LITIGATION CONCERNING TRIBAL TAXES IN INDIAN COUNTRY

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A. TRIBAL TAXING AUTHORITY BEFORE 1978.

In the first 200 years of the United States of America, judicial decisions on the nature of Indian tribal powers adhered to three fundamental principles: (1) an Indian tribe possesses, in the first instance, all the powers of any sovereign state; (2) conquest renders the tribe subject to the legislative power of the United States, terminating the external power of the tribe but not affecting the internal sovereignty of the tribe; and (3) except where expressly qualified, full powers of internal sovereignty are vested in Indian tribes and their duly constituted organs of government. F. Cohen, *Handbook of Federal Indian Law* 230-35 (R. Strickland ed. 1982).

From the earliest days, Indian tribes were recognized as "distinct, independent, political communities." *Worcester v. Georgia*, 6 Pet. (31 U.S.) 515, 559 (1832). Indian tribes had powers of self-government, not by virtue of any delegation of powers from the federal government but by reason of their original tribal sovereignty. Tribes' sovereignty predated the Constitution, and this is acknowledged in the Commerce Clause's grouping of the "Indian Tribes" with "foreign Nations" and "the several States." Thus treaties and statutes were looked to by the courts as limitations upon original tribal powers or, in some cases, recognition of particular powers. In *Worcester v. Georgia*, Chief Justice Marshall adopted principles of European law holding that weak States, in order to provide for their safety, may place themselves under the protection of one more powerful, without stripping themselves of the right of government and ceasing to be States.

The establishment of permanent reservations for most surviving Indian tribes in the mid-1800s produced several rulings on the civil jurisdiction of tribal governments over nonmembers, in particular, taxing power.

In *Maxey v. Wright*, 54 S.W. 807 (Ind. Terr. Ct. App.), *aff'd*, 105 Fed. 1003 (8th Cir. 1900), the right of a tribe to levy a tax upon nonmembers of the tribe, attorneys practicing in federal court and residing on the reservation, was held to be an essential attribute of tribal sovereignty. The Court said: "[I]n the absence of express contradictory provisions by treaty, or by statute of the United States, the Nation (and not a citizen) is to declare who shall come within the boundaries of its occupancy, and under what conditions." 54 S.W. at 809.

Morris v. Hitchcock, 194 U.S. 384 (1904), arose within the Chickasaw Reservation in Oklahoma. The Interior Department sought to remove livestock pastured within the reservation without a tribal permit or license and to close businesses conducted without permits. The Curtis Act, 30 Stat. 495, June 28, 1898, stated that tribal law would apply upon executive approval: "[N]o act . . . of . . . the Choctaw or Chickasaw tribes . . . shall be of any validity until approved by the President of the United States. . . . Said acts . . . when so approved, shall be published in at least two newspapers . . . ."

The Court concluded that the Curtis Act was intended "to permit the continued exercise, by the legislative body of the tribe, of such a power as is here complained of, subject to a veto power in the President over such legislation as a preventive of arbitrary and injudicious action." The Court thus upheld the permit tax on livestock within the Chickasaw Reservation whether or not the livestock owners lawfully possessed parcels of land in towns and cities in the Reservation.

The Attorney General had issued a similar opinion, 23 Ops. Atty. Gen. 528 (1900); *see also* 7 Ops. Atty. Gen. 174, 177-78 (1855), with respect to the right of the Cherokee Nation to impose an export tax on hay grown within the limits of the reservation. The opinion of the Attorney General suggested that tribal authority to impose such a tax would remain "even if the shipper was the absolute owner of the land on which the hay was raised." This was approved by the Supreme Court in *Morris v. Hitchcock*, 194 U.S. at 392.

The Creek Nation won a similar case, *Buster v. Wright*, 135 Fed. 947, *app. dismissed*, 203 U.S. 599 (1906). In that case non-tribal members contended that the sale of lots to them and the incorporation of cities and towns within Creek territory, as authorized by Congress, segregated the town sites and lots from the territory of the Creek Nation and deprived the Creeks of governmental jurisdiction to impose a permit tax on the privilege of trading within the Creek Nation. The Court said:

> But the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title of the land which they occupy in it, or by the existence of municipalities therein endowed with power to collect taxes for city purposes, and to enact and enforce municipal ordinances. Neither the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein enclosed with the usual powers of municipalities, nor by the ownership nor occupancy of the land within its territorial jurisdiction by its citizens or foreigners.

