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AUTHOR Goldberg, Carole E.
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ABSTRACT

In the past, courts have described American Indian sovereignty in ways that suggest the existence of power in the Navajo Tribe to tax the activities and property of non-Indians on their reservation. These judicial statements were made, however, at a time when tribal governments were viewed as transitional mechanisms for Indian assimilation, and contact between Indians and non-Indians on the reservation was minimal. Current efforts by non-Indians to develop energy resources on the Navajo Reservation will result in greater benefits for the Navajo people if the Navajos can exercise taxing power to the exclusion of the states. Since large-scale taxation assumes and permits the growth of a permanent, complex tribal government, legal doctrine and legislative schemes may alter as the Navajos assert themselves. Changes in the definition of tribal sovereignty and the extent of Federal and state limitations on taxing and other tribal powers should be anticipated if the Tribe begins taxing non-Indians. Navajo taxing power over non-Indians seems to have a firm basis in current judicial doctrine. There are few Federal restraints on such tribal power, but Federal restraints may be increased via the Indian Civil Rights Act, especially in terms of homogenizing tribal with state/local government wherein freedom from state taxation would require the Tribe to assume some state functions. (Author/JC)

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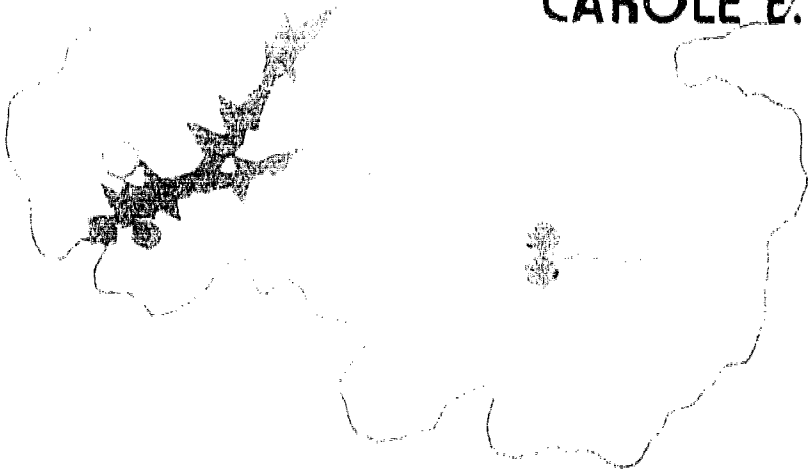
# the prospects for navajo taxation of non-indians

CAROLE E. GOLDBERG



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BULLETIN EDITORS
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Jeni M. Varady
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# THE PROSPECTS FOR NAVAJO TAXATION OF NON-INDIANS

Carole E. Goldberg

School of Law

University of California

Los Angeles, California 90024

March 1976

# LAKE POWELL RESEARCH PROJECT

The Lake Powell Research Project (formally known as Collaborative Research on Assessment of Man's Activities in the Lake Powell Region) is a consortium of university groups funded by the Division of Advanced Environmental Research and Technology in RANN (Research Applied to National Needs) in the National Science Foundation.

Researchers in the consortium bring a wide range of expertise in natural and social sciences to bear on the general problem of the effects and ramifications of water resource management in the Lake Powell region. The region currently is experiencing converging demands for water and energy resource development, preservation of nationally unique scenic features, expansion of recreation facilities, and economic growth and modernization in previously isolated rural areas.

The Project comprises interdisciplinary studies centered on the following topics: (1) level and distribution of income and wealth generated by resources development; (2) institutional framework for environmental assessment and planning; (3) institutional decision-making and resource allocation; (4) implications for federal Indian policies of accelerated economic development of the Navajo Indian Reservation; (5) impact of development on demographic structure; (6) consumptive water use in the Upper Colorado River Basin; (7) prediction of future significant changes in the Lake Powell ecosystem; (8) recreational carrying capacity and utilization of the Glen Canyon National Recreational Area; (9) impact of energy development around Lake Powell; and (10) consequences of variability in the lake level of Lake Powell.

One of the major missions of RANN projects is to communicate research results directly to user groups of the region, which include government agencies, Native American Tribes, legislative bodies, and interested civic groups. The Lake Powell Research Project Bulletins are intended to make timely research results readily accessible to user Groups. The Bulletins supplement technical articles published by Project members in scholarly journals.

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## ABSTRACT

In the past, courts have described Indian sovereignty in ways that suggest the existence of power in the Navajo Tribe to tax the activities and property of non-Indians on their Reservation. These judicial statements were made, however, at a time when tribal governments were viewed as transitional mechanisms for Indian assimilation, and contact between Indians and non-Indians on the reservation was minimal. Current efforts by non-Indians to develop energy resources on the Navajo Reservation will result in greater benefits for the Navajo people if the Navajos can exercise taxing power to the exclusion of the states. Since large-scale taxation assumes and permits the growth of a complex Tribal government with a sense of permanence, legal doctrine and legislative schemes may alter as the Navajo Tribe attempts to assert itself. Changes in the definition of Tribal sovereignty and the extent of federal and state limitations on taxing and other Tribal powers should be anticipated if the Navajo Tribe begins taxing non-Indians.

# THE PROSPECTS FOR NAVAJO TAXATION OF NON-INDIANS

> Domestic dependent nations are permitted an existence in the United States so long as they are weak.
>
> Mary Shepardson[1]

## INTRODUCTION

In an earlier Lake Powell Research Project (LPRP) Bulletin,[2] Lynn Robbins demonstrated that the Navajo Tribe is unlikely to reap economic benefits from power development commensurate with Tribal needs unless the Tribe alters its relationship to such development. Instead of operating merely as a land and resource owner (proprietor), leasing or selling its possessions for a prearranged price, the Tribe will have to operate more fluidly--for example, as a joint venturer (capitalist), contributing its resources in exchange for a percentage of profits, or as a governmental entity (sovereign), exercising taxing power.

This Bulletin explores the legal, institutional, and political limitations on the Tribe's exercise of the second of these options--taxing non-Indians on the Reservation. It is potentially more lucrative, because it can improve the Tribe's position with respect to disadvantageous long-term contracts it has already made as well as future economic ventures. Since rights to a sizeable fraction of Navajo coal and oil resources were leased before the current "energy crisis," Tribal taxation could bring Navajo revenues closer into line with prevailing market prices.[3]

The gains possible from taxation of massive future industrial developments are staggering. The New Mexico Revenue Commission has estimated that contemplated coal gasification plants on the eastern end of the Navajo Reservation would bring in the following sums at current prices and tax rates: $20 million per plant from a tax on contractors for the value of the completed project; $51 million from a sales tax on coal sold to power the gasification plants (assuming seven such plants operating for 25 years); $61 million from severance and natural resource excise taxes (on the same assumptions); $12.5 million from a property tax on production; plus additional sums from income taxation of non-Navajos.[4] If Tribal taxation can preempt state taxation, all these revenues could go far towards meeting the goals of the Tribe's 10-Year Plan.[5] While the Tribe, in its capacity as landowner, might attempt to bargain for a contractual right to such revenues, the history of Tribal efforts is not encouraging--either because of inadequate assistance from the Department of the Interior or from Tribal legal advisors. Furthermore, taxing power has the virtue of much greater flexibility in the face of changing conditions.

While taxation offers a more lucrative alternative for the Navajo Tribe than does venture capitalism, it requires a radical departure from the Tribe's

traditional role. Despite the long standing legal definition of Indian tribes as "semi-sovereign" entities,[6] only rarely have tribes, including the Navajo, attempted to define their powers (jurisdiction) as broadly as a state might, to encompass any kind of dispute so long as the defendant or the property in question is located within state boundaries at the time process is served, or there are "minimum contacts" between the defendant and the state.[7] To the extent that modern Indian governments have punished, taxed, zoned, or otherwise regulated activities on their reservations, they have generally done so only if those activities were undertaken by Indians of their own tribe or another.[8]

The general absence of efforts to exercise jurisdiction over non-Indians by the Navajo Tribe and others is not the result of clear indications in treaties, statutes, and court decisions that such power does not exist. On the contrary, to the extent that the law is clear on the subject, it seems to support tribal jurisdiction over non-Indians; but tribes have simply not asserted this power nor tested it in the courts. The following discussion suggests that exercise of fundamental sovereign powers by Indian tribes over non-Indians has not been common because it does not comport with the governing scheme envisioned either by the architects of federal Indian policy, who promoted tribal self-government in the 1920s and 1930s, or by the courts that decided cases establishing the sovereign powers of Indian tribes. Thus, fundamental reorientation of thinking about tribal governments on the part of Anglos (and Indians) may be necessary to effectuate the kind of taxing system that would bring real economic benefits to the Navajo Nation. Significantly, this reorientation may have to be paid for with a surrender of other things the Tribe values, such as its distinctive way of life, and its departures from Anglo institutions, culture, and values.

Ultimately, legal doctrine cannot be considered in a political-institutional vacuum. A dynamic model of Tribal jurisdiction suggests that legal doctrines defining the kinds of power the Tribe may exercise will vary depending on the kinds of power the Tribe tries to exercise. Furthermore, confirmation of Tribal power in one area may be accompanied by new restraints on the exercise of power in that area or others, or by new responsibilities that the Tribe will not necessarily welcome or be well-suited to carry out.

## THE ORIGINS AND FUNCTIONS OF NAVAJO GOVERNMENTS

A brief summary of the origins of the current Navajo government should provide a useful background for a discussion of the dynamics of legal doctrine relevant to Tribal taxing power. The Navajo Tribe is a tripartite government like most other governmental entities in this country, with legislative, executive, and judicial branches. Tribal Council members are elected by Navajos from designated districts within the Reservation.[9] There are standing committees[10] and an Advisory Council that exercises the Tribal Council's powers when it is not in session.[11] The executive branch consists of a Tribal Chairman, Vice-Chairman, and numerous administrative departments. The Chairman and Vice-Chairman are elected by vote of all enrolled members of the Tribe.[12] The judicial branch has several trial courts and an appellate court in which cases

may be retried. Judges are appointed by the Chairman with the approval of the Council.[13]

None of these institutions is indigenous to the Navajo culture, although they purport to exercise the sovereign powers possessed by the Navajo people.[14] Sovereignty of the Western "nation-state" variety is not an historical attribute of the Navajos. Traditionally, small groups of Navajo families were led by non-hereditary peace leaders and war leaders. "Leadership" consisted of fostering consensus among those who had to make decisions. While there are records of large gatherings of many such units to discuss questions relevant to all the Navajo people, there was no centralized government and no individual recognized as leader of all the people. For settlement of disputes, the traditional way was to have both sides appear before a respected local leader, who would listen to them and suggest a resolution that would restore harmony in the community.[15]

Following the military defeat of the Navajos and their resettlement based on the Treaty of 1868, the United States government installed a Superintendent on the Reservation to administer federal policies including the controversial stock reduction plans. In the 1920s, the Bureau of Indian Affairs (BIA) and the Department of the Interior sponsored the creation of Tribal-wide government, with leadership based on elections and majority will, to accomplish several goals, including: (1) establishment of "indirect rule," which both facilitated communication with the subject group and made implementation of unpopular federal policies more palatable; (2) legitimization of federal decisions, since those decisions could not be made in the absence of consent of the communal owners to lease or sell Tribally owned assets; and (3) education of Indians in the ways of the Anglo governmental system, which promoted the integration and assimilation of Indians into Anglo culture.[16]

