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Margaret Vick

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Challenging the Assessment of the California Timber Yield Tax Against Purchasers of Indian Timber

Indians occupy a unique place in American jurisprudence. They are accorded a status and protection not enjoyed by other ethnic groups. The special treatment given Indians has developed from the historical concept that Indian tribes were sovereign entities. This status as a "sovereign" allowed the federal government to govern the Indians first through treaty and later through separate statutes and regulations. Today the remnants of Indian sovereignty color all federal and state actions affecting Indians.

The Supreme Court has developed three constitutional theories to determine the limits of state regulation of Indian affairs. The three theories recognize the traditional notion of Indian sovereignty and invalidate the state action if (1) the state infringes on the Indian right to self-government, (2) the federal government preempts the state action by regulating the same activity, or (3) the tribal interest in remaining free from state interference outweighs the state interest in the action.

The concept of Indian sovereignty retains some vitality, as the Supreme Court has recently used each of these tests to delineate the limits of the state taxing power over Indians and those who conduct business with Indians.

California is currently assessing a timber yield tax against purchasers of Indian timber and this would seem to violate the constitutional

1. See F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW xxi-xxiv (1945).
4. See generally Id.
8. 447 U.S. at 156-57.
theories based on Indian sovereignty. Prior to the enactment of the timber yield tax, counties in California assessed an annual property tax on standing timber based on the value of the timber at the time of assessment, i.e. an ad valorem tax.\textsuperscript{11} Under the ad valorem system Indian timber was exempt from taxation.\textsuperscript{12} The ad valorem system was severely criticized, however, and the California Legislature attempted a patchwork solution by enacting an exemption for reforested timber.\textsuperscript{13} The exemption had such an adverse impact on forest management and local government revenues that the legislature, in the face of severe criticism from timber owners, environmentalists, and county governments, enacted the timber yield tax to replace the ad valorem tax.\textsuperscript{14} Unfortunately, the legislature did not consider the unique situation of Indian timber when the timber yield tax was formulated.

The timber yield tax is a one-time assessment at the time of harvest,\textsuperscript{15} and thus eliminates many of the problems caused by the ad valorem tax system.\textsuperscript{16} The tax is assessed against the owner of the timber at the time of harvest, unless the owner is an exempt entity.\textsuperscript{17} If the owner is exempt from the tax, the tax is assessed against the first non-exempt purchaser of the timber.\textsuperscript{18} Since Indian timber is exempt from direct tax,\textsuperscript{19} the assessment against the purchasers of Indian timber allows the state of California to tax the previously untaxed Indian timber. The effect is to reduce the revenue of the Indian tribes. The Hoopa Timber Corporation, an Indian-owned company, is contesting the assessment of the timber yield tax against its customers\textsuperscript{20} and the challenge is now pending before the State Board of Equalization.\textsuperscript{21} This comment examines whether the imposition of the timber yield tax against purchas-

\begin{thebibliography}{10}
\bibitem{14} \textit{See} Unkel & Cromwell, \textit{supra} note 13, at 839-42; \textit{Review, supra} note 11, at 378-379.
\bibitem{15} \textit{See} \textsc{Cal. Rev. & Tax. Code} §§38108-38110.
\bibitem{16} Unkel & Cromwell, \textit{supra} note 13, at 839-42.
\bibitem{17} \textsc{Cal. Rev. & Tax. Code} §§38101, 38108-38110, 38115.
\bibitem{18} \textit{Id.} at §§38101, 38115.
\bibitem{19} \textit{See} note 12 \textit{supra}.
\bibitem{20} Telephone conversation with Clarence Hossler, Assistant Manager, Hoopa Timber Corporation, (Sept. 29, 1981) (notes on file at \textit{the Pacific Law Journal}).
\bibitem{21} This comment will not discuss the specific challenge by the Hoopa Timber Corporation. This comment is limited to the general principles of law applicable to a challenge of the timber yield tax by any of the Indian tribes located within California. This comment will not discuss any other aspect of the Z'berg-Warren-Collier-Keate Forest Taxation Reform Act, \textsc{Cal. Stats.} 1976, c. 176, §§1-23, at 293.
\end{thebibliography}
Taxation of Indian Timber

ers of Indian timber is a valid exercise of the state power of taxation. This examination requires an analysis of the purposes and policies of the timber yield tax, and an investigation of the three theories of Indian law used to test the state taxing power. This comment will demonstrate that the application of the timber yield tax to purchasers of Indian timber is valid if the infringement test is employed but invalid under both the federal preemption and the balancing of interests tests. This leads to the conclusion that the assessment of the timber yield tax against purchasers of Indian timber is beyond the limits of the state taxing power. An initial discussion of the enactment of the timber yield tax, however, is necessary to understand the application of the tax to purchasers of Indian timber and to determine the state's interest in imposing the tax.