135 Fed. at 952.

In 1934, Congress authorized tribes to exercise authorities in addition to the "powers vested in any Indian tribe or tribal council by existing law." 25 U.S.C. 'sec. 476. That section of the Indian Reorganization Act led to an Interior Department Solicitor, opinion on what powers were vested in tribes by then-existing law. Margold's seminal opinion, 55 I.D. 14, 1 Ops. Sol. Int. 445 (Oct. 25, 1934), notes that the powers of Indian tribes can only be answered generally because individual tribes' authority is affected by special treaties and acts of Congress. Margold found that:

> [O]ver all the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business.

Id. at 50.

While much of Margold's opinion addresses the authority of tribes over their own members, its discussion of taxes, licensing, and the power to exclude remains important to analysis of tribal civil jurisdiction over nonmembers. *See also* F. Cohen, *Handbook of Federal Indian Law* 122, 323 (1945).

Williams v. Lee, 358 U.S. 217 (1959), also made clear that tribes retained jurisdiction over nonmembers. This case remains a 20th Century landmark ruling on tribal civil jurisdiction over nonmembers. There, an action by a non-Indian against reservation Indians was held to fall within the exclusive jurisdiction of the Navajo tribal courts. The Court noted that the transaction occurred on the reservation and said: "The cases in this Court have consistently guarded the authority of Indian governments over their reservations," 358 U.S. at 223.

In 1973, however, the Supreme Court signaled its departure from the doctrine that reserved tribal authority stemming from inherent sovereignty was plenary, alterable only by express statute or treaty provision. In *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973), the Supreme Court ruled that Arizona had no jurisdiction to impose a tax on the income of Navajo families residing on the reservation whose income was wholly derived from reservation sources. The Court cited *Worcester* and other cases for the proposition that tribes are distinct political communities having territorial boundaries within which their authority is exclusive. However Justice Marshall warned that inherent tribal sovereignty had been diminished:

> This is not to say that the Indian sovereignty doctrine, with its concomitant jurisdictional limit on the reach of state law, has remained static during the 141 years since *Worcester* was decided. Not surprisingly, the doctrine has undergone considerable evolution in response to changed circumstances. . . .
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> This line of cases was summarized in this Court's landmark decision in *Williams v. Lee*, 358 U.S. 217 (1959): "Over the years this Court has modified [the *Worcester* principle] in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized . . ." *Id.*, at 219-220 . . .
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> The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power . . . The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read . . . [Indian nations Indian tribes] "were, and always have been, regarded as having a semi-independent position when they preserve their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided." *United States v. Kagama*, 118 U.S. at 381-82.

Id. at 173.

B. POST-1978 LIMITATIONS ON TRIBAL AUTHORITY

Federal law on tribal jurisdiction changed radically in 1978. In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Supreme Court stated: "[A]n examination of our earlier precedents satisfies us that, even ignoring treaty provisions and congressional policy, Indians do

not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress." *Id.* at 208 (emphasis added). The Court went on to declare that tribes retain elements of "quasi-sovereign" authority, but the retained powers are limited by more than the specific restrictions in treaties and congressional enactments. "Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers *inconsistent with their status*." In the years since *Oliphant* the federal courts have embarked on a wide ranging search for powers believed to be "inconsistent with the tribes' dependent status." Many such limitations have been found.

In *Oliphant*, 435 U.S. 191 (1978), the Suquamish Tribe claimed authority to try non-Indians not on the basis of a "congressional statute or treaty provision but by reason of [its] retained national sovereignty." *Id.* at 196. The case involved defendants charged with assaulting a police officer and resisting arrest or with recklessly endangering another person as a result of a high speed chase and collision with a tribal police vehicle. The Court noted that the exercise of criminal jurisdiction over non-Indians by tribal courts was a relatively new phenomenon. Even though some tribes had formal criminal systems during the 19th century, the *Oliphant* Court stated that treaties with the tribes assumed that the tribes did not have criminal jurisdiction over non-Indians "absent a congressional statute or treaty provision to that effect." *Id.* at 197.

The Court noted a treaty provision in which the tribe agreed "not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial." *Id*. at 208. The Court concluded that by submitting to the overriding sovereignty of the United States, treaty tribes necessarily gave up their power to try non-Indian citizens of the United States "except in a manner acceptable to Congress." *Id.* at 210. The Court found that modern tribal courts resemble their state counterparts and that the applicability of the Indian Civil Rights Act of 1968 and the prevalence of non-Indian crime on reservations "are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians." *Id.* at 211-12.