The current Navajo Tribal Council still functions under by-laws issued by the Secretary of the Interior in 1938.[17] There is no Tribal constitution authorizing the Council, since the Navajos declined to accept the provisions of the Indian Reorganization Act of 1934 which would have required such a constitution,[18] the Secretary of the Interior refused to approve an independently drafted Navajo constitution,[19] and the Constitution authorized by the Navajo-Hopi Rehabilitation Act[20] was never promulgated. The Secretary of the Interior attempts to exercise considerable control over the Council as it is presently constituted, approving or disapproving resolutions and budget items, and even calling for the Council to convene.[21] It is debatable whether all such powers are authorized by law.[22]

Tribal courts, known as Courts of Indian Offenses, were originally established by the Secretary of the Interior to hear civil and criminal cases against reservation Indians. The Indian judges for these courts were appointed by the Commissioner of Indian Affairs and were paid with federal funds until 1950, when the Tribal Council resolved that they be elected by the Navajo people.[23] Finally, in 1959 the Council provided for abolition of the Navajo Courts of Indian Offenses and establishment of the current Navajo judicial system, which is an instrumentality of the Tribe, free from control of the Department of the Interior.[24]

While these contemporary governing institutions of the Navajo Tribe are an

Anglo imposition on traditional Navajo forms of government, they are not fully equivalent to their federal, state, and local counterparts. In sharp contrast with federal and state governments, as well as local governments responsible for comparably large populations,[25] the Navajo Tribe has very few lawyers involved in any branch of government. Its legislature and court system have modest professional staffs.[26] Statutory law is codified in desultory and haphazard fashion. While the Tribe is expanding its administrative bureaucracy, it lacks a full complement of specialists possessing the expertise necessary to cope with the growing number of complex decisions related to environmental degradation, cultural change, resource utilization, and planned development.[27] More bureaucracy is indicated on flow charts than is evident in organizational behavior.

This discrepancy between the appearance of modern government in the Navajo Tribe and the reality of limited resources for governing should not be surprising. Navajo governing institutions were designed to accomplish indirect rule, legitimize resource exploitation, and educate Navajos into Anglo political ways, not to manage the intricate activities of major industrial and residential developers. The federal bureaucrats responsible for fostering Tribal government envisioned that Tribal institutions would represent and regulate only Indians who were following more or less traditional ways of life, not Anglo-controlled corporations. Furthermore, their assumption was that the institutions would be abandoned (and trust status terminated) when the assimilative purpose had been served.

Tribal taxation of non-Indians disturbs this vision in several respects. First, and most obviously, it involves the Indians in assertions of power over non-traditional, non-Indian activity. Second, it can provide the resources necessary to fund a thoroughly professional Tribal bureaucracy, capable of maximizing Tribal advantages from outsiders' development. Third, it can enable the Tribe to become self-sufficient and self-sustaining, reducing the arguments in favor of incorporating reservations into state jurisdiction and terminating trust status. With taxing power over non-Indians, the Tribe acquires the potential for equivalence with state governments.

Accordingly, it is important to present the law concerning sources of Tribal taxing power and possible state and federal restrictions on that power in dynamic terms. Sensing the political and institutional alterations following from new conceptions of Tribal government inherent in the exercise of taxing power over non-Indians, courts may become inclined to redefine the sources of and limitations on that power, and Congress may become inclined to exercise its prerogative to redistribute power over Reservation activities. Whether the Tribe welcomes such institutional change--with its promise of new financial responsibilities, a temporary need for large numbers of skilled Anglo administrators, and overthrow of traditional consensus-based modes of decision-making--is a serious question, but is outside the scope of this Bulletin. This Bulletin emphasizes the potential for alteration in decisional and statutory law affecting Indian sovereignty should the Navajos undertake taxation of non-Indians.

## SOURCES OF NAVAJO TAXING POWER

### Tribal Sovereignty

Early decisions of the United States Supreme Court proclaimed that Indian tribes possessed all sovereign powers over domestic matters within their territorial boundaries unless the United States decreed to the contrary.[28] This sovereign power has even been declared free of restrictions emanating from the Bill of Rights.[29] Designed to allocate power between states and Indian tribes in the absence of federal legislation, this principle has been modified over time in rather haphazard and unsatisfying fashion. But since these modifications have for the most part produced increases in the area of concurrent tribal and state jurisdiction,[30] it is not necessary to consider them when the only concern is whether the Navajo Tribe possesses taxing power over non-Indians.

It is safe to say that insofar as taxing power over all activities conducted in a sovereign's territory is an ordinary incident of sovereignty, under Supreme Court precedent the Navajo Tribe ought to possess this power unless Congress has withdrawn it.[31] In fact, Congress has not attempted to do so. The 1868 Treaty with the Navajos confirms their power to banish undesirable non-Indians from the Reservation.[32] And the Indian Reorganization Act of 1934, although not accepted by the Navajos, manifests Congress's intent that tribal governments generally possess taxing powers.[33]

The Solicitor of the Department of the Interior has not been willing to extend the logic of precedents announcing broad tribal sovereignty to their ultimate conclusion with respect to non-Indians--recognition of tribal power to impose criminal sanctions on non-Indians for offenses committed on a reservation.[34] The Solicitor's position, based on a few early lower federal court decisions, has been that Indian tribes are limited to the sanction of banishing non-Indians from the reservation. The implication is that Indian tribes have such distinctive values that it would not be proper to subject a non-Indian to their ordinary modes of punishments, although this is ordinarily the risk any alien takes upon entering a foreign country.[35] Thus, despite the broad judicial pronouncements about sovereignty, the Solicitor's opinion implies that Indian tribes are more like private clubs or businesses, capable of imposing sanctions only on those who acquiesce.[36]

This limited view of tribal sovereignty would not necessarily jeopardize Navajo Tribal taxing authority, since the Tribe could simply banish any non-Indian who failed to pay his taxes (lease provisions to the contrary notwithstanding). Indeed, court decisions of the 1950s dealing with similar situations on other reservations confirm this point.[37] It is important to understand, however, that even the broadest statements about Indian sovereignty have rested on assumptions about what tribal governments would want and ought to regulate. If a tribe had attempted to confiscate 90 percent of a non-Indian trapper's pelts on the theory that aliens on the reservation owed almost all their income to the tribe, the Secretary might have interpreted tribal taxing power as having limitations similar to those in the criminal area. Although tribal sovereignty implied sovereign power to protect and promote a way of life very different from that of the dominant culture,

it has long been tolerable because this power has remained geographically contained and limited to Indians and an occasional non-Indian intruder. Indeed, the justification for recognition of this sovereign power in Indian tribes was partly on the grounds of their cultural distinctiveness and the dangers associated with precipitous attempts at assimilation.[38] Thus, at the time when Indian-Anglo interdependence on the reservations was minimal, Indian sovereign powers were interpreted quite expansively so long as criminal sanctions were not used, even when the objects of tribal regulation could never participate in tribal government[39] and even if that regulation violated guarantees of the Bill of Rights.[40] In that sense, tribal powers have been more extensive than powers of states, which are required to permit residents to vote after 50 days,[41] and which must conform with the Bill of Rights.[42]

Navajo Tribal taxing power might be used to build a very different kind of Tribal government from the one envisioned by courts which announced the broad parameters of tribal sovereignty--one capable of sustaining itself in the context of the dominant culture, and reaping benefits from welcomed activities by majority group members. Anticipating this, the courts may alter their construction of Tribal sovereignty, limiting it to Indians, or may impose limitations on that power which the tribes have long avoided--either by requiring admission of non-Indians into Tribal society or by placing constitutional limitations on Tribal actions.

Recent decisions by the Department of the Interior and the United States Supreme Court indicate that a redefinition of tribal sovereignty to limit it to Indians is unlikely. The Solicitor has withdrawn his official opinion denying the existence of tribal criminal jurisdiction over non-Indians,[43] and has failed to disapprove several tribal ordinances imposing criminal jurisdiction over non-Indians on a theory of implied consent.[44] Furthermore, the BIA's policy of contracting with Indian tribes to provide services formerly administered by BIA personnel suggests that strengthening of administrative apparatus on reservations is an important goal.[45]

Most important, in January 1975, the Supreme Court delivered its opinion in United States v. Mazurie,[46] which reaffirmed the existence of wide tribal authority over non-Indians. The case did not deal with that issue squarely, since the question was whether the federal government could delegate law-making power over non-Indians to the tribes, not whether the tribes themselves could make these laws. Nevertheless, the Supreme Court asserted that the delegation of authority was easier to sustain because the delegate tribe possessed "a certain degree of independent authority over matters that affect the internal and social relations of the tribe,"[47] in this case the distribution and use of intoxicants on the reservation. The Court seemed anxious to avoid a direct statement that tribes could impose such regulations in the absence of federal delegation, but it is difficult to develop a credible theory that would support the federal delegation but not the independent authority.

Of course, the Supreme Court could still define narrowly the class of activities by non-Indians on a reservation that affect the tribe's internal and social relations. For example, confusion and discussion abound in case law and commentary over whether a crime committed by

one non-Indian against another non-Indian ought to be classified as such.[48] Conceivably taxation of non-Indians solely for the purposes of raising revenue might be viewed as a matter unrelated to regulation of internal tribal affairs, even though revenues might be used to redistribute income or to finance needed social services or cultural events. The trend does not seem to be in that direction, however. Rather, it seems to favor reaffirmation of Indian tribes as "unique aggregations possessing attributes of sovereignty over both their members and their territory."[49] What might reasonably be expected from courts, the Department of the Interior, and Congress in conjunction with this reaffirmation of the proper objects of tribal jurisdiction, however, is a fresh discussion of the limits on how authority may be exercised.