California's Timber Yield Tax

California taxes forest resources by use of the recently enacted timber yield tax. The timber yield tax is assessed against timber owners, or, if the owner is an exempt entity, against the first non-exempt purchaser of the timber. The application of the timber yield tax to Indian timber can best be understood by considering the reasons that the tax was enacted.

A. Taxing Timber Prior to the Timber Yield Tax

Before the enactment of the timber yield tax, ad valorem taxes were assessed annually against timber owners according to the fair market value of standing timber at the time of assessment. This annual assessment had an adverse impact on forest management. Three major groups expressed their dissatisfaction with the annual tax by exerting pressure on the legislature to change to a different tax system.

22. See text accompanying notes 28-41 infra.
24. See text accompanying notes 83-91 infra.
25. See text accompanying notes 133-44 infra.
26. See text accompanying notes 152-63 infra.
27. See text accompanying note 163 infra.
29. Id.
30. CAL. CONST. ART. XIII, §3(j); REVIEW, supra note 11, at 378-79 (1977).
31. See generally Unkel & Cromwell, supra note 13; REVIEW, supra note 11.
32. See Unkel & Cromwell, supra note 13, at 839-42; REVIEW, supra note 11, at 379. Timber owners opposed the ad valorem system because it required them to pay an annual tax on standing timber for many years prior to realizing any income. Because the rotation cycle of timber is often 50 to 75 years, the annual tax bills accumulated for a considerable time prior to harvest and sale. This also had the effect of discouraging investment in the state's forestry resources because potential investors were unwilling to expend money in annual taxes when higher returns could be obtained by investing in other areas. See Unkel & Cromwell, supra note 13, at 832-33; REVIEW, supra note 11, at 378-79.
The Legislature attempted to deal with the problem by providing a tax exemption if an owner reforested after a seventy percent harvest.\textsuperscript{33} This exemption, however, had an adverse effect on forest management by encouraging timber owners to harvest trees prematurely.\textsuperscript{34} Environmentalists voiced concern over this taxing structure since it encouraged depletion of timber resources and ignored the environmental benefits of timber.\textsuperscript{35} County governments disapproved of the taxing structure because it caused substantial reductions in county revenues.\textsuperscript{36} The counties also faced the difficulty of assessing the value of standing timber that did not qualify for the exemption.\textsuperscript{37}

Thus the concerns expressed by timber owners, environmentalists, and county governments centered around the requirement of an annual assessment and the adverse effect of this assessment on timber management. By changing the method and time of assessment many of these problems were eliminated.

\section*{B. The Timber Yield Tax as a Remedy}

The timber yield tax is assessed at the time of harvest.\textsuperscript{38} This one-time assessment eliminates the interference with forest management associated with the annual ad valorem taxes. Provisions within the timber yield tax structure also stabilize timber tax revenue to the counties.\textsuperscript{39} Environmentalists are satisfied with the one-time assessment because the tax consequences no longer influence ecological decisions.\textsuperscript{40}

The problems created for the county governments by the ad valorem timber tax system were not as easily eliminated. The timber yield tax does not provide an annual assessment, therefore, it creates a fluctuating source of income for the counties. Special provisions were incorporated within the timber yield tax to provide a steady and predictable

\begin{footnotes}
\item[33] CAL. CONST. art. XIII, §3(j).
\item[34] See Unkel & Cromwell, supra note 13, at 835. The requirement of a seventy percent cut to qualify for the exemption also encouraged owners to deplete the forest resources rapidly, resulting in erosion and other ecological imbalances. See Unkel & Cromwell, supra note 13, at 835.
\item[35] See REVIEW, supra note 11, at 379. The annual tax liability discouraged timber owners from leaving trees standing for highway buffer zones, for wildlife habitat, or for aesthetic benefits. See Unkel & Cromwell, supra note 13, at 835; REVIEW, supra note 11, at 379.
\item[36] See Unkel & Cromwell, supra note 13, at 842; REVIEW, supra note 11, at 378.
\item[37] See REVIEW, supra note 11, at 378.
\item[38] See CAL. REV. & TAX. CODE §§38108-38110.
\item[39] See Unkel & Cromwell, supra note 13, at 841-42. Timber owners may choose to leave timber standing without suffering a tax liability because the tax liability is now determined using the "immediate harvest value" as of the "scaling date," i.e. the stumpage value of the timber as of the date of harvest or sale. CAL. REV. & TAX. CODE §§38108, 38109. Stumpage is "the value of or price paid for timber as it stands uncut in the woods," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2270 (1971).
\item[40] See Unkel & Cromwell, supra note 13, at 840.
\end{footnotes}
income to the counties based on the average annual property tax revenue for previous years.\footnote{CAL. GOV'T CODE §27423; CAL. REV. & TAX. CODE §§38905, 38906.}

The timber yield tax was enacted to meet criticism voiced by timber owners, environmentalists, and local government, and appears to have met the respective concerns. Nowhere during the legislative process, however, does it appear that the special status of Indian timber was considered.

