

RECENT DEVELOPMENTS

INDIAN LAW—TAXATION OF NON-INDIANS TRANSACTING BUSINESS ON RESERVATIONS—STATE TAXES IMPOSED UPON NON-INDIAN MINERAL LESSEES INFRINGE TRIBAL RIGHT OF SELF-GOVERNMENT. *Crow Tribe of Indians v. Montana*, 650 F.2d 1104 (9th Cir. 1981). The Crow Tribe instituted an action in federal district court¹ seeking a declaration² that Montana's imposition of coal severance and gross proceeds taxes³ upon non-Indian mining operations on tribal lands interfered with the tribal right of self-government.⁴ Dismissing the case for failure to state a claim, the district court held that state taxation of the Tribe's mineral lessees produced an insufficient economic effect on the Tribe to constitute interference with Crow tribal self-government.⁵ The Ninth Circuit reversed and *held*: Coal severance and gross proceeds taxation unrelated to governmental costs associated with revenue production is preempted by the Mineral Leasing Act of 1938⁶ and is an

1. *Crow Tribe of Indians v. Montana*, 469 F. Supp. 154 (D. Mont. 1979), *rev'd*, 650 F.2d 1104 (9th Cir. 1981).

2. The Tribe also sought a declaration that imposition of Montana's severance and gross proceeds taxes upon non-Indian reservation coal mining operations: (1) violated article 1, section 8, clause 3 of the United States Constitution which vests in Congress the exclusive authority "[t]o regulate Commerce . . . with the Indian Tribes"; (2) deprived "the Tribe of rights guaranteed to it by the Mineral Leasing Act of 1938 and the Treaty of Fort Laramie"; and (3) reduced the ability of the Tribe to realize the full benefit of their land thereby depriving them of liberty and property in violation of the due process provisions of the fourteenth amendment. 469 F. Supp. at 156-58. The district court dismissed each claim. *Id.* at 158.

Courts consistently accord Indian tribes special consideration under the Commerce Clause. *See, e.g.*, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 18-19 (1831). Nevertheless, the standard for application of the "Indian Commerce Clause" frequently has been measured by traditional commerce clause analyses. *See, e.g.*, *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980), *aff'd*, 50 U.S.L.W. 4169 (U.S. Feb. 1, 1982) (No. 80-11). *Cf. Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 159 (1973) (Douglas, J., dissenting) (congressional Indian commerce clause power expanded by Indian status as wards of the nation).

3. *See* notes 43-46 *infra* and accompanying text.

4. 469 F. Supp. at 157, 161-62. *See* notes 57-62 *infra* and accompanying text.

5. The district court finessed the self-government issue by holding that the Tribe could have avoided the substantial adverse economic impact complained of by exacting increased royalties. 469 F. Supp. at 161. The court of appeals characterized the Tribe's complaint as seeking a declaration concerning future production. The Tribe alleged that the state tax would reduce the royalties generated by future production leases. *Crow Tribe of Indians v. Montana*, 650 F.2d 1104, 1113 n.13 (1981).

6. 25 U.S.C. §§ 396a-396g (1976). *See also* 25 C.F.R. §§ 171.1-30, 173.1-29 (1981). The 1938 Act permits an Indian "tribe, group, or band of Indians under Federal jurisdiction" to lease

invalid incursion of tribal self-government⁷ when the taxed revenue is derived from the value generated upon the reservation.⁸

The doctrine of tribal jurisdictional sovereignty originated in 1832 with *Worcester v. Georgia*.⁹ State authorities arrested Samuel Worcester for violating a Georgia law requiring state permission for non-Indians to reside on Cherokee territory.¹⁰ The United States Supreme Court held that the state lacked jurisdiction and voided the arrest.¹¹ Indian communities, Chief Justice Marshall ruled, are distinct political entities in which tribal authority is exclusive.¹² The Court determined that tribal authority is protected, *inter alia*, by the preemptive effect of treaties between tribes and the federal government¹³ and congressional legislation.¹⁴

its lands for mining purposes with the approval of the Secretary of the Interior. 25 U.S.C. § 396a (1976). See also 650 F.2d at 1112 n.9.

