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COMMENTS

HAYDEN-CARTWRIGHT: A READY REMEDY FOR OKLAHOMA'S INDIAN FUEL TAX WOES

I. INTRODUCTION

"The Oklahoma transportation infrastructure is close to a crisis Investment in transportation infrastructure is the key link to economic development"¹

In a decision that "could cost [Oklahoma] and other states hundreds of millions of dollars,"² the United States Supreme Court declined³ to consider whether Congress has specifically granted States the power to tax motor fuels bought by an Indian tribe for resale in Indian territory.⁴ This article argues that the Supreme Court has two primary reasons ultimately to decide that Congress has done so through the Hayden-Cartwright Act.⁵ First, the legislative history of the Act reveals that it was Congress' intent to permit such taxation. Second, failure to allow the States such power would threaten the ability of states to

1. Brian Ford, *Motorists' Fees Said Diverted from Roads by State*, TULSA WORLD, Oct. 29, 1995, at A24 (quoting Stephen Lalli, Executive Director, Oklahoma Good Roads and Streets Association).

2. Rob Martindale, *Decision Creates "Different Ball Game,"* TULSA WORLD, June 15, 1995, at N1 (quoting Phillip Chisholm, Executive Director, Petroleum Marketers Association of America).

3. In *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 n.16 (1980), the Court cursorily stated that the Hayden-Cartwright Act "was not designed to overcome the otherwise pre-emptive effect of federal regulation of tribal timber." The Court said, "[w]e need not reach the more general question whether the Hayden-Cartwright Act applies to Indian reservations at all." *Id.* See also, *Herzog Bros. Trucking, Inc. v. State Tax Comm'n*, 508 N.E.2d 914 (N.Y., 1987) (finding federal law pre-empted regulations), *vacated and remanded*, 487 U.S. 1212 (1988), *on remand* 533 N.E.2d 255 (1988), where a motor fuel wholesaler argued that New York could not impose its state motor fuel taxes on him because he sold only to Indian retailers on a reservation. Rather than pick up Hayden-Cartwright, the Supreme Court vacated and remanded for reconsideration under proposed regulations adopted by the state tax commission.

4. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S. Ct. 2214, 2219 (1995). Justice Ginsburg stated that "even though the Court of Appeals flagged the Act's possible relevance [footnote omitted], Oklahoma did not mention this 1936 legislation in its petition for certiorari." *Id.* In *Herzog Bros.*, 487 U.S. 1212, the Solicitor General suggested, to no avail, that the case be remanded to consider the applicability of Hayden-Cartwright, "A remand to the court of appeals also would allow that court to consider the extent, if any, to which the Hayden-Cartwright Act applies to sales of motor fuel to Indians or non-Indians on Indian reservations . . ." Brief for the United States as Amicus Curiae at 16 n.10, State Tax Commission of New York v. *Herzog Bros. Trucking, Inc.*, 487 U.S. 1212 (1988) (No. 87-382).

Congressional power to regulate tribal affairs has been taken as given: "Congress has broad power to regulate tribal affairs under the Indian Commerce Clause." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) (citing Indian Commerce Clause, U.S. CONST. art. I, § 8, cl.3).

5. 4 U.S.C. § 104(a) (1994). The State of Washington has taken this position. Fronda Woods (Assistant Attorney General, Washington State), Indian Issues Concerning Highway User Taxes (September 13, 1994) (unpublished manuscript, copy on file with author).

provide adequate transportation infrastructures for their populations,⁶ and thus would stifle economic development. In the alternative, Congress should reaffirm its commitment to the federal relationship between states and the national government by reaffirming states' power to tax fuel retailers regardless of ethnic heritage of the landowner.

To understand why Hayden-Cartwright is so important to Oklahoma requires some background information. That background first discusses *Oklahoma Tax Commission v. Chickasaw Nation*,⁷ the United States Supreme Court decision which underscored the need to look thoroughly at the Hayden-Cartwright Act. Second, the background explains that the Act's roots reach deep into the history of American highway funding. After this background, the author argues that those roots are strong enough to support state taxation of motor fuels bought by an Indian tribe for resale in Indian territory.

II. HIGH NOON FOR A FUEL TAX SHOWDOWN

The Oklahoma legislature imposes a tax "upon the sale of each and every gallon' of gasoline and diesel fuel sold within the State."⁸ Before this past legislative session ended, Oklahoma law required the fuel distributors to act as "agent[s] of the state for the collection of the excise tax."⁹ As such, the statutes required distributors to "pay the tax due on each gallon of fuel sold to retailers or others in Oklahoma."¹⁰ The Oklahoma legislature carved out an exemption for fuel tribes purchased for their own vehicles.¹¹

The tax is an important source of revenue for Oklahoma.¹² Of the \$320 million it raises annually,¹³ over 70% of this revenue goes to the State Transportation Fund to construct highways; counties and municipalities use most of the remainder to maintain roads.¹⁴

The Chickasaw Nation, one of 554 federally recognized Indian tribes,¹⁵ purchases motor fuels from non-Indians and resells them to any consumer, whether a tribal member or not. It does so at tribal-owned and operated conve-

6. "Because of Oklahoma's current 'donor' state status relating to its receipt of federal transportation funds, I have serious concerns regarding Oklahoma's future ability to finance its state highways, and the bearing the decision has on the state petroleum marketing industry." Letter from U.S. Representative Steve Largent to author (October 24, 1995) (on file with author). Oklahoma State Representative James Hamilton has said the decision will "have a severe crippling effect on not only the construction of new roads but maintenance of the current system." Mick Hinton, *State Fears Loss of Tax on Indian Gas*, DAILY OKLAHOMAN, Jan. 3, 1995, at 1.

7. 115 S. Ct. 2214 (1995).

8. OKLA. STAT. tit. 68, §§ 502, 502.1 (1992).

9. *Id.*

10. Brief of Petitioner at 2, *Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S. Ct. 2214 (1995) (No. 94-771) [hereinafter Brief of Petitioner] (citing OKLA. STAT. tit. 68, § 506 (1992)).

11. *See id.* at 4-5.

12. *See id.* at 3.

13. *See id.*

14. *Id.*

15. *See Tribe to Build New Jersey Casino*, TULSA WORLD, Aug. 15, 1995, at N8 (quoting U.S. Bureau of Indian Affairs spokesman Thomas Sweeney).

nience stores¹⁶ that are located on lands which the United States holds in trust for the Tribe.¹⁷ Those fuels are "used almost exclusively off of Indian country on State jurisdiction roads."¹⁸ Furthermore, "the Tribe does not construct or maintain roads and highways for the use of the general public in Oklahoma . . . [and] [a]ll of the road mileage maintained by the State is off Indian country."¹⁹

Despite these sales and the statutory mandate to "collect taxes," the Chickasaw Tribe decided, on tribal sovereignty grounds, not to collect state fuel taxes from anyone.²⁰ As a result, it was able to sell fuel to consumers well below the minimum cost other retailers could charge.²¹

The failure of the Chickasaw and other tribes to collect and remit these tax revenues has had two immediate consequences for other Oklahomans: it has constricted the amount of money the state has to maintain highways, and secondly as a result, "the state loses federal matching funds for road improvements."²²

The Chickasaw Nation sued the State of Oklahoma in the United States District Court for the Eastern District of Oklahoma, challenging the State's authority to impose certain taxes upon the tribe and its members.²³ On cross motions for summary judgment, Judge Frank Seay held that the State could tax

16. See Brief of Respondent at 7, *Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S. Ct. 2214 (1995) [hereinafter Brief of Respondent].

17. See Brief of Petitioner, *supra* note 10, at 4. Title 25 of the United States Code, Section 465, grants the Secretary of the Interior the power to acquire lands to be held in trust for Indians:

The Secretary of the Interior is hereby authorized, in his discretion, to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians.

