State Property Taxation of Tribal Fee Lands Located Within Reservation Boundaries: Reconsidering County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation and Leech Lake Band of Chippewa Indians v. Cass County

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STATE PROPERTY TAXATION OF TRIBAL FEE LANDS LOCATED WITHIN RESERVATION BOUNDARIES: RECONSIDERING COUNTY OF YAKIMA V. CONFEDERATED TRIBES & BANDS OF THE YAKIMA INDIAN NATION AND LEECH LAKE BAND OF CHIPPEWA INDIANS V. CASS COUNTY

Scott A. Taylor*

Although once the owners of the North American continent, native peoples and the governments that represent them now own only a small percentage of the land within the current United States. Many tribes are interested in reacquiring lands that once belonged to them. Tribes, as governments and as legal entities, have the power to acquire lands through purchase. When tribes

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1. Anglo-American law has long acknowledged native ownership of the land notwithstanding the view that the discovery doctrine vested title of North American lands in the crown of the European country whose subjects were the first Europeans to lay claim to the lands. See, e.g., John P. Lowndes, When History Outweighs Law: Extinguishment of Abenaki Aboriginal Title, 42 BUFF. L. REV. 77, 96 (1994) (discussing examples of judicial misapplication of the discovery doctrine). The European discovery doctrine merely gave each European nation, as against other European nations, the exclusive right to acquire native title through purchase or conquest. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 543-44 (1832). As Justice Marshall explained in Worcester, the discovery doctrine gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right of purchase, but did not found that right on a denial of the right of the possessor to sell.

Id. at 544.


4. The primary federal law recognizing tribes as legal entities (that is, governmental legal entities) is section 16 of the Indian Reorganization Act, which provides that any tribe "shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws . . ." Indian Reorganization Act, § 16, ch. 576, 48 Stat. 984, 987 (1934) (current version at 25 U.S.C. § 476 (1994). No specific federal statute specifically creates or recognizes Indian tribes as legal entities. Instead, tribes seem to have the status of pre-existing governments that
buy lands from private owners, the tax status of the lands becomes an immediate issue. All of the fifty states levy an annual ad valorem real property tax. States, constantly vigilant in protecting their tax revenue, readily attempt to tax lands newly acquired by tribes. Tribes, understandably, are interested in minimizing the cost of purchasing and holding lands. Moreover, tribes view state taxation of their lands as an affront to tribal sovereignty. As a result, conflicts over state taxation inevitably arise.

This article takes the position that tribally owned fee lands located within Indian country are exempt from state real property taxes because Congress has passed no law authorizing states to impose such taxes. As a result, the general rule that states have no power over Indian tribes except as granted by Congress applies and bars such taxation. The United States Supreme Court, in County of Yakima v. Yakima Indian Nation, erroneously concluded that the General Allotment Act of 1887, as amended by the Burke Act of 1906, authorized state taxation of all fee lands whose ownership status derived from the General Allotment Act. The Supreme Court, in Leech Lake Band of Chippewa Indians v. Cass County, is currently considering an extension of the Yakima case to all tribally owned fee lands whose ownership status derives from specific treaties or from other federal legislation not explicitly granting congressional authorization to states to impose real property taxes.

To demonstrate that tribally owned fee land located within Indian country is exempt from state property taxation, this author first discusses the current rules governing state taxation of Indian lands and then turns to a historical overview. The discussion then looks at the definition of Indian country and the problems that the often times imprecise definition creates. Within this context, the author discusses the leading cases dealing with state taxation of Indian lands and concludes that the Supreme Court should reconsider and correct its decision in the Yakima case and should decide the pending Leech Lake case in favor of the tribe.

have the rights of any government, which, presumably, would include the right to purchase and own property. Congress has provided that tribes cannot sell their lands without congressional approval. See 25 U.S.C. § 177 (1994) (enacted in 1790 at the request of then President George Washington and Secretary of War Henry Knox, both of whom were owners of large amounts of western lands and were desirous of protecting their investments by limiting the ability of tribes to sell their lands directly to other land developers; see discussion infra notes 267-68).


10. 103 F.3d 820 (8th Cir. 1997), cert. granted, 118 S. Ct. 361 (1997).
I. Summary of Current Legal Rules Governing State Taxation of Indian Lands

As a general rule, states have no power to tax tribes or members of tribes for activities within Indian country. This immunity from state taxation extends to state ad valorem real property taxes imposed on tribal lands or lands owned by members of the tribe. Congress, however, can authorize state taxation of these lands by enactment of explicit legislation. An example of such congressional authorization is section 6 of the General Allotment Act of 1887, which provided that previously tax-exempt Indian-owned lands would become subject to state taxation after the federal government issued a fee patent to the individual Indian owner.

In contrast, tribes and members of tribes enjoy no immunity from state taxation of their lands that are located outside Indian country unless Congress specifically prohibits state taxation. This means that the mere ownership of land by an Indian or a tribe provides no immunity from state taxation of the land. An example of congressional prohibition of state taxation involves certain lands held in trust.

12. See generally The New York Indians, 72 U.S. (5 Wall.) 761 (1866) (reaffirming immunity of tribal land from state property taxation); The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866) (finding lands allotted to individual Indians immune from state property taxation where members retained political membership in tribe, where lands remain restricted under a treaty, and where tribe remained in existence).
14. Act of Feb. 8, 1887, ch. 119, § 6, 24 Stat. 388, 390, as amended by the Burke Act, ch. 2348, 34 Stat. 182 (1906). Section 6 of the General Allotment Act gave states general civil and criminal jurisdiction over allotted lands. In 1905, the United States Supreme Court interpreted this language as extinguishing federal power over allotments at the time granted even though the period of restriction had not expired. See In re Heff, 197 U.S. 488 (1905). Congress passed the Burke Act in 1905 to reverse the Heff decision and to provide that state federal authority did not end and state jurisdiction did not commence until the restrictions on the allotted land were lifted. In the Burke Act, Congress specifically stated that at the end of the period of restriction any restrictions on state taxation would end. Burke Act, ch. 2348, 34 Stat. at 182.
15. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973) (imposing New Mexico's gross receipts tax on tribe that operated a ski resort on land leased from the federal government and located adjacent to the tribe's reservation); Salt River Pima-Maricopa Indian Community v. Yavapai County, 50 F.3d 739 (9th Cir. 1995) (upholding Arizona's imposition of its ad valorem real property tax on a cement production facility the tribe owned off its reservation).
16. See 25 U.S.C. § 465 (1994) (providing that lands acquired by the federal government and placed in trust for the benefit of a tribe or an individual Indian "shall be exempt from State and local taxation"). This federal bar on state and local taxation applies whether or not this trust land is located within Indian country.
in trust for a tribe or a member of tribe is exempt from state taxation even though the land is located outside of Indian country. 17

The taxation of non-Indian owned lands located within Indian country is less clear. For those lands acquired and traceable back to a fee patent issued under the General Allotment Act of 1887, state taxation is specifically permitted. 18 For other lands and interests in real property, state taxation seems to be permissible unless Congress prohibits it or if the state taxation would be an impermissible infringement of the tribe's right of self-government. 19

II. Historical Background

A. Treaty Period

Before the American Revolution, the British viewed the Indian tribes as politically separate entities that were largely self-governing. 20 Under the Articles of Confederation, the British view continued, 21 but the power of and responsibility for dealing with Indian tribes was not clearly allocated to the federal government or among the states. 22 The drafters of the Constitution attempted to remedy this confusion by making Indian affairs an exclusive federal concern. 23 In any case, the view of tribes as separate political entities was quite clear and well understood by state and federal governmental officials. 24

20. CHARLES C. ROYCE, INDIAN LAND CESSIONS IN THE UNITED STATES, EIGHTEENTH ANNUAL REPORT OF THE BUREAU OF AMERICAN ETHNOLOGY 549-61 (1899) (noting that British policy towards tribes as governments became explicit at the beginning of the 18th century).
23. Id. at 1147-64 (discussing the federalization of Indian affairs through the adoption and implementation of the Indian commerce clause.)
24. The negotiation and ratification of treaties would have made the political status of tribes quite clear. See PRUCHA, TREATIES, supra note 21, at 72 (noting that President Washington followed the same Senate ratification procedures for Indian treaties as for treaties with foreign countries).
The connection between political status and taxation was crystal clear to the Anglo-American colonists and remained clear after these "colonials" became citizens of the newly formed United States. To the new citizens of the United States, a political entity could impose taxes only on those individuals who were members of the political entity, on activities conducted within the entity's boundaries, or on lands located within the political boundaries. In the case of Indians, it was logical that self-governing tribes and their members would not be subject to state or federal taxation. This made sense because the tribal member owed political allegiance to the tribe and had no rights as a resident of a state or as a citizen of the United States.

The United States Constitution is silent about federal or state powers of taxation of Indian tribes and is also silent about their political status within the federal system. Nonetheless, the view that tribes were politically separate and therefore not subject to state or federal taxation was unquestionably clear at the time of the drafting of the Constitution. In apportioning members of the House of Representatives among the states based on population, the drafters provided that "Indians not taxed" would be excluded from the census. At the time, most of the states did not permit residents to vote unless they owned property and paid their state property taxes. Therefore, it made perfect sense that Indians who remained members of their tribes and who held property not subject to state taxation should be excluded from the census that allocated representatives.

Following the formation of the United States, federal Indian policy reflected the view that tribes were politically separate from the states and from the United States. The political separation from the United States, however, was not complete. The United States, in establishing its boundaries with European countries, acquired territory within which Indian tribes resided.
powers had long used American Indian tribes as pawns in imperial struggles, and the young United States realized that European powers would continue to do so in a way contrary to federal interests. The United States pursued a policy of acquiring the political allegiance of tribes and to use this allegiance to cut the tribes off from foreign influence. Through this process, the United States viewed tribes as owing an exclusive allegiance to the federal government. The hundreds of federal treaties entered into with the Indian tribes reflect this relationship. Notwithstanding the federal view that Indian tribes were "dependent nations" and, therefore perhaps, subject to the federal power to tax, Congress never attempted, until quite recently, to impose a federal tax on tribes or their members.

The landmark United States Supreme Court decision of Worcester v. Georgia clearly established that a state has little or no power over an Indian tribe located within a state's boundaries. In that case, Samuel A. Worcester, a missionary from Vermont, traveled to the Cherokee Nation in Georgia in order to preach the gospel. Mr. Worcester had secured the necessary federal permits to enter the territory of the Cherokee Nation and also had permission from the tribe. However, he had not secured a permit from Georgia, which had passed a statute that required a license from the governor, which had passed a statute that required a license from the governor before anyone would be permitted to enter that part of the Cherokee Nation located within

31. The Treaty of Ghent, which concluded the War of 1812, makes clear that tribes were involved on the side of the British. The United States of America engages to put an end, immediately after the ratification of the present treaty, to hostilities with all the tribes or nations of Indians with whom they may be at war at the time of such ratification; and forthwith to restore to such tribes or nations, respectively, all the possessions, rights, and privileges which they may have enjoyed or been entitled to in one thousand eight hundred and eleven, previous to such hostilities. Treaty of Ghent, Dec. 24, 1814, art. 9, 8 Stat. 200, 202, reprinted in 3 AMERICAN STATE PAPERS, FOREIGN RELATIONS 747 (1832).