7. Cf. *Mescalero Apache Tribe v. O'Cheskey*, 625 F.2d 967 (10th Cir. 1980) (indirect burden of New Mexico's gross receipts tax levied on non-Indian contractor insufficient to constitute interference with the internal affairs of the Mescaleros); *Fort Mojave Tribe v. San Bernadino County*, 543 F.2d 1253 (9th Cir. 1976) (imposition of county possessory interest tax on non-Indian lessees of trust land not invalid as an interference with tribal self-government); *Tiffany Construction Co. v. Bureau of Revenue*, 96 N.M. 296, 629 P.2d 1225 (1981) (indirect burden of proceeds tax does not interfere with tribal self-government).

8. 650 F.2d at 117. See also *Washington v. Confederated Tribes*, 447 U.S. 134, 156-57 (1980).

9. 31 U.S. (6 Pet.) 515 (1832). The rationale of *Worcester* was first applied to preclude a state tax upon Indian-held real property in *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866). See also *The New York Indians*, 72 U.S. (5 Wall.) 761 (1866).

10. 31 U.S. (6 Pet.) at 515. For a discussion of the factual background and the historical and constitutional significance of the *Worcester* decision, see Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500 (1969). See also D. GETCHES, D. ROSENFELT & C. WILKINSON, *FEDERAL INDIAN LAW 157-75* (1979) [hereinafter cited as *FEDERAL INDIAN LAW*].

11. 31 U.S. (6 Pet.) at 562-63.

12. *Id.* at 561. Although concurring in the judgment, Justice McLean disagreed with the Chief Justice's broad characterization of Cherokee rights and stated that "[t]he exercise of the power of self-government by the Indians, within a state, is undoubtedly contemplated to be temporary [A] sound national policy does require that the Indian tribes within our states should exchange their territories, upon equitable principles, or, eventually, consent to become amalgamated in our political communities." *Id.* at 593 (McLean, J., concurring). See Burke, *supra* note 10, at 523-24.

For a general discussion of the concept of tribal sovereignty, see *FEDERAL INDIAN LAW*, *supra* note 10, at 253-99. See also McCoy, *The Doctrine of Tribal Sovereignty: Accommodating Tribal, State, and Federal Interests*, 13 HARV. C.R.-C.L.L. REV. 357 (1978); Mettler, *A Unified Theory of Indian Tribal Sovereignty*, 30 HASTINGS L.J. 89 (1978); Werhan, *The Sovereignty of Indian Tribes: A Reaffirmation and Strengthening in the 1970s*, 54 NOTRE DAME LAW. 5 (1978).

13. 31 U.S. (6 Pet.) at 549-56. See Clinton, *State Power Over Reservations: A Critical Comment on Burger Court Doctrine*, 26 S.D.L. REV. 401 (1981).

14. 31 U.S. (6 Pet.) at 556-57.

Worcester implied that a tribal right of self-government was ultimately dependent upon the will of Congress.¹⁵ Chief Justice Marshall, however, did not base his decision solely on the preemptive effect of any particular statute or treaty. Rather, he perceived tribal self-government as an independent barrier to state action.¹⁶ Consequently, two tests evolved from *Worcester*: first, whether the state action is preempted by federal statute or treaty;¹⁷ and second, whether the state action interferes with the tribal right of self-government.¹⁸ The dependence of the latter test on preemption analysis, however, provided the basis for its subsequent erosion as an independent barrier.¹⁹ In the tax context, and in particular, when a state has attempted to tax non-Indian, on-reservation activity, the principle of tribal self-government has rarely precluded the state action.²⁰

Williams v. Lee,²¹ although not a tax case, articulated the basis of the modern approach for analyzing the self-government principle in state-Indian taxation disputes.²² In *Williams*, the Supreme Court denied

15. *Id.* at 560. Chief Justice Marshall declared that "Indian nations [possess] a full right to the lands they [occupy], until that right should be extinguished by the United States. . . ." *Id.* See also *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

16. 31 U.S. (6 Pet.) at 561. "The Cherokee nation, then, is a distinct community . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves. *Id.* (emphasis added). See also F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 122-23 (1971).

