derives from the fact that as the first Americans, Indian tribes enjoyed the aboriginal status of completely sovereign nations. Having relinquished their sovereignty to the federal government only to the extent provided by treaty, their powers remain inherent rather than delegated. The scope of relinquishment of these powers can be expanded only by subsequent act of Congress or by the Indians' consensual abandonment of such rights. The rule, based on the theory that the laws of one sovereign are not applicable to the subjects of another sovereign, was that general federal statutes did not apply to Indians unless specific reference was made to them. Elk v. Wilkins, 112 U.S. 94 (1884). This rule has been eroded by subsequent decisions of the United States Supreme Court, see, e.g., Chouteau v. Burnet, 283 U.S. 691 (1931) and by the silent acquiescence of Congress.

16. 411 U.S. at 165.
17. 411 U.S. at 172.
19. 15 Stat. 667 (1868). The primary subject matter of treaties between the Indian nations and the United States is the control of land formerly held by the Indian tribes.
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Arizona Enabling Act, the Buck Act and several other federal statutes as indicating, when considered together with traditional views of Indian sovereignty, that Congress did not intend to allow the states to tax Indians on their reservations. Though no immunity from state taxation is explicitly reserved in the Navajo Treaty, the Court reasoned that the circumstances under which the agreement was reached indicated that the treaty was meant to establish the reservation as within the exclusive sovereignty of the Navajos under general federal supervision. The provision of the Arizona Enabling Act expressly disavowing an intention to preclude state taxation of Indian property off the reservation was cited as evidence that state tax immunity was intended within the reservation. The court read the Buck Act, which provides comprehensive federal guidance for state taxation of persons living in federally controlled areas, but explicitly exempts “Indians not otherwise taxed,” as refuting the notion that the states had residual power to impose taxes on reservation Indians. The Court concluded that statutes authorizing states to assert tax jurisdiction over reservations in special situations are explicable only if Congress assumed that states lack inherent power to impose taxes without such authorization. Finally, P.L. 83-280, authorizing states to assume civil and

All treaty references to taxation of Indians pertain exclusively to the state and federal tax immunity of certain real and personal property. Silence on other kinds of taxes allows at least two arguments: First, that they may be levied against Indians, or second, that the power to tax is never found to exist by implication, other kinds of taxation presumed sub silentio to be within the exclusive province of the Indian tribes as aboriginal sovereigns. One’s view as to the appropriate inference ultimately depends on his or her view of the historical relationship between the Indian and the federal government, as well as upon what is the desirable relationship between them today. See Williams V. Lee, 358 U.S. 217 (1959) (Justice Black's discussion of the modification of Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)). Most of the treaties acknowledge the exclusive jurisdiction of the United States, but a later case holds that similar language in a statehood act is not invariably exclusive of state authority, Organized Village of Kake v. Egan, 369 U.S. 60 (1965).

20. 36 Stat. 557 (1910). State enabling acts generally provide that the people of a state forever disclaim all right and title to reservation lands but they do not preclude state taxation of lands owned or held by Indians outside the reservation or from which restrictions on alienation have been removed unless Congress specifically prescribes an exemption. The reasons for allowing the state to tax non-reservation land were (1) to put all owners similarly situated on an equal footing, and (2) to put the new state on an equal footing with the original states with respect to jurisdiction to tax, Ward v. Race Horse, 163 U.S. 504 (1896).


criminal jurisdiction over reservation Indians, was cited by the Court as additional evidence that Congress did not recognize an inherent state jurisdiction to tax Indians. In the words of the Court,\footnote{23} 411 U.S. at 178.

But we cannot believe that Congress would have required the consent of the Indians affected and the amendment of those state constitutions which prohibit the assumption of jurisdiction if the States were free to accomplish the same goal unilaterally by simple legislative enactment.

Furthermore, the Court implied that even if there were no federal preemption by Congress, the states would not be able to enforce taxes on the reservation without first complying with P.L. 83-280 because state courts would have no civil or criminal jurisdiction.\footnote{24} See note 108 infra for a discussion of cases concerning methods of assuming jurisdiction under P.L. 83-280.

In Mescalero, however, the Court declined to extend the doctrine of federal preemption to Indian activities off the reservation, again gauging Congress's intention from a reading of relevant statutes and treaties.\footnote{25} Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.\footnote{26} 36 Stat. 557 (1910).

The Court observed that the New Mexico Enabling Act,\footnote{27} similar to Arizona's, indicated no congressional intent to preclude state taxation of off-reservation Indian property. In addition, citing precedents applying state criminal laws\footnote{28} and fishing regulations\footnote{29} to Indians beyond the reservation boundaries, the Court noted that non-discriminatory state law had been applied to Indians off the reservation. The Court further held that the explicit exemption from property taxes granted by the Indian Reorganization Act extended only to permanent improvements on land and not to income taxes.