32. See, e.g., PRUCHA, TREATIES, supra note 21, at 130.
33. Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1871), is something of an exception. Congress passed an excise tax on tobacco. The tax by its term did not expressly extend to Indian country. A federal tax official asserted a tobacco tax liability against members of the Cherokee Nation for tobacco they had grown within the reservation located within the Indian territory. The United States Supreme Court held that the general federal tax statute superseded a treaty provision that explicitly granted an exemption from federal taxes. The executive branch later concluded that the case had no precedential value because only six justices participated in the decision (four of whom voted in favor of taxation). See Method of Determining "Indians Not Taxed," Op. Solic. Dep't Interior, No. M-31039 (Nov. 7, 1940) [hereinafter Solicitor's Opinion], reprinted in 1 U.S. DEPT OF INTERIOR, OPINIONS OF THE SOLICITOR OF THE DEPARTMENT OF THE INTERIOR RELATING TO INDIAN AFFAIRS, 1917-1974, at 990 (1979) [hereinafter OP. SOLIC. DEPT INTERIOR].
34. 31 U.S. (6 Pet.) 515 (1832).
35. 31 id. at 538.
36. 31 id.
For violating this statute, Georgia prosecuted Worcester in a state court. A Georgia jury convicted Worcester of violating the licensing statute, and the trial court judge sentenced him to four years of hard labor in the state penitentiary.

Justice Marshall's opinion in *Worcester v. Georgia* offers a detailed history and exposition of the prevailing federal view that tribes were distinct political entities not subject to state authority. Justice Marshall even went so far as to conclude that the territory of the Cherokee Nation located within the boundaries of Georgia was politically outside Georgia.

The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves or in conformity with the treaties and with the acts of Congress.

The general principle in *Worcester*, although now much eroded by subsequent acts of Congress and decisions of the Supreme Court, remains viable and served as a partial basis for the Supreme Court's relatively recent tax decision in *Oklahoma Tax Commission v. Sac and Fox Nation*.

That Indian tribes remained exempt from state taxation must have remained obvious through the 1860s. In 1861 the Confederate States of America adopted a constitution that provided for popular representation in a house of representatives. The apportionment clause provided that "Indians not taxed" would be excluded from the census. In 1867 Congress and the states, to reflect the elimination of slavery, amended the United States Constitution by adding the Fourteenth Amendment. In Section 2 of the Fourteenth

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37. Id. at 542.
38. Id. at 540.
39. Id.
40. Id. at 542-60.
41. Id. at 561.
42. Id.
43. 508 U.S. 114, 123 (1993) (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) at 557, that Indian tribes are "distinct political communities, having territorial boundaries, within which their authority is exclusive.")
Representatives and direct taxes shall be apportioned among the several States which may included within this Confederacy, according to their respective numbers, which shall be determined by adding to the whole number of free persons including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all slaves.
45. Id.
46. See Reynolds v. Sims, 377 U.S. 533, 593-608 (1964) (Harlan, J., dissenting and
Amendment, the Apportionment Clause for representation in the House of Representatives removed the three-fifths clause for slaves but retained the "Indians not taxed" rule. The "Indians not taxed" language in the Confederate Constitution and in the Fourteenth Amendment demonstrates that state and national leaders continued to view Indian tribes as politically separate outside of the jurisdiction of states.

The United States Supreme Court confirmed this view in two cases it decided in 1867; Kansas Indians and New York Indians. Both cases involved attempts by states to tax Indian lands under a state ad valorem real property tax. In both cases, the Supreme Court held that the Indian lands remained beyond the reach of the state's taxing power so long as Congress took no action to remove the immunity of the lands from state taxation.

In Kansas Indians, the Supreme Court squarely addressed the power of Kansas to impose its property tax on lands owned by members of the Shawnee
Tribe. The Court reiterated the basic principle in Worcester that Indian tribes are separate and politically distinct entities that are beyond the powers of a state, including its power to tax. In Kansas Indians, the county taxing authority pointed out that the treaty setting aside lands for the members of the Shawnee Tribe allocated some of the land to them in severality. This form of individual ownership, the county argued, subjected the lands to state taxation. The Court, however, rejected this argument, finding instead that so long as the tribe remained a viable entity the members' land remained immune from state taxation. The Court further found that Kansas agreed not to tax Indian lands by operation of its constitution and by a provision in the federal enabling legislation granting statehood.

To further ensure the exemption of tribal lands from state taxation, Congress required the constitutions of newly admitted states to disclaim the power to tax these lands. The enabling legislation for these states contained a similar provision. These provisions, however, made it clear that Congress could in the future authorize state taxation of tribal lands or extinguish tribal ownership, which would remove the ban on state taxation because the tribe would no longer be the owner.

In New York Indians, the Supreme Court considered New York's attempt to impose its property taxes on reservation lands of the Seneca Nation. Unlike

51. 72 U.S. (5 Wall.) at 751.
52. Id. at 755-56.
53. Id. at 756.
54. Id. at 755.
55. Id.
56. Id.
57. Id. at 756.
58. See, e.g., N.M. CONST. art. XXI, § 2.
60. See, e.g., id. at 558-59. This provision states:
That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to . . . all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States . . . but nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing, as other lands and other property are taxed, any lands and any property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any Act of Congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as Congress has prescribed or may hereafter prescribe.

61. 72 U.S. (5 Wall.) 761 (1866).
Kansas, which was a new state admitted under condition that it disclaim all authority over Indian lands, New York was one of the original states whose constitution and terms of admission to the union involved no express waivers of power over Indian tribes or their lands. New York viewed the issue as one involving consistency between state law and the underlying federal treaties. New York acknowledged that the treaties with the Indians, to the extent they conflicted with state law, would govern by operation of the supremacy clause of the United States Constitution. New York, however, asserted that none of the relevant treaties expressly prohibited New York from taxing Indian lands. New York argued that the Indian lands were within the political boundaries of New York and should be subject to the state's taxing power absent an express federal prohibition.

In ruling against New York's power to tax, the Supreme Court interpreted the treaty terms broadly, finding that the treaty language providing that the tribe "shall continue in the occupation and enjoyment of the whole of the said two several tracts of land" was sufficient to bar New York from taxing the lands. Prior to the formation of the union, New York and Massachusetts through a compact settled the competing claims they had over the territory that included these reservations. The terms of their settlement of the boundary dispute indicated that New York would acquire the power to tax the lands after a period of years. The Court read these provisions as affecting only those lands where Indian title had been extinguished and noted that the neither New York nor Massachusetts had any power over tribes or their lands.

The Kansas Indians and the New York Indians cases starkly illustrate that states will assert their taxing power over Indian lands even when the existing law clearly forbids it. In both cases, the state courts upheld the state taxing power. The bias of state courts in state tax cases is quite natural because the fiscal health of the state that pays the judges' salaries is at stake. These two

62. See U.S. CONST. signature page (Alexander Hamilton was the delegate from New York who signed on behalf of New York). New York later narrowly ratified the United States constitution in a ratifying convention. FORREST MCDONALD, ALEXANDER HAMILTON: A BIOGRAPHY 114-15 (1979) (stating that the vote was 30-27 in favor of ratification).
63. 72 U.S. (5 Wall.) 761, 766 (1866).
64. Id.
65. Id.
66. Id. at 767.
67. Id.
68. Id. at 769.
69. Id.
70. Id.
71. See ANGIE DEBO, AND STILL THE WATERS RUN 164-65 (2d ed. 1984) [hereinafter DEBO, WATERS]. Debo described the problem for Oklahoma Territory as it planned for statehood:
Besides the abstract and impersonal desire to "develop the country" and the individual desire to develop a portion of it for their private interest, the citizens of the embryo commonwealth were confronted with a serious tax problem. The
cases show that state and local tax administrators are often aggressive and that the state courts will back them up.

After these two cases, the tax status of Indian lands located within states was clear. States could not impose property taxes on Indian lands held by a tribe or held individually by a tribal member holding the property by operation of tribal law or under federal restrictions imposed by treaty or statute.

B. The Allotment Period: 1887-1934

Federal officials involved in Indian affairs had long believed that individual Indians would remain "uncivilized" and impoverished so long as tribes continued to follow systems of communal land ownership. If a system of private property replaced tribal ownership, these officials reasoned, then civilization and prosperity would result. Federal administrative officials had held this "private-land-ownership-equals-civilization" view since the early 1800s and consistently sought ways to implement western style property law within Indian country. Many of the treaties negotiated during the latter decades of the treaty period included provisions for eliminating tribal ownership of lands and replacing it with private ownership by members.

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Indians had never paid taxes except in a limited sense, and they had consented to accept their lands in severalty only upon the condition that the allotments should be non-taxable for a certain period. In a political society accustomed to rely almost exclusively for its revenue on the general property tax, this problem seemed insurmountable. Although it seemed impossible to create a state government without taxation, the Indian Territory "boosters" were not willing to wait until most of the land would be taxable; they wished to secure statehood immediately, even before the date set for the expiration of the tribal governments, and then obtain the premature removal of the restrictions to deliver them from their difficulties.

72. John C. Calhoun, Report of the Secretary of War (1818), reprinted in 3 NEW AMERICAN STATE PAPERS: INDIAN AFFAIRS 277-89 (1972). In discussing government run trading houses set up to trade with the Indians, Secretary Calhoun noted that these "trading establishments being fixed, will, in time, become the nucleus of Indian settlements, which by giving greater density and steadiness to their population, will tend to introduce a division of real property, and thus hasten their ultimate civilization," Id. at 284. He advocated allotment of land within reservations: "The land ought to be divided among families; and the idea of individual property carefully inculcated." Id. at 285. He saw private ownership of land ultimately leading to assimilation: "When sufficiently advanced in civilization, they would be permitted to participate in such civil and political rights, as the respective states within whose limits they are situated, might safely extend to them." Id.

73. Id. at 277-89.
74. Id.
75. See PRUCHA, TREATIES, supra note 21, at 173 (noting allotment by treaty in the 1832 Treaty with the Creek Nation) and at 242 (noting treaty allotment and its failure in Kansas and Nebraska during the 1850s).
In 1887 Congress passed legislation designed to eliminate tribal ownership of lands and to require individual ownership. Under this system, federal officials would determine tribal membership, survey tribal lands, and assign individual allotments to tribal members based on family status. After tribal members received their individual allotments, the remaining tribal land became surplus lands that the federal government sold. The proceeds of these sales were kept in accounts for the benefit of tribal members.