\section*{C. Relationship of the Timber Yield Tax to Indian Timber}

The state of California is not responsible for the management of forest resources on Indian lands located within the state. Federal and tribal policies control the timber operations on these lands.\footnote{25 U.S.C. §§406, 407 (1976); 25 C.F.R. §§141.6, 141.7 (1981).} Federal regulations control the time and place of harvest and determine the conditions of sale, yet it is the state of California which imposes a tax.

California Revenue and Taxation Code Section 38104 defines a timber owner for purposes of the assessment of the timber yield tax as “any person who owns timber immediately prior to felling or the first person who acquires . . . title . . . to timber after it has been felled from land owned by a federal agency or any . . . entity exempt from property taxation . . . .”\footnote{CAL. REV. & TAX. CODE §38104.} Indian timber,\footnote{See White Mountain Apache v. Bracker, 448 U.S. 136, 138 (1980); Squire v. Capoeman, 351 U.S. 1, 10 (1956). See generally Note, Natural Resources: Federal Control Over Indian Timber, 5 AM. INDIAN L. REV. 415 (1977).} and Indian land,\footnote{25 U.S.C. §465 (1976).} are exempt from direct taxation. The timber yield tax is, therefore, assessed against any person or non-exempt entity buying timber from a tribe.

Since the Indian timber was exempt from the ad valorem tax, the legislative purpose of eliminating the problems associated with that tax should not extend to the Indian interests. Tribal timber is under the direct supervision of the Secretary of the Interior\footnote{25 U.S.C. §§466 (1976); 25 C.F.R. §§141.1-141.23, 142.1-142.12, 144.1-144.15 (1981).} (hereinafter referred to as the Secretary). By statutory mandate the Secretary manages the forests according to principles of sustained yield,\footnote{25 C.F.R. §§141.3(a)(1), (a)(2) (1981).} i.e., regulation of cutting and reforesting to ensure continuous production.\footnote{Id. §141.3(a)(6).} The Secretary is also authorized to leave trees standing to preserve the forest in its natural state for environmental reasons,\footnote{Id. §141.3(a)(7).} to preserve wildlife habitat,\footnote{Id. §141.3(a)(5).} or for purely aesthetic reasons.\footnote{Id. §141.3(a)(5).}
The concerns which prompted the enactment of the timber yield tax, therefore, do not apply to Indian timber. Resource management concerns of timber owners and environmentalists are inapplicable to Indian land. Furthermore, since Indian timber was exempt from taxation, the local government revenue concerns do not justify application of the timber yield tax.

In approving the timber yield tax, the California Legislature did not consider the unique position of purchasers of Indian timber. The reasons for replacing the ad valorem system of timber taxation have no application to purchasers of Indian timber. By extending the timber yield tax to purchasers of Indian timber, the state has exceeded the intent and purpose of the legislation and raised doubts as to the validity of this application in light of principles of Indian law.

PRINCIPLES OF INDIAN LAW

A discussion of law as it relates to Indians, Indian property and reservation land involves a unique analysis. Because of the historical development of law affecting the Indian in America, many traditional legal principles do not apply. "The fact that Indians are involved gives the basic doctrines and concepts of the field a new quirk which sometimes carries unpredictable consequences." In 1832, the Supreme Court established that a state does not have jurisdiction over Indians or land within the reservation. This total lack of jurisdiction has been modified by judicial decree and statute. Today there exists a complicated network of laws determining jurisdiction over various aspects of Indian jurisprudence which reflects the changing attitudes and philosophies toward Native Americans.

In recent decisions, the Supreme Court has applied three tests to determine the validity of a state tax imposed against non-Indians: infringement of tribal self-government, federal preemption of state taxing power, and balancing of tribal interests against those of the state. These three tests will be discussed and applied to the timber

52. See text accompanying notes 30-37 supra.
53. See note 32 supra.
54. See note 35 supra.
55. See text accompanying notes 36-37 supra.
56. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW xxii (1945).
59. See text accompanying notes 64-82 infra.
60. See text accompanying notes 96-132 infra.
61. See text accompanying notes 145-151 infra.
yield tax to determine the validity of the assessment against purchasers of Indian timber.