The stunning decision in *Oliphant* immediately led to arguments that tribes lacked civil jurisdiction as well as criminal jurisdiction over nonmembers within their reservations. Thus far, the United States Supreme Court has refused to fully embrace that approach. However, the Court's new analysis based on implicit divestiture of tribal authority has been reiterated many times.

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980), rejected the State of Washington's contention that inherent tribal authority to tax the activities or property of non-Indians is inconsistent with the overriding interests of the national government. The Court said:

> [A]uthority to tax the activities or property of non-Indians taking place or situated on Indian lands, in cases where the tribe has a significant interest in the subject matter, was very probably one of the tribal powers under "existing law" confirmed by ' 16 of the Indian Reorganization Act of 1934, 48 Stat. 987, 25 U.S.C. ' 476.

447 U.S. 134, 153 (emphasis added).

The *Colville* court acknowledged the implicit divestiture analysis of *Oliphant* and *Wheeler* but noted that such divestiture had only been found when tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts. Also, while the Court found that the IRA "confirmed" the tribal power to tax events on Indian land, it did not find that Congress had also preempted state taxing power over nonmember transactions. Thus, in *Colville*, the Court upheld the tribe's authority to impose cigarette taxes on nonmember purchasers on reservations on the basis of inherent authority and the IRA's ratification of that authority, and it also upheld the state's authority to tax the same transactions.

Colville illustrates that the analysis of statutes concerning tribal authority is a two-step process. The Court first examined statutes fostering tribal self-government and found that they confirmed tribal power to act. Second, the Court found none of the statutes was intended to give tribal enterprises a competitive advantage over all other businesses, nor to comprehensively regulate all sales by Indians to nonmembers of the tribe. The Court noted that Congress could create that power:

> [A]lthough the Tribes themselves could perhaps pre-empt state taxation through the exercise of properly delegated federal power to do so, cf. *Fisher v. District Court*, 424 U.S. 382, 390 (1976) (*per curiam*); *United States v. Mazurie*, 419 U.S. 544 (1975), we do not infer from the mere fact of federal approval of the Indian taxing ordinances, or from the fact that the Tribes exercise congressionally sanctioned powers of self-government, that Congress has delegated the far-reaching authority to pre-empt valid state sales and cigarette taxes otherwise collectible from nonmembers of the Tribe.

447 U.S. at 156.

In contrast, the lower court in *Colville* believed that the tribal tax preempted the state tax. It reasoned that because Congress can validly delegate legislative authority to a tribe, when a tribe exercises such delegated authority and the result is a tribal ordinance that conflicts with an otherwise valid state statute, the state statute is preempted. The Supreme Court rejected that reasoning.

The first major restriction of tribal civil jurisdiction over nonmembers came in 1981 with the decision in *Montana v. United States*, 450 U.S. 544 (1981). In *Montana*, non-Indian fee land owners challenged the power of the Crow Tribe to restrict their hunting and fishing on and near the Big Horn River. The tribe sought to rely on its ownership of the bed of the Big Horn River. In a six-to-three decision, the Supreme Court held that the riverbed passed to the State upon its admission into the Union and that the authority of the Crow Tribe recognized in the Fort Laramie Treaty to control hunting and fishing could only extend to land on which the tribe exercised absolute and undisturbed use and occupation. *Montana* established that, in general, tribes lack plenary regulatory authority over activities of nonmembers on lands alienated to non-Indians as a result of the General Allotment Act. The Court applied the implicit divestiture of sovereignty notion from *Oliphant* and established as a "general proposition" that the inherent sovereign

powers of an Indian tribe do not extend to the activities of nonmembers of the tribe, subject to several exceptions. *Id*. at 564-66.
Montana v. United States, 450 U.S. 544 (1981), establishes the benchmark: tribal jurisdiction over nonmembers exists if one of three tests is met: (1) "express congressional delegation," (2) "taxation, licensing, or other means [regulating] the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements," or (3) "conduct of non-Indians on fee lands within [the] reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 564-66.

By 1989, *Montana v. United States* began to be viewed as the Rehnquist Court's seminal opinion on tribal civil jurisdiction over nonmembers. In particular, two of the exceptions to *Montana's* general rule, the consensual relationship exception and the threatening conduct exception, have come to be known as *Montana* Exceptions 1 and 2. It is important to recognize that reliance on these exceptions oversimplifies both the *Montana* decision itself and current federal common law on tribal civil jurisdiction over nonmembers.