## Sovereignty as Exercised by the Navajo Tribe

The Navajo Tribe has not often attempted to assert and thereby test its sovereign powers with respect to non-Indians. The general provisions for civil and criminal jurisdiction in Navajo Tribal courts specify that the defendant must be an Indian.[50] A resolution to expand this jurisdiction to non-Indian defendants has been introduced in the Tribal Council, but has not even come to a vote.[51] An attempt by the Tribal Council to institute a system of hunting and fishing licenses applicable to non-Indians and enforced by Tribal courts was thwarted in the late 1960s, when counsel for the Tribe contended with misplaced conviction that the Tribe possessed no enforcement power.[52] Quite recently, however, in response to supportive precedent in the courts[53] and a supportive opinion by the Solicitor of the Department of the Interior,[54] the Tribe has asserted jurisdiction over non-Indians who violate Tribal laws regulating hunting and fishing.[55] Significantly, it has also authorized the training and hiring of special Tribal law enforcement officers concerned only with arresting people pursuant to these laws.[56] A few other resolutions applicable to a narrow range of non-Indian activities have also passed the Council in recent years. One, which grants Tribal jurisdiction over forcible entry and detainer actions against any "person," has been upheld by the Navajo Court of Appeals as applied to a non-Indian corporation.[57] Another resolution authorizes the recently established Navajo Environmental Protection Commission to seek imposition of fines on non-Indian as well as Indian polluters.[58] Interestingly, debate on these measures did not focus on the novel imposition of jurisdiction over non-Indians, and it is not clear whether the expansion was intentional.[59]

Problems associated with the exercise of jurisdiction over non-Indians received much more attention during debate over a recent resolution of the Tribal Council establishing a Navajo Tax Commission to explore and report on possible imposition of taxes on activities and property on the Reservation.[60] The Commission is unable to institute any taxes without the concurrence of the Tribal Council. As yet, however, the Commission members have not even been appointed, studies of appropriate tax bases have not been made, and of course specific taxes have not been recommended. In the meantime, the State of New Mexico has moved closer to taxing the same non-Indian assets and income the Tribe may want to tap.[61]

Why has the Tribe moved so slowly to exploit substantial sources of revenue? The legislative debates, considered in

light of the legal and institutional developments described in this Bulletin, suggest a number of explanations. First, the resolution was controversial because many Council representatives feared imposition of taxes on Navajos as well as non-Navajos. This fear was fed by a consultant's report on Navajo taxation, which recommended imposition of a payroll tax. Since counsel for the Tribe insisted, with more certainty than the law warranted, that taxes may not distinguish between Navajos and others (although he did suggest that taxes could be structured so they fell more heavily on non-Navajos), many representatives felt compelled to reject the measure. Ironically, the legitimacy of the Tribal Council with respect to Navajos was tested by a measure designed primarily to exploit non-Indian development. Second, the Council may have sensed that an effective taxing scheme would require resources both to ascertain appropriate types and levels of taxation, as well as to collect and enforce payments. Yet the Tribe does not even have an adequate means of auditing and enforcing royalty and lease obligations of lessees.[64] While tax proceeds would more than offset the expense of establishing such mechanisms, the time lag would be considerable. Third, this reluctance to act despite the competition with state taxing authorities may have reflected uneasiness about the changing role of Tribal government with the onset of jurisdiction over non-Indians. It may signify Tribal uncertainty about whether it can provide services to the non-Indians it decides to tax, in order to make its assertions of power more convincing. As significantly, it may represent concern that special treatment for Tribal members generally (e.g., with respect to voting, service on juries) would be jeopardized by expanded jurisdiction over non-Indians. Thus, while the power to tax non-Indians may exist and the Tribe has made tentative overtures to exercise it, efforts to assert the power have not been vigorous. The delay may ultimately jeopardize the Tribe's claim either to any taxing power at all, or at least to taxing power that preempts the states. To understand why, a full explanation of the federal and state restrictions on tribal powers that may follow tribal taxation of non-Indians is in order.

## SOURCES OF POSSIBLE RESTRICTIONS ON NAVAJO TAXING POWER

### Federal Restraints

One reason why the Supreme Court may be so willing to recognize wide-ranging sovereign powers in tribal governments is that Congress may act at any time to restrain those powers. Thus, while the Navajos may seem to enjoy advantages over underdeveloped areas such as Appalachia because of their ability to impose taxes,[65] in fact their powers are limited in much the same way as taxing authority of local Appalachian governments is limited by state home rule provisions. While Congress has not confronted the general question of tribal authority over non-Indians, federal presence is manifest in three ways in this area: arguable federal power to approve or disapprove Tribal Council decisions; the Indian Civil Rights Act of 1968, applying certain provisions of the Bill of Rights to tribal governments; and federal power to structure jurisdictional relationships in the course of approving long-term leases of Indian land.

### Power To Approve or Disapprove Tribal Council Decisions

The extent of the Navajo Tribal Council's independence from Congress and the

Department of the Interior is critical in gauging the courts' willingness to recognize broad Tribal powers over non-Indians. One fact which the Supreme Court noted with favor in its Mazurie decision was that the Secretary of the Interior must approve any tribal ordinance limiting sale of liquor on the reservation before violation of the ordinance becomes a federal offense.[66]

Because of its unusual origin, the Navajo Tribal Council enjoys more independence from the Secretary of the Interior than do most tribal governments. Had the Navajos adopted a constitution under the Indian Reorganization Act of 1934, it probably would have followed the BIA's model provisions, including a requirement that all tribal resolutions be approved by the Secretary before becoming effective.[67] Since the Navajos refused not only that invitation to establish a constitution, but also the more personal one embodied in the 1954 Navajo-Hopi Rehabilitation Act,[68] the Council continues to act under some sketchy rules promulgated by the Secretary of the Interior in 1938--rules intended to be only temporary. Thus, although the Navajo Tribal Council operates as if the Navajo people had formally vested it with their sovereign power, it is technically the creation of Secretarial rules. These rules do not, however, define or limit what the Council may do. Neither do they require Secretarial approval of all Tribal resolutions. They simply provide for elections and terms of office for members of the Tribal Council, the Chairman, and the Vice-Chairman.[69] While Congress could limit the Council's powers and require Secretarial approval, it has not done so. It is debatable whether in the absence of specific Congressional direction the Secretary could require such approval under the general delegation of authority in 25 U.S.C. § 2. This section has been interpreted narrowly in recent years,[70] although without much judicial guidance as to its precise limits.

The Navajo Tribal Code nevertheless contains statements that Tribal law and order regulations must be approved by the Secretary before becoming effective.[71] While tax laws do not fall into this category, it has been the general practice for many years for the Tribe to submit resolutions to the Secretary for his signature. A signal that this practice may be terminated is the holding of the Court of Appeals for the Navajo Tribe in the case of Navajo Tribe of Indians v. Hoylan. The Court concluded that even where the Tribe has expressly provided for Secretarial approval, the submission is unnecessary and the Secretary's action is a "meaningless formality."[72] According to the Court, Congress and the Secretary have not ordered the submission, and the Tribe cannot voluntarily relinquish its sovereignty.

Thus there is no direct Secretarial barrier to Navajo imposition of taxes on non-Indian development. However, the absence of such a barrier will not necessarily enhance the sovereign powers of the Tribe. The existence of a potential federal check, as in the Mazurie case, may make courts more relaxed about recognizing Tribal power to tax non-Indians, or may make them inclined to find a taxing ordinance within the permissible limits of the Indian Civil Rights Act. It is true, however, that the Secretary can exercise some indirect control over Navajo legislation. Under § 7 of the Navajo-Hopi Rehabilitation Act, Tribal power to appropriate "funds" is subject to Secretarial approval.[73] Whether expenditures of taxes collected by the Tribe itself are subject to this limitation is uncertain. The

reference may only be to rentals, royalties, and federal appropriations. But assuming any Tribal funds may be spent only after Secretarial approval, some indirect federal supervision of Tribal policies does exist, although perhaps not enough to convince courts that Tribal jurisdiction over non-Indians will reflect dominant values and political preferences.

The Indian Civil Rights Act

Another well-spring of federal power to regulate Indian tribes which may shape the use of Navajo taxing power is the Indian Civil Rights Act.[74] Enacted in 1968, this statute was designed to restrain the actions of tribal councils with respect to Indians and non-Indians[75] in conformity with dominant values expressed in the Bill of Rights, since several court decisions had suggested that in their sovereign capacity Indian tribes were not subject to the Bill of Rights at all.[76] The Act does not render all ten constitutional amendments applicable to the tribes; nor is it clear that the language in the Act making certain amendments applicable to tribal governments means the same in a tribal context that it does elsewhere.[77] The Act, however, does impose limits on tribal prerogatives, including the prerogative to tax.

These limits are relevant to an examination of the dynamics of Navajo taxing power over non-Indians in two very different ways. First, they dictate how the Tribe must structure and administer the taxes it decides to impose. Second, they open the possibility that Tribal sovereignty will be subject to greater restraints in areas other than taxation, should the Tribe attempt to impose a tax on non-Indians, even if that tax is itself acceptable under the Act. This second possibility is much more serious than the first; but both deserve elaboration.

The major structural restriction on Navajo taxing power is the equal protection clause inserted in the Indian Civil Rights Act. This provision might prevent the Tribe from choosing to tax only non-Indians or non-Navajos, a practice that would correspond to existing preferences granted Navajos in leasing of Tribal lands.[78] Since many of the objections to the establishment of a Navajo Tax Commission raised in the Tribal Council focused on the possibility that Navajos would be taxed along with major developers,[79] the Tribe's ability to tax only non-Indians may be critical in determining whether taxing power is exercised at all. To the extent that Council opposition to a taxing authority reflected what some anthropologists and political scientists have identified as a low level of acceptance of the Council's authority over Navajos themselves,[80] taxing power may be exercised more readily if it can be limited to non-Indians or non-Navajos.

To determine whether the equal protection clause of the Indian Civil Rights Act prohibits taxation only of non-Indians or non-Navajos, it is useful first to examine general equal protection theory in the context of the Fifth and Fourteenth Amendments, and then to consider how it might be modified in the Indian context. Equal protection decisions of the Supreme Court interpreting the Fifth and Fourteenth Amendments specify that ordinarily a law which treats groups of people differently must differentiate between them on some basis which is rationally related to the achievement of some legitimate statutory purpose.[81] Thus, for example, a law which taxed veterans at a lower rate than all other people would have to be justified

as tending to encourage people to enlist in the military service and/or as compensating them for their efforts. In some cases, where the law distinguishes among classes of people with respect to their ability to exercise some constitutional right,[82] or classifies people on the basis of some individual characteristic, such as race or alienage, which the individual cannot control and which has historically been the basis for invidious treatment,[83] the law will have to satisfy a more demanding set of criteria if it is to pass muster under the equal protection clause. The law must be necessary to achieve a compelling state interest. Very few laws have survived this requirement, one notable exception being the law that produced the internment of Japanese-Americans in detention camps during World War II.[84]

Under these standards, a Navajo law taxing non-Indians or non-Navajos might survive, even though it smacks of discrimination against a racial group or against aliens. First, the Supreme Court has indicated that it will rarely second-guess legislative determinations about who should bear tax burdens, no matter which group receives the heavier burden. Thus, in a case involving distribution of tax burdens on the basis of sex,[85] Justice Douglas, who had just joined a plurality opinion[86] viewing sex discrimination with the same suspicion as race discrimination, nevertheless upheld the tax. Since allocation of tax burdens is perceived to be within the peculiar competence of local governing bodies, the Supreme Court is inclined to find a discriminatory tax law adequate to withstand any level of scrutiny.

Second, distinctions involving Indians have not always been subjected to as rigorous a scrutiny as have other racial distinctions. In the Supreme Court's 1974 decision in Morton v. Mancari,[87] a federal statute giving preference to members of federally recognized Indian tribes in BIA hiring and promotions was upheld in the face of equal protection challenges under the Fifth Amendment. The Court found that the classification was not a racial classification at all, but rather a "political" classification, since people who are racially Indian but not members of federally recognized tribes would not qualify. Hence, the requirement of a "compelling state interest," applicable to racially discriminatory laws, need not operate. Thus, a tax only on non-Navajos would more easily satisfy constitutional equal protection requirements than a tax only on non-Indians.