17. See, e.g., *McClanahan v. State Tax Comm'n*, 411 U.S. 164 (1973); *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965).

18. See, e.g., *Washington v. Yakima Indian Nation*, 439 U.S. 463, 470 (1979); *Williams v. Lee*, 358 U.S. 217, 220 (1958).

19. See *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 171-73 (1973).

20. See, e.g., *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Fort Mojave Tribe v. San Bernadino County*, 543 F.2d 1253 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977); *Agua Cliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972). See generally Craig, *The Indian Tax Cases—A Territorial Analysis*, 9 N.M. L. REV. 221, 238-54 (1979).

For examples of early decisions in which state taxation authority over non-Indians transacting business on the reservation was upheld, see *Thomas v. Gay*, 169 U.S. 264 (1898); *Utah & Northern Ry. v. Fisher*, 116 U.S. 28 (1885). Federal preemption is the more frequent basis for preclusion of State taxation of non-Indian activities on reservations. See notes 27 & 29 *infra* and accompanying text.

21. 358 U.S. 217 (1959).

22. See, e.g., *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980); *Washington v. Confederated Tribes*, 447 U.S. 134, 140 (1980); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 482-83 (1976); *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 168-73 (1973). Cf. *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 687 n.3 (1965) (*Williams* cited to support statement that state laws may apply to reservations when they do not interfere with federal policies concerning the reservations). For a discussion of *Williams* as providing

state jurisdiction over a debt collection action brought by a non-Indian against a reservation Indian.²³ Nevertheless, the Court refused to recognize tribal authority as exclusive, even within reservation boundaries, and implied that *Worcester* would not bar state action that did not infringe upon the tribe's right to make and be ruled by its own laws.²⁴

In *McClanahan v. State Tax Commission*²⁵ the Supreme Court, troubled by the conceptual problems inherent in the self-government standard, declared that Indian sovereignty merely provided a backdrop against which preemption analysis was to proceed.²⁶ The Court read *Williams* as having espoused a preemption doctrine rather than the self-government standard.²⁷ Post-*McClanahan* state-Indian tax deci-

the modern analysis for questions involving tribal sovereignty, see Comment, *The Case for Exclusive Tribal Power to Tax Mineral Lessees of Indian Lands*, 124 U. PA. L. REV. 491, 511-15 (1975). But see Note, *Balancing the Interests in Taxation of Non-Indian Activities on Indian Lands*, 64 IOWA L. REV. 1459, 1494-98 (1979) (argued that *Williams* employed and intended a preemption test).

23. 358 U.S. at 223.

24. Some commentators maintain that the *Williams* Court created a broad presumption of no state jurisdiction on the reservation in the absence of congressional legislation to the contrary. See, e.g., 27 WAYNE L. REV. 1259, 1263 (1981). In the context of a state tax of an on-reservation non-Indian, however, such a conclusion is doubtful. See note 20 *supra* and accompanying text. See also *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) in which the Court stated that:

in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing *Indian reservation lands or Indian income* from activities carried on within the boundaries of the reservation, and *McClanahan v. Arizona State Tax Commission* . . . lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent.

Id. at 148 (emphasis added).

25. 411 U.S. 164 (1973).

26. The Court noted that the Indian sovereignty doctrine had "undergone considerable evolution [since its establishment in *Worcester*] in response to changed circumstances." *Id.* at 171. It concluded that "[t]he 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." *Id.* at 172.

For a discussion of the unique character of preemption principles in the context of Indian law, see note 27 *infra*.