During an initial period, the allottees would own a restricted title to the land. During the period of restriction, the allottee could not sell his land or encumber it without federal approval. Once the allottee had sufficient skill and education to handle his own financial affairs, the federal government issued a certificate of competency to the allottee thereby permitting him to sell the land. Under the Act, individual tribal members receiving allotments became subject to state civil and criminal jurisdiction. In addition, members became eligible for citizenship if they lived apart from the tribe and adopted civilized ways.

These jurisdictional and citizenship provisions led states to assert that they had full civil, criminal, and tax jurisdiction over allotted land and over the Indians who owned the lands from the point in time that the United States made the allotment. The period of restriction related only to the transferability of the land (and not to state powers) according to this line of cases. In In re Heff, a case involving a federal criminal prosecution for selling liquor within Indian country, the defendant liquor seller asserted that the General Allotment Act terminated the federal interest. In Heff, the Court agreed with the defendant and wrote an opinion that would have meant that states acquired full civil, criminal, and tax jurisdiction at the time of the allotment and not some twenty-five years later when the restricted allotment became unrestricted.

77. Id. §§ 1-3.
78. Id. § 5.
79. Id.
80. Id.
81. Id.
82. Id.
83. Id. § 6.
84. Id.
85. See State ex rel. Tompton v. Denoyer, 72 N.W. 1014 (N.D. 1897); Wa-La-Note-Tke-Tynin v. Carter, 53 P. 106 (Idaho 1898); United States v. Rickert, 106 F.1 (C.C.D.S.D. 1901), rev’d, 188 U.S. 432 (1903); In re Now-ge-zhuck, 76 P. 877 (Kan. 1904).
86. 197 U.S. 488 (1905).
87. Id. at 497.
88. Id. at 509. The Court stated:

We are of the opinion that when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of and requires him to be subject to the laws, both civil and criminal, of the State, it places him outside the reach
Congress viewed *Heff* as erroneous and quickly overturned it with the passage of the Burke Act in 1906. The Burke Act amended the General Allotment Act to specifically provide that a state did not acquire civil and criminal jurisdiction until the restrictions on transferability of the land were lifted. The Burke Act also made it explicit that once restrictions were lifted the land would be subject to taxation. This taxation provision operated as an explicit authorization of state taxation, but only after the allottee received a certificate of competency and after the restrictions on alienation were lifted. The authorization of state taxation after the period of restriction was an implicit acknowledgment that until that time the land remained immune from state taxation.

The allotment process continued from 1887 until 1934. One Commissioner of Indian Affairs, sounding as if he worked for NAZI Germany, declared the allotment system a success and referred to it as the "final solution" to the of police regulations on the part of Congress; that the emancipation from Federal control thus created cannot be set aside at the instance of the Government without the consent of the individual Indian and the State, and that this emancipation from Federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and encumbrance, or the further fact that it guarantees to him an interest in tribal or other property.

Id. at 183.

92. U.S. DEP'T OF INTERIOR, ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS, DEPARTMENT OF INTERIOR (1905) [hereinafter 1905 COMMISSIONER'S REPORT]. Commissioner Francis E. Leupp stated:

Some one has styled this [the allotment program] a policy of shrinkage, because every Indian whose name is stricken from a tribal roll by virtue of his emancipation reduces the dimensions of our red-race problem by a fraction — very small it may be, but not negligible. If we can thus gradually watch our body of dependent Indians shrink, even by one member at a time, we may congratulate
"Indian question." Most historians of Native American history, however, have concluded that the allotment process caused cultural genocide through dispossession of Indians from their lands. The historical record is clear: tribes lost two-thirds of their lands during this period. Most of the lands passed to land speculators in transactions that often involved fraud or sharp practices. In addition, many Indians who did not sell their unrestricted land often lost it through tax sales because of the nonpayment of state taxes. Under the federal allotment legislation, states could tax allotted lands of individual Indians once the federal government issued a certificate of competency.

In 1934, Congress concluded that the allotment system was a failure. With the Indian Reorganization Act of 1934, Congress halted the allotment process, extended the period of restriction indefinitely, and attempted to preserve and reinvigorate tribes as political entities. In 1934, many tribes

ourselves that the final solution is indeed only a question of a few years.

Id. at 5 (emphasis added).

93. U.S. DEPT OF INTERIOR, ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS, DEPARTMENT OF INTERIOR (1906) [hereinafter 1906 COMMISSIONER'S REPORT]. Commissioner Francis E. Leupp stated:

The legislation of recent years shows conclusively that the country is demanding an end of the Indian question and it is right. The Burke Act, wisely administered, will accomplish more in this direction than any other single factor developed in a generation of progress. When it is supplemented by other legislation which will enable their pro rata shares of the tribal moneys to be paid, principal and interest, to competent Indian, the beginning of the end will be at hand. Such Indians, owning their land in fee, and receiving their portions of the tribal property without restriction can not by any course of action maintain a claim for further consideration. Through such measures the grand total of the nation's wards will be diminished daily and at a growing ratio.

Id. at 30.


95. DEBO, HISTORY, supra note 94, at 331.

It can be shown statistically that Indian holdings declined from 138,000,000 acres in 1887 to 47,000,000 in 1934. But these figures are misleading, for not all reservations were allotted; the huge desert holdings of the Navahos were even increased during the same period. A more accurate indication of what was happening is the shrinkage of the Five Tribes holdings [in Oklahoma] from 19,500,000 to slightly more than 1,500,000 acres by 1934 (and most of that worthless, twenty acres of cut-over timber required to support one cow).

Id.

96. See DEBO, WATERS, supra note 71, at 92-125.

97. See HAGAN, supra note 94, at 146.


100. Ch. 576, 48 Stat. 985.

101. Id. § 1.

102. Id. § 2.

103. Id. § 16 (permitting the adoption of tribal constitutions and the formation of tribal
found themselves within reservations containing land owned mostly by non-
members. In an effort to reconstitute the land base of many of the tribes, Congress authorized the Secretary of the Interior to acquire lands for tribes and to place them in trust. This provision stated that these lands would be exempt from state taxation.

Prior to the General Allotment Act, tribal lands on reservations with no allotment had a clear ownership status. For most tribes, the land within the reservation boundaries was tribal land to be administered in any way the individual tribe saw fit based on tribal law. Many tribes had property systems that used notions of private ownership—a fact that suggests that the federal policy of bringing private ownership to individual Indians was a ruse for unlocking Indian lands for the benefit of land speculators. The rapid loss of ownership suggests that this was the actual intent behind the allotment process.

After 1934, the legal status of Indian lands varied tremendously. Within a reservation, one could find state land, federal land, restricted allotted land, unrestricted allotted land, original tribal land (held under tribal property rules), land reacquired by the federal government and held in trust for the tribe, land purchased and owned by members, and private land. Some Indian tribes had no formal reservation boundaries but their land was viewed as "Indian country" because the tribes were "dependent Indian communities." Within a dependent Indian community, one could find the same variety of land ownership as within a reservation. Outside of reservations and dependent Indian communities, individual Indians continued to hold restricted allotments, the federal government could also acquire lands and hold them in trust for a tribe, and tribes could purchase lands and hold title in the tribe.

When the federal government instituted the allotment process, it fully expected that after twenty-five years or so no tribes would exist. It also expected that all Indian lands would pass into private ownership and be subject to state taxation. Instead, tribes survived this "final solution," and Congress abandoned its failed policy. The Indian Reorganization Act of 1934, however, did not return tribes to the position they occupied prior to 1887. The 1934 legislation froze the allotment process and tribes found themselves in various
governments); id. § 17 (permitting the formation of tribally owned and controlled corporations).


106. Id.

107. DEBO, HISTORY, supra note 94, at 128.

108. HAGAN, supra note 94, at 144.


conditions — many with no formal reservations, some with diminished reservations, some with reservations containing little tribal lands, and some largely unaffected. At the beginning of the allotment process, states could not tax Indian lands. At the end of the process Congress expected that there would be no Indian lands and that states would then be free to tax all these former Indian lands. The allotment process never finished, so where were states left with their power to tax Indian lands? Part of the answer hinges on the meaning of "Indian country," a phrase of continuing importance in defining the limitations of states' power of taxation involving Indian lands.

III. Indian Country

In the ongoing struggle between tribes and states, the courts often use the phrase "Indian country" as the construct for establishing the limits of state power. In addition, courts have used the concept of "Indian country" to define the limits of a state's power to tax. Indian country is a fairly old concept predating the formation of the United States by nearly a century. In the Proclamation of 1763 King George III of England explicitly reserved lands for Indian tribes and nations and fixed their boundaries to prevent white encroachments. Early federal legislation used "Indian country" to describe the political boundary separating the United States from the Indian tribes. As time passed, the line continued to move west.

111. See, e.g., Hagen v. Utah, 510 U.S. 399 (1994) (state criminal jurisdiction hinged on determination of an area being Indian country).


113. See Act XV, Apr. 1691, 3 Va. Stat. 82, 84-85 (1823), where the Colonial Virginia legislature provided the fixing of a boundary line:

And forasmuch as by a clause of the 8th act of assembly, made at James City, October the tenth, 1665, it is enacted that the bounds of the Indians on the south side James river, be from the heads of the Southern branches of the Black water to the Appomatuck Indians, and thence to the Manokin Town, for the better explaining and ascertaining the bounds betwixt the English and Indians on the south side of James River.


115. In its first Indian trading statute, Congress used the phrase "Indian country" to describe the political territory of the various tribes. See Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137, 137-38. The Trade and Intercourse Act of 1802 clearly identified the boundaries of Indian country. Act of Mar. 30, 1802, ch. 13, 2 Stat. 139. The act prohibited white settlers' unlicensed entry into Indian country and also required passports as a condition to entry. Id. §§ 2-3, 2 Stat. at 138-39.

116. See Trade and Intercourse Act of June 30, 1834, ch. 161, 4 Stat. 729. This statute provided that
This federal legislation reflected the commonly accepted idea that tribes were separate, self-governing political entities. Whether Indian country included lands within existing states was not initially clear. By the end of the nineteenth century Indian country came to mean that territory where tribes retained autonomy.