While *Montana* addressed tribal regulation of nonmembers on lands alienated to non-Indians, its general rule and its exceptions are being seen by some courts now as applicable to activities on tribal land.

In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), the Court upheld a tribal severance tax on oil and gas production on tribal reservation land, concluding that the taxing power is an inherent attribute of tribal sovereignty that has not been divested by any treaty or act of Congress. In a six-to-three decision the Court found the tribe's taxing power in its general authority, as a sovereign, to control economic activities within its jurisdiction and to defray the cost of providing governmental services.

The Court majority and minority divided over the question whether the tribe's power to tax was derived solely from its power to exclude non-Indians from the reservation. Petitioners operated under approved long-term leases with the tribe. The Court held that although the tribe had agreed to sell the right to use the land, it had not abandoned its sovereign powers simply by failing to expressly reserve them in a contract. The majority did not rely upon consensual jurisdiction and never cited *Montana v. United States*. Instead the Court relied upon *Washington v. Confederated Tribes of the Colville Indian Reservation*, *supra*. The majority also explained *Morris v. Hitchock*, *Buster v. Wright*, and *Maxey v. Wright*, discussed *supra*, saying:

> These cases demonstrate that a tribe has the power to tax nonmembers only to the extent the nonmember enjoys the privilege of trade or other activity on the reservation to which the tribe can attach a tax. This limitation on tribal taxing authority exists not because the tribe has the power to exclude nonmembers, but because the limited authority that a tribe may exercise over nonmembers does not arise until the nonmember enters the tribal jurisdiction. We do not question that there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe.

Id. at 141-42. In *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985), the Court also upheld the Navajo Nation's authority to impose a possessory interest tax on lands leased to a nonmember mining company doing business on the reservation, although the Nation's ordinance was not approved by the Secretary of the Interior.

City of Timber Lake v. Cheyenne River Sioux, 10 F.3d 554 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 2741 (1994), shows the important result that flows from statutorily conferred power. There, the court relied on ' 1161, as construed in *Rice v. Rehner*, 463 U.S. 713 (1983), to find authority for tribal regulation of liquor throughout the reservation with no exemption for non-Indian communities. Thus, while the reference to non-Indian communities at issue in *Mazurie* would affect federal criminal prosecutions, it would not limit the tribal civil jurisdiction over nonmembers authorized by ' 1161. This ruling provides strong support for tribal liquor taxes, applicable throughout the reservation, where they are part of a federally-approved liquor ordinance.

In *Big Horn Electric v. Adams*, 219 F.3d 944 (9th Cir. 2000), affirming 53 F. Supp. 2d 1047 (D. Mont. 1999), the Crow Tribe imposed an ad valorem tax on utility property located on power company rights-of-way on the Crow Reservation. The electric company sued officials of the Crow Tribe, seeking injunctive and declaratory relief against the tribal tax on the company's property on a right-of-way across tribal lands. The district court determined that the right-of-way was equivalent to fee land owned by nonmembers for purposes of deciding nonmember governance. The court determined that the ad valorem tax on the property exceeded the Tribe's inherent sovereignty because it was not imposed on the activity which formed the consensual relationship, the sale of power. The court stated that *Strate* and *Wilson v. Marchington* had impliedly overruled *Blackfeet*. Accordingly, the Tribe lacked authority to impose an ad valorem tax on rights-of-way deemed to be the equivalent of fee land owned by nonmembers. However, the court also ruled that the sale of power to customers, about half of whom are tribal members, was taxable by the Tribe and supported by a consensual relationship within the meaning of *Montana* Exception 1.

Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645 (2001), rejected the Navajo Nation's claim that inherent sovereignty supported imposition of a hotel occupancy tax upon nonmembers on non-Indian fee land within its reservation. The Court analyzed the first and second *Montana* exceptions and held them inapplicable. The Court rejected broad language in *Merrion* and earlier cases and found the analysis of *Brendale* to be inapplicable because the effects of the trading post did not endanger the Navajo Nation's political integrity.