* * *

Title to any lands or rights acquired . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 465 (1994). This power is not beyond question. See *infra* notes 200-04 and accompanying text.

Recent Oklahoma trust holdings include 17,718 acres (Cherokee), 96,309 acres (Chickasaw), 144,402 acres (Choctaw), 4,061 acres (Creek), 35,763 acres (Seminole), and 217,639 acres (Osage). Kirke Kickingbird, "Way Down Yonder in the Indian Nations, Rode My Pony Cross the Reservation!" from *Oklahoma Hills by Woody Guthrie*, 29 TULSA L.J. 303, 324 n.91 (citing G. HALL, THE FEDERAL INDIAN TRUST RELATIONSHIP 91 (1981)).

18. Brief of Petitioner, *supra* note 10, at 5 (quoting factual stipulation accepted by United States District Court for the Eastern District of Oklahoma).

19. *Id.*

20. See *Chickasaw Nation v. State of Oklahoma ex rel. Oklahoma Tax Commission*, 31 F.3d 964, 966 (10th Cir. 1994) (quoting parties' stipulations to trial court), *rev'd in part*, 115 S. Ct. 2214 (1995). In the past, "Indian tribes paid motor fuel taxes without ill effect for many years." Bob Vandewater, *Some Tribes Charge Own Gas Tax State Fears Growing Loss of Revenue*, SUNDAY OKLAHOMAN, Aug. 20, 1995, at 1 (quoting Oklahoma Tax Commission attorney David Miley). The tribe still paid federal fuel taxes.

21. Oklahoma State Transportation Secretary Neal McCaleb, himself a Chickasaw, has been reported to indicate that "many of the tribes sell fuel cheaper than other competitors, thereby creating an unfair advantage." Manny Gamallo, *Tribal Tobacco, Fuel Mixture Ignites*, TULSA WORLD, Oct. 1, 1995 at A3. See also Bob Vandewater, *Some Tribes Charge Own Gas Tax State Fears Growing Loss of Revenue*, SUNDAY OKLAHOMAN, Aug. 20, 1995, at 1. While the tribe has been able to charge lower prices, it has not chosen to do so on a large scale. Rather, it has applied its own tribal tax and used the proceeds for tribal activities.

22. "[T]he state [of Oklahoma] is losing \$800,000 a month in potential federal aid because of the tax loss to tribal fuel sales." Gamallo, *supra* note 21, at 3 (quoting Transportation Secretary McCaleb).

23. See *Chickasaw*, 31 F.3d at 966.

fuel sales by the Tribe and its members.²⁴ In doing so, he rejected the Tribe's contention that the tax was "void as a direct tax[] on the Tribe."²⁵

The Tenth Circuit reversed on this issue.²⁶ It held that the State could not apply the motor fuels tax to fuel sold by the Tribe's retail stores.²⁷ Writing for the Court of Appeals, Judge Monroe McKay found two faults in Judge Seay's reasoning.²⁸ First, "the district court substituted economic assumptions for the language of the statutes" when it concluded "that the taxes were passed on through the retail price to the consumer . . ." ²⁹ Because the statute does not specifically state that the amount of tax must be "included in the retail price at the pump," the Court of Appeals refused to recognize the legal incidence of the tax to be on the consumer.³⁰ This was true even though the economic incidence fell on the consumer.

The appellate court also said that Judge Seay erred by concluding that federal law did not pre-empt the fuel tax.³¹ The court recognized that "[t]his conclusion may have been based on the assumption that the statutes imposed the taxes on the consumer."³² However, because the Court of Appeals concluded that the retailer bore the incidence of the tax, it presumed pre-emption.³³

To defeat this presumption, said the Court, the State needed to show an explicit statement from Congress that state law shall apply.³⁴ The Court held that Oklahoma failed to defeat this presumption because it did not raise such a statement.³⁵ Had Oklahoma argued that the Hayden-Cartwright Act should be deemed to be such a statement by Congress, the Tenth Circuit might have decided otherwise.

Oklahoma ultimately raised the 1936 legislation in its brief to the United States Supreme Court.³⁶ However, Justice Ginsburg refused to consider the issue because "[t]he State made no reference to the Hayden-Cartwright Act in the courts of first and second instance."³⁷ Had the Court exercised its authority

24. As the Supreme Court stated:

In addition to the motor fuels and income taxes before us, the Tribe's complaint challenged motor vehicle excise taxes on Tribe-owned vehicles, retail sales taxes on certain purchases by the Tribe for its own use, and sales taxes on 3.2% beer sold at the Tribe's two convenience stores, as well as tax warrants issued against officers of the Tribe. In the course of litigation, Oklahoma apparently decided not to contest the Tribe's claims regarding the vehicle and retail sales taxes, and withdrew the warrants; the United States Court of Appeals for the Tenth Circuit affirmed the District Court's grant of summary judgment for the State on the 3.2% beer tax, and the Tribe has not sought review of that issue.

Oklahoma Tax Comm'n v. Chickasaw Nation, 115 S. Ct. 2214, 2218 n.3 (1995).

25. *Chickasaw*, 31 F.3d at 971.

26. *See id.* at 972.

27. *See id.*

28. *See id.*

29. *Id.*

30. *Id.* (discussing OKLA. STAT. ANN. tit. 68, §§ 502, 502.2, 502.6, 516, 520, and 522, in light of § 302, which specifically provides that the consumer's price include the cigarette tax).

31. *See id.*

32. *Id.*

33. *Id.*

34. *See id.* (citing *Rice v. Rehner*, 463 U.S. 713, 719-20 (1983)).

35. *See id.*

36. *See* Brief of Petitioner, *supra* note 10, at 23-24.

37. Oklahoma Tax Comm'n v. Chickasaw Nation, 115 S. Ct. 2214, 2219 (1995).

to review the Act,³⁸ it would have examined legislation deeply rooted in America's quest for mobility and economic development.

III. HIGHWAY FUNDING³⁹

The first decades of the twentieth century saw a rapid increase in the popularity of the automobile. Only 8,000 automobiles dotted the United States in 1900, but by 1910 that number had jumped to 468,500. Just five years later the number of automobiles had grown to almost two and a half million.⁴⁰

States and local governments initiated early efforts to build durable roads for the new cars.⁴¹ They paid for road construction by taxing real property.⁴² This was the method used when Congress passed the first federal aid highway bill in an effort to improve rural mail delivery service.⁴³ That 1916 legislation provided for state-federal cost-sharing, state maintenance and construction of federally funded roads, and the free public use of all federally subsidized roads.⁴⁴

The use of property taxes to pay for this effort proved an Achilles' heel for many states. Extensive federal lands in the Western states required public roads. However, because national forests and military and Indian reservations were not private property, they failed to generate property taxes for road construction.⁴⁵ The smaller populations of Western states also produced fewer property tax revenues.

As a result, states stopped using property taxes to fund highways. States shifted the burden to road users by imposing motor fuel taxes.⁴⁶ While this led to consistency of revenue production,⁴⁷ Western states "were still handicapped because of 'public lands and Indian reservations.'"⁴⁸

38. *Id.* The Chickasaw conceded this authority: "[T]here is no statutory requirement that an issue be raised in the court of appeals in order for this Court to enjoy the power to decide . . ." Brief of Respondent, *supra* note 16, at 16.

39. See Brief as Amici Curiae in Support of Petitioner, *Oklahoma Tax Commission v. Chickasaw Nation*, 115 S. Ct. 2214 (1995) (No. 94-771) [hereinafter Brief of the Amici].

40. U.S. DEPARTMENT OF TRANSPORTATION, *AMERICA'S HIGHWAYS, 1776-1976, A HISTORY OF THE FEDERAL AID PROGRAM 67* (1976) [hereinafter *AMERICA'S HIGHWAYS*].