\footnote{23} 411 U.S. at 178.
\footnote{24} See note 108 infra for a discussion of cases concerning methods of assuming jurisdiction under P.L. 83-280.
\footnote{25} 411 U.S. at 148-49.
\footnote{26} 36 Stat. 557 (1910).
\footnote{27} Ward v. Race Horse, 163 U.S. 504 (1896) (Indians cannot exercise treaty right to hunt off the reservation in violation of state laws).
\footnote{28} Puyallup v. Department of Game, 391 U.S. 392 (1968) (the state may, in the interest of conservation, regulate fishing by Indians in common with the fishing of others if reasonable and necessary).
\footnote{29} Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465 (1970), provides that lands and rights in land acquired pursuant to the Act for the tribes are free from state and local taxation. It should be noted that the Indian Reorganization Act is the foundation of present-day tribal organizations. It prohibited further allotment. See text accompanying note 1 supra. Substantial land was restored to tribal ownership, and new land replaced some of the tribal lands lost to non-Indians during the allotment period.
United States v. Mason,30 decided subsequent to McClanahan and Mescalero, indicates how the Court's new theory of federal preemption, understood against a backdrop of Indian sovereignty, may be applied in the future. The representatives of the estate of the decedent, a restricted Osage Indian,31 argued that McClanahan had substantially extended the protection afforded Indian tribes against state taxation and had therefore undermined West v. Oklahoma Tax Commission.32 West had upheld Oklahoma's inheritance tax as applied to restricted Osage Indians. Without deciding whether it would continue to adhere to West in a case squarely presenting the tax issue,33 the Court noted that the McClanahan situation was wholly different from that presented in Mason because the Osage Indians had become assimilated into the general community.34 The Court carefully distinguished the other cases which the lower court had cited as undermining the West rationale on the grounds that they involved a different tax, a different level of government or a tribe organized pursuant to a different statute. The Court's discussion in Mason reaffirms suggestions in

Funds were appropriated for the organization and operation of Indian corporations. Tribal proprietary enterprises were required to be conducted "not inconsistent with the law." Tribes were encouraged and authorized to adopt constitutions which were subject to ratification by tribal members and approval by the Secretary of the Interior. All of the constitutions so adopted were, in fact, prepared by the Department of the Interior, see Hearings on Const. Rights of the American Indian, 87th Cong., 1st Sess., pt. 1 at 165 (1962). The dual goals of the Act of developing tribal self-government and economic independence so as to permit Indians "to enter the white world on a footing of equal competition," 78 Cong. Rec. 11732 (daily ed., June 15, 1934), are the source of the major controversy over the Act in the context of state tax litigation. Basically, the argument is over how far Congress' protective policy toward Indians goes.

31. I.e., a member of the Osage tribe not authorized to alienate his real property. His land is held in trust for him and he receives only the income. This disability can be removed only by a certificate of competency granted at the discretion of the Secretary of the Interior. 34 Stat. 544 (1906), amended until 1984 by 52 Stat. 1035 (1938).
32. 334 U.S. 717 (1948).
33. The plaintiff's principal argument in Mason was that the United States had breached its fiduciary duty as a trustee of Indian property in failing to anticipate that McClanahan and lower court decisions had so weakened the rationale of West that it would be overruled.
34. 93 S. Ct. at 2206 n.7. The Osage reservation originally belonged to the Cherokee Nation who agreed in a treaty with the United States, 14 Stat. 799 (1866), to let the Osages settle in their territory. In 1883, the Cherokees conveyed the area to the United States to be held in trust for the Osages. Subsequently, the Osage Allotment Act, 34 Stat. 539 (1906), divided tribal land equally among members of the tribe subject to restrictions on alienation and created trusts for individual shares in income derived from minerals located on the land. See text accompanying notes 66 to 70 infra for a further discussion of Mason.
McClanahan and Mescalero that those cases should not be read as asserting as an inflexible doctrine, constitutional or otherwise in origin, that the federal government has exclusive jurisdiction over Indians on reservations to the exclusion of all state taxing power, the Court made quite clear that the scope of federal preemption will be ascertained from the particular facts and legislation involved in each case. Moreover, the backdrop of sovereignty concept weights the scale against taxation only on those reservations which have successfully resisted assimilation and retained substantial tribal self-government.