In *Atkinson Trading*, a non-Indian hotel proprietor sued members of the Navajo Tax Commission seeking a declaratory judgment that the Navajo Nation had no jurisdiction to impose a hotel occupancy tax on the proprietor's guests. The New Mexico District Court entered summary judgment in favor of the Commission members. Atkinson Trading appealed. The Court of Appeals held that: (1) district courts in reviewing tribal court decisions on jurisdictional issues should review findings of fact for clear error and conclusions of law de novo; (2) the District Court did not abuse its discretion in finding that Navajo tribal courts were not fundamentally

unfair or biased, and that clear error discretion thus should be given to the tribal courts' findings of fact; (3) the fact that the hotel was situated on fee land did not compel a finding that the Nation lacked jurisdiction over the proprietor's nonmember guests; (4) the District Court applied the appropriate test for determining whether the proprietor entered into a consensual relationship with the Navajo Nation; and (5) a consensual relationship existed between Nation and guests, such that Nation had inherent jurisdiction to tax. Circuit Judge Briscoe dissented. 210 F.3d 1247 (10th Cir. 2000). On petitions for rehearing, the Court of Appeals split evenly so rehearing was denied.

The Supreme Court's unanimous opinion rejected the Tenth Circuit's finding of consensual relationships between the Navajo Nation and the hotel guests or the trading post. The Court stressed that the case involved no claim of statutorily conferred power. Slip op. at 8, n.5. The Court noted that neither the Indian Trader's Statute, 25 U.S.C. § 261, nor the regulations adopted under that statute, authorized the hotel occupancy tax at issue. Slip op. at 10 and n.10.

Tribal utility taxes were again at issue in a Washington Utilities and Transportation Commission case, *Brannan v. Qwest Corporation*, (Feb. 2002). The Commission upheld Qwest's pass-through of the Lummi Nation's and Swinomish Tribe's utility taxes to nonmember customers living within reservation boundaries. The Commission distinguished the tribal utility taxes from those in *Atkinson* on the basis of the Tribes' relationship with the utilities. In *Willman v. Washington Utilities and Transp. Comm'n*, 154 Wn.2d 801 (2005), the Washington Supreme Court reached the same result regarding power and other utility taxes where Yakama Nation taxes were passed through to member and nonmember utility bills. These decisions highlight the importance of thinking "outside of the box," and like here, working with utilities to impose tribal taxes on nonmembers.

We jump ahead now to more recent court opinions affecting this topic, first from the Supreme Court:

C. UNITED STATES SUPREME COURT

1. ***United States v. Lara***, 541 U.S. 193 (2004). Following denial of his motion to dismiss on basis of prior tribal court conviction, defendant, an Indian nonmember of the tribe, pleaded guilty in district court to assault on a federal officer occurring in Indian Country. Defendant appealed. A panel of the Eighth Circuit affirmed, 294 F.3d 1004. On rehearing en banc, the appellate court reversed and remanded with instructions. Certiorari was granted. The Supreme Court held that: (1) source of tribe's power to prosecute and punish defendant for violence to a policeman was inherent tribal sovereignty rather than delegated federal authority; (2) Congress possessed constitutional power to lift or relax restrictions on Indian tribes' criminal jurisdiction over nonmember Indians that political branches of government had previously imposed; and (3) the Double Jeopardy Clause could not bar federal prosecution of defendant for assaulting a federal officer after Indian tribe's prosecution and punishment of him for violence to a policeman, absent any showing that the source of the tribal prosecution was federal power. Reversed. This case illustrates the broad power of Congress to delegate or clarify tribal authority.

2. ***City of Sherrill, New York v. Oneida Indian Nation of N.Y.,*** No. 03-855,

544 U.S. 197 (U.S. Mar. 29, 2005). A 1794 treaty recognized that the Oneida Reservation included lands in Sherrill and Madison Counties. During the 1880's, much of the Reservation was sold to non-members but recently the Tribe and tribal members have begun repurchasing parcels. The Tribe sued the City after Sherrill began eviction proceedings because taxes went unpaid on certain tribal properties. The district court held the City could not tax the Tribe. The Second Circuit Court of Appeals affirmed, concluding that property owned by the Tribe is Indian Country. The Supreme Court reversed. The damages remedy upheld in Oneida II does not support declaratory and injunctive relief recognizing sovereign status. The doctrine of laches, which focuses on one side's inaction and the other's legitimate reliance, applies here to bar the reestablishment of Indian sovereign control after two centuries since the Oneidas last exercised regulatory control. Justice Stevens dissented. This case illustrates the continuing importance of trust land.