27. After discussing the modification of the *Worcester* principle as summarized in *Williams* and noting the trend to escape "from the idea of Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption," the Court observed that "[t]he modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and look instead to the applicable treaties and statutes . . ." 411 U.S. at 172. For support of the view that preemption has been the single unifying, though unspoken, principle in the state-tribal jurisdictional disputes since *Williams*, see Werhan, *supra* note 12; Note, *supra* note 22. Cf. Craig, *supra* note 20, at 252-54 (separate interference with self-government test).

Justice Marshall summarized the Court's current approach to preemption in Indian law in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980):

The unique historical origins of tribal sovereignty make it generally unhelpful to apply

sions consistently recognize the self-government standard as a check on state action. The test, however, has lacked independent force or substance²⁸ apart from the issue of preemption.²⁹

In the context of state taxation, courts often resort to an "interests analysis" approach. In two decisions, *Washington v. Confederated Tribes of the Colville Indian Reservation*³⁰ and *White Mountain Apache Tribe v. Bracker*,³¹ the United States Supreme Court recognized the interests analysis standard as implicit in both the preemption and self-government tests. This recognition indicated a renewed, albeit subtle, willingness to give substantive effect to the tribal self-government test.³²

to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law The tradition of Indian sovereignty . . . must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence.

Id. at 143-44 (citations omitted).

28. See note 20 *supra* and accompanying text.

29. The focus on the post-*McClanahan* decisions has been primarily on preemption. See, e.g., *Central Machinery Co. v. Arizona Tax Comm'n*, 448 U.S. 160 (1980); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Washington v. Confederated Tribes*, 447 U.S. 134 (1980); *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976).

30. 447 U.S. 134 (1980).

31. 448 U.S. 136 (1980).

32. The Court's perception of the more general principle of tribal sovereignty in nontax contexts has been restrictive. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). The Court in *Oliphant* determined that Indian tribes do not have inherent criminal jurisdiction over non-Indians. In *United States v. Wheeler*, 435 U.S. 313 (1978), Justice Stewart, commenting on the principle of tribal sovereign authority, observed that, "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Id.* at 324. The tribe's dependent status, the Court held, implicitly divested it of aspects of sovereignty "involving the relations between an Indian tribe and nonmembers of the Tribe." *Id.* at 326. "These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations." *Id.* But see *Montana v. United States*, 101 S. Ct. 1245 (1981), in which Justice Stewart, in discussing the Indian sovereignty principles recently interpreted in *Oliphant* and *Wheeler*, observed:

Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation . . . the activities of nonmembers who enter consensual relationships with the tribe"

Id. at 1258.

One explanation for this apparent inconsistency is that Congress has never established political independence as a federal policy, although it has established Indian economic independence as a

In *Colville* several tribes complained that the state could not lawfully apply its cigarette and tobacco products taxes³³ to on-reservation tribal sales. The district court determined that the state tax, as applied to sales to either Indians or non-Indians, was preempted by tribal taxing ordinances and constituted an impermissible interference with tribal self-government.³⁴ The Supreme Court reversed.³⁵ The Court depicted the tribe's argument as primarily economic:³⁶ an exemption from the state tax is necessary if the tribe is to attract business and raise revenue to combat severe tribal poverty. Upholding the tax as applied to on-reservation, non-Indians, the Court stated that congressional concern for fostering tribal self-governance and economic development did not guarantee the tribes an artificial³⁷ competitive advantage through an exemption from the state tax.³⁸

The Court noted that the tribal self-government principle required an accommodation between tribal and federal interests on the one hand, and state interests on the other.³⁹ Tribal interest, the Court observed, was strongest when the revenue sought to be taxed was "derived

desired goal. See generally Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479 (1979).

33. The identity of the taxed wealth has not been the principle criterion in the state-Indian tax cases, although the Court has distinguished taxation of trust realty and fixtures from personalty. See, e.g., *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 155-59 (1973). For a helpful chart identifying relevant criteria see Barsh, *Issues in Federal, State, and Tribal Taxation of Reservation Wealth: A Survey and Economic Critique*, 54 WASH. L. REV. 531, 569 (1979).