A reasonable relationship between the discrimination and some legitimate statutory purpose was still required in Morton, where the goal of furthering Indian self-government sufficed. Federal (as opposed to tribal) discrimination in favor of Indians will almost always satisfy this requirement because of the federal government's trust and guardianship responsibilities with respect to Indians and special constitutional provisions giving Congress authority over Indian affairs. A Tribal tax only on non-Navajos cannot be justified as easily. A justification based simply on the desire to favor one "political group" (Navajos) over others (non-Navajos) would be circular as well as suspect, given that the group imposing the tax was the exempt group. A rationale based on the fact that Tribal members own the Tribal resources might be plausible, however, since the tax would be on outsiders for the privilege of operating on the Tribal territory. Perhaps a more convincing argument would rest on the need to

overcome the hardships and disadvantages long suffered by the Indians. This kind of justification sufficed to support a sex discriminatory tax,[88] although it has never been applied by the Supreme Court to racial discrimination as such.[89]

Even if a tax on non-Navajos would not be acceptable on constitutional equal protection grounds, it is conceivable that the equal protection clause of the Indian Civil Rights Act imposes different requirements. A substantial body of legal literature exists on this subject,[90] addressing the question whether constitutional doctrine should be modified in interpreting identical provisions in the Indian Civil Rights Act, to take into account the distinctive culture and institutions prevailing on Indian reservations. Thus, for example, while tribes frequently make distinctions on the basis of blood quantum in distributing benefits among tribal members,[91] distinctions which might well fall under the Fifth and Fourteenth Amendments as racial classifications,[92] these same distinctions might be upheld under the Indian Civil Rights Act as necessary to preserve tribal integrity, to maintain longstanding tribal traditions, or to recognize tribal ownership. Other distinctions between "constitutional" requirements on and off reservations might be justified by the need for informality on reservations where bureaucratic institutions have not developed and government operates as an extended family.[93] Some commentators would allow this deference only in situations where the tribal action reflects longstanding tradition essential to tribal culture,[94] forgetting perhaps that although many modern tribal institutions have Anglo forms, they operate in uniquely Indian ways.

Under either standard of review, however, a tax only on non-Navajos would be little easier to justify under the Indian Civil Rights Act than under the Fifth or Fourteenth Amendment. Separate treatment of outsiders for matters such as voting, jury service, issuance of grazing permits, and perhaps even freedom of speech, may be justifiable to maintain tribal identity and distinctiveness. The problem is that special taxation of outsiders has no connection with these values, except perhaps as a means of regulating entry by outsiders, or protecting the income and property of Indians whose traditional pursuits do not leave them with sufficient funds to pay taxes. Yet these possible connections are not viable if the Tribe is simultaneously pursuing a policy of encouraging non-Indian enterprises on the Reservation,[95] and the tax exemption for Navajos applies to Anglo-style entrepreneurs as well as to sheepherders.

Thus, the validity of a tax only on non-Navajos would probably depend on whether such a tax satisfies the requirements of the Fifth and Fourteenth Amendment equal protection clauses. To the extent that the requirements of the Indian Civil Rights Act are different, they are unlikely to dictate a different result. At the same time, precedent supportive of such a tax does exist under the Fifth and Fourteenth Amendments.

Assuming the Navajos are willing to tax their own people and outsiders alike (relying, for example, on steep graduation of taxes above some minimum income level, or taxes applied only to major industry), the Indian Civil Rights Act may introduce

a very different kind of restraint on the Tribe, which may appear in exchange for judicial recognition of Tribal power elsewhere. On the one hand, the potential in the Act for imposition of dominant values on Tribal actions may enhance the likelihood that taxing power and other jurisdiction over non-Navajos will be upheld in the courts.[96] Although claims have been made that application of tribal rules to non-Indians violates due process because resident non-Indians cannot participate in formulating the rules, these claims have generally not led to invalidation of the rules themselves.[97] On the other hand, the quid pro quo for this expanded jurisdiction over non-Indians might well be an increasing inclination on the part of the courts to force Indian governments into the mold of state and local entities by interpreting the Indian Civil Rights Act provisions to mean the same as their counterparts in the Bill of Rights. This development might accomplish the goals not successfully achieved by the arguments based on due process mentioned above. For example, Tribal rules limiting voting in Tribal elections to enrolled members of the Tribe might be invalidated on a theory analogous to the one used to strike down long residency requirements for voting in state elections,[98] given that there is no way to become part of the Tribal body politic except by birth.[99] Alternatively, Tribal rules limiting to Indians service on juries or in Tribal offices might be struck down on a theory analogous to those applied in recent cases challenging exclusion of aliens from juries or civil service employment.[100]

This result should not be surprising if it is true that Tribal power will be viewed expansively by the courts only so long as it is exercised within the bounds intended by the federal architects of tribal governments. As soon as a tribal government appears to obtain the independence and permanence that significant exercise of taxing power brings; as soon as tribal institutions are developed and Anglicized to the point where effective exercise of such jurisdiction is possible; and as soon as a tribe clearly indicates that its sovereign concern is everything that affects its territory (not simply its people), the federal or state courts may balk at deference to tribal definitions of expedient legislation that differ from dominant societal values, and may require participation by non-Indians in the legislative (e.g., taxing) process.

The Indian Civil Rights Act may have been enacted in contemplation of this possibility, since at the time of its passage Congress was encouraging long-term leasing of reservation lands to non-Indians,[101] yet making it impossible for states to acquire jurisdiction over reservation Indians without consent of the affected Indians.[102] The Act was the only remaining protection against imposition of alien cultural or political values on non-Indians. Thus tribal sovereignty may receive a freer rein as long as tribes choose to retain their self-contained, distinctive way of life. The Supreme Court's very different responses to non-normative policies of the expansionist Mormons on the one hand[103] and to the isolated Amish on the other[104] illustrate this point. It is unlikely that the Navajos will be permitted to retain their sovereign independence while selecting out portions of the reservation for lucrative development by non-Indians. Since the cases suggest that tribal powers over non-Indians are not about to be denied altogether,[105] the important question is how far the courts will go in fitting tribal governments to non-Indian models.

The Indian Civil Rights Act is a powerful tool for accomplishing that purpose.

Power To Approve or Disapprove Leases

As trustee for tribally held and allotted Indian lands, the Secretary of the Interior or his delegate must approve every lease of that property.[106] When the lease is for a very long term, Congress has required that prior to approval the Secretary shall first satisfy himself that adequate consideration has been given to "the availability of police and fire protection and other services [and] the availability of judicial forums for all criminal and civil causes of action arising on leased lands."[107]

These Secretarial powers can affect the exercise of Navajo taxing powers in several ways. Indirectly, the Secretary could refuse to approve leases generally or hinder the process of lease approval if he disfavored some Tribal tax. More directly, the Secretary could refuse to approve a particular lease unless it contained a provision in which the Tribe surrendered its power to tax. Several major industrial leases entered into by the Tribe over the last fifteen years, including the leases for the Four Corners Plant and the Navajo Generating Station, contain just such waivers, although not at Secretarial insistence.[108] For example, the Four Corners lease prohibits taxation of property located on leased lands, leasehold rights granted in the lease, ownership, construction and operation of facilities, generation or transmission of power, sale or disposal of power, company income, or sale or delivery of fuel to the company until 2005, when the Tribe is then permitted to levy only a property tax, and at a rate one-half that of New Mexico or Arizona. Here is recognition of the Tribe as property-owner, entitled to collect rents and royalties, but not as sovereign, entitled to tax.

Whether such lease provisions are enforceable against the Tribe is unclear. If a state which had agreed to forego assessing certain taxes later imposed those very taxes, the taxpayer would have a constitutional defense or claim based on the section of the federal Constitution prohibiting any state from impairing the obligations of contracts.[109] For the Supreme Court has held, over powerful dissent, that a sovereign state is capable of contracting away its taxing powers.[110] By contrast, a sovereign is incapable of contracting away its police power or its power of eminent domain.[111] In deference to the sovereign, however, courts have gone out of their way to construe narrowly any exercise of the power to contract away taxing authority; to construe broadly any state constitutional restriction on contracting away taxing authority; and to characterize tax exemptions as legislative measures rather than contracts.[112]

This body of law is not easily related to the situation of the Navajo Tribe. The constitutional prohibition on impairment of the obligations of contracts has not been applied to Indian tribes under the Indian Civil Rights Act. It is unclear, however, whether that means a Tribal tax in the face of an agreement not to tax would be treated as an exercise of state police or eminent domain power in the face of an agreement to the contrary--as a potential but unlikely deprivation of property without (substantive) due process. A recent decision by the Navajo Court of Appeals[113] makes it clear that Navajo sovereign immunity[114] will not save the Tribe from suit if such a claim under the Civil Rights Act is made. Alternatively, the

courts may be more willing to find a due process violation in the contravention of a tax waiver than in a police power waiver, because there is Supreme Court precedent upholding state power to institute tax waivers. Should that be the case, the Tribe might nevertheless utilize those other state precedents construing narrowly any arguable exercise of the power to contract away taxing authority. Following these precedents, the courts might decline to find any authorization for the Tribal Council to enter into such agreements. The problem with such an argument is that it calls into question many principles the Tribe would not want threatened--especially the Tribal Council's personification of all sovereignty possessed by the Navajo people, notwithstanding the lack of any constitution. Nevertheless, the Tribe might argue that while the Council may have broad regulatory authority in the absence of a constitution, it lacks the authority in the absence of a constitution to cede further sovereign powers in a contract. In one way or another, then, the Tribe may be able to elude its agreement not to tax existing major industry on the Reservation.

Even if the validity and enforceability of agreements not to tax are doubtful, Secretarial refusal to approve a lease in the absence of such a provision might fail to comport with the Secretary's trust responsibility.[115] At least in the case of long-term leases, however, the Secretary might justify such action on the basis of Congress's direction that he ensure there has been adequate consideration of the availability of public services and judicial forums prior to approving such leases. Restrictions on Tribal taxing power might be deemed appropriate to avoid possible Tribal preemption of state taxing power under circumstances where the state is being relied on to provide the services and forums.[116] The surrender of Tribal taxing power would have to be carefully tied to this rationale, however, if the Secretary ever attempted to invoke it. For example, the Tribe would have to be permitted to tax if it ever became willing and able to provide necessary services and court facilities.

In both indirect and direct ways, then, the Secretary may be able to restrain Navajo taxing power through exercise of control over leasing tribal lands. As in the case of other federal controls, the existence of this potential for Secretarial control may make the courts more comfortable about the prospect of jurisdiction over non-Indians. But the price of this acceptability is the possibility of a Secretarial veto whenever Tribal sovereignty is exercised in ways that threaten non-Indian interests.

## Inhibitions Emanating from State Taxing Power

Another important dynamic of Navajo Tribal sovereignty is the response of courts and legislatures to the competition among state and tribal governments for lucrative tax revenues arising from reservation activities by non-Indians. As tribal governments expand their functions and assert the prerogatives of state and local governments, judicial doctrines and legislation which protected tribes from state incursions may weaken. Not only is there fear that tribes may obtain advantages the states wish for themselves, or that tribal decisions will affect people who do not participate in their formulation, but there is also concern that the states will be burdened by the demands

for protection and education of non-Indians on the reservation, but still not be allowed the necessary compensating revenues.[117]

State power to tax non-Indians on reservations may preclude tribal taxation in three different ways. It may do so because Congress has authorized state jurisdiction to the exclusion of the tribes, because state taxation is capable of preempting even where Congress has not so authorized, or because, as a practical matter, the existence of state taxes puts the tribes in a worse bargaining situation vis-à-vis non-Indian lessees, so that tribal taxes are impractical even if permissible.