41. See *id.*

42. See *id.*

43. Act of July 11, 1916, ch. 241, 39 Stat. 355.

44. See *id.* at 356. During floor debate on an amendment by Senator Hayden to the National Highway Appropriations Bill, 80 CONG. REC. 6914 (1936), Senator Russell noted that the Federal Government was paying for the greater portion of road construction at that time:

This is an effort to reach out on the farm-to-market roads and benefit not only those who are tourists, and who move from State to State over our highways but to give passable roads, all-weather roads, to the farmers and others who live in the rural sections.

Id.

45. PHILIP H. BURCH, JR., *HIGHWAY REVENUES AND EXPENDITURE POLICY IN THE UNITED STATES* 218 (1962).

46. See *AMERICA'S HIGHWAYS*, *supra* note 40, at 115.

47. See *id.* at 123-24.

48. Brief of the Amici, *supra* note 39, at 20.

These handicaps were significant.⁴⁹ First, sparsely populated, yet extensive tracts of public land required extensive and costly road construction.⁵⁰ Second, filling stations on populated public lands such as military and Indian reservations sold gasoline without charging the state motor fuel tax.⁵¹ People purchased motor fuel tax-free and then consumed it while adding wear and tear to state-maintained roads.

In 1934 the Supreme Court endorsed this practice.⁵² Western states responded by seeking federal legislation that would ensure their ability to fund and maintain roads.⁵³ "Bills were introduced allowing States to collect their motor fuel taxes within federal areas."⁵⁴ The resulting legislation was the Federal Aid Highway Appropriations bill,⁵⁵ to which Arizona Senator Carl Hayden introduced an amendment that permitted states to tax motor fuel sold on "military or other reservations when such fuels are used for other than governmental purposes."⁵⁶

At Conference Committee, Senator Hayden found a strong advocate for his amendment. Oklahoma Representative Wilburn Cartwright chaired the Roads Committee in the House and was instrumental in developing the national interstate highway system.⁵⁷ Motivated in part by the belief that the "highway brings cheaper living . . . and in addition furnishes access to the centers of marketing for the small agriculturalist,"⁵⁸ Cartwright said that "[p]erhaps nothing has done so much to make this nation a great neighborhood as the chain of highways linking North and South, East and West."⁵⁹ Additionally, Cartwright was a member of the House Indian Affairs committee.⁶⁰

49. *See id.*

50. *See id.* at 20-21.

51. *See id.* at 21.

52. *See id.* The Supreme Court held that California's state motor fuel tax could not be imposed on gasoline sold at the Presidio, a military reservation in San Francisco. *Standard Oil Co. v. California*, 291 U.S. 242 (1934). As a result, motorists could purchase Presidio gasoline state-tax free and for consumption on state-maintained public highways. *Id.*

53. Senator Hayden read the following resolution adopted at the 1936 Annual Meeting of the Western Association of State Highway Officials:

Whereas this conference views with alarm the continued sale of motor vehicle fuels on Government military and other reservations, upon which no State tax has been collected, such tax-free fuel being used on the public highways; and

Whereas the various States have no remedy under existing laws; Now therefore, be it *Resolved*, That this conference pledge its support to a bill now before Congress (H. R. 3660) sponsored by the North American Gasoline Tax Conference, which, if enacted, will confer upon the several States authority to collect motor vehicle fuel taxes on all sales made on such reservations other than to the United States government or its agencies.

80 CONG. REC. 6913 (1936).

54. *Id.*

55. *See id.*

56. *Id.* (emphasis added). "The general purpose of the Hayden-Cartwright Act clearly was to further and extend the program of highway improvement which had been initiated by the Federal Aid Highway Act of 1916, 39 Stat. 355 . . ." *Minnesota v. Keeley*, 126 F.2d 863, 864 (8th Cir. 1942).

57. The author thanks the staff of the Carl Albert Congressional Research Center for facilitating his review of Congressman Cartwright's documents. The Center's address is University of Oklahoma, Monnet Hall, Room 202, 630 Parrington Oval, Norman, Oklahoma 73019-0375.

58. Wilburn Cartwright, *The Value of Good Roads to a Community* (no date) (unpublished manuscript, courtesy of the Carl Albert Congressional Research and Studies Center Congressional Archives, University of Oklahoma).

59. *Id.* at 3.

60. *See* Biographical Sketch Accompanying Profile of Wilburn Cartwright Collection at Carl Albert Cen-

Routinely reelected to Congress by a strong Indian constituency,⁶¹ Cartwright was well positioned to consider the impact of Hayden's road funding legislation on American Indians, particularly those from Oklahoma.⁶² Together with Senator Hayden, Cartwright gave states a powerful tool for economic development—the power to tax motor fuel sold throughout the state, even on federal reservations.

IV. HAYDEN-CARTWRIGHT ACT

In 1936, Congress passed what became known as the Hayden-Cartwright Act.⁶³ A pertinent portion of the Act provides:

§ 104. Tax on motor fuel sold on military or other reservation[;] reports to State taxing authority

(a) All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, *located on United States military or other reservations, when such fuels are not for the exclusive use of the United States*. Such taxes, so levied, shall be paid to the proper taxing authorities of the State, Territory, or the District of Columbia, within whose borders the reservation affected may be located.⁶⁴

On its face, this amendment allows a state to tax motor fuel sold at filling stations and by licensed traders located on "United States military or other reservations."⁶⁵ While there is apparently little dispute that "licensed traders" applies to Indian trading posts,⁶⁶ the use of the word "reservation" has prompted considerable controversy. First, does "reservation" mean Indian land? Second, if it does, is the term limited to the formal borders of Indian lands such as the Apache, Navajo, and Gila River reservations in Arizona, or does it extend to the debated status⁶⁷ of Indian lands⁶⁸ found in Oklahoma?⁶⁹

ter, University of Oklahoma, at 23 (Univ. of Oklahoma, 1995).

61. *See id.* at 24.

62. Indeed, "[t]he substantial number of Native Americans in [Oklahoma's] Third [Congressional] District . . . received the support of the congressman, who played a role in issues involving Indian lands, hospitals, and schools." *Id.*

63. Pub. L. No. 74-582, § 10, 49 Stat. 1519, 1521-22 (1936) (codified as amended at 4 U.S.C. § 104 (1994) (emphasis added)).

64. 4 U.S.C. § 104(a) (1994) (emphasis added).

65. *Id.*

66. *See Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685, 689 (1965). *See also* Application of Federal and State Sales Taxes to Activities of Menominee Indian Mills, 57 Interior Dec. 129, 139 (1940).

67. *See generally*, Kickingbird, *supra* note 17; D. Faith Orlovski and Robbie Emery Burke, *Oklahoma Indian Titles*, 29 TULSA L.J. 361 (1993); Angela M. Risenhoover, Note, *Reservation Disestablishment: The Undecided Issue in Oklahoma Tax Commission v. Sac and Fox Nation*, 29 TULSA L.J. 781 (1994).

68. The Federal statutes currently define "Indian country" as:

[A]ll 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

A. "Reservations," Broadly Speaking

States urging that Hayden-Cartwright authorizes state taxation of fuel sold on Indian lands⁷⁰ rely on language in the Act which permits such taxation on reservations,⁷¹ as well as judicial and executive interpretations that equate "reservations" with Indian land generally.⁷² As noted, the Act specifically states that fuel taxes may be levied on fuels sold by dealers "located on United States military or other reservations"⁷³ where "such fuels are not for the exclusive use of the United States."⁷⁴

Contemporaneous executive agency interpretations indicate that "reservation" carries a broad meaning within the Hayden-Cartwright Act. When confronted with the issue in 1940, Solicitor of the Interior Margold, representing the agency charged with applying the Act, concluded that Hayden-Cartwright authorizes a state to tax sales of motor fuel by an on-reservation tribal enterprise to Indians and non-Indians.⁷⁵ In 1936, the United States Attorney General stated that the term "reservation" in the Act "describe[s] any body of land, large or small, which Congress has reserved from sale for any purpose. It may be a military reservation, or an Indian reservation, or, indeed, one for any purpose for which Congress has authority to provide"⁷⁶ In short, "reservation" denotes land that has been set aside by the federal government for a particular purpose.