3. ***Wagnon v. Prairie Band Potawatomi Nation***, No. 04-631, 126 S. Ct. 676 (U.S. Dec. 6, 2005). Indian tribe brought suit for declaratory and injunctive relief, challenging imposition of Kansas motor fuel excise tax on non-Indian distributor for fuel supplied to gas station operated by tribe on reservation property. The district court, 241 F.Supp.2d 1295, granted summary judgment dismissing action. Tribe appealed. The appellate court, 379 F.3d 979, reversed. State petitioned for certiorari which was granted. The Supreme Court, Justice Thomas, held that: (1) Chickasaw categorical bar on imposition of legal incidence of state excise tax on a tribe or on tribal members for sales made inside Indian Country without congressional authorization was not applicable; (2) Bracker interest-balancing test for preemption of state taxation of activity on an Indian reservation, which applies when a state asserts taxing authority over the conduct of non-Indians engaging in activity on a reservation, was not applicable; (3) tax was not invalid on theory that it was impermissibly discriminatory because the state exempted from taxation fuel sold or delivered to all other sovereigns; and (4) tax was valid and posed no affront to tribe's sovereignty. Reversed. This case illustrates the continuing importance of the Bracker balance test within Indian Country.

4. ***Plains Commerce Bank v. Long Family Land and Cattle Company, Inc., et al.***, Docket No. 07-411 (June 25, 2008). Issue: Do Indian tribal courts have subject matter jurisdiction to award relief with respect to a sale of fee land as "other means" of regulating conduct of nonmember bank, owning fee land on reservation, that entered into private commercial agreement with member-owned corporation? The lower court ruled in *Plains Commerce Bank v. Long Family Land and Cattle Co. Inc.*, 491 F.3d 878, that the tribal court had jurisdiction over claim by tribal members that defendant bank, South Dakota corporation with its principal place of business outside tribe's reservation, discriminated against them, based on either their Indian ancestry or tribal affiliation, in terms of loan that bank made to their family-owned corporation. That court held that the Longs' claim satisfied requirements for the first category of permissible tribal jurisdiction over nonmembers recognized in *Montana v. United States*, 450 U.S. 544 (1980), in that (i) bank had formed consensual relationship with tribal members, by virtue of loans to their corporation whose overwhelming tribal character clearly benefited bank (through loan guarantees by Bureau of Indian Affairs that greatly reduced bank's risk) and bank's related commercial relationships with corporation's individual owners, and (ii) tribal tort law invoked by tribal members is appropriate "other means" of regulating activities of nonmember that have some nexus to consensual relationship, given that discrimination claim arose directly from pre-existing commercial relationship between tribal members and bank and

sought to hold nonmembers, such as bank, to minimum standard of fairness when they voluntarily deal with tribal members.

The Supreme Court reversed the lower court, ruling that the tribal court could not set aside the bank's sale of fee lands. The Court did not reach the question of the tribal court's authority over contract breach claims and instead issued a very narrow decision concerning one form of relief granted by the tribal court.

D. LOWER COURTS

5. ***Reservation Telephone Cooperative v. Henry***, Nos. A4-02-121, A4-02-126, 278 F. Supp. 2d 1015 (D.N.D. Aug. 26, 2003). The Plaintiffs commenced an action against the Three Affiliated Tribes and the Tax Director for injunctive and declaratory relief alleging that a possessory interest tax imposed by the Three Affiliated Tribes cannot be assessed against rights-of-way and telephone lines granted and used by the Cooperatives throughout the Fort Berthold Indian Reservation. The district court granted plaintiff's motions for summary judgment.

6. ***State of South Dakota v. Mineta,*** No. CIV. 02-3034, 278 F. Supp. 2d 1025 (D.S.D. Aug. 21, 2003). State brought action against Secretary of Transportation, seeking declaration that the Secretary, who assertedly had taken final action to require the state to require highway contractors to pay, and charge to the state, occupational taxes levied by Indian tribes in connection with construction projects on state highways which traverse Indian reservations, had no such authority, and that the Secretary could not withhold federal highway funds because of state action to not honor and reimburse highway contractors for such tribal occupational taxes. On the Secretary's motion to dismiss, the district court held that there was no final agency action and the state had suffered no injury, and thus, the action was not ripe for review. Motion granted.

7. ***Warbelow's Air Ventures, Inc. v. Commissioner of Internal Revenue***, No. 02-73328, 2003 WL 22417080 (9th Cir. Oct. 22, 2003). Not selected for publication in the Federal Reporter. Taxpayer petitioned for redetermination of deficiencies arising from denial of Indian employment credit ("IEC"). The Tax Court, 2002 WL 1396736, decided in favor of IRS. Taxpayer appealed. The appellate court held that in statute permitting tax credit for wages paid to Indian tribal members, phrase "within an Indian reservation" referred to land on the village or regional corporation lands. Affirmed.