Congressional Authorization for Exclusive State Taxing Power

Congress has the power to confer exclusive jurisdiction on the states to tax Indians as well as non-Indians on reservations. This power derives from Congress's plenary control over Indian affairs[118]--the same control that enables the Secretary of the Interior to regulate tribal budgets and leases. Congress has never acted, however, to confer such jurisdiction on the States of Arizona, New Mexico, and Utah with respect to the Navajo Tribe. While one might construe Congress's directive to the Secretary to consider jurisdictional problems before approving long-term leases as a delegation of this authority, the Secretary has never promulgated comprehensive regulations.[119]

The closest Congess has come to conferring jurisdiction on these states is the enactment in 1953 of a statute known as Public Law 280 (PL-280),[120] authorizing them to assert jurisdiction over reservation Indians. Important exceptions in the law maintained the tax-exempt trust status of Indian lands and preserved treaty and statutory rights with respect to hunting, fishing, and land use.[121] The Act was amended in 1968 to provide that no such jurisdiction could be asserted unless the affected Indians first consented in a referendum.[122] Since neither Arizona, New Mexico, nor Utah took the measures necessary to assume PL-280 jurisdiction unilaterally prior to 1968 (Utah did so afterwards[123]), and the Navajo Indians have never voted in favor of such jurisdiction,[124] there is no state jurisdiction pursuant to Public Law 280 anywhere on the Navajo Reservation.

An unanswered question is the extent to which these states' failure or inability to acquire jurisdiction under PL-280 provides the Navajos with arguments that states have lost their power to tax non-Indians on the reservation. Had PL-280 never been enacted, the states could base their taxing power with respect to non-Indians on longstanding judicial doctrines allocating jurisdiction over persons and property on Indian reservations.[125] However, the Supreme Court has stated that Congressional allocations of power supercede these doctrines;[126] and a state's failure to follow PL-280 can lead to loss of state jurisdiction that might otherwise exist under the judge-made doctrines.

Of course, if PL-280 only offers the states jurisdiction over reservation Indians, it is difficult to see how a state's failure to accept PL-280 can lead to loss of jurisdiction over non-Indians, which it would otherwise have had. In some instances, however, the impact of a tax may be on both Indians and non-Indians. For example, a state leasehold tax on non-Indian interests in Indian trust land may be characterized as an exercise of jurisdiction

over Indian interests, which ought not to be permitted in states lacking PL-280 jurisdiction, even if in the absence of PL-280 judge-made doctrines would have permitted the tax. The problems created by state tax lien foreclosure of leasehold interests and substitution of new lessees not desired by a tribe reinforces this argument. A state gross receipts tax on contractors doing business with a tribe or a tribal enterprise[127] may be subject to a similar analysis, as might a tax on an entity incorporated under tribal law, even if a majority of shareholders are non-Indian. Thus it may be possible to utilize existing Congressional legislation offering states jurisdiction as an argument against such jurisdiction in states which have failed to accept it. The argument has limited application, however, to jurisdiction over non-Indians as opposed to jurisdiction over Indians.

Of course, one consequence of increased efforts by Navajos to tax and otherwise regulate more extensive activity by non-Indians on the Reservation may be new Congressional legislation putting lessees and their property under exclusive state jurisdiction. Non-exclusive state power to tax mineral production on unallotted leased lands already exists under federal legislation enacted in 1924.[128] A more threatening measure from the point of view of the Indians was introduced into the 93rd Congress by Representative Lujan of New Mexico.[129] Starting from the assumption that ordinary state sources of revenue to support public services (mainly property taxes) would not be available from development on Reservation lands, he solicited the views of the Pueblo Governors on the problem that had prompted his bill:

> How do we solve it? Certainly there is no desire to move backward in the direction of the infamous termination policy by removing the land completely from Pueblo or Tribal jurisdiction or by making it subject to alienation through non-payment of newly authorized taxes...Nor is there any desire to impose the total cost of community services onto the Pueblo or Tribe itself. At the very least, this would eliminate any economic advantages the Pueblo or Tribe might derive from the subdivision. There may be an administrative method of handling this problem without legislation... Or the answer may lie in legislation that makes someone responsible for levying and collecting the taxes necessary to support the required community services. Who should that "someone" be? If the children of non-Indian families residing on Indian land are attending school in nearby communities, should the Pueblo or Tribe collect the necessary school taxes and turn them over to the county or school district? Or, should the county itself be authorized to levy and collect a real property tax?[130]

Hearings were never held on this bill. In the meantime, Arizona and New Mexico have both moved closer to imposition of leasehold taxes as substitutes for a property tax.[131] With the advent of non-Indian residential and industrial development on reservations, competition with states over sources of revenue to support necessary services will increase. As Reservation peoples and development blend in with surrounding non-Indian communities, the Navajo Tribe will be pressured either to take on characteristics and responsibilities of non-Indian governments, or to surrender powers to the states--if not by state taxation, then by termination.[132] While the former alternative may preserve Tribal taxing power, it is uncertain that the Tribe is capable of assuming the responsibility; even if it is capable, it may do so at the expense of Tribal exclusivity and cultural distinctiveness.

State Preemption of Tribal Taxing Power over Non-Indians in the Absence of Congressional Authorization

In the absence of Congressional allocation of exclusive jurisdiction to the states, the states have nevertheless argued that their exercise of regulatory power over non-Indians on reservations can preempt any tribal powers. One judicial response to increased assertiveness of the Navajo Tribe might be to strengthen the doctrinal underpinning of the states' argument--mainly Supreme Court cases denying federal (and by implication, tribal) jurisdiction over crimes committed by one non-Indian against another on the reservation in favor of exclusive state jurisdiction.[133] Then, assuming that the failure to implement PL-280 does not blunt state jurisdiction, Tribal sovereignty would be defeated.

It is unlikely that the law will evolve in this direction, however. The logic of the original cases upholding exclusive state jurisdiction is under increasing attack, as commentators point out that activities by non-Indians may legitimately concern the tribes.[134] These observations are correct even if a tribal government is still functioning merely as a transitional agent of assimilation and indirect rule. Laws prohibiting interference with activities of tribal police,[135] with traditional Indian ceremonies or burial grounds,[136] or with tribal decisions to limit sale of liquor on the reservation[137] would all fall within such appropriate federal and tribal regulation. Accordingly, there is no reason to say that state efforts to control non-Indians in these respects ought to be exclusive. Indeed, as will be discussed below, it is not even reasonable that state jurisdiction in such areas ought to prevail when it conflicts or overlaps with exercise of tribal sovereignty. Thus a general rule rendering state jurisdiction preemptive with respect to non-Indians will be more and more difficult to justify without the support of federal legislation.

The Supreme Court's decision in Mazurie[138] confirms this impression. There the State of Wyoming had laws providing for licensing of the sale and distribution of liquor. Non-Indians who had complied with those laws were prosecuted under federal law for selling liquor on the Reservation in violation of different Tribal regulations respecting the same subject. Without making reference to the cases supporting exclusive state jurisdiction over crimes by and against non-Indians, the Court announced that tribal jurisdiction over non-Indians persisted despite state legislation on the same subject, at least in the case of matters that affect "the internal and social relations of tribal life."[139] Thus, if tribal jurisdiction exists in the absence of state efforts to tax, that jurisdiction to tax non-Indians can probably survive the exercise of any concurrent state taxing power.

Whether such double taxation would discourage location of development on Indian reservations is a separate problem. Certain activities, such as mineral extraction, are not mobile, although resources on Indian reservations compete with resources located elsewhere. However, the really lucrative tax sources may be plants and employment which could be located either on or off reservations.

Can Tribal Taxation Preempt State Taxation?

Tribal fears of double taxation would be eliminated if in the absence of

Congressional allocation of taxing power a Tribal tax could render any state tax on the same activity or property illegal. Existing Supreme Court doctrine provides support for such an argument, suggesting that state taxes on non-Indians may be permissible only where tribal interests would not be jeopardized. But given the dynamics of control over tribal governments that this Bulletin has suggested, the doctrine will not necessarily be so applied. Certainly the longer a tribe waits to exercise this potentially preemptive power, the more likely it is that courts will respect developed expectations and uphold state taxation.[140] The existing doctrine indicates, however, that there may be a greater chance of tribal taxes being held preemptive in some situations than in others. If the Navajos are careful in creating the setting for their taxes, they may have more success.

Careful examination of the doctrine will reveal what circumstances optimize the possibility of preemption. This doctrine is the one that allocates jurisdiction between states and tribes in the absence of a Congressional directive such as the one found in PL-280 or the law giving states power to tax mineral extraction on leased, allotted land.[141] Its basic tenet, reaffirmed by the Supreme Court several times in the past fifteen years, is that states have no jurisdiction over reservation activities and property where that jurisdiction would interfere with "the right of reservation Indians to make their own laws and be ruled by them"[142] or would "affect the internal and social relations of tribal life."[143]

While these general statements are difficult to apply in particular situations, there is a clear tendency in the cases for state jurisdiction over non-Indians to prevail.[144] The judicial perception seems to be that state regulation of non-Indians by definition does not touch the tribe or any of its members governmentally or individually.[145] A most relevant recent example of this reasoning is Norvell v. Sangre de Cristo Development Co.,[146] in which a Federal District Court in New Mexico upheld the State's power to tax certain interests of a non-Indian lessee of Indian lands: the full value of the leasehold interest and improvements thereon, as well as the gross receipts of certain sales by the lessee. While recognizing that the taxes would have an indirect effect on the Indians by making their land worth less, the court held that these taxes did not "do violence to the governmental powers of the pueblo."[147]

This case was reversed on appeal, but on other grounds.[148] It is still important to stress features of the case that made affirmation of state jurisdiction to tax a likely result. Norvell involved a 99-year lease of Pueblo land to a non-Indian developer, for the creation of a second-home recreational subdivision. These homes were advertised for sale to an almost completely non-Indian market. Furthermore, the Pueblo had made no effort to regulate the development, and had no plans to provide services of any kind to the development. The developer and/or the State and local governmental entities were relied on to fulfill needs such as education, sanitation, and fire protection.

Under these circumstances, it was understandable that the court failed to perceive any threat to the Pueblo's sovereignty from the imposition of State taxation. The Indians[149] might have presented facts tending to establish, for example, that higher rental values would have been obtained with a guarantee to the lessee

of freedom from State taxation, and the higher rentals would have been part of an overall development plan for the Reservation which would be undermined by the taxes. Such a showing might have brought the case closer to the circumstances of White Mountain Apache Indian Tribe v. Shelley,[150] where the Arizona Supreme Court extended Tribal sovereign immunity from suit to a profit-making entity authorized under the Tribal charter as a means of furthering the Tribe's economic development plans. In the absence of that kind of showing, the Pueblo in Norvell appeared to be acting more as a landowner than a sovereign with respect to the territory of the residential tract. Accordingly, the State taxes were not likely to be viewed as infringements on Tribal sovereignty. Moreover, the inequity of denying the State revenue sources to finance services for this development would have convinced the court to permit State taxation.