Federal preemption thus applies, with varying effects, to state efforts to tax Indians on or off their reservations. But state taxation of non-Indians may also affect Indian activities when state enforcement extends onto the reservation. In dealing with taxation of non-Indians engaged in reservation activities, the McClanahan Court, in the absence of controlling federal statutes, decided to rely on the older rule of Williams v. Lee: Application of state law would not be permitted if it would interfere with the right of Indians to make their own laws and be ruled by them. The McClanahan Court limited this rule, formerly

35. Mescalero clearly rejected the theory underlying some older Indian tax cases that Indian lands were immune from state taxation as a matter of constitutional law. The doctrine of implied governmental immunity has not been a concept limited to Indian law. Under it, a tax which interferes with a "federal instrumentality" is void. Standard Oil Co. v. Johnson, 316 U.S. 481 (1942) (an army post exchange is a federal instrumentality). In United States v. Rickert, 188 U.S. 432 (1903), the Court had occasion to consider the applicability of the instrumentality doctrine to Indian affairs and held that lands, some improvements and farm implements issued to the Indians by the United States were instrumentalities. Since then, the doctrine has been greatly narrowed and, after Mescalero, is inapplicable to Indian tribes or individuals.

36. Acceptance of such an assertion would be tantamount to acceptance of the federal instrumentality doctrine which was rejected in Mescalero, 411 U.S. at 150-55.

37. 93 S. Ct. at 2206 n.7 (The Tlinget Indians involved in Organized Village of Kake v. Egan, 369 U.S. 60 (1962), were never given a reservation, nor made treaties with the United States, but had organized their villages into corporations chartered under the Indian Reorganization Act, see note 29 supra.) (For a discussion of the Osage Indians see discussion at note 34 and accompanying text supra.).

The Court's decision in McClanahan preserved the holdings of Kake and Oklahoma Tax Commission by distinguishing them on the ground that the Indians involved lacked the essential features of tribal self-government. The interpretation of the particular legislation governing these tribes was the key factor in determining whether the state might tax their activities. For instance, the Court in Kake held that "absolute" federal jurisdiction was not invariably exclusive jurisdiction and that this language in the Alaska Statehood Act, 72 Stat. 339 (1959), did not preclude the exercise of residual state authority over use of fish traps by Indians. The ultimate decision in Tonasket similarly will depend on whether state assumption of civil and criminal jurisdiction over the reservations pursuant to P.L. 83-280 includes the power to tax. Future efforts by states to tax on reservations will be based on (1) the exclusion of reservations lacking traditional tribal self-government from the preemption approach or (2) the Williams rule that a state retains jurisdiction over non-Indians on reservations.

applied to all regulation of reservation activities, to transactions involving only non-Indians.39

The relevance of this distinction between Indian and non-Indian activities on the reservation to a state's power of taxation was emphasized by the Court's dismissal last Term of Kahn v. Arizona State Tax Commission40 for want of a substantial federal question. The issue in Kahn was whether a state could tax a non-Indian attorney's income earned on the reservation from employment by the Navajo Tribe. The Court's refusal to review the Arizona Court of Appeals decision that the lawyer's income could be taxed indicates that the state retains jurisdiction over non-Indian activity on Indian reservations.

In summary, after McClanahan and Mescalero, because of considerations of Indian sovereignty, the fundamental factor to be considered is the situs of the taxation. Where the state seeks to tax the fruits of Indian activity on the reservation, three consequences follow. First, the conflict between two traditional canons of construction (exemptions to tax laws should never be implied,41 and doubtful expressions in Indian treaties are to be construed in favor of the Indians and against state taxation42) is to be resolved in favor of the latter. Second, the distinction between state taxes on land and income is irrelevant. Third, it is also irrelevant whether the state tax infringes on the individual or the tribe.43 In contrast to Indians on the reservation, Indians going beyond the reservation are subject to nondiscriminatory state laws that otherwise apply to all persons in the state,44 as well as to the canon of construction that exemptions to tax laws should never be implied.45

39. But even if the state's premise [that state taxation of reservation members can be reconciled with tribal self-determination] we 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 [citation omitted]. In these situations, both the Tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The Williams test was designed to resolve this conflict.

McClanahan, 411 U.S. at 179.
43. This distinction is relevant under the rejected federal instrumentality doctrine, McClanahan, 411 U.S. at 170 n.5.
44. See notes 27 & 28 supra.
45. 411 U.S. at 156.

But absent clear statutory guidance, courts ordinarily will not imply tax exemptions and will not exempt off-reservation income from tax simply because the land from which it is derived, or its other source, is itself exempt from tax.
II. IMPACT OF THE COURT'S NEW THEORY ON PRIOR TAX DECISIONS

In the cases decided by the Court this term, the taxes at issue were general excise taxes imposed on receipts derived from employment, business or the use of property. Although no prior tax decision concerning Indians was specifically overruled, past decisions which rely on theories now rejected by the Court must be confined to their facts. This section will be devoted to an analysis of the ability of states to impose specific kinds of taxes in light of the McClanahan-Mescalero approach.