8. ***Winnebago Tribe of Nebraska v. Kline***, No. 02-4070-JTM, 297 F. Supp. 2d 1291, 2004 WL 73284 (D. Kan. Jan. 15, 2004). Indian tribes challenged state's right to collect motor vehicle fuel taxes from tribally-operated businesses. State moved to dismiss. The district court held that: (1) tribe was not "person" who could sue under § 1983; (2) Eleventh Amendment did not bar suit; (3) Tax Injunction Act did not bar tribes' suit, but did bar claims by individual tribal members; (4) principles of comity did not warrant dismissal of suit; (5) abstention was not warranted; (6) complaint stated sovereign immunity claim; and (7) suit was not barred by Hayden-Cartwright Act. Motion granted in part and denied in part.

9. ***Bercier v. Kiga***, No. 31052-0-II, 127 Wn. App. 809, 103 P.3d 232 (Wash. Ct. App. 2004). Bercier appealed the trial court's dismissal of his declaratory judgment action. He argued he should be exempt from all Washington excise taxes and regulations because, as a member of the Fort Peck Indian Tribe who resides and sells tobacco products on the Puyallup Indian reservation, he is an Indian doing business on Indian trust land, entitled to exemptions under RCW 82.24.260, 82.24 .900, and 82.26.040. Holding that Bercier is not entitled to a tax exemption because he is not enrolled in the Puyallup Tribe on whose land he is doing business, the appellate court affirmed.

10. ***Coeur d'Alene Tribe of Idaho v. Hammond***, No. 02-35965, 384 F.3d 674 (9th Cir. 2004). Idaho officials appealed order enjoining them from collecting the motor fuels tax on fuel delivered by non-tribal distributors to tribally-owned gas stations for sale on Indian reservations. After the Supreme Court of Idaho ruled in 2001 that the incidence of the tax fell impermissibly on Indian tribes, Idaho legislature amended the tax law to state that the incidence of the tax falls on non-tribal distributors. However, because the relevant operative provisions of the fuel tax that the state Supreme Court analyzed have not changed, the incidence of the motor fuel tax still falls on the tribes. Furthermore, the Hayden-Cartwright Act does not provide Congressional authorization for imposing the tax. Affirmed.

11. ***Mann v. ND Tax Commissioner*** , Dkt. No. 20040174, 2005 ND 36, 692 N.W. 2d 490 (N.D. 2005). Native Americans brought action against Tax Commissioner and Treasurer for declaratory and injunctive relief against imposition of motor fuels taxes on them on their reservations. The Northwest Judicial District Court issued permanent injunction against collection, dismissed all plaintiffs except one, and denied motions for reconsideration. Appeal and cross-appeal were taken. The Supreme Court held that: (1) denial of state's motion for reconsideration was not appealable without certification as final; (2) dismissal of all but one plaintiff without prejudice was not appealable without certification as final order; and (3) decision not to exercise supervisory authority was warranted. Appeals dismissed.

12. ***Willman v. Wash. Util. and Transp. Comm'n.,*** No. 75821-1 (Wash. Sup. Ct. Aug. 11, 2005). In August 2002, the Yakama Tribal Council adopted a franchise ordinance whose preamble states in part: Utilities operating on the Reservation have placed Utility facilities on lands owned or controlled by the Yakama Nation without authorization or for which authorization has expired and the Tribal Council finds that it is in the public interest to require Utilities operating on the Reservation to obtain permission for such facilities by entering into agreements with the Yakama Nation. The ordinance requires any utility operating within the reservation to obtain a franchise from the Nation and provides for a fine of $1,000 per day for operating without a franchise. In addition, any utility operating within the reservation (regardless of whether it has obtained a franchise) is required to pay a franchise fee of three percent of its gross operating revenue. Affirmed