During the early part of the twentieth century, when federal policy, through the allotment process, actively sought to destroy tribes as political entities, Indian country was not a statutorily defined term. The lack of a statutory definition should not have been a problem because Congress expected Indian country to no longer exist twenty-five years after the commencement of the allotment process. After 1934 and the passage of the Indian Reorganization Act, the future political existence of tribes became more certain. In response to jurisdictional problems in enforcing state and federal criminal laws on Indian lands, Congress in 1948 adopted a jurisdictional definition of Indian country for purposes of applying the Major Crimes Act. The statute, contained in 18 U.S.C. § 1151, defines Indian country as:

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter means

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation,

(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and

(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Federal courts have recently started using section 1151 to define Indian country when deciding the reach of state taxing power over Indian lands. The Supreme Court of the United States held that Indian country includes all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country.

Id. at 7 (noting that the courts tended to use concepts borrowed from the Trade and Intercourse Acts).

117. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 6 (Univ. of N.M. photo. reprint 1971) (1942) [hereinafter COHEN].

118. Id.

119. Id. at 7 (noting that the courts tended to use concepts borrowed from the Trade and Intercourse Acts).


Court’s first explicit use of section 1151 to limit state taxing power was in *Oklahoma Tax Commission v. Sac and Fox Nation.* That case involved Oklahoma’s attempt to impose its income and motor vehicle excise taxes on tribal members. The Court found that a dispositive inquiry in determining the state’s power to tax was the status of the land as Indian country within the meaning of section 1151. A subsequent case, *Oklahoma Tax Commission v. Chickasaw Nation,* involved Oklahoma’s income and gasoline excise taxes. The Supreme Court again looked to section 1151 and its definition of Indian country to determine the limits of the state’s power to tax. Based on these cases, the status of land as Indian country under section 1151 is a critical determination and is bound to affect the state’s power to impose real property taxes on Indian lands or lands located within Indian country.

Why the Supreme Court has decided to use the section 1151 definition of Indian country in state tax cases is unclear. The Court has not explained why it has started using a criminal jurisdictional statute as a limitation on state taxing power. The purpose of section 1151 is to establish the jurisdiction of federal courts over major crimes that Native Americans commit within Indian country. In its application, then, section 1151 defines the federal interest in regulating criminal behavior in Indian country. As already noted, states do not have criminal jurisdiction over Indians within Indian country. Section 1151, however, does not itself establish this rule. Instead, section 1151 reflects the federal policy that Congress, in the absence of state criminal jurisdiction, has taken the power to prosecute major crimes from tribes and taken over the responsibility itself. Theoretically, then, Indian country, as defined in section 1151 could very well be too broad or too narrow in establishing the limits of state taxing power. Nonetheless, the Supreme Court for now seems to have adopted the section 1151 definition in the state taxation arena. The discussion below

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123. Id. at 120.
124. Id. at 123.
126. Id. at 453.
127. Id.
128. The federal policy of asserting major crime jurisdiction over Indians within Indian country and exclusive of states developed in response to the Supreme Court’s decision in *Ex parte Crow Dog*, 109 U.S. 556 (1883), which held that the killing of one Indian by another was not a violation of the federal homicide statute because of an explicit exception for crimes within Indian country. *Id.* at 405. In 1885 Congress expressly provided major crime jurisdiction within Indian country. Act of Mar. 3, 1885, ch. 341, 23 Stat. 385, which the United States Supreme Court upheld as a proper exercise of Congress’ plenary power over Indians and Indian tribes. United States v. Kagama, 118 U.S. 375, 379-81 (1886).
A. Reservation Lands and the Problem of Diminishment

In the case of reservations, the actual ownership and status of lands located within the boundaries of a reservation are irrelevant to the determination of whether an area is Indian country. Section 1151 makes it clear that all lands within a reservation boundary are Indian country even though the United States may have issued a patent (fee title that is unrestricted in ownership) or a right-of-way. Instead, the boundary of the reservation is the critical inquiry.

The actual boundary is not usually that difficult to ascertain because treaties, federal statutes, and executive orders are usually precise in describing the land areas affected. The principal difficulty arises in cases involving diminishment or disestablishment of reservations. During the allotment period, two-thirds of tribal lands passed out of tribal and member ownership. Much of the land affected was the subject of special legislation. Whether this legislation diminished or disestablished a reservation was not always clear. The overall purpose of the allotment process was to terminate tribes as political entities and to convert all Indian lands into private land that would be freely transferable in the marketplace. Because Congress reversed course and ended the allotment process in 1934, the status of some reservations that lost most or all of their lands is unclear.

The diminishment of reservations is a question the Supreme Court has addressed several times. The leading diminishment case is Hagen v. Utah. Hagen involved a state criminal prosecution of an Indian, who the State of Utah had charged with distribution of drugs in the Town of Myton. Myton was located within the boundaries of the reservation created in 1861 and also on lands declared as "surplus lands" under a 1905 statute following allotment of the reservation. The federal government opened these surplus lands to white settlement offering the lands for $1.25 an acre.

In this context, the Court determined whether the various federal statutes had diminished the 1861 reservation boundaries. If so, then Hagen would have
committed his alleged crime outside of Indian country and would have been properly within the jurisdiction of the state court. To determine diminishment when Congress opened reservations to white settlement, the Court considered three factors: (1) the language of the federal statutes, (2) the historical context of the relevant legislation, and (3) the race of those who settled the land after opening it to settlement.\textsuperscript{139} In applying these factors, the Court indicated that it should follow the accepted cannon of construction applied in federal Indian law, namely, that ambiguities are construed in favor of the Indians.\textsuperscript{140} The United States, through the Solicitor of the United States, filed an \textit{amicus curiae} brief in support of the defendant and argued that the Court should adopt a "clear statement rule" in diminishment cases.\textsuperscript{141} Such a rule would require the state and federal courts to find no diminishment of Indian reservations unless (1) there was explicit language of cession and (2) an unconditional commitment from Congress to compensate the Indians.\textsuperscript{142}

The Court in \textit{Hagen} rejected the "clear statement rule," and instead decided that determinations regarding reservation diminishment requires an examination of all the circumstances surrounding the opening of the reservation.\textsuperscript{143} The "facts-and-circumstances" approach in \textit{Hagen} means that diminishment determinations must take place on a case-by-case basis. Such an approach means reservation boundaries of "opened" reservations will remain unclear until the federal courts make authoritative judicial determinations. This is especially troublesome in the tax area because determinations that land is within Indian country affect both state and tribal taxation.\textsuperscript{144}

The Supreme Court, in \textit{South Dakota v. Yankton Sioux Tribe},\textsuperscript{145} just decided another diminishment case that illustrates this important point. The case involved the application of environmental laws to a landfill.\textsuperscript{146} The classification of the land as Indian country or not-Indian country determined whether federal or state environmental laws and regulations applied to the landfill operating on non-Indian owned land within a disputed boundary of the reservation.\textsuperscript{147} The Court relied primarily on the approach followed in \textit{Hagen}, finding that words of cession and the payment of a specific sum created a strong presumption of diminishment.\textsuperscript{148} The Court found diminishment even though

\begin{itemize}
\item \textsuperscript{139} \textit{Id.} at 411.
\item \textsuperscript{140} \textit{Id.}
\item \textsuperscript{141} \textit{Id.}
\item \textsuperscript{142} \textit{Id.} at 411-12.
\item \textsuperscript{143} \textit{Id.} at 412.
\item \textsuperscript{144} \textit{See, e.g.,} Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294 (8th Cir. 1994) (applicability of tribal possessory interest and oil production taxes challenged based on taxpayer's assertion that Congress had diminished the tribe's reservation).
\item \textsuperscript{145} 118 S. Ct. 789 (1998).
\item \textsuperscript{146} \textit{Id.} at 795.
\item \textsuperscript{147} \textit{Id.}
\item \textsuperscript{148} \textit{Id.} at 798.
\end{itemize}
the agreement that the United States government negotiated with the tribe, which Congress approved by legislation, guaranteed continuation of rights under an earlier treaty that had established the reservation boundaries.\textsuperscript{149} The subsequent cession agreement did not address the boundary question, and later federal actions took place under the assumption that the pre-cession boundaries remained in effect.\textsuperscript{150} Given this apparent ambiguity, the Court nonetheless found diminishment.\textsuperscript{151} \textit{Yankton Sioux} amply illustrates the difficulty in diminishment cases. Any prior federal action that opened tribal lands to non-Indian ownership raises the specter of diminishment. As a result, the taxing power of tribes and states is often unclear.

\textbf{B. Dependent Indian Communities}

Potential diminishment or disestablishment create land status uncertainty in the case of some reservations, but the status of lands as a dependent Indian community\textsuperscript{152} is even more unclear. The concept of a dependent Indian community developed at the beginning of this century and dealt primarily with the Pueblos located in the American southwest.\textsuperscript{153} The federal government had dealt with the Pueblos as if they were Indian tribes.\textsuperscript{154} Their political status and the status of their lands, however, did not follow the pattern of federal treaties, executive orders, and federal legislation.\textsuperscript{155} Instead, the Pueblos, many of which could claim aboriginal title through continuous occupation of the lands from a time prior to the European arrival, held title through land grants from the Spanish crown, confirmed by the Mexican government (the political successor in interest to Spain), and confirmed again by the Treaty of Guadalupe Hidalgo, which established the boundaries between Mexico and the United States and confirmed the property rights of those occupants of lands now located in the United States and formerly located within Mexico.\textsuperscript{156}

From that beginning point involving the Pueblo Indians, the definition of a dependent Indian community has varied and developed, not yet having settled into a definition with any definite limits. The First,\textsuperscript{157} Second,\textsuperscript{158} Eighth,\textsuperscript{159}
Ninth and Tenth Federal Circuits have developed slightly different definitions. And an important case involving the definition of dependent Indian community is currently pending before the Supreme Court. All of the existing definitions are fairly general and often require extensive factual determinations. In many cases, the actual boundary of a dependent Indian community will also be unclear. As a result, the status of any specific parcel of land that might be a dependent Indian community is likewise unclear.

In almost all cases involving lands other than Pueblos in the southwest, the determination that a particular area is a dependent Indian community will require litigation. Often the litigation will be complex because of the interplay of various federal Indian law rules. Land within a dependent Indian community is Indian country. If a tribe or a member of a tribe owns the land, then a state's power to tax will not extend to these lands under the holdings of the Kansas Indians and the New York Indians cases. Obviously, state taxing authorities, in the absence of a clear judicial determination, will tax now and ask questions later, leaving it up to the property owner to contest the validity of the tax. These disputes will normally arise in state court, putting the tribe or the tribal member at a distinct disadvantage.

C. Restricted Allotments

This type of Indian country is usually the easiest to determine in terms of status because the original allotment retains its restricted status until lifted by

the relationship of the inhabitants to the tribe and the federal government, and (3) the established practices of governmental agencies towards the area. In Alaska v. Venetie Tribal Government, 118 S. Ct. 948 (1998), the United States Supreme Court held that a dependent Indian community arises only when (1) the land has been set apart by the federal government and (2) the tribe and the land are under federal superintendence. Id. at 954.