Admittedly, such a broad interpretation is limited by the fact that Indian lands, be they reservations or otherwise, have not only been created by Con-

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

18 U.S.C. § 1151 (1988).

The Supreme Court has applied this definition from the criminal code to civil cases. *See* Risenhoover, *supra* note 65, at 782 (citing *DeCouteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 478-79 (1976)). To see how the Court has "moved away from categorizing the land at issue," *id.*, see *infra* note 87 and accompanying text.

69. Indeed, concern that "reservation" did not apply to Oklahoma's Indian lands may have prompted the Oklahoma Tax Commission not to raise Hayden-Cartwright at the District or Circuit Courts:

Oklahoma did not assert the Act in defense of its tax in the lower courts because it was of the view that the "relevant boundary for taxing jurisdiction is the perimeter of a formal reservation, not merely land set aside for a tribe or its members." *Sac and Fox*, 113 S. Ct. at 1991 The State therefore viewed Chickasaw lands as indistinguishable for fuel tax purposes from other lands; because Chickasaw lands were seen as within the State's taxing jurisdiction, they were seen as outside the scope of the Hayden-Cartwright Act. But the Court's decision in *Sac and Fox*, issued after the State filed its brief in the court of appeals, rejected the State's position—and therefore implicitly made clear that the Act applies to Indian country.

Brief of Petitioner, *supra* note 10, at 24. For a strong argument that Indian lands in Oklahoma include extensive reservations that have not been disestablished, see *Kickingbird*, *supra* note 17.

70. *See* Brief of the Amici, *supra* note 39, at 20.

71. *Id.* at 23.

72. *Id.* at 23-24 (citing *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993)).

73. 4 U.S.C. § 104(a) (1994).

74. *Id.*

75. *See* Application of Federal and State Sales Taxes to Activities of Menominee Indian Mills, 57 *Interior Dec.* 129, 140 (1940).

76. 38 *Op. Att'y Gen.* 522, 524 (1936) (citing *United States v. Celestine*, 215 U.S. 278, 285 (1909)).

gress, but by treaty and executive order. As such, one could argue that these administrative interpretations should be extended only to those Indian lands Congress specifically contemplated. However, as this article discusses later, the Supreme Court has made clear that it is not the source of the Indian land which counts for taxation purposes but the fact that it is *Indian* land.⁷⁷

States' power to tax fuel sales nondiscriminatorily within their borders rests on a multi-layered foundation. These layers include court deference to agency interpretations when seeking legislative intent, a trend away from formalistic interpretation of "reservation," the strength of the plain language of the statute and Congressional intent as found in road funding legislation. The threat to economic development posed by a denial of taxation power and the clear risk of balkanizing our population provide further grounds to reaffirm state taxation power.

1. Agency Interpretation

The Supreme Court has made clear that an agency interpretation should be deferred to when it is thorough "in its consideration," valid in its reasoning, and consistent with earlier and later pronouncements.⁷⁸ Here, the Solicitor of the Interior interpreted the Act.⁷⁹

The Court should also defer to agency interpretation because Congressional reenactment without substantial change is evidence that Congress intended the meaning assigned by the agency. Congress did so just seven years after Interior Solicitor Margold concluded that the phrase "other reservation" authorized state taxation of fuels sold by Indian tribes.⁸⁰ A well-known rule of statutory interpretation, recently "imbu[ed] with constitutional significance,"⁸¹ provides that when Congress does so, it is "constitutionally less legitimate for unelected judges" to resolve statutory ambiguities where "executive agencies, which are responsible to the President, an elected official," have interpreted them.⁸² That is, because Congress re-enacted Hayden-Cartwright after it was aware that the Solicitor of the Interior had interpreted reservation broadly to include all Indian lands, it is to be presumed that Congress intended "reservation" to carry that same broad meaning when it enacted the amendment.

Recent Supreme Court jurisprudence may, in fact, mandate deference to the Solicitor's interpretation. Under the Supreme Court's decision in *Chevron U.S.A., Inc. v. National Resources Defense Council*,⁸³ a court must defer to any

77. See *infra* notes 87-94 and accompanying text.

78. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

79. Woods, *supra* note 5.

80. See Pub. L. No. 80-389, § 104, 61 Stat. 644 (1947).

81. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 618 (1992).

82. *Id.* (discussing *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984)) ("As applied by the Court, the *Chevron* clear statement rule is the following: Unless refuted by the clear language of the statute, the court must defer to the agency interpretation.").

83. 467 U.S. 837 (1984).

reasonable agency interpretation of an ambiguous statute.⁸⁴ As commentators have noted, *Chevron* requires that "unless refuted by the clear language of the statute, a court must defer to the agency interpretation."⁸⁵ This is true even where constitutional issues are involved.⁸⁶

2. Freedom from Formalism

The Supreme Court should also read the term "reservation" broadly because its precedents have refused to imprison "reservation" in a formalistic interpretation. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*,⁸⁷ the Supreme Court considered whether Oklahoma could assess and collect from a tribe back taxes on cigarette sales made on tribal trust land rather than on a formal reservation.⁸⁸ The Court said that Oklahoma could not, noting that "[no] precedent of this Court has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges."⁸⁹ "Rather," wrote Chief Justice Rehnquist, "we ask whether the area has been 'validly set apart for the use of the Indians as such, under the superintendence of the Government.'⁹⁰

The Court subsequently underscored its broad interpretation of "reservation" in *Oklahoma Tax Commission v. Sac and Fox Nation*.⁹¹ There, the Court considered whether Oklahoma could apply income and motor vehicle taxes to Indians who lived off a formal reservation. The Court "put an end to the argument . . . that there was some distinction between a formal reservation and trust land."⁹² In holding that Oklahoma could not tax Indians who lived off tribal trust lands or reservations without specific permission from Congress,⁹³ the Court said the operative term was "Indian country." This phrase includes "formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States."⁹⁴ By interpreting "reservation" to include trust land, *Potawatomi* and *Sac and Fox* bolster the

84. *See id.*

"If, however, the court determines Congress has directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."

BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* 702 (3d ed. 1991) (discussing *Chevron*, 467 U.S. at 843). This is true even where serious constitutional issues are involved. *See Rust v. Sullivan*, 500 U.S. 173 (1991).

85. *Eskridge & Frickey*, *supra* note 81, at 618.

86. *See Rust v. Sullivan*, 500 U.S. 173 (1991).

87. 498 U.S. 505 (1991).

88. *See id.* at 511 (relying on *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973)).

89. *Id.*

90. *Id.* (quoting *United States v. John*, 437 U.S. 634, 648-49 (1978)).

91. 508 U.S. 114 (1993).

92. *Risenhoover*, *supra* note 67, at 781.

93. *See Sac and Fox*, 508 U.S. at 128.

94. *Id.* (holding that "absent explicit congressional direction to the contrary," it must be presumed that a State does not have jurisdiction to tax tribal members who live and work in Indian country, "whether the particular territory consists of a formal or informal reservation, allotted lands, or dependant Indian communities").

argument that Hayden-Cartwright applies to Oklahoma Indian lands, regardless of what labels those lands bear.