A. State Infringement of Tribal Self-Government

Tribal governments existed prior to the formation of the government of the United States. The United States originally treated these governmental units as sovereign entities with whom treaties were made. As the United States expanded and tribes became less threatening, their legal status declined, and Indian reservation lands became encompassed within state boundaries. When conflicts arise between the states and the Indians, the federal courts intervene. One test the courts use to resolve these conflicts is to determine whether the state has interfered with the “sovereign” tribal government. If the interference is severe enough to infringe tribal self-government, then the state action is invalid.

I. The Nature of the Infringement Test

In Williams v. Lee the Court first articulated the test that a state action could not “infringe[en] on the right of reservation Indians to make their own laws and be ruled by them.” Williams involved a non-Indian storeowner, operating on the reservation, who attempted to use the state courts to collect money owed him for the sale of goods to an Indian couple. The issue was whether the state court had jurisdiction over the couple for the transaction occurring within reservation boundaries. The Court applied the infringement test and determined that the exercise of jurisdiction by the state would undermine the function of the tribal courts and interfere with the rights of the Indians to govern themselves. Thus, the state could not maintain jurisdiction over the dispute.

The infringement test has not been limited to determinations of jurisdiction. The Ninth Circuit Court of Appeal applied the infringement test in a challenge to the possessory interest tax imposed by the state of California on lessees of tribal lands. The Court emphasized in Fort Mojave Tribe v. County of San Bernardino that the tribe was not being

64. 358 U.S. 217 (1959).
65. Id. at 220.
66. Id. at 223.
68. Id.
“subjected to direct state court process” as was the Indian couple in *Williams*. The state action only indirectly affected the tribe. The imposition of the tax reduced the revenues of the tribe from these land leases, but this was not a sufficient interference to support a claim of infringement of tribal self-government.

Taxes with only indirect burdens, such as the possessory interest tax, are not sufficient to invalidate the state tax. Tribes attempted to assume a more direct tax burden by entering into contracts of indemnification with non-Indian taxpayers. For example, an indemnity agreement between the Mescalero Apache Tribe and a building contractor working on the reservation required that the tribe reimburse the contractor for all taxes assessed on gross receipts for work done on the reservation. The court rejected this tax burden by contract in *Mescalero Apache Tribe v. O'Cheskey*, stating that the tax burden only indirectly affected the tribe. The tax did not infringe on the tribe's right to make its own laws.

*Moe v. Confederated Salish & Kootenai Tribes* was another attempt by the Court to delineate the scope of state taxing power over non-Indians dealing with Indians. The tribes claimed an exemption from the state sales tax on cigarettes sold to non-Indians from smokeshops located on the reservation. The Court accepted the conclusion of the lower court that the direct burden on the tax was on the purchaser, thereby stating that the tribe suffered only incidentally even though the smokeshops would lose all non-Indian business. Even though the state required the tribe to collect the tax and keep records of sales to Indians and non-Indians, the Court determined that this was a minimal burden on the Indian smokeshop operators. The Court also distinguished between the state-imposed collection and record keeping requirements and a direct state tax. Since the collection of the tax is not itself a tax, states may impose this burden without the direct grant of authority required in *Mescalero Apache Tribe v. Jones*. Neither the indirect economic impact nor the collection requirement was sufficient state inter-

69. *Id.* at 1258.
60. *Id.*
61. *Id.*
63. *Id.* at 1066.
64. *Id.* at 1072.
65. *Id.* at 1073.
67. A smokeshop is a business, located on the reservation and usually close to the non-Indian population, from which cigarettes and other tobacco products are sold.
68. *Id.* at 482.
69. *Id.* at 483.
70. *Id.*
ference to frustrate tribal self-government. 82

As these cases indicate, a state tax not directly imposed against an Indian or Indian property is not likely to be a sufficient infringement to invalidate the tax. The timber yield tax is assessed against those purchasing timber from the reservation and is therefore an indirect burden.

2. Application of the Infringement Test to the Timber Yield Tax

The timber yield tax is not a direct tax burden on the tribes. Comparison of the timber yield tax to the cases leads to a prediction of validity. Even if the economic impact of the tax were totally to destroy the tribal timber operations, this would be insufficient to constitute an interference with self-government under the rationale of Moe. 83 The tax on timber can be distinguished from a tax on cigarettes because of the close relation to reservation activities; this distinction, however, is not sufficient to provide the necessary infringement under the holding of Fort Mojave Tribe v. County of San Bernardino. 84 Since the interest of the Indian lessee was not sufficiently connected to tribal government to defeat the possessory interest tax,9 5 it is doubtful any distinction for timber would be upheld. Even if a contract were entered into between the Indians and purchasers requiring the tribe to indemnify the purchasers for the taxes paid, it would not be a sufficient burden under O'Cheskey. 86 Using the infringement test as articulated and applied in Williams, 87 Fort Mojave, 88 O'Cheskey, 89 and Moe, 90 the state action of taxing timber purchasers does not infringe on the right of reservation Indians to “make their own laws and be ruled by them.” 91 Although the tax is valid under the infringement test, validity must be determined also under the preemption and balancing tests.