34. *Confederated Tribes v. Washington*, 446 F. Supp. 1339 (E.D. Wash. 1978) (three judge court). The district court opinion constituted a major departure from precedent. Subsequently some authors envisioned a new doctrine of tribal preemption based upon the conflicting taxing authority of the tribe. See Barsh, *supra* note 33, at 570-72.

35. *Washington v. Confederated Tribes*, 447 U.S. 134 (1980).

36. 447 U.S. at 150-52 (citing *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976)). Although the exemption of marketing the sales tax provided the tribes with a substantial source of revenue, the Court in *Moe* upheld imposition of the state tobacco sales tax upon non-Indian purchasers. The tribe, however, had not enacted a tribal tax. *Id.* at 482-83.

37. The Court's use of the term "artificial" is unfortunate. The Court squarely upheld the tribe's own taxes as applied to nontribal purchasers. 447 U.S. at 153. If the tribe's tax is added to the state's tax, the market for reservation cigarettes will dwindle and tribal economic development will be thwarted. Cf. *Crow Tribe of Indians v. Montana*, 650 F.2d 1104, 1116-17 (9th Cir. 1981) (substantial incursions into revenues obtained from land-based wealth can destroy tribe's ability to sustain itself). Terming the tax advantage offered by the tribe "artificial" assumes the answer to the question of whether the state tax ought to be imposed. See notes 71-73 *infra* and accompanying text.

38. 447 U.S. at 155.

39. *Id.* at 156. For an interpretation of interests analysis in the context of state-Indian taxation, see Note, *supra* note 22.

from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services."⁴⁰ The state's interest, on the other hand, was "strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services."⁴¹ *Colville* thus revitalized the precedent that rejected the self-government principle when the tax involved non-Indians,⁴² but also established that the principle could be upheld when the taxed revenue was derived from value generated on the reservation.⁴³

White Mountain,⁴⁴ decided shortly after *Colville*, rejected on federal preemption grounds Arizona's attempt to impose its motor carrier license tax and its use fuel tax upon a non-Indian enterprise that operated solely within the reservation. The Court observed that, in disputes involving a state tax aimed at non-Indian, on-reservation activity, preemption analysis called for careful scrutiny of the nature of the state, federal, and tribal interests at stake.⁴⁵ The *White Mountain* Court did not reach the self-government question. The Court, however, did acknowledge that the semi-independent status⁴⁶ of Indian tribes gives rise to an independent barrier to state regulatory authority over tribal reservations. The Court identified this barrier as the self-government test.⁴⁷

In *Crow Tribe of Indians v. Montana*⁴⁸ the Ninth Circuit considered the validity of Montana's Coal Severance Tax⁴⁹ and Gross Proceeds

40. 447 U.S. at 156-57.

41. *Id.* at 157.

42. See note 20 *supra* and accompanying text.

43. See *Wofford v. Department of Revenue*, 28 Wash. App. 68, 622 P.2d 1278 (1980), *cert. denied*, 102 S. Ct. 507 (1981). Cf. *Mescalero Apache Tribe v. O'Cheskey*, 625 F.2d 967 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 1417 (1981) (state taxation of on-reservation non-Indian contractors upheld). The court, implicitly balancing the interests of the state and tribe to uphold the state tax, cryptically noted: "[*Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973)] leaves no room for any doctrine of preemption." *Id.* at 970. See also *Tiffany Construction Co. v. Bureau of Revenue*, 96 N.M. 296, 629 P.2d 1225 (1981); *Ramah Navajo School Bd., Inc. v. Bureau of Revenue*, 95 N.M. 708, 625 P.2d 1225 (N.M. Ct. App. 1980), *prob. juris. noted*, 102 S. Ct. 85 (1981).

44. 448 U.S. 136 (1980).

45. *Id.* at 144-45.