A very different application of the doctrines enunciated in Norvell may therefore be expected where a tribe has an ongoing interest in non-Indian activity or property on the reservation, as where the tribe is taxing the very same matters, the tribe has a major financial interest in the venture,[151] the venture is integrally connected with tribal economic development projects, and/or the tribe is providing services and governmental support for the activity or property. Of course it is not easy to predict just how much tribal involvement is sufficient to preclude state jurisdiction. It may be that the mere existence of a tribal tax will suffice, on the theory that an infringement of tribal sovereignty always exists where state and tribe attempt to derive revenue from the same source. Interestingly, none of the recent cases upholding state power to tax or regulate non-Indians on reservations has involved a situation where the tribe was attempting to do the same. But where overlapping tribal and state regulations do not entail conflicting directions to individuals (as with subdivision regulation), or conflicting policies about public health and welfare (as with different liquor licensing laws), the courts may allow both to stand. And taxation of income, property, or gross receipts, standing alone, may fall into neither of these categories. It is possible that such taxes may have a regulatory function (e.g., to encourage or discourage some activity) or be set at different levels in order to support different levels of public services or to effect different schemes of redistribution of income. For the tribe to rely on either of these rationales to preempt the state, however, it might have to be doing more than simply collecting tax revenues.

An example of a situation which would present a compelling case for tribal preemption of state taxing power is a proposed "new town" for the Navajo Reservation to house Navajo and Anglo employees of contemplated coal gasification plants in the eastern part of the Reservation. The plans as presented in a consultant's report[152] suggest joint participation by the Navajo Nation and gasification companies in creating a non-profit development corporation to lease the land for the town, prepare the physical and social plan, obtain long-term financing for construction, promote retail and service uses in the new town, etc. When the property has been developed and transferred to individuals for residential, business, and industrial use, a local governmental body accountable to the Navajo Tribal Council would set policy and provide public services other than

education. The ultimate goals of this activity would be enhancement of life-style alternatives on the Reservation through creation of a uniquely Navajo urban environment, as well as an increase in Tribal capacity to benefit economically from extraction of its precious resources.[153] Given the connection between revenue-raising and Tribal plans for management of non-Indians' activities on the Reservation, a court might be inclined to prohibit state intervention in Tribal fiscal plans as an infringement on Tribal sovereignty. What makes the case particularly appealing is the Tribal provision of public services.

Doctrinally, the preemptive impact of Navajo Tribal taxes would seem to depend on what the Tribe does in addition to taxing. Practically, it may also depend on how long the Tribe waits to institute a taxing scheme. Since state taxes on non-Indians are probably permissible in the absence of a Tribal taxing scheme,[154] it may be more difficult for courts to disrupt state expectations or to invalidate a tax that has been permissible for years. Accordingly, the Tribe ought to resolve doubts about its taxing power in favor of attempting to invoke it, since delay in doing so may destroy its preemptive force.

Finally, the prospects for Navajo taxation preempting state taxation should be evaluated in light of the dynamic of tribal sovereignty suggested in this Bulletin. It is quite possible that even under the propitious circumstances of the new town, Navajo taxing power will not be found preemptive, because otherwise the Tribe would be placed in a powerful and independent governing position. The seeming permanence and self-sustaining nature of such a "new town" government would jar too severely with the prevailing assumptions about tribal government.

## CONCLUSION

Navajo taxing power over non-Indians seems to have a firm basis in current judicial doctrine, as does state taxing power. Furthermore, there are few direct federal restraints on exercise of such Tribal power, and little likelihood that state taxation will preempt it. Indeed, under certain circumstances the Tribe may preempt the state with its taxes. The legal framework is dynamic, however, and may change as the Navajo Tribe departs from its original weak governmental form. Federal restraints may be increased through the mechanism of the Indian Civil Rights Act, especially in the direction of homogenizing Tribal government with state and local counterparts. Freedom from state taxation may be available only if the Tribe takes on functions traditionally performed by the state.

Significantly, both of these developments propel the Tribe in the direction of becoming a state itself, some subordinate entity within a state, or perhaps a Commonwealth like Puerto Rico. To the extent that the courts perceive these consequences with fear or concern, the judicial tendency may be to deny Tribal taxing power over non-Indians altogether. The result will depend largely on what the Tribe itself does with respect to conceiving and implementing its power to tax. The ultimate lesson, however, is that jurisdictional doctrine cannot be understood apart from the political-institutional framework within which it is applied.

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## FOOTNOTES

[Ed. Note] The form of citation for most of the legal references in the following footnotes may be found in A Uniform System of Citation published by the Harvard Law Review Association, Cambridge, Massachusetts (1967). Explanations of some of the abbreviations follow:

220 The Nation 359 = volume 220, page 359 of the periodical The Nation

*Id.* = refers to the sources referenced immediately preceding this footnote

*infra* = refers to source referenced subsequently in this list

*supra* = refers to source referenced previously in this list

D. = District Court (federal)

259 F.2d 553 = Federal Reporter, Second Series, volume 259, page 553

298 F. Supp. 26 = Federal Supplement, volume 298, page 26

H.R. 11748, 93rd Cong., 1st Sess. = House of Representatives Bill Number 11748, 93rd Congress, First Session

2 N.T.C. § 101 = Title 2, section 101 of the Navajo Tribal Code

525 P.2d 72 = Pacific Reporter, Second Series, volume 525, page 72

Pub. L = Public Law

95 S. Ct. 710 = Supreme Court Reporter, volume 95, page 710

25 U.S.C. § 476 = Title 25, section 476, of the United States Code

Worcester v. Georgia, 31 U.S. 515 (1832) = the case of Worcester versus Georgia, volume 31, United States Reports, page 515

1. Shepardson, "Navajo Ways in Government," Am. Anth. Assoc., Memoir 96, Vol. 65, No. 3, Part 2, p. 117 (1963) [hereinafter cited as Shepardson].

2. Robbins, "The Impact of Power Developments on the Navajo Nation," Lake Powell Research Project Bulletin No. 7 (1975).

3. Reno, "High, Dry & Penniless," 220 The Nation 359, 361 (1975). According to Professor Reno, coal is now worth three to four times as much as when contracts for extraction of much of Navajo coal were signed, "but the Navajos still receive 15¢ to 25¢ a ton...whereas Montana receives a royalty of 40¢ or more for coal taken from state lands and the Crow Indians receive a sliding scale with a 40¢-a-ton minimum."

4. "Gasification Plants Face Sales Tax," Farmington [New Mexico] Daily Times, p. 8 (Feb. 17, 1975).

5. Navajo Nation, The Navajo Ten-Year Plan (1972). According to the Plan, $3.8 billion is needed over the next ten years if Navajos are to enjoy a standard of living at the national average. *See* also The Navajo Nation, Overall Economic Development Program (1974).

6. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

7. This is an oversimplification of legal principles respecting state jurisdiction over defendants. *See* Hanson v. Denckla, 377 U.S. 235 (1958). Generally speaking, there are no limits on state subject matter jurisdiction except those expressly imposed by federal law or those derived from Indian sovereignty. *See* Bator, Mishkin, Shapiro & Wechsler, Hart and Wechsler's The Federal Courts and the Federal System, 419-31 (1973).

8. *See, e.g.*, "State of South Dakota, Task Force on Indian-State Government Relations," Staff Report on Taxation,

(1973), describing tax collection agreements between the State and the Pine Ridge Tribe, whereby the State agreed to collect and return a 4 percent sales tax which the Tribe had levied on Indian purchases on the Reservation. The state collects a 4 percent tax on non-Indian purchases on the Reservation.

9. Secretary of the Interior, Rules for the Tribal Council, July 26, 1938, Chapter 1, reprinted in Young, R., Navajo Yearbook 407 (1961) [hereinafter cited as Rules for the Tribal Council]; 2 N.T.C. (Navajo Tribal Code) § 101.

10. 2 N.T.C. §§ 361-802.

11. 2 N.T.C. §§ 341-349.

12. Rules for the Tribal Council, Chapter III; 2 N.T. §§ 4, 281-289.

13. 7 N.T.C. §§ 101, 131-173. For a description of the Navajo judiciary, see Davis, "Court Reform in the Navajo Nation," 43 J. Am. Jud. Soc. (1959); Judicial Branch, Navajo Nation, Annual Report (1973).

14. Williams, Navajo Political Process 24 (Smithsonian Contributions to Anthropology, Vol. 9, 1971) [hereinafter cited as Williams]; Shepardson at 3.

15. Williams at 6-7.

16. *Id.* at 18-26.

17. Rules for the Tribal Council, *supra* note 9.

18. Young, Navajo Yearbook 377 (1961). *See* 25 U.S.C. § 476.

19. Young, Navajo Yearbook 379-82 (1961).

20. 25 U.S.C. § 636.

21. Williams 26.

22. *See* text accompanying notes 67-73, *infra*.

23. Davis, Court Reform in the Navajo Nation, *supra* note 13.

24. Tribal Council Res. CO-69-58, Oct. 16, 1958.

25. There are approximately 135,000 on-Reservation Navajos.

26. The Tribal Council is assisted by personnel of the Navajo Tribal Legal Office, consisting of two or three state-licensed lawyers. 2 N.T.C. §§ 951-953, particularly § 953 (10). Although there is no express provision in the Navajo Tribal Code for law clerks for Navajo judges, the judges may by rule of court provide for the creation of such positions. 7 N.T.C. § 254. Currently there are law school graduates working for the Court of Appeals. Professionals who can provide probation and parole services are sorely needed. Judicial Branch, Navajo Nation, Annual Report 17 (1974).

27. *See* Cortner, H., "Development, Environment, Indians, and the Southwest Power Controversy," 4 Alternatives 14, 19 (1974).

28. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Ex Parte Crow Dog, 109 U.S. 556 (1883).

29. *E.g.*, Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959); Barta v. Oglala Sioux Tribe of Pine Ridge Reservation, 259 F.2d 553 (8th Cir. 1958).

30. *See* text accompanying notes 140-143, *infra*.

31. Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation, 231 F.2d 89, 99 (8th Cir. 1956).

32. Treaty with the Navajo Indians, ratified July 25, 1868, Art. II. See Dodge v. Nakai, 298 F.Supp. 26 (D.Ariz. 1969).

33. 25 U.S.C. § 476; *see* Barta v. Oglala Sioux Tribe of Pine Ridge Reservation, 259 F.2d 553 (8th Cir. 1958).

34. 77 Inter. Dec. 113 (1970). The use of authority in this opinion is thoroughly criticized in Baldassin & McDermott, "Jurisdiction over Non-Indians: An Opinion of the 'Opinion,'" I Am. Ind. L. Rev. 13 (1973).

35. The analogy between Anglos working on an Indian reservation and Americans working abroad, although appealing, is not fully warranted. Americans do not expect to be able to share the values of local decision-makers when they are abroad. An Anglo on a reservation, however, may have different expectations because he or she is still in his or her own home country.

36. Contrary to this theory, however, the code adopted by the Department

of the Interior for Courts of Indian Offenses authorizes criminal jurisdiction over Indians who are not members of the tribe in whose court they are tried. 25 C.F.R. § 11.2. At the same time, it excludes even non-Indians who have consented to jurisdiction, although civil jurisdiction is allowed over non-Indians in such cases. 25 C.F.R. § 11.22 This characterization of Indian tribes was rejected by the Supreme Court quite recently in United States v. Mazuri, 95 S. Ct. 710, 718 (1975). Recently several tribes have attempted to acquire criminal jurisdiction over non-Indians by posting notices at the boundaries of the reservation that entry will constitute consent to criminal jurisdiction. *See* discussion in Vollman, "Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict," 22 U. Kan. L. Rev. 387, 394 (1974) [hereinafter cited as Vollman]; Justice and the American Indian, Vol. 4, at 50-56 (1974).