159. United States v. South Dakota, 665 F.2d 837, 838 (8th Cir. 1981) (adopting a four-factor test that considers (1) whether the United States has retained title and authority over the land, (2) the nature of the area, the relationship of the inhabitants to the tribe and to the federal government, and the practices of governmental agencies toward the area, (3) whether there is cohesive community based on common economic pursuits, common interests, or needs of the inhabitants, and (4) whether that land has been set apart for the use of the Indian peoples).

160. Alaska v. Native Village of Venetie, 101 F.2d 1286, 1292 (1996), cert. granted, 117 S. Ct. 2478 (1997) (adopting a six factor test that considers: (1) the nature of the area, (2) the relationship of the area inhabitants to Indian tribes and the federal government, (3) the established practice of governmental agencies toward the area, (4) the degree of federal ownership of and control over the area, (5) the cohesiveness of the inhabitants, and 6) the extent that the area has been set aside for the exclusive use of Indian people), rev'd, 118 S. Ct. 948 (1998) (holding that only federal set-asides plus federal superintendence will make land into a dependent Indian community).

161. Pittsburg & Midway Coal Co. v. Watchman, 52 F.2d 1531, 1545 (10th Cir. 1995) (adopting the four-factor test used by the eighth circuit in United States v. South Dakota, 665 F.2d 837, 838 (8th Cir. 1981)).


affirmative action taken by the Department of Interior. Determination of ownership interests is often very difficult because the original allottee frequently has hundreds of potential heirs resulting from a number of successive generations. In any case, the tax status of most restricted allotments is quite clear. By federal statute, restricted allotted land remains exempt from state taxation. In the absence of specific statutory provisions, restricted allotted land should remain exempt from state taxation under the holding in the Kansas Indians case so long as the tribe retains its political status and the member retains his or her affiliation with the tribe. This exemption from state taxation also applies whether or not the land is located within or outside of a reservation.

D. Unrestricted Allotments Owned by Tribal Members

Congress fully intended that Indian-owned land, once its transferability became unrestricted, would have the same status as all other land within a particular state. Specifically, the land would become subject to state taxation. The General Allotment Act, as amended by the Burke Act, was explicit about state taxing power following the lifting of restrictions. For other Indian lands that were allotted under treaty provisions, the tax status was not so clear.

The Supreme Court, in Pennock v. Commissioner, addressed the power of the State of Kansas to tax lands held in fee simple by a member of the Sac

165. See, e.g., Hodel v. Irving, 481 U.S. 704, 707 (1987). The court noted that the policy of allotment of Indian lands quickly proved disastrous for the Indians. Cash generated by the land sales to whites was quickly dissipated. The failure of the allotment program became even clearer as successive generations came to hold the allotted lands. Thus 40-, 80-, and 160-acre parcels became splintered into multiple undivided interests in land, with some parcels having hundreds, and many parcels having dozens, of owners. Because the land was held in trust and often could not be alienated or partitioned, the fractionation problem grew over time.

166. Actually, the exemption is an implied one. Under 25 U.S.C. § 349 (1994), restricted land becomes subject to taxation when the restrictions are lifted. This provision implies that the land is tax-exempt until that time.
167. See Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 123 (1993). The court stated:

our cases make clear that a tribal member need not live on a formal reservation to be outside the State's taxing jurisdiction; it is enough that the member live in "Indian country." Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States.

169. Id.
171. 103 U.S. 44 (1880).
and Fox Tribe. 172 In 1842 the federal government removed the Sac and Fox Tribe from its reservation on the Mississippi to one located on the Missouri River. 173 By operation of the terms contained in a treaty entered into in 1859, the federal government allotted tribal lands to individual members and sold the surplus lands. 174 Under the treaty, the allotted lands remained restricted and exempt from state taxation. 175 Under the treaty, half-bloods and full-blooded women married to white men, received much larger allotments but were not entitled to share in the proceeds from the sale of the surplus lands. 176 The tax status of these special and large allotments was not entirely clear. 177 In 1867 the Sac and Fox Tribe and the United States entered into another treaty that provided for the tribe's removal to the Indian Territory (Oklahoma). 178 Under the 1867 treaty, the half bloods and the full bloods with white husbands were entitled to fee title to the lands that they had received under the 1860 treaty. 179

The Indian owner of the land in question, Sarah Pennock, was a half blood who had received her allotment under the terms of the 1860 treaty. 180 Pennock remained in Kansas after the Sac and Fox Tribe was forced to move to Oklahoma. 181 She received an unrestricted fee title from the United States for her land in Kansas. 182 She also maintained her membership in the tribe even though she remained behind in Kansas. 183

Under these facts, the Supreme Court interpreted the treaty provisions granting tax exemption as not extending to these specific lands. 184 The language of the three treaties nowhere specifically authorized state taxation of the lands. The Court nonetheless construed the tax exemption provisions narrowly given the title to the land (fee simple) and the departure of the tribe. 185 In distinguishing the Kansas Indians case, the Court noted that the tribe involved in the earlier case continued to exist within Kansas and that the treaty provisions granting tax exemption remained in effect until the federal government lifted them. 186 The process of assimilation also was important to the Court. The Court pointed out that Pennock was an Indian of the half-blood, that she married a white man (following the death of her first husband who was

\[172. \text{Id. at 44-45.} \]
\[173. \text{Id. at 45.} \]
\[174. \text{Id. at 46.} \]
\[175. \text{Id.} \]
\[176. \text{Id. These individuals received 320 acres instead of 80.} \]
\[177. \text{Id. at 47.} \]
\[178. \text{Id.} \]
\[179. \text{Id.} \]
\[180. \text{Id.} \]
\[181. \text{Id.} \]
\[182. \text{Id.} \]
\[183. \text{Id.} \]
\[184. \text{Id. at 48.} \]
\[185. \text{Id.} \]
\[186. \text{Id.} \]

https://digitalcommons.law.ou.edu/ailr/vol23/iss1/3
a full blooded member of the tribe), that her white husband was a citizen of Kansas, and that she chose to remain in Kansas after her tribe's departure to Oklahoma. Because of her assimilation and her unrestricted ownership of her land, "she and her property have come under the control of the State, and are subject to its laws, entitled to its protection, and bound to bear a portion of its burdens."

Twenty-six years later, the Supreme Court addressed the question of whether a state could impose its property tax on Indian-owned land located within a reservation where the title had become unrestricted by operation of treaty provisions. In *Goudy v. Meath* the Supreme Court held that allotted land that became unrestricted (freely transferable by the Indian owner) was subject to state taxation unless Congress expressly provided otherwise. The lands in *Goudy* were lands allotted under the terms of a 1854 treaty between the United States and the Puyallup Tribe. Goudy, the Indian owner, received the lands through a patent that the United States issued in 1886. In 1893, Congress passed a law restricting the transferability of allotted lands located within the Puyallup reservation for a ten-year period. After the restriction period ended, the county began imposing its *ad valorem* real property tax.

In the decision of the Washington Supreme court, Goudy asserted that, under the Supreme Court's decision in the *Kansas Indians* case, his land remained immune from state taxation until Congress explicitly authorized the taxation. In rejecting this argument, the state court interpreted the 1893 statute as implicitly authorizing taxation after the period of restrictions on alienation expired. In its factual findings, the court noted that Goudy had become a citizen of the State of Washington and had severed all political allegiance with his tribe. This fact suggests that continued tribal existence and a member's political membership in the tribe made a difference in determining the reach of the state's power.

Emphasis on Goudy's political status was rational from the state's point of view and within the context of federal Indian law because states, then as now, had no power over tribes or their lands except to the extent granted by Congress. By the same token, as tribes located within states went out of

187. *Id.* at 44-47.
188. *Id.* at 48.
189. 203 U.S. 146 (1906).
190. *Id.* at 149.
191. *Id.* at 146.
192. *Id.*
193. *Id.* at 147.
194. *Id.*
196. *Id.* at 296-97.
197. *Id.*
198. *Id.* at 296.
existence or decreased in political and geographical size, state power and jurisdiction expanded to fill the void. During the treaty making period, treaties with tribes served to define political boundaries. It was the explicit assumption of most federal officials during the nineteenth century that tribes would not continue to exist within states. Instead, tribes would either go out of existence or move to the Indian territory.

During the treaty-making period, tribal lands decreased rapidly as the federal government purchased lands that then became part of the public domain located within a territory or later a state. In contrast, the allotment process, which involved Indians staying on lands instead of being moved to reservations, called into question the tax status of lands during the process. The court in Goudy, however, was unconcerned that the land involved remained within the boundaries of the tribe's reservation. The court's disregard for the tribe's boundaries and political existence is understandable because the federal policy at the time was to eliminate tribes and to eliminate Indian lands as a type of land ownership. In the eyes of the court, the tribe scarcely existed politically and was something that would become a mere memory.

In 1934 Congress concluded that its allotment/assimilation policy was a failure. After forty-seven years of allotment, most Native Americans remained unassimilated and, having lost two-thirds of their land, much poorer. With the Indian Reorganization Act of 1934, Congress attempted to revitalize tribes, permit self-government, and encourage economic development on reservations. Following the end of the allotment process, much of the land within reservations was unrestricted in ownership and some of the acreage was held by tribal members. In some case, the members and their descendants merely retained ownership of lands that the federal government had allotted to them.

The ability of the state to tax these member-owned fee lands located within a reservation came into question in 1992 in the case of County of Yakima v. Yakima Indian Nation. In that case, the United States Supreme Court answered the question whether the State of Washington could impose its ad valorem property tax on unrestricted fee lands within the Yakima Reservation

199. See, e.g., ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS (Nov. 6, 1858), reprinted in S. Exec. Doc. No. 1, 35th Cong. 353, 358 (1858) ("In all cases where the necessities of our rapidly increasing population have compelled us to displace the Indian, we have ever regarded it as a sacred and binding obligation to provide him with a home elsewhere . . . ").