A. Income Tax

McClanahan and Mescalero held that state income taxes may not be imposed on the income of Indians living and working on the reservation, as long as the tribe has not submitted to state jurisdiction. Application of the federal income tax to Indians has been generally upheld absent a clear statutory intent to exempt the income in question. The Court's new theory vitiates its often relied on analogy between state and federal income taxation. As an example of this analogy, the Court in Leahy v. Oklahoma upheld a state tax on an Indian's share of income from the tribe's restricted mineral resources, citing as authority Choteau v. Burnet, a decision which held under similar facts that an Indian's income was subject to the federal income tax. Leahy appears to have been simply confined to its facts since Mescalero cited it for its holding without further comment.

46. For a discussion of a state's power to tax on reservations over which civil and criminal jurisdiction has been assumed see text accompanying notes 84-100 infra.

47. Compare Superintendent of Five Civilized Tribes v. Commissioner, 295 U.S. 418 (1935) (Indian income from tax-exempt sources was subject to federal income taxation when reinvested on grounds no specific exemption existed and none could be implied from the wardship status of the Indian) with Squire v. Capoeman, 351 U.S. 1 (1956) (immunity from federal capital gains taxation upon sale of timber from allocated land premised on provision of General Allotment Act which said the fee was to be transferred free of all charge or encumbrance).


49. 283 U.S. 691 (1931). Though it was not clear in Choteau whether the income was derived from oil lands comprising the reservation or purchased off the reservation, the Court rested its decision on the proposition that tax exemptions are never implied and a distinction between exempt land and its fruits. With respect to on reservation activity, McClanahan rejected both these principles, but Choteau's continuing validity as Leahy's predecessor cannot be determined without knowing the status of the land involved therein.

50. 411 U.S. at 157.
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Thus, the Court's approach to federal taxation on the reservation is now fundamentally different from that of state taxation, and no analogy between them is justified. Application of a state income tax to reservation Indians is presumed invalid unless tribal sovereignty has ceased through historical accident or design or express congressional permission to overcome the presumption of sovereignty. Federal taxation, on the other hand, is presumed valid unless a clear congressional intent to exempt the income appears.

B. Estate Tax

West v. Oklahoma Tax Commission and its precursor, Oklahoma Tax Commission v. United States, are the principal decisions upholding state taxation of Indian estates. In the latter case, the Court held that the statutory immunity of Indian lands from state taxation extended to estate taxation on the transfer of those lands, but that this estate tax exemption did not include within its coverage the transfer of restricted cash and securities, lands not specifically exempt from direct taxation and miscellaneous personal property and insurance not tax-exempt at the time of death. This decision was based on the principle that tax exemptions must derive from the plainly expressed intention of Congress, although the Court also mentioned the Osages' assimilation into the general community and the principle of benefit-burden sharing. The McClanahan decision, by invoking the federal preemption doctrine, in effect rejected this principle as applied to Indian reservations, holding that state taxation on reservations is not permissible absent express Congressional consent. The McClanahan decision preserved the result in Oklahoma Tax Commission, however, by distinguishing the Osage Indians as a tribe without the usual attributes of sovereignty, their assimilated status removing Indian sovereignty as a reason for tax immunity.

West extended the Oklahoma Tax Commission ruling to permit state taxation of mineral headrights transferred at death, as well as various forms of income and assets derived ultimately from these

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52. 319 U.S. 598 (1943).
54. A "headright" is the interest of the individual member of the tribe in the tribal trust estate. West, 334 U.S. at 719 n.2.
headrights and held in trust for the Osage Indians by the federal government. The Court based its decision on the theory that an inheritance tax is not levied against the restricted property itself, to which the United States had legal title, but upon the shifting economic benefits and the privilege of transmitting or receiving such benefit. The West decision seems to have been weakened by McClanahan to the extent that it relied on the distinction between taxes on incorporeal property and on the right to receive income derived from it, a distinction similar to the land-income dichotomy rejected in McClanahan.

United States v. Mason makes it fairly clear, however, that West can be distinguished and preserved. Though not squarely reaffirming West, the Court made at least three arguments in favor of its continuing validity. First, the Court noted in Mason that decisions concerning other types of taxes are not applicable to estate taxation where the tax is imposed on the transfer of property, not the property itself. This rationale avoids reliance on a formalistic distinction between federal ownership of title and individual use of income, but is of questionable value since other taxes imposed on abstract concepts have been stricken down. Second, the Court noted that the Osage Allotment Act did not provide for the removal of tax restrictions on the property upon its transfer out of Indian ownership. Such a provision had been heavily relied on to invalidate application of a federal capital gains tax to profits from the sale of timber on trust land in Squire v. Capoeman. The Mason Court's reliance on the intent of Congress as inferred from the particular applicable statutes is consistent with the Mescalero and McClanahan approaches. Finally, the Court noted that McClanahan had distinguished the special assimilated status of the Osage Tribe which removes Indian sovereignty as a reason for tax immunity.