46. *Id.* at 142. See *McClanahan v. State Tax Comm'n*, 411 U.S. 164 (1973):

[Indian tribes have retained] a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.

Id. at 173 (quoting *United States v. Kagama*, 118 U.S. 375, 381-82 (1886)).

47. 448 U.S. at 142.

48. 650 F.2d 1104 (9th Cir. 1981).

49. MONT. REV. CODES ANN. §§ 15-35-101 to -111 (1979).

from Coal Tax.⁵⁰ Montana set its severance tax rate for highest quality coal at thirty percent of value⁵¹ after determining that the demand for coal would tolerate appropriation of one-third of the price for economic rents such as production taxes and royalties.⁵² The Crow Tribe alleged that imposition of the state taxes upon non-Indian lessees mining tribal coal severely impaired tribal capacity to generate revenue from royalties and from the tribe's own taxation.⁵³ The Tribe argued that the taxes interfered with the tribe's ability to govern itself⁵⁴ and

50. MONT. REV. CODES ANN. §§ 15-23-701 to -704 (1979).

51. "Value" is defined as the contract sales price. MONT. REV. CODES ANN. § 15-35-103(1) (1979). See also MONT. REV. CODES ANN. § 15-35-107 (1979) (procedure for determining when coal valuation may be imputed). The state imposes a graduated schedule according to heating quality:

- (1) A severance tax is imposed on each ton of coal produced in the state in accordance with the following schedule:

<u>Heating Quality</u> (BTU per pound of coal)	<u>Surface Mining</u>	<u>Underground Mining</u>
Under 7,000	12 cents or 20% of value	5 cents or 3% of value
7,000-8,000	22 cents or 30% of value	8 cents or 4% of value
8,000-9,000	34 cents or 30% of value	10 cents or 4% of value
Over 9,000	40 cents or 30% of value	12 cents or 4% of value

- (2) The formula which yields the greater amount of tax in a particular case shall be used at each point on this schedule.

MONT. REV. CODES ANN. § 15-35-103(1)(2) (1979).

The severance rate in Montana is exceptionally high. Cf. COLO. REV. STAT. § 39-29-106 (Cum. Supp. 1980) (60¢/ton after 8,000 tons quarterly); IDAHO CODE § 47-1201 (Cum. Supp. 1981) (2% of net value); KY. REV. STAT. ANN. §§ 143.010-.990 (Baldwin 1977) (4.5% of gross value; property tax on value of unmined coal). See also *Coal Severance Tax: Hearing on S. 2695 Before the Senate Committee on Energy and Natural Resources*, 96th Cong., 2d Sess., table 3, at 73 (1980) (statement of Hon. David Durenberger). [hereinafter cited as *Coal Severance Tax*].

The United States Senate recently considered legislation that would put a ceiling on state severance taxes at 12.5% of value for coal mined on federal and Indian lands. See *Coal Severance Tax*, *supra*.

52. 650 F.2d at 1113. Montana's coal tax generated substantial political controversy. See, e.g., *Coal Severance Tax*, *supra* note 51, at 108-10. The tax recently survived a challenge by four Montana coal producers and 11 of their out-of-state utility company customers who sought a declaration that the tax is invalid under the supremacy clause, U.S. CONST. art. VI, cl. 2; and the commerce clause, U.S. CONST. art. I, § 8, cl. 3. See *Commonwealth Edison Co. v. Montana*, 101 S. Ct. 2946 (1981).

53. 650 F.2d at 1116. See note 73 *infra*.

54. *Id.* at 1111-14 (preemption); *Id.* at 1115-17 (infringement).

that the Mineral Leasing Act of 1938⁵⁵ preempted the tax.