200. DEBO, HISTORY, supra note 94, at 338.

201. Id. at 332-33.


203. Id. at 79.

204. Id. at 81.

and owned by members and by the tribe.\textsuperscript{205} The General Allotment Act as amended by the Burke Act, according to the court's holding, explicitly precluded state taxation of restricted allotted lands and explicitly permitted state taxation of those lands once the restrictions were lifted through the process of determining competency of the Indian owner to manage his or her property.\textsuperscript{207}

The tribe, on its own behalf and on behalf of its members who owned fee land within the reservation, acknowledged that Congress through the General Allotment Act and the Burke Act which amended it, authorized state taxation of allotted land once the restrictions were lifted.\textsuperscript{208} The tribe asserted, however, that the Indian Reorganization Act of 1934 effectively repealed these provisions.\textsuperscript{209} The Court, in construing the two statutes, found no express repealer language in the Indian Reorganization Act and concluded that the congressional authorization of state taxation found in the General Allotment Act and the Burke Act remained valid.\textsuperscript{210} Before reaching this conclusion, the Court reiterated the general rule of federal Indian law that states have no power over tribes or their members within Indian country except to the extent that Congress grants power to a state.\textsuperscript{211} This general rule extends to taxation and bars state taxation of tribes or members within Indian country unless authorized by Congress.\textsuperscript{212}

In construing the three statutes (the General Allotment Act, the Burke Act, and the Indian Reorganization Act), the Court purported to follow an approach that would find authorization of state taxation only if Congress' intention to permit such taxation was "unmistakably clear."\textsuperscript{213} Congress' intention in the General Allotment Act and the Burke Act was unmistakably clear and exposed unrestricted lands to state taxation. The intention, however, became unclear when Congress enacted the Indian Reorganization Act. To deal with the resulting ambiguity, the Court applied the rule of statutory construction that existing statutes are not repealed by implication.\textsuperscript{214} The Court failed to explain why this particular rule of construction should apply in the area of federal Indian law where the Court has consistently followed the rule of construction that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."\textsuperscript{215}

\begin{flushright}
\textsuperscript{206} \textit{Id.} at 270.  \\
\textsuperscript{207} \textit{Id.} at 264.  \\
\textsuperscript{208} \textit{Id.} at 259.  \\
\textsuperscript{209} \textit{Id.} at 260.  \\
\textsuperscript{210} \textit{Id.} at 262.  \\
\textsuperscript{211} \textit{Id.} at 258.  \\
\textsuperscript{212} \textit{Id.}  \\
\textsuperscript{213} \textit{Id.}  \\
\textsuperscript{214} \textit{Id.} at 262.  \\
\textsuperscript{215} The Court's failure to use this pro-tribe canon of construction is quite mysterious because the court later used it to invalidate Washington's land sales excise tax that applied to the same lands.
\end{flushright}
The tribe and the United States, as amicus curiae, relied on the Supreme Court's earlier decision in *Moe v. Confederated Salish & Kootenai Tribes*,\(^{216}\) which had held, among other things, that Montana could not tax activity of tribal members taking place within the reservation\(^ {217}\) and, in some cases, on lands that were unrestricted fee lands.\(^ {218}\) The tribe and the United States in *Yakima* asserted that *Moe*, by granting tax exempt status to those member activities on unrestricted fee land, acknowledged that the Indian Reorganization Act had effectively repealed the tax authorization contained in the General Allotment Act as amended by the Burke Act.\(^ {219}\) The Court, however, rejected this argument by pointing out that the *Moe* case did not involve the state's power to tax the fee land itself.\(^ {220}\)

The parties in *Yakima* also disputed the validity of another state tax.\(^ {221}\) The State of Washington imposed an excise tax on all lands sales within the state.\(^ {222}\) The Court applied the same reasoning it had used to evaluate the validity of the *ad valorem* real property tax to conclude that the excise tax was invalid.\(^ {223}\) The Court reiterated that states cannot tax tribes or their members within Indian country unless clearly authorized by Congress.\(^ {224}\) In this case, the Court concluded that the phrase "taxation of land," as contained in the Burke Act, when construed in light of the doctrine that statutes should be interpreted in favor of Indians, did not extend to an excise tax on the sale of unrestricted lands.\(^ {225}\) This conclusion, to the extent it embraces the doctrine that statutes are interpreted in favor of Indians, is inconsistent with the Court's holding validating the *ad valorem* real property tax. The Court was unwilling to concede that the Indian Reorganization Act impliedly repealed the tax authorization language in the General Allotment Act and the Burke Act because of another statutory rule of construction that statutes are not repealed by implication.\(^ {226}\)

### E. Unrestricted Tribal Lands

The *Yakima* case, in addition to resolving the state taxation question involving member-owned fee lands, also addressed the state's power to tax fee lands that the tribe owned.\(^ {227}\) The Court made no analytical distinction between

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217. Id. at 476.
218. Id. at 477-78.
220. Id. at 262.
221. Id. at 268.
222. Id.
223. Id. at 268-69.
224. Id. at 269.
225. Id.
226. The Court failed to explain why no-implied-repeal cannon of construction should control over that cannon that ambiguous status are construed in favor of the tribe.
TAXATION OF TRIBAL FEE LANDS

member ownership and tribal ownership of the lands. The failure to draw any analytical distinction between the tribe and its members is a critical error.

At the fundamental level of statutory construction, the distinction between members and the tribe is very important. The General Allotment Act specifically and the allotment process in general took land from tribal ownership and gave it to individual members. The statutory provision granting the state the power to tax involved lands held by members after the restrictions on alienation were lifted. By its terms, then, the statutory grant of authority to the state to tax the land was directed only at land held by individual members. The statute does not expressly authorize the state to tax the tribe on its ownership of land. Indeed, the general rule then, as now, is that the state has no power to tax a tribe's lands or activities within Indian country unless Congress clearly and unmistakably permits it. Neither the General Allotment Act nor the Burke Act expressly permits state taxation of lands that the tribe owns.

The absence of such an authorization in these statutes is actually quite logical. These statutes had as their goal the elimination of tribes as political entities and as owners of property. Congress did not expect its allotment program to fail. Because Congress did not think that tribes going through the allotment process would continue to exist, it made sense that Congress would provide no specific rule to govern the taxability of lands that tribes would later reacquire more than forty-seven years later when Congress prudently scrapped its allotment policy in favor of tribal self-government.

The Court's reading of the General Allotment Act is flawed. The Court is essentially saying that states can tax unrestricted allotted land without limitation. Such a conclusion obviously reads too much into the grant of the taxing power in the General Allotment Act and the Burke Act. For example, if the federal government acquires title to unrestricted allotted land through purchase or condemnation, the state cannot then impose its ad valorem real property tax on the land or its improvements even though the General Allotment Act says that allotted lands that become unrestricted will be subject to state taxation. Any land and improvements now owned by the federal government would remain exempt from state property taxation under the doctrine of intergovernmental tax immunity. The property remains immune from state taxation because the federal government owns it and is itself immune from state taxation.

Indian tribes, as governments within the federal system, enjoy immunity from state taxation on their lands located and their activities conducted within Indian

228. The doctrine of federal immunity from state taxation has continued as a fundamental constitutional principle since its first judicial articulation in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (invalidating a state tax on a national bank). In 1982, the Supreme Court stated that a state may not lay a tax directly upon the United States. United States v. New Mexico, 455 U.S. 720, 733 (1982) (case involving imposition of the New Mexico gross receipts tax imposed on federal contractors).
This immunity remains intact unless and until Congress removes it. The General Allotment Act and the Burke Act did nothing to alter the tax immunity of the tribe. These statutes did not alter the tax immunity of the various Indian tribes because the allotment program did not deal with tribal acquisition of lands. Instead, the statutes operated to take lands out of tribal ownership.

A much more reliable indicator of congressional authorization of state taxation is Congress' determination of reservation boundaries. Historically, the boundary between Indian country and non-Indian country has had an important legal significance for marking the territorial line limiting state power over tribes. When the reservation system became more prevalent, these boundaries retained the same political and legal significance as the earlier east/west frontier boundary that marked off Indian country. The modern definition of Indian country found in 18 U.S.C. § 1151 retains "reservation" as the primary category of Indian country. The Supreme Court uses this definition when dealing with the reach of state taxing power. So, it makes sense, then, that the Court should not abandon this approach unless Congress makes its intent unmistakably clear with regard to tribally owned lands.

The failure of the Court in Yakima to provide more deference to tribal sovereignty is quite appalling. The Court glibly concludes that the problem for the tribe is a statutory one and that the tribe can seek relief from Congress. In reality, Congress has enacted a maze of conflicting laws growing out of conflicting policies. When Congress enacts laws that are less than clear, who should bear the brunt of the resulting confusion? The well-known canon of statutory construction requiring statutes to be construed in favor of the tribal interest would have been the rational approach in the Yakima case. If it is not clear whether a state can tax fee land that a tribe owns and that is located within the tribe's reservation, then the state is in the best position to rectify the legislative confusion. States, through the United States Senate, have political representation in Congress. Each state as a political part of the United States has a say in Congress. Moreover, each state has popular representation in Congress through the House of Representatives. Many of the senators and representatives in Congress are former state, city, and county officials who are sympathetic to the need of individual states to exercise their tax authority.

230. Id.
232. U.S. CONST. art. I, § 3 (specifying that each state shall have two senators appointed by the legislature of each state); id. amend. XVII (requiring senators to be elected by a popular vote within each state).
234. It is quite common for members of Congress to serve in state and local political offices prior to running for federal office.
Native Americans and their tribes, in contrast, have no political representation or virtually no popular representation in Congress. As a result, it is much more difficult for tribes to seek and to receive statutory solutions to problems resulting from statutory confusion.

The litigation that has resulted from the Yakima case helps illustrate the point that tribes are not well positioned to resist state attempts to impose their property taxes on tribal lands. After Yakima, at least four states (Colorado, Michigan, Minnesota, and Washington) have taken the position that all fee lands that a tribe owns are subject to state property taxation even when the land had not originally been allotted under the General Allotment Act.

F. Lower Court Litigation After Yakima

1. Lummi Indian Tribe v. Whatcom County

The State of Washington, the state involved in the Yakima case, asserted its power to tax tribal fee lands located within the boundaries of the Lummi Tribe's reservation. The Lummi Tribe asserted that the holding in Yakima did not apply to it because the land it held had been allotted under the Treaty of Port Elliot and not the General Allotment Act. The tribe pointed out that the Treaty of Point Elliot did not authorize the State of Washington to impose its property taxes. The tribe purchased the four parcels of land that were the subject matter of the litigation. At the time of purchase of each parcel, the restrictions on alienation had been lifted in accordance with the procedures specified in the treaty.

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235. By definition, tribes can have no political representation because they have no senatorial representation. Ben Nighthorse Campbell, although a Native American, represents the State of Colorado in the United States Senate. He does not represent any specific tribe or group of tribes. The House of Representatives has no Native American members.


239. Lummi Indian Tribe v. Whatcom County, 5 F.3d 1355 (9th Cir. 1993), cert. denied, 512 U.S. 1228 (1994).

240. The Yakima case left open this issue and remanded it to the federal district court for further consideration. County of Yakima v. Yakima Indian Nation, 502 U.S. 251, 270 (1992). The subsequent decision on this issue has not been reported.