3. Plain Language

A review of the same highway funding bill which houses Hayden-Cartwright confirms that “reservation” includes, but is not limited to, Indian reservations. Section 3 provides:

For the purpose of carrying out the provisions of section 3 of the Federal Highway Act of 1921, as amended . . . there is hereby authorized to be appropriated for the survey, construction, reconstruction, and maintenance of main roads through unappropriated or unreserved public lands, nontaxable Indian lands, or other Federal reservations other than the forest reservations, the sum of \$2,500,000⁹⁵

This specific allotment of federal funds was for “Indian lands” or *other* Federal reservations other than forest reservations. Clearly, Congress did not intend to confine “reservation” to the narrow and specific boundaries of lands such as the Navajo, Apache, and Gila River reservations of Arizona. The phrase “or other Federal reservations” suggests that the words immediately preceding it are also federal reservations. Those words are “non-taxable Indian lands.”⁹⁶ Indeed, Thomas MacDonald, Chief of the Bureau of Public Roads, said that “the unreserved public lands and nontaxable Indian lands constitute practically all of the lands to which this text has any major application.”⁹⁷

The use of “non-taxable” does not defeat this interpretation. All it indicates is that Indian lands were to be treated the same as military or forest reservations in that they were immune from state real property taxation. Section 104 makes clear that fuel taxes could be imposed on such lands as long as they were not direct taxes on the government.⁹⁸

The Supreme Court has supported this interpretation in other state taxation cases. In *White Mountain Apache Tribe v. Bracker*,⁹⁹ the Court considered whether Arizona could apply its motor carrier license and use fuel taxes to a non-tribal owned logging company doing business on the White Mountain Apache reservation.¹⁰⁰ The Court held that Arizona could not apply such license taxes because Congress had imposed a comprehensive regulation on tribal timber harvesting and sale.¹⁰¹ However, Justice Marshall said that States could still apply nondiscriminatory state tax law[s] within their borders¹⁰² as long as

95. H.R. 11687, 74th Cong., 2d Sess. 15 (1936).

96. Statement of Thomas H. MacDonald to House of Representatives Committee on Roads at 55 (March 12, 1936).

97. *Id.*

98. See 4 U.S.C. § 104 (1994).

99. 448 U.S. 136 (1980).

100. See *id.* at 137-38.

101. See *id.* at 151. The use tax in *White Mountain Apache* differs from the fuel tax in *Chickasaw* because it was applied to travel on roads that had been “built, maintained, and policed exclusively by the Federal Government, the Tribe and its contractors.” *Id.* at 150.

102. *Id.* at 144 & n.11 (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973)).

those laws do not unduly burden "on-reservation conduct involving only Indians."¹⁰³

In *Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe*,¹⁰⁴ the Court affirmed that a State may tax sales by Indian tribes to non-Indians. In that case, an Indian tribe successfully challenged Oklahoma's power to collect back taxes on tribal cigarette sales between Indians on tribal trust land.¹⁰⁵ The Court held that the doctrine of Indian sovereign immunity prevented Oklahoma from suing the tribe for these past taxes¹⁰⁶ unless the tribe consented¹⁰⁷ or Congress specifically permitted the action.¹⁰⁸ However, the Court said that the "doctrine does not excuse a tribe from all obligations to assist in the collection of validly imposed state sales taxes."¹⁰⁹ Referring to the Court's earlier holding in *Moe v. Confederated Salish and Kootenai Tribes*,¹¹⁰ Chief Justice Rehnquist explained that requiring the tribal seller to collect all state taxes applicable to sales to non-Indians "was a minimal burden justified by the State's interest in assuring the payment of . . . lawful taxes."¹¹¹

Furthermore, the Court "rejects the argument that this governmental entity—the Tribe—is completely immune from legal process."¹¹² As the Court said, "[w]e have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State."¹¹³

4. Legislative Intent

The history of the road legislation reveals that Congress intended that *states* share responsibility with the Federal government for the construction of roads within their borders. Furthermore, Congress intended that states bear the complete burden for the maintenance of the roads.¹¹⁴ To facilitate this activity, Congress, through the Hayden-Cartwright Act, granted states the authority to tax fuel sold on Indian lands.

That Congress viewed itself in a partnership with *states* is clear from the history of the roads funding legislation. In fact, consistent with the "immediate object of the Federal Constitution,"¹¹⁵ no other governmental entity is contemplated. In discussing the purposes of the National Highway funding bill, Senator

103. *Id.* at 144.

104. 498 U.S. 505 (1991).

105. *See id.* at 512-14.

106. *See id.*

107. *See id.* at 509.

108. *See id.*

109. *See id.* at 512 (citing *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980)).

110. 425 U.S. 463 (1976).

111. *Potawatomi*, 498 U.S. at 512. *See also* *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980).

112. *Potawatomi*, 498 U.S. at 516 (Stevens, J., concurring).

113. *Id.* at 514.

114. *See* MacDonald, *supra* note 96, at 67.

115. THE FEDERALIST NO. 14 (James Madison). "[T]he immediate object of the Federal Constitution is to secure the union of the Thirteen Primitive States, which we know to be practicable; and to add to them such other States, as may arise in their own bosoms or in their neighbourhoods . . ." *Id.*

Hayden said, “[s]ince 1916-through two-decades the States and the Federal Government have been working in excellent cooperation upon the gigantic task of providing our country with adequate highways.”¹¹⁶ Enacting such legislation was unquestionably desirable so that “orderly processes of both Federal and State Government shall be permitted to function to the highest advantage.”¹¹⁷

The authors of the legislation viewed any relationship other than that between Congress and the states as unacceptable. As Senator Hayden reported in 1936,

Federal highway legislation has from its inception consistently adhered to cooperation with each State through its State highway department and *any other course is wholly impracticable*. It would jeopardize the Federal relationship to the 48 States if the Federal government were to deal directly with the 3,100 counties upon highway matters.¹¹⁸

Representative Cartwright told his constituents that Congress saw itself in partnership with *states*, not other entities. In a letter to Mr. Robert Maret of Caddo, Oklahoma,¹¹⁹ Cartwright responded to Maret’s concerns that his mail route was in bad condition. Cartwright told Mr. Maret that he needed to address his concerns to the county commissioner. The federal government had previously allocated funds to various states for “farm-to-market” road work. Representative Cartwright informed Mr. Maret of the process needed to get the roads repaired. The process consisted of a county commissioner initiating the project, the state highway commission allocating the funds from the grant, and the Works Product Administration repairing the roads.¹²⁰

5. Economic Development

The public threat posed by continued depletion of tax revenue for road maintenance and construction also warrants equalization of taxation through Hayden-Cartwright. The shrinking of resources promises to impair the state’s ability to provide for its citizens a need basic to economic development: good roads.¹²¹ Infrastructure is important to economic development. This apparent tautology is evident from the fact that those countries that have acquired the most wealth are those with the most extensive transportation infrastructures.¹²² The reason for the relationship is clear. Without the transportation infrastructure, of which roads form a large part, components cannot be shipped efficiently

116. S. Rep. No. 1976, at 2 (1936).

117. *Id.* at 3.

118. *Id.* at 8 (emphasis added).

119. See Letter from Representative Wilburn Cartwright to Mr. Robert Maret, Caddo, Oklahoma (October 31, 1936) (on file with author).

120. See *id.*

121. “In the long run, investment in transportation infrastructure is the key link to economic development and increasing the state’s tourism dollars.” Ford, *supra* note 1, at A24 (citing the Oklahoma Good Roads and Streets Association).

122. See generally INT’L BANK FOR RECONSTRUCTION AND DEVELOPMENT, WORLD DEVELOPMENT REPORT (1995).

to manufacturing facilities for assembly. That same infrastructure makes possible the finished goods' trip to market.