After determining that the incidence of the tax fell on the lessees and thus was not invalid as a direct taxation of tribal mineral holdings,⁵⁶ the court considered the Tribe's preemption argument. The *Crow Tribe* court refused to view the Act so broadly as to forbid any state involvement,⁵⁷ but noted that a central purpose of the Act was to encourage tribal economic development.⁵⁸ Relying on *White Mountain*, the court found that to the extent Montana's taxes thwarted and thus conflicted with the federal and tribal interests reflected in the Act, the state taxes were preempted.⁵⁹ The state had no interest in expropriating Indian mineral wealth to perpetuate the acknowledged policy of preserving the value of nonrenewable assets.⁶⁰ Further, the court doubted whether legitimate state interests such as the social and environmental burdens of large scale mining would save the tax from its "fatal conflict" with the 1938 Act.⁶¹

Finally, the court in *Crow Tribe* turned to the self-government argument. The court observed initially that *McClanahan* requires the interests of the state to be balanced against the impact on effective self-

55. 650 F.2d at 1111-14. See 25 U.S.C. §§ 396a-396g (1976). See also 25 C.F.R. §§ 171.1-30, 173.1-29 (1980). The 1938 Act provides for Indian tribes, groups, or bands to lease their lands for mining purposes for a maximum period of ten years, subject to the approval of the Secretary of the Interior, 25 U.S.C. § 396a (1976). Lessees are required to furnish surety bonds for compliance with their lease terms, 25 U.S.C. § 396c (1976). Certain lands, originally including the Crow Reservation in Montana, are excluded from the Act's provisions, 25 U.S.C. § 396f (1976). In 1959, Congress provided that mineral leases on the Crow Reservation were to be governed by the provisions of the 1938 Act. Act of September 16, 1959, Pub. L. No. 86-283, 73 Stat. 565. See also 650 F.2d at 1111-12 nn.6 & 9-11.

56. 650 F.2d at 1110-11. See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *Mescalero Apache Tribe v. O'Cheskey*, 625 F.2d 967 (10th Cir. 1980); *Tiffany Const. Co. v. Bureau of Revenue*, 96 N.M. 296, 629 P.2d 1225 (1981).

57. Characterizations of federal preemption in both the general and Indian contexts take several forms. See, e.g., *Central Machinery Co. v. Arizona Tax Comm'n*, 448 U.S. 160 (1980) (no room for the state to legislate on the subject) (citing *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965)); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (state taxation would threaten overruling federal objectives). See also Note, *supra* note 22, at 1475-80.

58. 650 F.2d at 1112. The *Crow Tribe* court also acknowledged that the 1938 Act "sought uniformity in the law governing mineral leases on Indian lands . . . [and achievement of] the broad policy of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1976), that tribal governments be revitalized." *Id.*

59. 650 F.2d at 1114.

60. *Id.*

61. *Id.* See Note, *supra* note 22, at 1477-80.

governance.⁶² The court determined that the right of self-government, although related to preemption analysis through its dependence on federal policy, is an independent barrier to state regulation.⁶³

Accepting the Tribe's allegation that the economic effect of the taxes on tribal government was severe, the court observed that *Colville* had held that erosion of tribal revenues alone was insufficient to invalidate a state tax.⁶⁴ The court, however, interpreted *Colville* to have recognized a limit upon state taxation when the tribal interest outweighed the state's governmental interests.⁶⁵ Pursuant to this analysis, the Ninth Circuit held that the Tribe had a significant interest in its mineral resources⁶⁶ and, to the extent the tax was unrelated to governmental costs associated with mining Indian coal, the state's interest in raising revenues was insignificant. Thus the court struck the balance in favor of the Crow Tribe.⁶⁷

Crow Tribe reinforces the self-government standard as a separate element of the interest analysis employed in state-Indian taxation disputes.⁶⁸ The semi-independent status of Indian tribes suggests that separate preemption and self-government barriers to state action are appropriate. The two-pronged interests analysis, recognized in *Colville* and *White Mountain* and utilized in *Crow Tribe*, strengthens tribal rights both economically and politically.⁶⁹

62. 650 F.2d at 1108-09.

63. *Id.* at 1110.

64. *Id.* at 1116.