37. Barta v. Oglala Sioux Tribe of Pine Ridge Reservation, 259 F.2d 553 (8th Cir.. 1958); Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation, 231 F.2d 89 (8th Cir. 1956). See also 55 I.D. 14, 45 (1934), in which the Associate Solicitor affirmed the power of the Tribe to tax non-members who accept privileges of trade and residence. This power was written into the Oglala Sioux Constitution and approved by the Secretary of the Interior. Price, Law and the American Indian 717 (1973).

38. Ex Parte Crow Dog, 109 U.S. 556 (1883).

39. Adoption into the Navajo Tribe, for example, is not possible. Membership is solely by birth. 1 N.T.C. §§ 101, 102.

40. *See* cases cited at note 29 *supra*.

41. Marston v. Lewis, 410 U.S. 679 (1973); Burns v. Fortson, 410 U.S. 686 (1973).

42. U.S. Const., Amend. XIV; Gunther & Dowling, Constitutional Law: Cases and Materials 796-840 (1970).

43. *See* I Ind. L. Rptr. 51 (1974).

44. Vollman at 294.

45. Taylor, The States & Their Indian Citizens 142-43, 160-67 (1972). *See* also the Indian Self-Determination Act of 1974, 88 Stat. 2203.

46. 95 S. Ct. 710 (1975).

47. *Id.* at 718.

48. For a criticism of the case law holding crimes by non-Indians against non-Indians to be outside federal or tribal jurisdiction, *see* Taylor, "Development of Tripartite Jurisdiction in Indian Country," 2 Solicitor's Review 1, 70-71 (1973); Canby, "Civil Jurisdiction & the Indian Reservation," 1973 Utah L. Rev. 206, 208-10; Vollman at 395. Recent lower court authority suggests that the commentators are having some impact. See Oliphant v. Schlie, Civ. No. 511-73C2 (W.D. Wash. 1974). app. pending, upholding tribal jurisdiction over non-Indian charged with resisting arrest by tribal police officer and assaulting the officer; Ortiz-Barraza v. United States, 512 F.2d 1176 (9th Cir. 1975), upholding the power of tribal police to stop and search non-Indians suspected of violating state or federal law, for purposes of excluding them under applicable tribal law.

49. United States v. Mazurie, 95 S. Ct. 710, 717 (1975).

50. 7 N.T.C. § 133 (a) and (b).

51. Proposed Resolution of the Navajo Tribal Council Amending Tribal Council Resolution Number CJA 5-59 to Include Civil and Criminal Jurisdiction over Non-Indians (copy on file). From the Tribe's point of view, it was probably too large an initial step into the realm of jurisdiction over non-Indians. It might have produced a test case involving very little Tribal interest.

52. Minutes of the Navajo Tribal Council, Feb. 3, 1969, pp. 129-140. The Resolution as eventually adopted required that non-Indians found in violation of Tribal hunting and fishing laws be delivered to federal authorities. 23 N.T.C. § 109.

53. *E.g.*, Quechan Tribe of Indians v. Rowe, 350 F. Supp. 106 (S.D. Calif. 1972); see Comment, Indian Regulation of Hunting and Fishing, 1974 Wisc. L. Rev. 499.

54. Opinion dated June 3, 1974, reported in II Ind. L. Rptr. 20 (1974).

55. Tribal Council Resolutions CAU-46-73 and CJN-38-75 (June 18, 1975).

56. Tribal Council Resolution CJN-38-75 (June 18, 1975) Exhibit "D" (Plan of Operation for the Establishment of a "Wildlife Enforcement Section" within the Fish and Wildlife Department).

57. Navajo Tribe v. Orlando Helicopter Airways, Inc. & Indian Airways, Inc., Nav. Ct. App. (Jan. 12, 1972). *See* Note, "Indian Tribal Courts--Jurisdiction--Navajo Court Jurisdiction over Indian Defendants," 18 St. Louis U. L. J. 461 (1974).

58. Resolution, Navajo Tribal Council, Aug. 10, 1972 (copy on file).

59. Minutes, Navajo Tribal Council, concerning Tribal Council Resolution CN-100-69 (Nov. 21, 1969) and Tribal Council Resolution CAU 72-72 (August 10, 1972).

60. Navajo Tribal Council Resolution CJA-6-74 (Jan. 16, 1974). The Tribe had before it a study prepared by Professor Gerald Boyle of the Department of Economics, University of New Mexico, concerning appropriate sources of tax revenue on the Reservation. Boyle, Revenue Alternatives for the Navajo Nation (University of New Mexico Working Papers in Economics 1973).

61. *See* "Gasification Plants Face Sales Tax," Farmington [New Mexico] Daily Times, p. 8 (Feb. 17, 1975).

62. Minutes of Navajo Tribal Council, January 16, 1974, at 41-64.

63. Boyle, Revenue Alternatives for the Navajo Nation 13-15 (University of New Mexico Working Papers in Economics 1973).

64. *Id.* at 17-19.

65. *See* Robbins, *supra* note 2, at 4, 15-17.

66. 95 S. Ct. at 718 n. 12.

67. *See* Price, Law and the American Indian 717-719 (1973).

68. 25 U.S.C. § 636.

69. Rules for the Tribal Council, *supra* note 8.

70. *E.g.*, Organized Village of Kake v. Egan, 369 U.S. 60, 63 (1962); Norvell v. Sangre de Cristo Development Co., 372 F. Supp. 348, 354-55 (D.N.M. 1974), rev'd on other grounds, Nos. 74-1365 to -1367, 10th Cir., July 10, 1975.

71. 7 N.T.C. § 1(e); 17 N.T.C. § 1.

72. Navajo Tribe of Indians v. Hoylan, Nav. Ct. App. (Aug. 22, 1973).

73. 25 U.S.C. § 637.

74. 25 U.S.C. §§ 1301-41.

75. Although early commentators on the Act doubted its applicability to non-Indians, judicial decisions have found it applicable. Compare Note, "The Indian Bill of Rights and the Constitutional Status of Tribal Governments," 82 Harv. L. Rev. 1343, 1364 (1969) with Dodge v. Nakai, 298 F. Supp. 17, 26 (D.Ariz. 1968); Oliphant v. Schlie, Civ. No. 511-73C2 (W.D. Wash. April 5, 1974), app. pending.

76. The legislative history is described from competing points of view in Ziontz, "In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act," 20 S.Da. L. Rev. 1 (1975) and de Raismes, "The Indian Civil Rights Act of 1968 and the Pursuit of Responsible Tribal Self-Government," 20 S.Da. L. Rev. 59 (1975). *See* cases cited at note 29, *supra*.

77. Comment, "The Indian Bill of Rights and the Constitutional Status of Tribal Governments," 82 Harv. L. Rev. 1343 (1969).

78. In 1956, the Advisory Committee set the annual rent for Navajo business leases at $10.00 per year for the first ten years of operations, significantly lower than the rental fee charged to non-Navajos. Advisory Committee Resolution ACJ-48-56 (1956), described in Gilbreath, Red Capitalism 39 (1973).

79. Minutes of Navajo Tribal Council, January 16, 1974, at 46.

80. Williams, *supra* note 14, at 60-63; Cortner, *supra* note 27, at 19.

81. *See, e.g.*, the statement of this principle in Reed v. Reed, 404 U.S. 71 (1971).

82. *E.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972).

83. *E.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (race); Graham v.

Richardson, 403 U.S. 365 (1971) (alienage).

84. Korematsu v. United States, 323 U.S. 214 (1944).

85. Kahn v. Shevin, 416 U.S. 351 (1974).

86. Frontiero v. Richardson, 411 U.S. 677 (1973) (opinion of Mr. Justice Brennan).

87. 417 U.S. 535 (1974).

88. Kahn v. Shevin, 416 U.S. 351 (1974).

89. The issue was avoided in DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169, *vacated as moot*, 416 U.S. 312 (1974).

90. *See* articles cited in de Raismes, "The Indian Civil Rights Act of 1968 and the Pursuit of Responsible Tribal Self-Government," 20 S.Da. L. Rev. 59 n. 2 (1975).

91. *See, e.g.*, the Crow Creek Tribe's requirement that certain Tribal Council candidates be at least one-half blood, upheld in Daly v. United States, 483 F.2d 700, 705 (8th Cir. 1973).

92. There are some early Supreme Court decisions upholding federal distinctions among enrolled tribal members on the basis of blood quantum. *E.g.*, United States v. Waller, 243 U.S. 452 (1917). None, however, squarely faced the equal protection issue. For a discussion of these cases, *see* Viera, "Racial Imbalance, Black Separatism, & Permissible Classification by Race," 67 Mich. L. Rev. 1553, 1577-1581 (1969).

93. Ziontz, "In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act," 20 S.Da. L. Rev. 1, 47-78 (1975). Imagine, for example, the impact on reservations of a holding that criminal cases with potential jail sentences must be heard by attorney judges. Such a requirement exists as a matter of due process in California. Gordon v. Justice Court for Yuba Judicial District of Sutter County, 115 Cal. Rptr. 632, 12 Cal. 3d 323, 525 P. 2d 72 (1974).

94. de Raismes, *supra* note 76, at 82-85.

95. The Navajo Nation, Overall Economic Development Program 73-80 (1974).

96. Ziontz, *supra* note 76, at 56-57 and de Raismes, *supra* note 76 at 81-82, agree on this point. The Supreme Court's approving reference to the Indian Civil Rights Act in United States v. Mazurie, 95 S. Ct. 710, 718 n. 12 (1975), which upheld tribal jurisdiction over non-Indians, reinforces this opinion.

97. *See* Memo, Assoc. Sec'y, M-36836, Jurisdiction of Indian Tribes to Prohibit Aerial Crop Spraying within the Confines of a Reservation, 38 I.D. 229 (April 19, 1971), advising that Fort Hall Business Council Resolution 56-70, prohibiting all aerial spraying, does not violate due process under 25 U.S.C. § 1302 (8) as to non-Indian lessees who had no opportunity to present their view on the measure prior to its enactment. A similar claim was rejected in United States v. Mazurie, 95 S. Ct. 710, 718 n. 12 (1975).

98. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972).

99. 1 N.T.C. § 102.

100. *See* Sugarman v. Dougall, 413 U.S. 634 (1973) (state civil service); Hampton v. Mow Sun Wong, 500 F.2d 1031 (9th Cir. 1974), app. pending (federal civil service); People v. McZeal, No. A305140, Cal. Super. Ct. (jury service); Travers, "The Constitutional Status of State and Federal Discrimination Against Resident Aliens," 16 Harv. Int. L.J. 113 (1975). While the Tribe might demand that major employers who bring large numbers of Anglo employees onto the Reservation exact promises from the employees that they will sit on juries for one another, even a Navajo might demand Anglos on his jury under current definitions of the right to a representative jury. Peters v. Kiff, 407 U.S. 493 (1972).

101. 25 U.S.C. § 415(a). Ninety-nine-year leases of Navajo land were first authorized in 1960. Pub. L 86-505.