Economic development is not, however, its own *raison d'etre*. It encourages social stability. Without good roads citizens may begin to view the State as ineffective.¹²³ As one scholar has noted, "[i]n the modern world . . . effectiveness means primarily constant economic development. Those nations which have adapted more successfully to the requirements of an industrial system have the fewest internal political strains . . ." If unchecked, "a breakdown of effectiveness . . . will endanger even a legitimate system's stability."¹²⁴

6. A Bulwark Against Balkanization

Any long-term dilution of states' ability to exercise their taxation power equally over lands within their borders threatens to balkanize states along ethnic lines. Central to our national ethic is the realization that "all men are created equal."¹²⁵ To tell the non-Indian retailer that the competitor across the street may undercut him and force his business to close¹²⁶ because the competitor's ancestors arrived on these shores earlier is to tell that retailer that he is not equal to the Indian. To do so is to discard a central cause of America's domestic tranquility and consequent economic growth.¹²⁷ As a result, that retailer may no longer look at the person across the street in fellow citizenship terms; ethnicity may now be the language of the day. In a severe economic downturn, what is to prevent Oklahoma from severe ethnic conflict?¹²⁸

B. *But What of Tribal Sovereignty?*

The real reason for the Court's *Oklahoma Tax Commission v. Chickasaw Nation* ruling and its unwillingness to pick up Hayden-Cartwright may not be hard to find. If not a tacit endorsement, it accords with a "federal policy of promoting tribal self-sufficiency and economic development."¹²⁹ This policy is clearly articulated in the Indian Financing Act of 1974,¹³⁰ which provides that

123. Effectiveness has been defined as "actual performance, the extent to which the system satisfies the basic functions of government as most of the population and such powerful groups within it as big business or the armed forces see them." SEYMOUR MARTIN LIPSET, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* 64 (1981).

124. *Id.* at 67-68.

125. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

126. Oklahoma State Representative Don Webb has stated that such an "unfair advantage . . . could prove disastrous to private businesses as well as to the state of Oklahoma." Brian Ford, *Tribe's Exemption From Gas Tax Under Fire*, TULSA WORLD, June 25, 1995, at N18.

127. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1945); see also SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* (1968); ROBERT A. DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION* (1971).

128. Germany, Britain, and France are all examples of developed countries that have experienced substantial periods of ethnic harmony, but which have recently witnessed ethnic splintering prompted by economic downturns.

129. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).

130. 25 U.S.C. § 1451 (1994).

[i]t is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities.¹³¹

This Congressional policy is clearly limited in two respects. First, by its own terms, the policy applies to the Indians' "own productive efforts," not to the mere marketing of goods produced by someone else. Second, while the policy is rooted in "traditional notions of Indian self-government"¹³² that are "deeply ingrained in [the Court's] jurisprudence,"¹³³ those notions of sovereignty¹³⁴ find little basis in reality.

Sovereignty is a special status that has both internal and external characteristics. "[I]nternal sovereignty . . . means supremacy over all other authorities within [a] territory and population."¹³⁵ "[E]xternal sovereignty [denotes] independence of outside authorities"¹³⁶ and a "recognition by other states as a legally equal player in the global environment."¹³⁷ The tribes have retained neither internal nor external sovereignty. In 1968, for example, Congress adopted the Indian Civil Rights Act as Title II of the Civil Rights Act of 1968. That Act "limit[s] the power of tribal governments by applying portions of the federal Bill of Rights to Indian tribes."¹³⁸ More than four-thousand statutes and treaties affect Native Americans.¹³⁹

Indeed, the Court has stated that "platonic notions" of tribal sovereignty are no longer the rule of law.¹⁴⁰ Even though "various Indian tribes were once independent and sovereign nations," and even though "their claim to sovereignty long predates that of our own Government[,] . . . Indians today are American citizens."¹⁴¹

The argument that the Court should emasculate States' taxation power because it has previously contemplated a tribal *quasi*-sovereignty,¹⁴² ignores the modern legal truth that tribes and states do not share a common claim to sovereignty. Rather, "through their original incorporation into the United States

131. *See id.*

132. *White Mountain Apache*, 448 U.S. at 143.

133. *Id.*

134. "[W]e have recognized that the Indian tribes retain 'attributes of sovereignty over both their members and their territory.'" *Id.* at 142 (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)).

135. HEDLEY BULL, *THE ANARCHICAL SOCIETY* 8 (1977).

136. *Id.*

137. BARRY B. HUGHES, *CONTINUITY AND CHANGE IN WORLD POLITICS: THE CLASH OF PERSPECTIVES* 67 (1991). In this context, "states" refers to countries.

138. Rennard J. Strickland, *Indian Bill of Rights*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 427 (Kermit L. Hall ed., 1992).

139. *See* Rennard J. Strickland, *Native Americans*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 577, 578 (Kermit L. Hall ed., 1992).

140. *See McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 172 (1973).

141. *Id.*

142. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). *See also Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty."¹⁴³ The result is that "tribes do not possess the same attributes of sovereignty that the Federal Government and the several States enjoy."¹⁴⁴

Today, just as when James Madison penned Federalist number 14, the "immediate object of the Federal Constitution is to secure the union of the . . . States."¹⁴⁵ Any policy which hobbles a quarter of our States by denying them the power to tax nondiscriminatorily lands regardless of the owners' ethnicity threatens the economic strength of one partner in our national marriage. Aspirations for American ethnic enclaves do not provide just cause to weaken States or the federal union our constitution created.

V. AVOIDING THE CURE: OKLAHOMA'S RESPONSE

In *Oklahoma Tax Commission v. Chickasaw*, the Court did not foreclose Oklahoma's options. However, by failing to decide the Hayden-Cartwright issue in Oklahoma's favor, it left those options toothless.

Justice Ginsburg stated that Oklahoma could in fact, tax motor fuel sold by Indian retailers.¹⁴⁶ However, to satisfy the Court, she said that Oklahoma must clearly place the legal incidence of the tax somewhere besides the tribe: "[I]f a State is unable to enforce a tax because the legal incidence of the impost is on Indians or Indian tribes, the State generally is free to amend its law to shift the tax's legal incidence."¹⁴⁷

Soon after the Court issued its opinion, Oklahoma sought a solution to its fuel tax woes. Then Stanley Johnston, then Counsel to the Oklahoma Tax Commissioners, informed the commissioners that the Oklahoma legislature could shift the "legal incidence" at least three ways.¹⁴⁸ The legislature adopted a hybrid.

The legislature can move the legal incidence of the tax "away from the retailer," Johnston wrote, "where it cannot be enforced if the retailer is an Indian tribe . . ."¹⁴⁹ It can shift the tax to "(a) the ultimate consumer; (b) the distributor; or (c) the refiner/importer."¹⁵⁰ None of these options offers the taxation security of Congress's specific grant of authority in Hayden-Cartwright.

143. *Montana v. United States*, 450 U.S. 544, 563 (1981).

144. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 169 (1982).

145. THE FEDERALIST NO. 14 (James Madison).

146. *See Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S. Ct. 2214, 2221 (1995).

147. *Id.*

148. *See* Memorandum from Stanley Johnston, Counsel to the Commissioners, Oklahoma Tax Commission, to Robert Anderson, Robert Cullison, and Don Kilpatrick (June 27, 1995) (on file with author) [hereinafter Johnston Memorandum]. Both the legal incidence and the point of collection can shift.

149. *Id.* at 4.