241. Lummi Indian Tribe v. Whatcom County, 5 F.3d 1355 (9th Cir. 1993), cert. denied, 512 U.S. 1228 (1994).

242. Id. at 1356.

243. Id.

244. Id. at 1357.

245. Id. at 1356.

246. Id. at 1356-57.
Washington argued that the underlying source of the fee title (the Treaty of Port Elliot or the General Allotment Act) was not relevant. Instead, the state asserted that the status of the land as freely alienable was the basis for taxation. The Ninth Circuit went back to the Supreme Court's decision in Yakima and interpreted it as relying on alienability as the basis for taxation. Such an interpretation of Yakima ignores the finding of the Court that section 6 of the General Allotment Act (as amended by the Burke Act) with its explicit taxation language provided the clear manifestation of congressional intent necessary to permit the state to tax. The Ninth Circuit emphasized the Supreme Court's reliance on Goudy v. Meath, in Lummi Indian Tribe v. Whatcom County, a 1906 case in which the Supreme Court upheld the power of the State of Washington to tax allotted land that had become unrestricted through treaty provisions. In Goudy, the Supreme Court found that alienability, coupled with citizenship and severance of tribal relations, was sufficient to permit state taxation.

The Ninth Circuit's indirect reliance on Goudy is entirely misplaced. First, the Supreme Court in Yakima cited Goudy, not as binding precedent, but merely to illustrate that earlier courts had equated the assumption of state civil and criminal jurisdiction with extension of the states' power to tax. This aspect of Goudy is no longer good law, having been effectively overruled by the Supreme Court in Bryan v. Itasca County. In Bryan, the Supreme Court held that the grant to Minnesota of civil and criminal jurisdiction over Indian tribes by operation of Public Law 280 did not represent a specific congressional authorization of state taxation. The Court in Bryan reiterated the point that a state cannot tax tribes or their members within Indian country absent clear and explicit congressional authorization.

Second, Goudy is no longer good law because Congress reversed the statutory and judicial basis on which Goudy relied. The Court in Goudy relied on In re Heff to establish that with the citizenship granted under the General Allotment Act came state taxation. Congress, unhappy with the Court's interpretation of Yakima, passed the Burke Act to override the decision. Congress was concerned that the decision in Yakima created a precedent allowing states to tax Indian lands and that the decision in Goudy would allow states to tax Indian lands under the General Allotment Act. Congress, therefore, amended the General Allotment Act to provide that the state could tax Indian lands only if the land was not restricted by treaty.

The Ninth Circuit's reliance on Goudy is misplaced. The Supreme Court in Yakima did not rely on Goudy as binding precedent, and the decision in Goudy was effectively overruled by the Supreme Court in Bryan. Therefore, the Ninth Circuit's reliance on Goudy is not a valid basis for taxation of Indian lands.

247. Id. at 1357.
248. Id. at 1357-58.
249. 502 U.S. 251, 258 (1992) (stating that "Yakima County persuaded the Court of Appeals, and urges upon us, that express authority for taxation of fee-patented land is found in § 6 of the General Allotment Act, as amended. We have little doubt about the accuracy of that threshold assessment" (footnotes omitted)).
250. Lummi Indian Tribe, 5 F.3d at 1357-58.
252. See Yakima, 502 U.S. at 258.
254. Id. at 375.
255. Id. at 377.
256. 203 U.S. 146, 149 (1906).
257. 197 U.S. 488 (1905).
decision in Heff, enacted the Burke Act to reverse the result in the case.258 If Goudy relied on Heff, and if Heff relied on the erroneous judicial assumption that with citizenship came taxation, then it would be foolish to say that Goudy in any way remained binding precedent. By elevating Goudy to this status, the Ninth Circuit essentially repealed protections Congress put in place when it enacted the Burke Act.

Third, Goudy is distinguishable because the taxpayer involved was an individual Indian. In Lummi, the landowner was the tribe. This distinguishing fact also escaped the notice of the Supreme Court in Yakima and is one of the reasons why the decision is incorrect. The political status of the land owner was an important fact to the Court in Goudy. The Court noted that the Indian involved had severed his relationship with his tribe.259 Such an emphasis on political status is in keeping with the general intent of the allotment process, which was the destruction of tribes and the assimilation of Indians.

Finally, the Supreme Court that decided Goudy did so when federal policy towards Indians was overtly hostile to tribes. In his annual report for 1905, Indian Commissioner Francis Leupp praised the destruction of reservations:

Thanks to the late Senator Henry L. Dawes of Massachusetts, we have for eighteen years been individualizing the Indian as owner of real estate by breaking up, one at a time, the reservations set apart for whole tribes and establishing each Indian as a separate landholder on his own account.260

The allotment process included destruction of the relationship between members and their tribes, something Commissioner Leupp saw as appropriate.

Some one has styled this a policy of shrinkage, because every Indian whose name is stricken from a tribal roll by virtue of his emancipation reduces the dimension of our red-race problem by a fraction — very small, it may be, but not negligible. If we can thus gradually watch our body of dependent Indians shrink, even by one member at a time, we may congratulate ourselves that the final solution is indeed only a question of a few years.261

By 1934 federal policy changed dramatically. Indian Commissioner John Collier explained.

The allotment system with its train of evil consequences was definitely abandoned as the backbone of national Indian policy when Congress adopted the Wheeler-Howard bill. The first section

258. See 1906 COMMISSIONER'S REPORT, supra note 93, at 27-31.
259. 203 U.S. 146 (1906).
260. 1905 COMMISSIONER'S REPORT, supra note 92, at 4.
261. Id. at 5.
of this act in effect repeals the General Allotment Act of 1887. During numerous committee hearings, during several redrafts and modifications affecting every other part of the measure, this first section was never questioned or revised. It reached the President's desk in its original form without the change of a word or a comma, indicating that Congress was thoroughly convinced of the allotment system's complete failure and was eager to abandon it as the governing policy.\(^{262}\)

Given the dramatic change in federal policy, it is inappropriate to take a decision from a period whose views now seem especially and clearly wrong. To follow Goudy, given this context, helps to resurrect the dead hand of the allotment period from its 1934 grave.

After determining that alienability was the dispositive factor in deciding the state power to tax the tribal fee lands, the Ninth Circuit looked at the actual alienability of the land.\(^{263}\) The tribe argued that a federal statute (25 U.S.C. § 177) prohibiting land transfers by tribes made the land inalienable.\(^{264}\) Congress had passed the statute in 1790.\(^{265}\) According to the Ninth Circuit, Congress originally enacted the section 177 land transfer restrictions upon the recommendation of President Washington and Secretary of War Henry Knox who wanted to protect the Indians from the greed of other races.\(^{266}\) In reality, the land restrictions helped protect the wealth of Washington\(^{267}\) and Knox,\(^{268}\) both of whom were owners of large tracts of western lands. If the Indian lands came onto the market, the increased supply would drive down the price of the lands that they owned. This land sale provision gave the federal government an actual monopoly in dealing with tribes for acquisition of lands. The monopoly later enabled the federal government to acquire tribal lands at a nominal cost and to sell them at a handsome profit.\(^{269}\) The tribes, because they could sell

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262. 1934 SECRETARY'S REPORT, supra note 202, at 78-79.
263. Lummi Indian Tribe, 5 F.3d at 1358.
264. Id.
265. Id.
266. Id.
267. BEARD, ECONOMIC INTERPRETATION, supra note 26, at 144. The author noted that George Washington was probably the richest man in the United States in his time, and his financial ability was not surpassed among his countrymen anywhere. He possessed, in addition to his great estate on the Potomac, a large amount of fluid capital which he judiciously invested in western lands, from which he could reasonably expect a large appreciation with the establishment of stable government and the advance of the frontier.
269. PRUCHA, TREATIES, supra note 21, at 123 (describing how then territorial governor William Henry Harrison rejoiced at purchasing Indian lands for less than two cents an acre); see

https://digitalcommons.law.ou.edu/ailr/vol23/iss1/3
to only one buyer and one with a superior bargaining position, never received
fair value for their lands.

The Ninth Circuit refused to construe the land restriction statute as applying
to the Lummi tribal lands.270 By its terms, the statute clearly applies.271 The
Ninth Circuit concluded that section 177 did not apply because no cases said
that it did not apply.272 Such judicial reasoning is rather remarkable.

According to the court, a statute that is clear on its face has no operative effect
because no cases have confirmed the obvious. If the court thought that section
177 was unclear, then it should have applied the canon of construction that
applies in Indian law cases: statutes are interpreted in favor of the tribe!273

In interpreting section 177, the court did cite two cases that it read as saying that
tribally owned fee land is not subject to the restrictions in section 177.274 One
case275 involved land owned by a terminated tribe and the other276 involved
land owned by an individual allottee. By its terms, section 177 applies only to
land transactions with tribes.

In general, then, the decision in the Lummi case is especially misguided. It
misinterpreted Yakima, relied on invalid precedent, and refused to apply the
literal language of a statute.

2. Southern Ute Tribe v. Board of County Commissioners277

In this federal district court case from Colorado, the court decided whether
the state could impose its real property tax on fee lands that the Southern Ute
Tribe owned and that were located within the tribe's reservation.278 In this
case, the tribe acquired fee lands279 that originally had been allotted under an
1880 statute.280 The state argued that the underlying legislation was irrelevant
because alienability, as decided in the Lummi case, was the deciding factor.281
The court rejected the "alienability" approach in the Lummi case and decided instead that a specific federal statute had to authorize state taxation of the lands. Mere removal of restraints on alienation did not expose the lands to state taxation. The court undertook a detailed analysis of the statute and found that all of the conditions to remove restrictions had not been satisfied. As a result, the lands were not subject to the state property tax. The court stated that the general rule exempting tribal lands from state taxation applied to the Ute tribal lands because Congress had not expressly authorized the taxation.

In reaching its decision, the court in the Southern Ute case did not discuss whether the ownership of the land by the tribe made any difference. The court could have reasoned that none of the federal allotment statutes, when they discuss taxation, specifically address tribal ownership. Under this line of reasoning, the state could tax tribal lands only if a federal statute specifically allowed taxation of the tribe. The allotment statutes and the treaties with allotment provisions were silent about tribal ownership of allotted lands because the federal government expected tribes to go out of existence and, therefore, did not have to provide for something that it thought would be a future impossibility.