13. ***Squaxin Island Tribe v. Stephens***, No. C033951Z, 2006 WL 278559 (W.D. Wash. Feb. 3, 2006). Defendant Fred Stephens, represented by the state of Washington ("State"), moved for reconsideration of the court's November 22, 2005, entry of judgment and permanent injunction barring the state from collecting the Washington State motor vehicle excise tax from tribal retailers. The court entered an order granting the Tribes' motion for summary judgment as to the legal incidence of the Washington State motor vehicle fuel tax, ruling that the

legal incidence of the tax impermissibly fell on the Tribes' retail fuel stations, relying on the multifactor analysis described in *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995), and *Coeur d'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674 (9th Cir. 2004). Because the court ruled in favor of the Tribes as to their legal incidence claim, the Tribes' preemption and tribal sovereignty claims were rendered moot. On December 6, 2005, the United States Supreme Court issued its decision in *Wagnon v. Prairie Band Potawatomi Nation*, __ U.S. __, 126 S. Ct. 676 (2005). The Tribes filed their proposed judgment and permanent injunction and the state filed its response and objections to the proposed judgment requesting that the court direct the parties to file additional briefing on the impact of the *Potawatomi* decision on the case. The state moved for reconsideration of the judgment and injunction and requested a stay of the judgment and injunction pending the resolution of the motion for reconsideration. The court found that the state provided no basis for altering the judgment or reconsidering the November 22 Order granting summary judgment in favor of the Tribes, that the state continued in its failure to identify which entity in the supply chain bears the legal incidence of the tax, and that the state had apparently abandoned any argument that the consumer bears the legal incidence of the Washington State motor vehicle tax and would now place it on suppliers, distributors, or both. The court found that none of the state's arguments, including those based on the *Prairie Band* decision, supported that conclusion under the factors articulated and applied in *Chickasaw Nation* and *Hammond*. The state's Motion for Reconsideration and Stay of the Judgment was denied as untimely and meritless.

14. ***Winnebago Tribe of Nebraska v. Kline***, No. 94,781, 283 Kan. 64, 150 P.3d 892 (Kan. Feb. 2, 2007). Indian tribes brought action seeking injunctive relief and a determination that the motor-fuel tax law does not authorize assessment of tax on motor fuel delivered and sold by a Nebraska tribal corporation to tribes in Kansas for on-reservation retail sale. The district court certified question of law. The Supreme Court held that: (1) distributor of first receipt is liable for payment of the motor fuel tax; (2) importers are not included within the meaning of "distributors"; and (3) tribal corporation did not "receive" fuel within state and, thus, did not fall within definition of "distributor" and was not liable for motor fuel tax. Certified question answered.

15. ***Osage Nation v. State of Oklahoma Ex Rel. Oklahoma Tax Commission***, No. 03-5162, 2007 WL 4553668 (10th Cir. Dec. 26, 2007). Not selected for publication in the Federal Reporter. The district court permitted the Osage Nation (Nation) to sue the state of Oklahoma, the Oklahoma Tax Commission, and individual members of the Tax Commission in their official capacities in federal court to enjoin the state's assessment of income tax on tribal members who are employed by the Nation and reside in Osage County, Oklahoma. The court found that the Nation sought to assert sovereign rights in direct opposition to the historically exercised sovereign authority of the state of Oklahoma. The appellate court reversed the district court decision to allow the Nation's suit to proceed against the state of Oklahoma and the Oklahoma Tax Commission and remanded for dismissal of those defendants. As to the individual defendants, the decision of the district court was affirmed.

16. ***Village of Pender v. Parker,*** No. 4:07CV3101, 2007 WL 2914871 (D. Neb. Oct. 4, 2007). This case raised the question of whether or not the Village of Pender, and the other plaintiffs' businesses, are physically within the Omaha Indian Reservation such that the Omaha Tribe may regulate and tax liquor sales in Pender. Before the court was a motion to

amend seeking to add the Village of Pender as a plaintiff. Also pending was a motion to dismiss the case because plaintiffs failed to exhaust their tribal court remedies. The court: (1) granted the motion to amend the complaint; (2) denied the motion to dismiss; (3) stayed the case to allow the plaintiffs to exhaust their remedies in the Omaha Tribal Courts; and (4) kept a temporary restraining order in place with the defendants bound by its terms during the pendency of the stay

17. ***Barona Band of Mission Indians v. Yee***, No. 06-55918, __ F.3d __, 2008 WL 2440528 (9th Cir. June 18, 2008). Indian tribe brought action against California State Board of Equalization (SBE), seeking declaratory relief from imposition of state sales tax on construction materials purchased by non-Indian electrical subcontractor from non-Indian vendor and delivered to Indian land pursuant to contract for $75 million casino expansion. The district court granted tribe's motion for summary judgment, and the SBE appealed. The appellate court held that: (1) legal incidence of sales tax fell upon subcontractor and thus tax was not per se invalid as a tax on tribe or its members; (2) sales tax was valid under Bracker preemption analysis; and (3) Indian Gaming Regulation Act (IGRA) did not preempt sales tax. Reversed and remanded.

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