102. 25 U.S.C. §§ 1321-1326.

103. *See* Reynolds v. United States, 98 U.S. 145 (1878), upholding anti-polygamy laws in the face of challenge under the Free Exercise Clause; Shepardson, *supra* note 1 at 113, where she notes "the futile efforts of the Mormons to establish an independent State of Deseret..."

104. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972), striking down state compulsory school laws as applied to the Amish, whose religion forbad formal education.

105. *See* text accompanying notes 43-49, *supra*.

106. 25 U.S.C. § 415. For a thorough description of the leasing process, see Chambers & Price, "Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands," 26 Stan. L. Rev. 1061 (1974).

107. 25. U.S.C. § 415(a).

108. *See* Boyle, *supra* note 60, at 7-8.

109. U.S. Const. Art. I, § 10.

110. Dartmouth College v. Woodward, 4 Wheat. 518 (1819); New Jersey v. Wilson, 7 Cranch. 164 (1812).

111. "Tax Exemptions and the Contract Clause," 173 A.L.R. 15, 31 (1948).

112. *Id.* Thus, it might be possible to argue that the Tribal Council does not have sufficient authorization from the Secretary to contract away Tribal taxing power.

113. Halderman Dennison v. Tucson Gas & Electric Company, Nav. Ct. Apps. (Dec. 23, 1974).

114. *See, e.g.*, Thebo v. Choctaw Tribe, 66 F. 372 (8th Cir. 1895); cases cited in Ziontz, *supra* note 76, at 32 n. 124 (immunity in federal court). This immunity can be lifted by Congress. Hamilton v. Nakai, 453 F.2d 152 (9th Cir. 1971).

115. *See* Chambers & Price, note 106, *supra*; Chambers, "Judicial Enforcement of the Federal Trust Responsibility to Indians," 27 Stan. L. Rev. 1213, 1232-34 (1975). The Secretary might take the position that a waiver of taxing power would increase the return measured in terms of rentals and royalties.

116. *See* text accompanying notes 139-152, *infra*.

117. *See* text accompanying note 129, *infra*. These fears already exist with respect to Indians, as courts have held Indians entitled to participate in state governmental benefits. See Goldberg, "Public Law 280: The Limits of State Jurisdiction over Reservation Indians" (1975) [hereinafter cited as Goldberg].

118. Goldberg at 535, 563-67.

119. The only relevant regulations concern application of state zoning laws to leased lands. 25 C.F.R. § 1.4. They were adopted prior to the legislation incorporating this directive. 25 U.S.C. § 415(a). For a suggestion that such regulations be promulgated, *see* Note, "Need for a Federal Policy in Indian Economic Development," 2 N. Mex. L. Rev. 71, 79-80 (1972).

120. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588-90 (now codified as amended in scattered sections of 18 and 28 U.S.C.). For an analysis of the Act, see Goldberg.

121. 28 U.S.C. § 1360 (b); 18 U.S.C. § 1162(b).

122. 25 U.S.C. §§ 1321-26.

123. Arizona has improperly asserted PL-280 jurisdiction over air and water pollution, but the assumption has never been challenged. Ariz. Rev. Stat. Ann. §§ 36-1801-1865 (Supp. 1973). Utah's assumption is found in Utah Code Ann. §§ 63-36-9 to -21 (Supp. 1973).

124. Under the Act, the Navajos in Arizona, New Mexico, or Utah could accept the Act for their territory independent of the rest.

125. Utah & Northern Rwy. v. Fisher, 116 U.S. 28 (1885); Williams v. Lee, 358 U.S. 217 (1959).

126. Kennerly v. District Court, 400 U.S. 423 (1971); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973).

127. The Mescalero Apache Tribe, which has imposed its own gross receipts tax, is protesting such a tax in the State of New Mexico. Personal communication with George Fettinger, Esq., counsel for the Mescalero Tribe.

128. 25 U.S.C. § 398.

129. H.R. 11748, 93rd Cong., 1st Sess. (1973).

130. Letter from Representative Manuel Lujan, Jr., to Governors of New Mexico Indian Pueblos, March 14, 1974.

131. Reno, "High, Dry & Penniless," 220 The Nation, 359, 362 (1975). New Mexico already imposes personal property, severance, and sales taxes on the Four Corners power plant complex, located on Indian land. These taxes have never been challenged in court. "Gasification Plants Face Sales Tax," Farmington [New Mexico] Daily Times, p. 8, February 17, 1975.

132. *See* Aqua Caliente Band v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972) (upholding leasehold tax in a PL-280 state); Taylor, The States & Their Indian Citizens 153 n. 17 (1972) states that "The non-Indian population might not support continued trust status for a wealthy Indian group over an extended period of time. However, various state governments are experimenting with a possessory interest tax which, if held legal by the courts, may erode the tax protection afforded by trust and therefore take the pressure off eliminating trust status, as such, even for a wealthy Indian group."

133. *E.g.*, Draper v. United States, 164 U.S. 240 (1896).

134. *See* note 48, *supra*.

135. *See* Oliphant v. Schlie, Civ. No. 511-73C2 (W.D. Wash. April 5, 1974), *app. pending*.

136. See "The Impact of Public Law 280 upon the Administration of Justice on Indian Reservations," Vol. 1 Justice and the American Indian (National American Indian Court Judges Association 1973).

137. *See* United States v. Mazurie, 95 S. Ct. 710 (1975).

138. *Id.*

139. *Id.* at 718.

140. By analogy, because the Supreme Court has been unwilling to review lower court decisions ruling against challenges to state assumptions of jurisdiction under PL-280, courts have begun upholding state jurisdiction in order to avoid defeating expectations of those who have relied on it. Tonasket v. State, 525 P.2d 744, 753 (Wash. 1974).

141. *See* text accompanying note 128.

142. Williams v. Lee, 358 U.S. 217, 220 (1959).

143. United States v. Mazurie, 95 S. Ct. 710, 718 (1975).

144. Cases involving state taxation of non-Indians include Utah & Northern Rwy. v. Fisher, 116 U.S. 28 (1885); Kahn v. Arizona State Tax Comm'n, 490 P.2d 846 (Ariz. Ct. App. 1971); Oklahoma Tax Comm'n v. Texas Company, 336 U.S. 342 (1949); Thomas v. Gay, 169 U.S. 264 (1898).

145. This reasoning, of course, is facile. *See* note 48, *supra* and accompanying text.

146. 372 F. Supp. 348 (D.N.M. 1974), rev'd on other grds, Nos. 74-1365 to -1367, 10th Cir., July 10, 1975.

147. *Id.* at 358.

148. The decision of the Supreme Court in United States v. Mazurie, 95 S. Ct. 710 (1975) came down after the District Court opinion in Norvell.

149. The Tesuque Pueblo was not actually a party. The United States intervened on their behalf as did the Mescalero Apache Tribe.

150. 480 P.2d 654 (Ariz. 1971).

151. The Tribe might, for example, lease to a corporation incorporated under Tribal law, with itself or some Tribal enterprise as a minor but not insignificant shareholder. The Tribal shares might be in exchange for a lower lease price or a contribution of minerals to the project undertaken on leased land. A state tax on the corporation itself (as opposed to a tax on dividends paid the non-Indian shareholders) would then be a direct and impermissible burden on the Tribe, even if a fraction of the corporate tax were assessed corresponding to the fraction of non-Indian shareholders.

152. Development Research Associates, Housing and Community Services for Coal Gasification Complexes Proposed on the Navajo Reservation (April, 1974).

153. *Id.* at 11-2 and 11-3.

154. *See* note 141, *supra*.

## GLOSSARY

| | |
|---|---|
| alienage | the state or condition of being someone who is not a citizen of the country in which one is living |
| appellate court | a court that sits to review the decisions of a trial court; it usually considers only the written record of the proceedings before the trial court, and determines whether the trial court acted contrary to the law or abused its discretion |
| blood quantum | a fraction representing the extent of an individual's Indian ancestry, often used as a basis for allocating property and benefits of Indian tribes |
| codified | related statutes which have been enacted piecemeal over a period of time are codified when they are readopted by the legislature in a systematic uniform array. |
| decisional versus statutory law | the former consists of opinions written by courts or by administrative agencies acting on individual cases; the latter consists of enactments by legislative bodies such as Congress |
| due process of law | what is required under the Fifth and Fourteenth Amendments of the United States Constitution before the states or federal government may deprive any person of life, liberty, or property; the term has no fixed meaning, but reflects fundamental ideas of fair treatment of individuals by the government |
| eminent domain | the right of the sovereign to take private property for public use, regardless of the owner's consent; the Fifth Amendment to the United States Constitution requires that just compensation be made whenever private property is taken for public use by the federal government |
| Indian Civil Rights Act of 1968 | federal legislation which imposed limitations on the actions of tribal governments, in terms comparable to several provisions of the Bill of Rights |
| Indian Reorganization Act of 1934 | federal legislation designed to end the dissipation of tribal |

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|---|---|
| | lands through allotment, to provide loan funds for tribal economic development projects, and to strengthen tribal governments through the sponsorship of tribal constitutions |
| Navajo-Hopi Rehabilitation Act of 1950 | federal legislation designed to improve the standard of living of the Navajo and Hopi peoples by authorizing capital expenditures for irrigation projects, off-reservation settlement, public services, and economic enterprises, by authorizing creation of revolving loan funds, and by strengthening the respective tribal governments |
| non-normative | departing from the generally accepted values and standards of proper behavior |
| quid pro quo | something for something; an exchange |
| plurality opinion | a judicial opinion of an appellate court which is agreed to by less than a majority of the court, but which is concurred in for the result only so that the court can dispose of the matter in accordance with the majority wishes of the court with respect to result if not with respect to reasoning; such opinion is of less value as precedent than an opinion whose reasoning is concurred in by the majority of the court |
| police power | the power incident to state and local governments to impose those restrictions upon private rights which are reasonably related to the promotion and maintenance of the health, safety, morals, and general welfare of the public |
| Public Law 280 | federal legislation enacted in 1953, which required some states and enabled others to assume civil and criminal jurisdiction over reservation Indians with exceptions for certain subjects; it was amended in 1968 to prevent future assumptions of jurisdiction without prior consent of the affected Indians |
| sovereign immunity | a legal doctrine precluding the institution of a lawsuit against the government without the sovereign's consent when the sovereign is engaged in governmental functions |

| | |
|---|---|
| stock reduction | a federal policy designed to prevent overgrazing of Indian lands by forcible purchase of livestock |
| tax lien foreclosure | the cutting off or termination of a right to land for the nonpayment of taxes |
| Treaty of 1868 | treaty between the Navajo Nation and the United States, which resulted in creation of a Reservation for the Navajos; it ended years of warfare and followed a period of internment of the Navajo people at Fort Sumner |
| trust status | the condition of much Indian land, in which legal title is held by the United States for the benefit either of a Tribe or an individual Indian |
| vacated as moot | appellate court's determination that a trial court decision will have no further force as law because the dispute between the parties ended before the litigation was finished |

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## THE AUTHOR

Carole Goldberg is an Acting Professor of Law at the School of Law of the University of California at Los Angeles. She is author of the article "Public Law 280: The Limits of State Jurisdiction over Reservation Indians" (22 UCLA Law Review 535, 1975).

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