B. Federal Preemption of State Taxing Power

Federal preemption of state authority is not a doctrine unique to Indian law. Traditional notions of preemption developed to resolve conflicts between state and federal authority to regulate commerce whereas the Indian law preemption doctrine emerged from the concept of tribal

82. 425 U.S. at 483.
83. Id. at 481-83.
84. 543 F.2d 1253 (9th Cir. 1976).
85. See id. at 1258.
88. 543 F.2d 1253 (9th Cir. 1976). See text accompanying notes 67-71 supra.
91. 358 U.S. at 220.
sovereignty. "The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of preemption that have emerged in other areas of the law."93 Once the federal government establishes a reservation the authority to govern that reservation becomes plenary and any attempt to regulate reservation activities by the state is preempted.94 If Congress has established a comprehensive scheme of regulations over Indian activity, the state is precluded from regulating any aspect of the activity, either on or off the reservation.95

1. The Nature of the Preemption Test

The Indian preemption test was first used to defeat a state taxing statute in 1965 in *Warren Trading Post v. Arizona Tax Commission*.96 A trader, licensed under federal authority, challenged the state tax on his income derived from trading with Indians on the reservation. An operator of a trading post on a reservation is required to have a government license97 and is subject to strict regulations including the type, quantity, and price of goods to be sold, the business records to be kept, the manner of payment for goods traded, and the type of conduct forbidden on the business premises.98 The Court stated that the “all-inclusive” nature of these regulations left no room for the state to impose any additional burdens upon the non-Indian trader.99 The Court also determined that, by enacting these regulations, Congress intended to occupy this field of activity and the state was not to interfere.100 The state interference would “disturb and disarrange the statutory plan Congress set up in order to protect Indians . . . .”101

The Court turned to the interest the state might have in imposing the


94. *Id.*

95. The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making. *McClanahan v. Arizona Tax Comm’n*, 411 U.S. 164, 172 n.7 (1973).


98. 380 U.S. at 689 (citing 25 C.F.R. §§251.3, 251.5, 251.8, 251.9, 251.18, 251.19, 251.21, 252.3, 252.15).

99. 380 U.S. at 690.

100. *Id.* at 691.

101. *Id.*
tax, dismissing the possibility by stating the Congress had left the state free from any duties or responsibilities toward the Indians; therefore, Congress would not have intended the state to have the privilege of imposing this tax.\textsuperscript{102} This left open the possibility for a state to specify duties or responsibilities toward a reservation as justification for the imposition of a tax. \textit{McClanahan v. Arizona State Tax Commission}\textsuperscript{103} clarified this question.

\textit{McClanahan} involved a challenge to a direct tax on the income of a tribal member that was earned from activities solely within the reservation boundaries. The Court articulated the broad principles of Indian sovereignty and federal preemption as a groundwork for examining the relevant treaties and statutes delineating the scope of the federal, tribal and state authority over reservation activities.\textsuperscript{104} These principles are that treaties and statutes are to be read against a backdrop of Indian sovereignty\textsuperscript{105} with doubtful expressions resolved in favor of the Indians,\textsuperscript{106} and services and privileges provided by the state do not alter the tax exempt status of reservation Indians. The status “can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization.”\textsuperscript{107}

Although the Court attempted to limit the \textit{McClanahan} holding to similar situations on direct taxation of reservation Indians,\textsuperscript{108} these broad principles have been applied to the preemption analysis of taxes imposed on non-Indians dealing with reservation Indians. In \textit{Washington v. Confederated Tribes of the Colville Indian Reservation}\textsuperscript{109} (hereinafter referred to as \textit{Colville}), the Court applied the \textit{McClanahan} principles to statutes promoting tribal self-government and the establishment of tribal businesses as well as to the relevant treaties in an attempt to find a basis for preemption.\textsuperscript{110} Giving these statutes and treaties the broadest reading possible, the Court was still unable to find any provision that would preempt the state tax on sales of cigarettes to non-Indians. Although the imposition of this sales tax would destroy the tribal smokeshop businesses, even this, against the backdrop of sovereignty and the general policies of self-government, was not enough to overcome the legitimate governmental interests of the state.\textsuperscript{111}