In the future, when a state attempts to impose an estate tax on un-

55. See note 31 supra.
56. See, e.g., Spector Motor Service v. O'Connor, 340 U.S. 602 (1951), invalidating a state franchise tax on the privilege of doing business in the state, since the incidence of the tax fell entirely on interstate commerce. "It is not a matter of labels. The incidence of the tax provides the answer." Id. at 608.
57. 34 Stat. 539 (1906).
59. See also Kirkwood v. Arenas, 243 F.2d 863 (9th Cir. 1957) (Mission Indian Act and General Allotment Act read and applied in pari materia to exempt Indians from California inheritance tax).
60. 93 S. Ct. at 2206 n.7.
assimilated Indians, the Court will doubtless consider the source of the items in the deceased Indian's estate as an important factor in determining the tax's validity. Since the holdings and rationales of Oklahoma Tax Commission and West appear to be limited to assimilated Indians such as the Osage tribe, the Court will apparently apply the same reasoning it developed in McClanahan to estate tax cases of unassimilated Indians, determining the intent of Congress as expressed by the relevant statutes in each case. It is difficult to believe that Congress intended to take different approaches for taxes on income and on "shifting of economic benefits" when both are based on reservation activities. Therefore, in arriving at the tax base in either situation, the McClanahan distinction between items generated from activity on the reservation and items generated from activity off the reservation may be logically applied and only the latter taxed.

C. Sales and Use Taxes

There is a paucity of prior authority concerning the imposition of state sales and use taxes on transactions occurring on Indian reservations, but the validity of such taxes is likely to be litigated in the near future as Indian economic development thrusts Indian business into increasing competition with non-Indian enterprises. For example, the Yakima Nation, a Washington tribe which has ceded no jurisdiction to the state, is contesting the validity of the seizure of cigarettes destined for sale on the reservation, primarily to non-Indians, free of the state's cigarette excise tax.

Generally, when a sale and delivery take place within the taxing state, the jurisdictional basis for a sales tax exists. When a sale takes place in another state, but the property purchased is used within the taxing state, the jurisdictional basis for a use tax on the purchaser exists. The out-of-state seller is not required to collect the tax, however, unless delivery to the buyer is effected within the taxing state

61. For a discussion of the use tax applied to Indians off the reservation in a jurisdiction with nondiscriminatory tax laws, see text accompanying notes 72-75 infra.
65. At the time of the sale [to a Maryland purchaser in Delaware], no one is liable for a Maryland use tax. That liability arises only upon importation of the
and the seller also has sufficient minimum contacts with the taxing state to satisfy due process requirements. Whether these jurisdictional tax rules applying between states can be analogized to transactions occurring on Indian reservations within a state is an open question. A state may or may not have a legitimate interest in taxing certain transactions on the reservation in order to prevent non-Indian citizens from evading state taxes by purchasing items tax-free on the reservation for use back in the taxing forum.

A compensating use tax, imposed on the non-Indian buyer for the privilege of using property within the state but purchased on the reservation, is a device by which a state could compensate for the lost sales tax on such transactions. However, since it is impractical to collect a compensating use tax from each individual non-Indian as he returns from the reservation, the real question becomes whether the state may impose the duty of collecting it on the Indian seller. By qualified analogy to cases involving similar tax situations between states, the answer depends on whether the seller has sufficient contacts with the taxing forum to satisfy the requirements of due process. In *Scripto, Inc. v. Carson*, the Court held that Florida could constitutionally require a Georgia corporation to collect a use tax on pens manufactured in Georgia but delivered in Florida for use by Florida residents. The Court distinguished *Miller Bros. Co. v. Maryland*, in which a similar tax had been stricken down, on the ground that the residents of the taxing state in that case had gone personally to the store in an adjoining state to buy the goods. The importance of this distinction is not clear in the case of non-Indians, since the state retains jurisdiction over them while on the reservation.

After *McClanahan*, Indian activity on the reservation is tax-exempt so it is unlikely that a state sales tax on Indian businesses will be upheld. The basis for a use tax on non-Indian purchasers seems clearly
to exist, however, since there is no real distinction between property purchased out of state or property purchased on the reservation and used in the taxing forum by its residents. Because the state retains taxing jurisdiction over non-Indians even while they are on the reservation,\textsuperscript{70} state highways may be used in the importation of goods for resale on reservations,\textsuperscript{71} and the goods are almost certain to be used off the reservation in the taxing state, it can be argued that sufficient minimum contacts exist between the Indian seller and the state to require the Indian seller to collect the use tax from non-Indian purchasers.