65. *Id.*

66. *Id.* at 1117.

67. *Id.* *Cf.* *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274 (9th Cir. 1981) (state hunting and fishing license imposed upon non-Indian hunting and fishing upon reservation does not violate tribal interest in self-government when state has substantial conservation interest); *Powell v. Farris*, 94 Wash. 2d 782, 620 P.2d 525 (1980) (state jurisdiction over accounting for partnership dissolution in which defendant was tribal Indian and plaintiff a non-Indian upheld).

68. See notes 30-47 *supra* and accompanying text. The court could have based its reversal exclusively upon its determination that the 1938 Act had preempted imposition of Montana's coal taxes. See, e.g., *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), in which the Court recognized two separate barriers to assertion of state authority, but after holding that federal statutes preempted the state action, found it unnecessary to reach the self-government test.

69. See 1 AMERICAN INDIAN POLICY REVIEW COMM'N, 95TH CONG., 1ST SESS., FINAL REPORT 13-21, 24-31 (Comm. Print 1977). Congress has affirmed this policy particularly during the last decade. See, e.g., Indian Self-determination & Educational Assistance Act, 25 U.S.C. §§ 450a-450n (1976). Recently, however, Congress has indicated some ambivalence toward this position. See, e.g., H.R. 2478, 97th Cong., 1st Sess. (1981) (proposal to abolish separate tribal political status); S. 874, 97th Cong., 1st Sess. (1981) (limiting Indian fishing rights). For an excellent defense of the present federal policy of tribal autonomy, see Clinton, *Isolated in Their Own*

By invalidating Montana's coal tax in part as an interference with Crow tribal self-government, however, the Ninth Circuit extended *Colville* to its practical limit. *Colville* suggested that tribal self-government interests may prevail when the revenue taxed is derived from value generated by activities involving Indians upon the reservation and when the taxpayer receives tribal services.⁷⁰ *Crow Tribe* revealed that *Colville* created an improbable distinction between tribes that have marketable natural resources and those that do not. The tribe without marketable natural resources rarely will attract a non-Indian taxpayer who will generate revenue derived from value associated with the reservation.⁷¹

The well-established federal policy of encouraging tribal economic self-determination merits greater attention than that given by the Court in *Colville*. Policy considerations have guided the search for a coherent doctrine in this area of federal Indian law⁷²—a search that has grown more urgent during the current period of state and federal economic retrenchment in which governmental revenue sources are diminishing. Formalistic distinctions such as those created in *Colville* are of small value.

In *Crow Tribe*, the Ninth Circuit properly recognized that invalidation of Montana's severance and gross proceeds taxes enables the tribal government to secure a reasonable return from its natural resources. The Supreme Court should abandon the unworkable distinction created in *Colville* and recognize a broad tribal interest in revenue generation.⁷³

B.H.S.

Country: A Defense of Federal Protection of Indian Autonomy and Self-Government, 33 STAN. L. REV. 979 (1981).

70. 447 U.S. at 156-57.

71. See Ickes, *Tribal Economic Independence—The Means to Achieve True Tribal Self-determination*, 26 S.D. L. REV. 405 (1981). See also Skibine, *High Court Blows Political Smoke in Cigarette Tax Cases*, AM. INDIAN J., July, 1980, at 2.

72. In *White Mountain* the Court observed that its inquiry into disputes involving state taxation of non-Indians on reservations required an examination of "the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribe independence." 448 U.S. at 144. See also *Williams v. Lee*, 358 U.S. 217, 218-19 (1958).

73. The United States Supreme Court in *Merrion v. Jicarilla Apache Tribe*, 50 U.S.L.W. 4169 (U.S. Feb. 1, 1982) (No. 80-11), a case involving tribal rather than state taxation, upheld the tribe's power to impose severance taxes on non-Indian lessees' oil and gas production. The Court noted that the tribal power to tax "derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction . . ." *Id.* at 4171. See generally *Clinton*, *supra* note 69.