\begin{enumerate}
\item \textit{Id.}
\item 411 U.S. 164 (1973).
\item \textit{Id.} at 172-73.
\item \textit{Id.} at 172.
\item \textit{Id.} at 174 (citing Carpenter v. Shaw, 280 U.S. 363, 367 (1930)).
\item \textit{Id.} at 173 n.12 (citing The Kansas Indians, 72 U.S. 737, 756 (1866)).
\item 411 U.S. at 168.
\item 447 U.S. 134 (1980).
\item \textit{Id.} at 155.
\item \textit{Id.} at 157.
\end{enumerate}
Two other cases involving the specialized doctrines of federal preemption were decided the same month as Colville: Central Machinery Co. v. Arizona State Tax Commission and White Mountain Apache Tribe v. Bracker. Central Machinery involved the imposition of a transaction privilege tax on the non-Indian, Central Machinery Company, for a sale of farm equipment to the tribe. Central Machinery Company was not a licensed trader, did not maintain a permanent place of business on the reservation, and was not involved in more than one sale to the tribe. Nevertheless, the Court determined that the Indian trader statutes preempted the imposition of the state tax. Analyzing the Indian trader statutes, the Court determined that the purpose of the extensive regulation of trade with the Indians was to protect the Indians from potentially unscrupulous dealings of non-Indians. These regulations could not be avoided by the non-Indian party's choosing to have only a single encounter with the tribe. The Court cited extensively from Warren Trading Post, emphasizing that the enactment of comprehensive regulations by Congress precludes the state from legislating on the same subject.

The companion case of White Mountain Apache Tribe v. Bracker interrelated the principles articulated in the previous cases. The state attempted to impose motor carrier license and use fuel taxes on a non-Indian enterprise hauling timber on the reservation under a contract with the tribal timber corporation. Citing Warren Trading Post and McClanahan as examples of the preemption and infringement tests, the Court set forth the test to be applied when non-Indians engage in activities on the reservation. The Court examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

This analysis was then applied to the facts of Bracker to determine that the regulation of Indian timber and tribal roads was comprehen-
sive, leaving no room for state taxation.\textsuperscript{120} The imposition of the tax threatened the federal objective of guaranteeing that the tribe “receive . . . the benefit of whatever profit [the forest] is capable of yielding . . . .”\textsuperscript{121} The taxes undermined the Secretary’s ability to make the wide range of determinations committed to his authority, including fees and rates with respect to the harvesting and sale of tribal timber\textsuperscript{122} thereby reducing tribal revenues from such sales.\textsuperscript{123} The “imposition of state taxes . . . adversely affect[ed] the Tribe’s ability to comply with the sustained-yield management policies imposed by federal law”\textsuperscript{124} and reduced the sums of money available for federally required administrative expenses.\textsuperscript{125} The Court also concluded that the state did not have a legitimate governmental reason for imposing the taxes, i.e., the taxes were not imposed in return for governmental services nor did they perform a regulatory purpose.\textsuperscript{126} The state’s “generalized interest in raising revenues . . . [was not] sufficient to permit its proposed intrusion into the federal regulatory scheme with respect to the harvesting and sale of tribal timber.”\textsuperscript{127}

Combining the principles enunciated in \textit{Bracker} with those of the earlier preemption cases, the preemption doctrine has developed to contain four general requirements:

1. The minute details of the Indian—non-Indian transaction must be covered by a comprehensive, all-inclusive set of federal regulations.\textsuperscript{128}

2. The imposition of the state tax must be contrary to the federal policy of encouraging the specific Indian activity.\textsuperscript{129}

3. The federal regulations and policies must be read against a backdrop of Indian sovereignty with any doubtful expressions being construed in favor of the Indians.\textsuperscript{130}

4. The state must be assessing the tax in return for significant governmental functions\textsuperscript{131} or to further legitimate regulatory purposes\textsuperscript{132}

\textsuperscript{120} \textit{Id.} at 148.

\textsuperscript{121} \textit{Id.} at 149 (quoting 25 C.F.R. §141.3(a)(3) (1979)).

\textsuperscript{122} \textit{Id.}

\textsuperscript{123} \textit{Id.}

\textsuperscript{124} \textit{Id.} at 149-50.

\textsuperscript{125} \textit{Id.} at 150.

\textsuperscript{126} \textit{See id.}

\textsuperscript{127} \textit{Id.}


\textsuperscript{129} \textit{See 448 U.S. at 167-68; 448 U.S. at 149; 380 U.S. at 686-90.}

\textsuperscript{130} \textit{See 448 U.S. at 143-44; McClanahan v. Arizona State Tax Comm’n, 411 U.S. 164, 174-75 (1973).}

\textsuperscript{131} \textit{See Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 476 (1976).}
in order to outweigh the interests of the tribe and federal government. All four requirements must be considered in determining the validity of a state tax.