150. *Id.*

A. *The Ultimate Consumer*

The Oklahoma legislature could collect the tax from the ultimate consumer by means of at least four financing schemes: "Full pre-payment of tax [with] refunds/credits"; "Tax-free sale to Indian retailer with duty to collect from non-member consumers"; "Limited quantity allowance for tax-free purchase [with] balance prepaid"; and "State/Tribal Compacts."¹⁵¹

The full pre-payment scheme coupled with refunds and credits is that which had been applied to non-Indian retailers.¹⁵² If applied to Indian retailers, they would "pre-pay the tax on 100% of fuel purchased for resale."¹⁵³ They would receive "either refunds or credit against future purchases for documented exempt sales."¹⁵⁴ While the scheme would be "both convenient and efficient for the purposes of the State's tax administration,"¹⁵⁵ it is vulnerable. "It is subject to the tribe's challenge . . . that the State is attempting to tax, even for a short time, sales to members of the tribe."¹⁵⁶ Under *Oklahoma Tax Commission v. Sac and Fox*¹⁵⁷ and *Oklahoma Tax Commission v. Citizen Band Potawatami Indian Tribe*,¹⁵⁸ such a tax might well be held impermissible.

Another option Johnston presented is based on Oklahoma's general sales tax code.¹⁵⁹ It is also flawed. This "honor system" would require the State to sell all fuel tax-free to "qualified Indian retailers."¹⁶⁰ The retailer would then remit to the State taxes it collected "from all non-exempt consumers."¹⁶¹ Under the general tax scheme such vendors "are held personally liable for the tax if they fail either to collect it or to remit it to the State."¹⁶² However, as Johnston stated, "The potential problem . . . is (1) the inability of the State to audit the tribal seller's records without the tribe's consent; and (2) the inability of the State to enforce a claim directly against a tribe for unremitted non-exempt taxes."¹⁶³

A third option also fails to offer the taxation security of the Hayden-Cartwright Act. Under this "limited quantity tax-free" plan, Indian retailers could buy a "preset quantity of motor fuel free of the State's tax, based upon the probable amount which would reasonably be resold (tax exempt) to tribal members."¹⁶⁴ Additional fuel which the retailer may purchase "would be presumed to be taxable sales to non-members, and the tribal or Indian retailer would be required to prepay the tax on any quantities purchased in excess of

151. *Id.* at 4-5.

152. *See id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. 508 U.S. 114 (1993).

158. 498 U.S. 505 (1991).

159. *See* Johnston Memorandum, *supra* note 148, at 4-5.

160. *Id.* at 5.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

the allowance."¹⁶⁵ Johnston believed that this method "has [a] two-fold advantage": first, it does not levy or pre-collect taxes on motor fuel that "can reasonably be expected to be purchased by tribal members . . .";¹⁶⁶ second, the method preserves the "State's right to impose and collect its tax on motor fuel sold to non-members of the tribe."¹⁶⁷

However, the method is not a panacea. If it were to prove an effective means of taxing fuel sales to non-tribal members, it would negate any significant advantage a tribe had for going into the fuel resale business. If it proved ineffective and tax revenue slipped through the cracks, the doctrine of Indian sovereign immunity would preclude an action against the tribe for recovery of the lost taxes.¹⁶⁸

B. *The Distributor*

An alternative that won some legislative support would have placed the legal incidence of the tax "directly on the distributor . . ."¹⁶⁹ The alternative "address[es] the immediate situation but would not likely solve the problem."¹⁷⁰ Two fatal flaws make it a poor second choice to the Hayden-Cartwright Act. First, there is no reason why an Indian tribe could not go into the fuel distribution business, "operating that business on and from Indian country."¹⁷¹ If it did so, the legal incidence of the tax would once again be impermissible because it would fall on the tribe in Indian country.¹⁷² Oklahoma would be back where it started.

Placing the legal incidence of the tax on the distributor is flawed for a second reason. As a distributor, a tribe's resale market "would expand to include not only consumers, but also other retailers, Indian or non-Indian."¹⁷³ Under *Oklahoma Tax Commission v. Chickasaw Nation*, Oklahoma could tax neither the tribe's retail nor its wholesale sales.¹⁷⁴

C. *Oklahoma's Choice: The Refiner/Importer and Compacts*

1. Moving the Collection Point

Moving the collection point even further up the distribution chain, combined with clearly placing the legal incidence on the consumer, proved too tempting to resist. The Oklahoma legislature sought its solution to its fuel tax woes by passing Chapter 345 of the 1996 Oklahoma Session Laws,¹⁷⁵ which

165. *Id.*

166. *Id.*

167. *Id.*

168. "Suits against Indian tribes are . . . barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

169. Johnston Memorandum, *supra* note 148, at 6.

170. *Id.*

171. *Id.*

172. *See id.*

173. *Id.*

174. *See id.*

175. "The purpose of this recodification is a result of the interpretation of the motor fuel tax code of this

moved the point of collection from the retailer to the refinery or bulk transfer terminal.¹⁷⁶ There, the tax is pre-collected but the consumer bears the legal incidence. This method, Johnston had stated, would reduce the number of tax collection points, and “placing the tax directly upon the refiner or importer,” it might “resolve the problem of attempting to tax Indians or Indian tribes on transactions in Indian country.”¹⁷⁷

Johnston suggested two primary problems with moving tax collection to the “rack.”¹⁷⁸ First, moving the tax to the refiner or importer will only work if tribes are unable or unwilling to become fuel refiners or importers.¹⁷⁹ Clearly not all tribes could assume such roles, but “it seems reasonable to conclude that other tribes might find such business activity both commercially desirable and within their means.”¹⁸⁰

Moving the tax to the refiner or importer would appear to open the gates to a Trojan horse. This metaphor is justified where a tribe or tribal entity elects to import out-of-state motor fuel directly into Indian country. Such fuel currently arrives in Oklahoma by pipeline and tanker truck.¹⁸¹ Were a tribe or tribal entity to act as the importer at a fuel storage/import terminal located on Indian country, “all fuel brought into and sold from that terminal would be beyond the State’s power to tax.”¹⁸² However, this problem might be somewhat muted by clearly placing the tax’s legal incidence on the consumer.

Johnston also wondered whether the refiner or importer could pass on its tax to a tribal seller or reseller who had “only purchased motor fuel from non-Indian refiners and importers.”¹⁸³ Examining *Chickasaw*, the counsel for the Oklahoma Tax Commissioners noted that “a tribal seller [can] be required to collect a state tax on the tribe’s non-exempt customer.”¹⁸⁴ However, a State may “not impose a transaction privilege tax on the seller of goods where the goods [are] sold to a tribal entity on Indian country, and the cost [is] passed on to the tribe.”¹⁸⁵ Once again, placing the tax’s legal incidence on the consumer may alleviate this concern to some extent. However, such taxation trapdoors suggest that moving the collection point to the refiner/importer is merely a placebo for the State’s tax woes. The reason Chapter 345 fails to offer the taxation security of Hayden-Cartwright is rooted in the second component of the legislation—compacts.

state by . . . the Supreme Court of the United States in ‘*Oklahoma Tax Commission v. Chickasaw Nation*.’” 1996 Okla. Sess. Laws ch. 345.

176. *See id.*

177. Johnston Memorandum, *supra* note 148, at 6.

178. *See id.*

179. *See id.*

180. *Id.*

181. *See id.*

182. *Id.* at 7.

183. *Id.*

184. *Id.*

185. *Id.* (citing *Central Machinery Co. v. Arizona State Tax Comm’n*, 448 U.S. 160 (1980)).

2. Compacts

Chapter 345 of the 1996 Oklahoma Session Laws had another component. Through it, the legislature offered the tribes a deal described by one legislator as "extortion."¹⁸⁶ Partially intended "for the purpose of limiting litigation,"¹⁸⁷ Chapter 345 offers Oklahoma tribes contracts.¹⁸⁸ If a tribe "will not challenge the constitutionality of this act or [its] application,"¹⁸⁹ the State will apportion among the tribes a percentage of the States's total fuel tax revenues, ranging from 3% in 1996 to 4 1/2% between 1998 and the year 2016.¹⁹⁰ This revenue given to the tribe must be used for "tribal government programs limited to highway and bridge construction, health, education, corrections, and law enforcement."¹⁹¹

Such "compacts" with tribes are subject to criticism, some of it already highlighted by Counselor Johnston. First, they do not assure the level of tax revenue that Hayden-Cartwright offers. Second, they discourage the existence of a level playing field among fuel retailers in Oklahoma.