\textbf{D. Personal Property Tax}

The personal property tax cases concerning Indians can easily be summarized since they all rely on at least one of the two grounds forming the basis of the decision in \textit{United States v. Rickert}.\textsuperscript{72} In that case, permanent improvements and cattle, horses and farming equipment issued by the United States to Indians were held not subject to local personal property taxes because (1) the permanent improvements had become part of the realty which was an instrumentality of the federal government, and (2) taxation would frustrate the federal purpose of emancipating the Indians. The decision had the effect of broadening the federal instrumentality doctrine to include those objects which the Court found necessary for the implementation of federal policy. The \textit{Mescalero} opinion reaffirms the first rationale of the \textit{Rickert} decision, insofar as that rationale barred a use tax on Indian personal property which had become permanently attached to tax-exempt realty.\textsuperscript{73}

Two Washington cases illustrate how the second \textit{Rickert} rationale is commonly applied. In \textit{Makah Indian Tribe v. Clallam County},\textsuperscript{74} personal property used in a hotel and restaurant business under Indian

\begin{footnotes}
\item[70] Kahn v. Arizona State Tax Comm'n, 411 U.S. 941 (1973), discussed in text accompanying note 40 \textsuperscript{supra}.
\item[71] Cf. Smith v. State, 64 Wn. 2d 323, 391 P.2d 718 (1964). The court held that the interruption of the movement of logs in Washington for the convenience of the out-of-state company is an incident sufficient to support a state business and occupation tax.
\item[72] 188 U.S. 432 (1903).
\item[73] \textit{Rickert}'s reliance on the federal instrumentality doctrine has since been abandoned.
\item[74] 73 Wn. 2d 677, 440 P.2d 442 (1968).
\end{footnotes}
management and ownership on the reservation was held not subject to a county personal property tax on the ground that imposition of the tax would interfere with a "discernable federal policy" to encourage Indians to acquire property as "the fruits of their own work, labor, and enterprise." Similarly, in Sohol v. Clark, personal property used in an Indian resort operated on the reservation pursuant to a federal program designed to further economic independence of Indians was held exempt from personal property taxation. The underpinnings of these decisions are weak to the extent that they rely on the now discarded federal instrumentality doctrine, but when based on furthering a federal purpose expressed in congressional legislation, they are consistent with the Court's new preemption approach. Without Congressional permission, state taxes on personal property used in Indian activities on the reservation are probably invalid after McClanahan.

E. Other Taxes

In Warren Trading Post Co. v. Arizona State Tax Commission, the Court struck down a state privilege tax on the gross receipts of a non-Indian company conducting retail trading business with Indians on the reservation on the basis of immunity implied from the Indian Traders Act. The Court in McClanahan refused to restrict the Warren holding to the theory that the federal government had preempted the field only to the extent covered by the Indian Traders Act (which does not purport to regulate Indian businesses selling to non-Indians on the reservation). Instead, the Court cited Warren Trading Post Co. for the broader proposition that the tax had been invalidated because "... the Federal Government had been permitting Indians largely to govern themselves, free from state interfer-

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75. 78 Wn. 2d 813, 479 P.2d 925 (1971).
76. Both the tribes involved in these cases have submitted to state jurisdiction pursuant to P.L. 83-280 and WASH. REV. CODE § 37.12.021 (Supp. 1972), so the taxability of Indian activity on their reservations depends, to a large degree, on whether this federal and state legislation is determined to authorize state taxation. See text accompanying notes 84-100 infra.
77. 380 U.S. 685 (1965).
78. Under the Indian commerce power, Congress enacted the Indian Trade and Intercourse Act 25 U.S.C. §§ 261-64 (1970). The last modification was legislated in 1908, and there have been no essential changes since the original law. Its primary purpose was the regulation of enterprises operated by non-Indians selling to Indians in order to protect Indians from unscrupulous merchants.
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ence." This interpretation of *Warren* clearly implies that Congress has taken Indian trading so fully in hand that no state taxes can be imposed on Indian businesses on reservations.80