2. Application of the Preemption Test to the Timber Yield Tax

The application of these four criteria to the timber yield tax parallels the development of the preemption argument in Bracker. Both the timber yield tax and the motor carrier license and use fuel taxes assessed in Bracker involve the imposition of a direct tax on a non-Indian contracting with the tribe or tribal timber corporation. In addition, both involve an examination of federal regulation of Indian timber. This parallel analysis leads to the same result reached in Bracker, the imposition of a state tax indirectly burdening the management of Indian timber lands is preempted by federal regulations.

The first requirement of the preemption analysis is to determine if the transaction between the Indian and non-Indian is controlled by an all-inclusive set of federal regulations. Congress has authorized the Secretary to make rules and regulations necessary for the management of Indian forestry units on the principle of sustained-yield management. These regulations are set forth in Title 25, Code of Federal Regulations, Sections 141.1-141.23 and 142.1-142.12. They cover not only every aspect of timber management and harvesting, but also timber sales, including the advertisement, acceptance, and rejection of bids, contract terms, and terms of payment. The purchaser of timber from a tribe, whether standing timber or that milled by a timber corporation, is actually contracting for that purchase with the United States through the Secretary of the Interior. Every aspect of the transaction is controlled by all-inclusive and comprehensive regulations.

The second requirement of the preemption analysis requires a determination of the federal policy regarding Indian timber. This policy is one of protection. The Court recognized, in Squire v. Capoeman that timber, unlike other crops, is integrally related to the value of the land, and that the value should be preserved for the individual Indians. The regulations controlling the timber operations also reflect the con-
cern of preserving the value of the timber land. The objectives of the regulations further state that the development of forests should provide the Indians with whatever profit the forests are capable of yielding. The imposition of the timber yield tax deprives the Indians of the maximum profit possible, thus destroying an integral part of the wealth of the reservation.

The third requirement of the preemption analysis calls for an examination of the federal regulations against the backdrop of Indian sovereignty, construing doubtful expressions in favor of the Indians. The federal regulations and policies concerning Indian timber are clear cut and unambiguous. This rule of construction is unnecessary to reach the conclusion that the federal government intends to occupy the entire field of timber management on reservation lands.

The final requirement in the analysis requires a balancing of the state’s interest with those of the tribe and the federal government. As discussed previously, the state of California has no regulatory interest in Indian timber, nor has the state provided services in response to the timber yield tax. The only interest of California in assessing the timber yield tax against purchasers of Indian timber is revenue raising. Thus, “[w]here, as here, the Federal Government has undertaken comprehensive regulation of the harvesting and sale of tribal timber, where a number of the policies underlying the federal regulatory scheme are threatened by the taxes [the state] seek[s] to impose, and where [the state is] unable to justify the taxes except in terms of a generalized interest in raising revenue, the proposed exercise of state authority is impermissible.” The timber yield tax is preempted by federal regulations. The timber yield tax also must be examined using the third test which requires a more detailed balancing of interests.

C. Balancing State Taxing Power with Tribal Autonomy

Balancing of interests is a familiar concept in constitutional law. When Indian interests are weighed against those of the state, the examination must consider the historical development of the legal standing of tribal governments. Tribal interests include the doctrine of sovereignty and the requirement that the tribes be free from state infringement. The interest of the federal government in controlling Indian activity also must be included in the balance. The state’s interests in-

142. Id. §141.3(a)(3).
143. See text accompanying notes 42-55 supra.
clude preventing tribes from marketing their exempt status and maintaining taxing power over non-Indians who receive state services.

1. The Nature of the Balancing Test

The Court articulated the factors of the balancing test in the 1980 decision of Washington v. Confederated Tribes of the Colville Indian Reservation. The facts of Colville were similar to those of Moe v. Confederated Salish & Kootenai Tribes. The state was taxing sales of cigarettes from Indian smokeshops. The tribes in Colville imposed their own tribal tax on cigarette sales to non-Indians and thereby claimed the tribal tax ousted the imposition of a state tax on the same sales. The tribes argued that the imposition of the state sales tax would not only destroy a source of revenue, but also would deprive the tribes of essential governmental services that were funded in part by the tribal tax. The Court did not use the same analysis as was used in Moe to determine the validity of the tribe’s claims. Instead, elements of the infringement test and elements of the preemption test were used to create a balancing test. The tribe’s interest in sovereignty and self-government and the federal government’s interest as expressed through congressional policies were balanced against the state’s interest in imposing a tax on non-Indians. The balance appeared to be weighted in favor of the Indians, but the Court equalized the scales with the statement that

[while the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.]