Compacts have been tried before; a similar compact governing cigarette taxes already exists between Oklahoma and the tribes.¹⁹² That experience suggests the motor fuel tax compact may be flawed in several respects. First, among the thirty-nine registered Indian tribes in Oklahoma, it is doubtful that there would be complete agreement.¹⁹³ As former Representative Howard Cotner, chairman of the Oklahoma Revenue and Taxation Committee has said, "[There is] a difference in attitude in the tribal areas in that the eastern tribes have a better working relationship than the western tribes."¹⁹⁴ As a result, "[y]ou could not work out a compact [that] they would all adhere to . . ."¹⁹⁵ An absence of complete agreement would leave some tribes free to undercut their competitors; those that entered into the compacts would be at a relative disadvantage.

The current cigarette compact also severely inhibits state taxation power. Member tribes pay only 57.5 cents on each carton of cigarettes they sell.¹⁹⁶ However, their non-Indian competitors must pay \$2.30 on each carton,¹⁹⁷ and, as a result, must charge consumers more. The difference with Chapter 345 is only one of degree. The new law provides that accepting tribes agree to procure

186. Chuck Ervin, *Lawmakers End Work On Key Bills*, TULSA WORLD, May 26, 1996 at A1 (quoting Chairman Cotner).

187. See H.B. 2208, § 63(A)(4), 45th Leg., 2d Sess. (Okla. 1996).

188. See *id.* at § 63(B).

189. *Id.* at § 63(C)(1).

190. See *id.* at § 63(C)(3)(a)(b)(c).

191. *Id.* at § 63(C)(5).

192. Gamallo, *supra* note 21, at 1.

193. As of July 17, 1995, only 13 tribes had entered into cigarette compacts with the State. Memorandum from Stanley Johnston to Don Kilpatrick, Secretary-Member of the Oklahoma Tax Commission (July 17, 1995) (copy on file with author).

194. Ford, *supra* note 126, at N18.

195. *Id.*

196. See Gamallo, *supra* note 21, at 1.

197. See *id.*

motor fuel on which the tax has been pre-collected, perhaps thereby leveling the playing field with respect to accepting tribes.

Chapter 345 followed a season of hot political debate, followed by unprecedented tribal donations to coffers of the Democratic party leadership.¹⁹⁸ Far from discouraging litigation, Chapter 345 is likely to encourage it. Perhaps primary among the reasons is the fact that it unequally provides a state benefit to tribes while denying it to others without clearly serving a rational state interest. Whatever interest the state may have in certainty of tax collection may be negated by the tremendous loss of revenue made possible under the scheme.

Another problem exists. Because many of the lands that would be made subject to the compacts are trust lands whose titles are held by the United States government, the federal government might be a necessary party. However, the federal government is not a party to the contracts under Chapter 345. In its absence, the compacts could be declared unconstitutional.¹⁹⁹

Chapter 345 is a far cry from providing Oklahoma the protection offered by Hayden-Cartwright. The state may not compel a tribe to enter into a contract with it. As such, significant tax revenue may still be lost from sales by non-contracting tribes or individuals. While tribes contracting under Chapter 345 agree not to license individuals to sell motor fuels, it is questionable whether tribes even possess the jurisdiction to make such a choice.

VI. OTHER POSSIBLE RELIEF

The Court's *Chickasaw* ruling is particularly troublesome because the statute that authorizes the Secretary of the Interior to acquire trust lands for Indians is so broad as to leave little protection to the non-Indian businessperson or to the State. Title 25 of the United States Code, Section 465, is the Secretary's authorization:

The Secretary of the Interior is hereby authorized, in his discretion, to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians.

* * *

Title to any lands or rights acquired . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.²⁰⁰

Under this statute, there is little to stop a tribe from purchasing in fee simple a lot in the most active commercial center of town, deeding it over to the federal government to keep in trust, and then erecting a filling station at

198. See Brian Ford, *House Removes Indian Land Fuel Tax Amendment From Bill*, TULSA WORLD, April 19, 1996, at A17.

199. U.S. CONST. art. I, § 8, cl. 3.

200. 25 U.S.C. § 465 (1988).

which it will undercut its competitors on opposite corners. The breadth of the grant is clear.

However, the statute may be unconstitutional. In a November, 1995 decision, the Court of Appeals for the Eighth Circuit held that it is "an unconstitutional delegation of legislative power . . ."²⁰¹ After examining what it viewed as the "very broad language of that statute," the Court said:

By its literal terms, the statute permits the Secretary to purchase a factory, an office building, a residential subdivision, or a golf course in trust for an Indian tribe, thereby removing these properties from state and local tax rolls. Indeed, it would permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present.²⁰²

Such a result could occur because

[t]here are no perceptible "boundaries," no "intelligible principles," within the four corners of the statutory language that constrain this delegated authority—except that the acquisition must be "for Indians." It delegates unrestricted power to acquire land from private citizens for the private use and benefit of Indian tribes and individual Indians.²⁰³

If the Supreme Court ultimately agrees that Section 465 is constitutionally crippled, it will put a finger in the dike of state fuel taxation.²⁰⁴ However, if it fails to recognize Hayden-Cartwright, the leak will go unrepaired.

VII. CONCLUSION

Oklahoma House Minority Leader Larry Ferguson articulated the concern that Oklahoma shares with similarly situated states: "This problem will not stop at 13 stations nor a million-dollar tax drain on the State . . . This is just the tip of the iceberg."²⁰⁵ Indeed, Representative Ferguson's fears may already be coming to pass. Since the Supreme Court's decision in *Oklahoma Tax Commission v. Chickasaw*, at least one tribe has developed a plan to expand considerably its number of gas stations along some of the most heavily traveled roads in the State.²⁰⁶ That same tribe already operates a Texaco station along "the busiest truck route in the state and a chief link between Dallas, St. Louis and Chicago."²⁰⁷ Much of the \$1.4 million dollars it grosses monthly is due to tax free sales.²⁰⁸

Despite the immediacy of this threat to Oklahoma's transportation infrastructure and its chances for economic development, Congress may leave its

201. *South Dakota v. United States Dep't of the Interior*, 69 F.3d 878, 880 (8th Cir. 1995).

202. *Id.* at 882.

203. *Id.*

204. The impact of such a decision would depend, to a large extent, on whether the Court applied its decision retroactively, which is unlikely.

205. Ford, *supra* note 126, at N18.

206. See Gamallo, *supra* note 21, at 1.

207. *Id.*

208. See *id.*

hands folded. It may do so because some proposed legislation directly attempts to “abolish Indian tribal sovereignty or rights to self-government with respect to gasoline or motor vehicle fuel sales.”²⁰⁹ Perhaps solving the fuel tax problem is simply not a high priority for Congress right now. It needs to be.

If it is not, though, the United States Supreme Court has the power to affirm States’ right to tax motor fuels bought and sold by Indians to non-Indians on Indian lands.²¹⁰ Hayden-Cartwright provides this power. Congress has not repealed the law. Rather, it re-enacted the legislation after the executive agencies charged with interpreting and applying the law contemporaneously interpreted the Act broadly. The legislative history underscores that Congress intended that States be able to tax on “military or other reservations”²¹¹ because it was in a partnership with the states to build and maintain the roads necessary for economic development. That reason remains. To decide otherwise will weaken the transportation infrastructure and cripple the state side of the national marriage.

Charles K. Bloeser

209. Letter from U.S. Congressman Steve Largent to author (October 24, 1995) (on file with author).

210. *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

211. H.R. Rep. No. 2902, at 2 (1936).