In *Agua Caliente Band of Mission Indians v. County of Riverside*,81 a state possessory interest tax on non-Indian lessees of Indian reservation land was upheld on the theory that the tax was assessed only against the lessee's interest in the land and not on the land itself, even though its rental value was admittedly decreased by the tax. The Court relied on a federal instrumentality case82 upholding taxation of a lessee's interest in tax-exempt land owned by the United States and on the proposition that tax exemptions are never implied. Though the application of the federal instrumentality doctrine to Indians was rejected in *Mescalero* and the rule against implying tax exemptions was relaxed with respect to taxation on the reservation in *McClanahan*, this case probably remains good law as long as the distinction between use of property by non-Indians and the property itself continues to be recognized.83

III. P.L. 83-280 AND TONASKET

In the discussion of the *Oklahoma Tax Commission*,84 *Organized Village of Kake v. Egan*85 and *Mason*86 cases, the Court noted that the tribes involved did not possess the usual accouterments of sovereignty, a fact which distinguished these cases permitting state taxation from those where state taxation of Indian activity on reservations was

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79. 411 U.S. at 170.
80. *But see* discussion of imposing a use tax on the non-Indian party in text accompanying notes 66-68 *supra*. If the state can impose compensating use tax on reservation sales of cigarettes to non-Indians, it will virtually have destroyed a thriving Indian enterprise. Such an effect seems to interfere with the exclusive federal control over Indian trading established in *Warren*. On the other hand, the use tax also interferes with a thriving interstate commerce between adjoining states with differing rates of sales tax. Attempts to brand the use tax as "protective tariff" were rejected in *Henneford v. Silas Mason Co.*, 300 U.S. 577, 586 (1937).
81. 442 F.2d 1184 (9th Cir. 1971), cert. denied, 405 U.S. 933 (1972). The reservation involved in this case was subject to state jurisdiction assumed pursuant to P.L. 83-280, but the Court did not consider this factor in rendering its decision.
83. *See* text accompanying note 37 *supra*.
84. *See* text accompanying note 34 *supra*.
85. 369 U.S. 60 (1962).
86. *See* text accompanying notes 30-34 and notes 56-60 *supra*.
impermissible. The *Tonasket* case, which the Court remanded for reconsideration in light of its new Constitutional approach, involves a Colville Indian whose tribe has ceded jurisdiction to the State of Washington pursuant to P.L. 83-280. Whether this cession puts the Colvilles in the same category as the Alaska Indians and the Osages with respect to state taxation is the subject of the remainder of this note.

As originally drafted, P.L. 83-280 specifically permitted a number of named states to assume civil and criminal jurisdiction over tribes

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88. The pertinent portions of P.L. 83-280 (see note 9 supra) are:

Section 2 (civil jurisdiction):

(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the *criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State.* (emphasis added)

(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 any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof. (savings clause)

Section 4 (criminal jurisdiction)

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and *those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State.* (emphasis added)

(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; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein. (savings clause)

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section. (emphasis added)

89. *Tonasket's tribe.*

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within their borders. It further provided authority for other states to assume such jurisdiction without the permission of the affected tribes. Subsequently, the act was amended to require tribal consent for such state assumption of jurisdiction.\(^9\) In *McClanahan*, the Court inferred that Congress had deemed it necessary to give federal consent by P.L. 83-280 to states which wished to acquire jurisdiction over reservation Indians. Without such consent, these states could obtain no jurisdiction over Indian reservations except to the extent permitted by the *Williams* rule,\(^9\) which the *McClanahan* Court clearly limited to non-Indian activities on the reservation.

The legislative history of P.L. 83-280 is confusing with regard to the act’s purpose. It was passed in response to the law and order hiatus on reservations, but was stated to have much more sweeping aims: withdrawal of federal administration of Indian affairs wherever practicable and termination of the application of federal Indian legislation in favor of administration of general state law.\(^9\) The purpose of P.L. 83-280 may have been to withdraw general federal responsibility for Indian affairs by terminating application of the federal instrumentality and federal preemption doctrines to them. It implied an intent that reservation activities no longer be exempt from state taxation. Under this interpretation, only specific federal legislation, to the extent it conflicted with any state law, would take precedence on reservations which had ceded civil and criminal jurisdiction to states pursuant to P.L. 83-280.

The scope of P.L. 83-280 is equally puzzling. That some application of state tax laws was contemplated by Congress as a result of its passage may be inferred from the savings clause,\(^9\) which reaffirms the tax-exempt status of some Indian property. If no jurisdiction to tax was intended, why did Congress think a savings clause was necessary? An argument might be made that the savings clause in P.L. 83-280 protects Indians from any taxation which could result in a lien upon trust property, thus deriving total Indian tax immunity from the tax-exempt status of Indian land.