3. United States v. Michigan

In this Sixth Circuit case, Michigan attempted to impose its ad valorem real property tax on fee lands owned by the Saginaw Chippewa Tribe and located within the tribe's reservation. The lands had been allotted under an 1864 treaty. The treaty provided that the lands conveyed to individual Indians would be freely alienable. When reacquired by the tribe, the county continued assessment and collection of the property taxes. The United States, which represented the tribal interests, asserted that because the lands allotted here came under a treaty that did not expressly authorize state taxation, as had been the case in the General Allotment Act, the state was without authority to tax the lands. The court specifically rejected the holding and alienability reasoning.
in the *Lummi* case.\textsuperscript{294} Specifically, the Sixth Circuit concluded that the Ninth Circuit had misread *Yakima* and had erroneously relied on *Goudy*.\textsuperscript{295}

Michigan also asserted that *Pennock v. Commissioner*\textsuperscript{296} was controlling.\textsuperscript{297} In *Pennock*, the Supreme Court had permitted Congress to impose its real property tax on fee land owned by a Sac and Fox Indian who had remained behind in Kansas after the federal government had moved her tribe to Oklahoma.\textsuperscript{293} The Sixth Circuit read *Pennock* as holding only that a state can tax an Indian's land if it is located outside of Indian country.\textsuperscript{299}

The Sixth Circuit case also addressed the taxability of member-owned fee lands located within the reservation.\textsuperscript{300} The court treated the member-owned and tribally owned lands in the same way. Therefore, the court's holding that Michigan could not tax the tribal lands also extended to the member-owned lands. On this point, the court's decision is somewhat inconsistent with *Goudy*.\textsuperscript{301} In *Goudy*, the Indian owner had severed his ties with his tribe.\textsuperscript{302} Here, the land owners were tribal members.\textsuperscript{303} The court did not mention this distinction between the two cases.

Interestingly, the Sixth Circuit remanded the case for further litigation on whether the tribe actually had a reservation and whether the tribe had been dissolved.\textsuperscript{304} Such an inquiry is relevant because the tax immunity of the tribe exists only so long as the tribe has a political existence. In addition, immunity from state taxation applies only where there is Indian country or specific federal preemption.\textsuperscript{305}

4. *Leech Lake Band of Chippewa Indians v. Cass County*\textsuperscript{307}

The United States Supreme Court has granted a writ of certiorari in this Eighth Circuit case.\textsuperscript{308} This case involved fee lands that the tribe owned and that were located within the tribe's reservation.\textsuperscript{309} The lands involved in the

\begin{itemize}
\item \textsuperscript{294} *Id.* at 134.
\item \textsuperscript{295} *Id.*
\item \textsuperscript{296} 103 U.S. 44 (1880).
\item \textsuperscript{297} United States v. Michigan, 106 F.3d at 134.
\item \textsuperscript{298} *Pennock*, 103 U.S. at 48.
\item \textsuperscript{299} United States v. Michigan, 106 F.3d at 134.
\item \textsuperscript{300} *Id.* at 131.
\item \textsuperscript{301} Goudy v. Meath, 203 U.S. 146 (1906).
\item \textsuperscript{302} *Id.* at 146.
\item \textsuperscript{303} United States v. Michigan, 106 F.3d at 131.
\item \textsuperscript{304} *Id.* at 135.
\item \textsuperscript{305} See Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, n. 2 (1995).
\item \textsuperscript{306} See Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114, 123 (1993) (extending immunity from state taxation to lands held in trust even if located outside of a formal reservation).
\item \textsuperscript{307} 108 F.3 820 (8th Cir. 1997), *cert. granted*, 118 S. Ct. 361 (1997).
\item \textsuperscript{308} *Id.*
\item \textsuperscript{309} *Id.* at 821.
\end{itemize}
litigation had been transferred out of tribal ownership by operation of the Nelson Act. 310 That Act provided for an allotment process, for disposition of timbered lands, and for homesteading by white settlers. 311 The land subject to the allotment process ended up being governed by the General Allotment Act as amended by the Burke Act. 312

In determining the authority of the state to tax the lands, the court rejected the alienability argument that the state made based on Lummi. 313 In rejecting the holding in Lummi, the Eighth Circuit astutely pointed out that alienability could not be the basis for state taxation given the Supreme Court's conclusion in Yakima that the state excise tax was impermissible. 314 In Yakima, the Court invalidated the application of the state excise tax because the language in the Burke Act authorized taxation only of the land. 315 Had alienability been the sole factor for determining taxability, as the Ninth Circuit had held in Lummi, then the excise tax would have been permissible. 316

Instead of following Lummi, the Eighth Circuit followed the approach taken in United States v. Michigan and in Southern Ute Tribe v. Board of County Commissioners. 317 Under that approach, the court looked for specific statutory language authorizing state taxation. The Burke Act was the only statute that the court found that addressed the taxation question. 318 That statute applied only to the allotted lands. The Nelson Act governed the disposition of the other lands and by its terms did not authorize state taxation. 319 As a result, the only lands subject to state taxation were the lands allotted under the Nelson Act and governed by the General Allotment Act as amended by the Burke Act. 320

The tribe argued that all of its lands should be exempt from state taxation on the theory that its ownership as a tribe entitled it to immunity. 321 The court rejected this argument because the Supreme Court in Yakima had specifically ruled that the General Allotment Act as amended by the Burke Act authorized state taxation of fee lands that the Yakima Tribe owned. 322 The tribe's argument in Leech Lake, however, illustrates the major weakness of the Yakima decision, which is that the General Allotment Act does not

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310. Id. at 822.
312. Id. § 3.
313. Leech Lake, 108 F.3d at 825.
314. Id. at 825-26.
315. Yakima, 502 U.S. at 268.
316. Lummi Indian Tribe, 108 F.3d at 826.
317. Id. at 827.
318. Id.
319. Id. at 829.
320. Id.
321. Id. at 824.
322. Id.
specifically address taxation of tribes. Perhaps this case will give the Supreme Court the opportunity to correct the mistake it made in *Yakima*.

**IV. Reassessing *Yakima***

*Yakima* and the lower court cases that have followed it all involved tribes whose land base eroded substantially because of the allotment process. Had the allotment process been the "final solution" to the "Indian problem," as Congress intended, questions of state taxation would not arise. Tribes would no longer exist to own land, and individual Native Americans would have no special political status. They would all be assimilated.

The Indian Reorganization Act of 1934, although intended to end the allotment policy and to reverse its negative effects, actually ended up preserving many of its negative consequences by freezing land status on reservations. Now the maze of land ownership, something that affects all aspects of tribal, federal, and state law as applied within Indian country, makes state land taxation a nightmare. Of the decided cases, only *Lummi* presents an approach that is administrable. *Lummi* permits state taxation if and when the land involved is freely transferable — a determination that should be relatively easy to make with current information. Sadly, *Lummi* is inconsistent with the judicial and statutory law governing the area. In addition, the case is entirely contrary to the existing federal policy which favors tribal sovereignty and self-determination.

The three lower court cases that have applied an express exemption requirement are consistent with *Yakima*, but they create a legal environment in which the state taxing authorities will be unable to administer their property taxes. Under these cases, property taxation cannot take place until the title history of the land and legal research into the relevant treaties and federal statutes is completed. If experience is any teacher, this factual and legal research is likely to produce more uncertainty and lead to further and costly litigation. Both the Sixth and Eighth Circuit cases, for example, were remanded for further factual and legal proceedings.

The difficulties that the *Yakima* case has created is ample evidence that the Supreme Court decided that case incorrectly. A critical mistake that the Court made was equating members with tribes. The Burke Act authorization of state taxation applied only to individual members. Neither the language nor the context of the statute suggested that the authorization of state taxation should extend to tribes. Absent an unmistakably clear authorization from Congress to tax a tribe's ownership of land within its reservation, state taxes should remain invalid. None of the allotment statutes or allotment treaties expressly, explicitly, unmistakably, or unequivocally dealt with the state taxation of tribally owned fee lands located within reservations. Finding no congressional authorization of state taxation of tribally owned fee lands located within reservations comports with the language of statutes and treaties, and is consistent with federal Indian law principles.
Unfortunately, this conclusion extends tax immunity only to tribes but not to their members. Individual members still face the potential of taxation. Under the *Leech Lake* approach, a legal and factual investigation of member-owned fee lands within reservations is still necessary.

The tribe had argued in *Yakima* that the Indian Reorganization Act effectively repealed the Burke Act language authorizing state taxation. The Court hastily rejected this argument and concluded that it would not repeal an existing statute unless the intent to repeal was explicit. Given the see-saw nature of federal policy and the inevitable inconsistency between statutes that embody policy reversals, the final tax status of tribally owned and member-owned fee lands is not entirely clear. Given this statutory ambiguity, it is appropriate for the Supreme Court to apply the statutory cannon of construction that ambiguous statutes are interpreted in favor of the tribe or the individual Native American. Under this approach, states, if they are unhappy with the result, are free to go to Congress for a statutory remedy. Such a result is hardly unfair. State and local governments have adequate representation in Congress and can easily seek statutory change. Tribes, on the other hand, have only that access to Congress that other interest groups have. They must hire lobbyists, make campaign contributions, and work on remedial legislation. Tribes have already expended much of their limited resources on litigating the state taxation question. And clear answers to many questions remain decades away unless the Supreme Court adopts the *Lummi* approach and throws the problem to Congress.

Obviously, adoption of the *Lummi* approach, merely because it would be administrable for state taxing authorities and remove the need for tribes to continue further litigation, is no reason for the Supreme Court to follow *Lummi*. The holding in *Lummi* is contrary to accepted federal Indian law principles involving taxation and statutory construction. By following *Lummi*, the Supreme Court would be providing states with a tax base windfall merely because Congress has historically followed erratic policies that have engendered statutory confusion.

Instead, the Supreme Court should recognize that Congress, when it passed the General Allotment Act and the Burke Act, did not in any way authorize state taxation of tribal lands located within a tribe's reservation boundaries. Congressional authorization of state taxation of tribal lands in such a context would have been inconsistent with Congress' unwavering insistence that states, at least those admitted to the union after 1860, disclaim all power to tax tribal lands.323

Finding no congressional authorization — an approach that comports with existing federal Indian law principles and with existing federal statutes — would also provide an easily administrable approach for tribally owned lands

323. See, e.g., Act of Jan. 29, 1861, ch. 20, 12 Stat. 126, 127 (requiring Kansas to disclaim authority over Indian lands). This prohibition barred state taxation of Indian lands.
located within Indian country. All tribally owned land located within Indian country would be exempt from state property taxation so long as Congress did not enact new legislation that authorized the taxation. Confusion would still remain for member-owned land, unless the Court took the *Lummi* "alienability" approach. The "alienability" approach, however, is legally indefensible as illustrated in the above discussion involving the *Lummi* decision. Therefore, the case-by-case approach of the other cases is the only correct approach.

**Conclusion**

Viewed from a distance, a state's right to tax tribally owned land located within an Indian tribe's political boundaries seems easy to resolve: a state has no such power absent an explicit and unequivocal grant from Congress. No federal legislation grants states the power to tax a tribe's ownership of its land within its boundaries. End of discussion. States, however, have taken the maze of treaties and federal legislation and have argued that Congress intended to authorize state taxation. The Supreme Court in *Yakima* has naively assumed that from this maze-like morass clear congressional intent emerges. Given the actual lack of clear congressional expression, who should be the beneficiaries of the confusion? States or tribes? The law says the tribes.