The state sales tax on cigarettes sold to non-Indians was upheld using this balancing test. The sale of cigarettes raised money for essential tribal governmental programs, but these sales were not generated by reservation activities; the tribe was instead marketing a tax exemption. The non-Indian purchasers were not the recipients of any tribal services. On the other hand, the tax by the state was “reasonably designed to prevent the Tribes from marketing their exemption to nonmem-

147. 447 U.S. at 156.
148. See id.
149. Id. at 156-57.
bers," who were presumably the recipients of state services.151 The state tax on cigarette sales was upheld. The balancing test applied to the timber yield tax, however, reaches a different result.

2. Application of the Balancing Test to the Timber Yield Tax

The state tax on timber is different from the cigarette tax upheld in Colville. These differences require the balance to tip in favor of the Indians, thereby invalidating the tax. The balancing test states that the tribal interest is strongest when:

(1) "The revenues are derived from value generated on the reservation. . . ."152 There are few activities which are more closely related to the reservation than forestry. Timber may represent the major value of reservation land153 and a major source of revenue to those holding such land.154

(2) "The taxpayer is the recipient of tribal services."155 The taxpayer-purchaser of timber enjoys the use of roads maintained by the tribe156 and benefits from timber management practices,157 harvesting procedures, and milling operations.158 The taxpayer is also the direct recipient of services under the contract of sale with the tribe, the terms of which are subject to extensive federal control.159

On the other side of the scale the state's interest is strongest when:

(1) "The tax is directed at off-reservation value."160 "Off-reservation value" is not defined in Colville, but apparently cigarettes have this value. The Court expressed concern over the possibility of a tribe marketing a tax exemption and building commercial enterprises based on the competitive advantage of a tax exemption, implying that an "off-reservation value" could be assigned to those goods readily available in a non-Indian market. Indian timber is not such a commodity.161 Indian timber is inextricably connected with the reservation land.162

150. Id. at 157.
151. Id.
152. Id. at 156-57. Application of the Indian preemption doctrine does not require direct conflict of federal and state law.
154. Id.
155. 447 U.S. at 157.
158. Id. §§142.1-142.12.
159. Id. §§141.10-141.17, 142.4-142.12.
160. 447 U.S. at 157.
161. The timber yield tax also differs from the cigarette taxes in that prior to the timber yield tax the state did not have a legitimate governmental interest in taxing exempt Indian timber. The sale of cigarettes by the tribes, on the other hand, was a direct attempt by the tribe to circumvent an existing tax and market an exemption.
162. Squire v. Capoeman, 351 U.S. 1, 10 (1956).
(2) "The taxpayer is the recipient of state services."163 The taxpayer, purchaser of timber, may not even be a resident of the state. The only state services he may receive are those necessary to travel to the reservation. The state interest in imposing the timber yield tax is not strong enough to tip the balance in its favor and the tax is invalid using this balancing test.

CONCLUSION

Dissatisfaction with the ad valorem tax structure led to the enactment of the timber yield tax. The Legislature remedied many of the problems of the previous ad valorem system through the timber yield tax but, by so doing, extended the tax to persons beyond the state’s taxing power. The purchasers of Indian timber are uniquely situated, and any tax assessed against them must comply with the principles of Indian law.

The principles of Indian law discussed in this comment involve constitutional issues: the infringement test based on sovereignty, the preemption test based on federal supremacy, and the balancing test based on state and tribal interests. Any court determining the validity of a statute may wish to avoid these constitutional questions by giving the statute a narrow interpretation based upon the history, intent, and effect of this legislation. This comment has pointed out that the Legislature did not specifically intend for the timber yield tax to be extended to the purchasers of Indian timber. The statute was designed to eliminate the problems of the previous tax system which did not affect the Indians. The court would have to determine that the Indian timber was exempt from taxation. The exemption would disallow any tax on the timber no matter from whom the state attempted to collect.

Assuming a court finds that the imposition of the timber yield tax against purchasers of Indian timber is a valid exercise of the state’s taxing power, the court must then face the constitutional questions. The tax must be measured against the infringement test, the preemption test, and the balancing test. This comment has discussed the development of these tests and has determined that the preemption and balancing tests may be used to invalidate the tax. Using the preemption test, the comprehensive and all-inclusive nature of the federal regulations leaves no room for the additional burden of the timber yield tax. Using the balancing test, the state’s interest in raising revenue is outweighed by the tribal and federal policies of preserving the timber for the benefit of the Indians.

163. 447 U.S. at 157.
Faced with these three alternative analyses of the imposition of the timber yield tax to purchasers of Indian timber, a court may determine that imposition is beyond the intent of the statute or that the principles of Indian law override the state’s authority in this area. Regardless of the analysis chosen, the result is the same—the state of California cannot impose the timber yield tax on purchasers of Indian timber.

*Margaret Vick*