A narrow interpretation plausibly can be given to P.L. 83-280,

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\(^9\) See text accompanying notes 38-40 supra.
reading it as an attempt to meet the specific goal of providing state rather than federal enforcement of "law and order." Congress did not intend, it might be argued, to subject reservations to the whole range of state regulatory and tax laws; it merely proposed to give the state jurisdiction to adjudicate civil disputes and prosecute criminal activity occurring on reservations. 44 Tax and regulatory laws are frequently enforced by criminal sanctions, 45 however, and P.L. 83-280 seems to give state criminal laws a sweeping application to reservations 46 which arguably implies an intent to enforce the tax laws and prima facie, an intent to tax. On the other hand, if P.L. 83-280 is such a broad grant of jurisdiction, then it may amount to an unconstitutional delegation of federal legislative authority over Indian commerce. 47

Until *Tonasket*, the Supreme Court had never had a case concerning a P.L. 83-280 reservation before it, except to consider the procedures by which tribal consent was obtained. 48 However, the Court has referred to the act in several cases, primarily as an indication of congressional Indian policy. 49 Similarly, no lower courts have discussed the perplexing problems of interpreting P.L. 83-280, other

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44. Legislative history is inconclusive. The report of the Senate Committee on Insular Affairs refers to the proposed bill as conferring state jurisdiction "with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes . . . ." Senate Report No. 699. 1953 U.S. CODE CONG. & AD. NEWS 2409. The House committee report noted: . . . [t]he Indians of several states have reached a stage of acculturation and development that makes desirable extension of State jurisdiction . . . . Permitting the State courts to adjudicate civil controversies arising on Indian reservations, and to extend to those reservations the substantive Civil laws of the respective states insofar as those laws are of general application to private persons or private property, is deemed desirable. House Report No. 848. 1953 U.S. Code Cong. & Ad. News 2412. However this wording might be interpreted, the emphasis at the time of the Act's passage seemed to be on the regulation of private rights among individuals and property. For a strong argument in support of this interpretation see Israel & Smithson, *Indian Taxation, Tribal Sovereignty and Economic Development*, 49 N.D.L. REV. 267, 290-97 (1973).

45. E.g., *WASH. REV. CODE* § 82.24.110 (1963) (cigarette tax violations are gross-misdemeanors). See also Ricon Band of Mission Indians v. County of San Diego. 324 F. Supp. 371 (S.D.Cal. 1971) (the criminal sanctions of the San Diego gambling ordinance were applied on the basis of California's P.L. 83-280 jurisdiction to nullify a gambling ordinance enacted by the governing body of the Ricon Indian reservation).


than to consider the methods of assuming state jurisdiction under it.100

The ultimate decision in the *Tonasket* case will undoubtedly settle
many of the issues concerning the interpretation of P.L. 83-280 and
shed additional light on the future consequences flowing from the
Court's new constitutional direction.

**IV. CONCLUSION**

Though the Court embarked on a new Constitutional direction in
the *McClanahan* and *Mescalero* cases by asserting its theory of federal
preemption against a backdrop of Indian sovereignty, the Court pre-
served all its prior decisions by allowing state jurisdiction over
non-Indians on reservations to an extent not inconsistent with tribal
self-government and by excepting reservations which do not have the
usual attributes of sovereignty from the operation of the new doctrine.
After these decisions, it is clear that state income taxes cannot be im-
posed on Indians working on the reservation. The status of state in-
heritance taxes and state use taxes as applied to non-Indian customers
of reservation Indian businessmen has not been settled. Furthermore,
the Court's emphasis on construing the particular legislation involved
in each case—in assessing congressional intent either to exempt In-
dian activity off the reservation from state taxation or to permit state
taxation of Indian activity on the reservation—makes prediction of
the result in individual cases difficult. For many Indians, the answer
to these questions depends upon whether the cession of civil and crim-
nal jurisdiction to state authorities under P.L. 83-280 includes the
power to tax.

The policy underlying the Court's new theory appears to be
midway between the poles of assimilation and sovereignty, leaving the
pendulum of federal Indian policy suspended in mid-air. On one
hand, Indians are protected from state encroachment on reservations
by federal preemption. On the other hand, federal preemption pro-

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100. *E.g.*, Quinalt v. Gallagher, 388 F.2d 648 (9th Cir. 1966), *cert. denied*, 387
U.S. 907. The Court in *Quinalt* held that whether "the people" have appropriately
amended their state constitution to assume P.L. 83-280 jurisdiction was a state question
Kennerly v. District Court of Montana, 400 U.S. 423 (1971) may cast some doubt on
the *Quinalt* ruling since the Court emphasized strict compliance with P.L. 83-280 would
be required in assuming jurisdiction. *Kennerly* may be distinguished on the ground that
tribal consent, not the consent of the state's people was at issue.
vides no constitutional protection to Indian sovereignty from the will of Congress itself.

_Clydia J. Cuykendall_