

ARTICLES

The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Tax Agreements

MATTHEW L.M. FLETCHER*

*"[T]he power to tax involves the power to destroy."*¹

*"The power to tax is not the power to destroy while this Court sits."*²

INTRODUCTION

On July 14, 2003, Rhode Island state police officers raided a smoke shop operated by the Narragansett Indian Tribe, seized the Tribe's unstamped cigarettes, and arrested about eight tribal

* Assistant Professor, University of North Dakota School of Law, Director, Northern Plains Indian Law Center. Enrolled Member and former Staff Attorney, Grand Traverse Band of Ottawa and Chippewa Indians. Appellate Judge, Pokagon Band of Potawatomi Indians. B.A. 1994, University of Michigan; J.D. 1997, University of Michigan Law School. The opinions expressed in this essay are the Author's only and do not represent any position any Tribe may take or has taken, and may not be attributed to any Tribe. An earlier draft of this paper was presented in conjunction with the National Intertribal Tax Alliance's Fifth Annual Conference held August 20-22, 2003. Chi-migwetch to Wenona Singel, Brian Upton, and John Petoskey, all of whom were members of Grand Traverse Band's negotiating team with me during the long, arduous tax agreement negotiations and were all kind enough to read prior drafts of this article. Brian and John worked on the negotiating team from the beginning. Wenona and I entered the picture in late 2001. Any factual assertions regarding the tax agreement negotiations are based on conversations I had with John, Brian, and Wenona, or are based on my own experiences. I wish also to thank our fellow lawyers – the long-suffering members of the tax agreement negotiation teams representing other Michigan tribes, particularly Kathryn Tierney, Bill Brooks, Mickey Parish, Rob Gips, Paul Shagen, Tony Mancilla, Jennifer Bliss, Chad DePetro, Jim Schoessler, Mike Phelan, Sean Reed, and Jim Bransky. I also thank Jonna Stebleton, an Interlochen, Michigan tax expert and a good friend who gave me insight on how tax preparers near Indian reservations view tax immunities. This piece is dedicated to Henry White, a Pokagon Band elder and leader, who contributed greatly to the tax agreement negotiations and who recently walked on into the next world.

1. *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819).

2. *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting).

members.³ Prior to the raid, Matthew Thomas, the Tribe's Chief Sachem, stated that if state police officers attempted to confiscate the unstamped cigarettes and shut down the smoke shop, "we'll throw them out."⁴

The raid took place on land owned by the Narragansett Tribe, and held in trust by the federal government for the benefit of the Tribe.⁵ The Tribe owned the smoke shop. The incidence of the state tax on cigarettes was on the retailer, which in this case was the Tribe.⁶ The Supreme Court interpreted facts very similar to the Narragansett Tribe's situation in *Oklahoma Tax Commission v. Chickasaw Nation*.⁷ In *Chickasaw Nation* the Court held that "[i]f the legal incidence of an excise tax rests on a Tribe or on tribal members for sales made inside Indian Country, the tax cannot be enforced absent clear congressional authorization."⁸

The State of Rhode Island's position is that the Rhode Island Indian Claims Settlement Act of 1978⁹ grants the State the right to enforce its laws against the Tribe. The Settlement Act does state, "the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island."¹⁰ The First Circuit has held that the Act confers civil regulatory and adjudicatory jurisdiction over the Tribe.¹¹ However, the First Circuit has also held that the Settlement Act does not operate to waive the sovereign immunity of the Narragansett Tribe.¹² As such, the State of Rhode Island has the authority to enforce its laws on the settlement lands, but it cannot do so by suing the Tribe.

The State of Rhode Island's dilemma is encapsulated in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*.¹³ In that case, the United States Supreme Court held that

3. Brief of Amici Curiae American Civil Liberties Union and the Rhode Island Affiliate, the American Civil Liberties Union at 15-16, *Narragansett Indian Tribe v. State of Rhode Island*, 296 F. Supp. 2d 153 (D. R.I. 2003).

4. *Id.*

5. *State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 689 (1st Cir. 1994) (finding that in September 1988, "the Tribe deeded the settlement lands to the Federal Bureau of Indian Affairs as trustee").

6. *Daniels Tobacco Co., Inc. v. Norberg*, 355 A.2d 636, 638 (R.I. 1976).

7. 515 U.S. 450 (1995).

8. *Id.* at 459.

9. 25 U.S.C. §§ 1701-1716 (1978).

10. *Id.* at §1708(a).

11. *State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 695-96 (1st Cir. 1994).

12. *Narragansett Indian Tribe v. Guilbert*, No.92-1622, 1993 WL 88161, at *1 (1st Cir. Mar. 24, 1993); *Maynard v. Narragansett Indian Tribe*, 984 F.2d 14, 15-16 (1st Cir. 1993).

13. 498 U.S. 505 (1991).

the State of Oklahoma was free to tax the tribal member retail sales to nonmembers.¹⁴ However, the Court left the State of Oklahoma with what the State called "a right without any remedy" by also holding that the Indian Tribe's sovereign immunity precluded the State from enforcing its laws in court.¹⁵ The Court expressly stated that the State had several options for collecting its tax; it could "collect the sales tax from cigarette wholesalers[,] . . . enter into agreements with the Tribes to adopt a mutually satisfactory regime . . . [,or] seek appropriate legislation from Congress."¹⁶ Rhode Island, like Oklahoma, was confronted with an Indian Tribe's sovereign immunity.

Rather than take the Supreme Court's offer, and choose one or more of the several alternatives, the State of Rhode Island chose force. Perhaps an advisor to the governor or the attorney general read the Supreme Court's recent Indian law decisions, *Inyo County, California v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony*,¹⁷ and *Nevada v. Hicks*¹⁸ too literally. In *Hicks*, the Supreme Court held that where a state officer conducts an invalid search in Indian Country on property owned by a tribal member, that member may not sue in the court of his Tribe under Section 1983¹⁹ to validate his federal rights.²⁰ In *Inyo County*, the Court held that an Indian Tribe, victimized by an illegal search, may not sue a state government or its officers under Section 1983 to vindicate federal rights.²¹ Perhaps the advisor concluded that, if the Rhode Island state police were to raid the Narragansett smoke shop, the Tribe would have little or no remedy against the State and its officers in the event of a violent confrontation, which is exactly what happened. If so, this is truly a disturbing development that can be attributed, at least in part, to the Court's confusing and sometimes inarticulate decisions in Indian law cases. As Professor Robert N. Clinton noted, "[w]hat the Court is doing is creating a climate which gave the Rhode Island officials the belief that they could do what they did, which is not a

14. *Id.* at 512 (citing *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 483 (1976)).

15. *Id.* at 514.

16. *Id.*

17. 538 U.S. 701 (2003).

18. 533 U.S. 353 (2001).

19. 42 U.S.C. § 1983 (2001).

20. *Hicks*, 533 U.S. at 364-65.

21. *Inyo County*, 538 U.S. at 710.

healthy development."²² In spite of these factors, the federal district court agreed with the State of Rhode Island.²³

Rhode Island sits in stark contrast to its western neighbor, Connecticut, which recently negotiated tax agreements with the two federally recognized Indian Tribes located within its borders – the Mashantucket Pequot Tribal Nation and the Mohegan Tribe.²⁴ As Professor Clinton stated, "[b]oth states have . . . great Indian leaders, both have tried to negotiate settlements. On one case, it has been highly successful. In another case, it has been a failure of leadership on the State of Rhode Island's part."²⁵

Over the years, many Tribes in many states have compacted with state governments to avoid disputes over taxation authority.²⁶ Voluntary agreement is by far the best method for Indian Tribes to settle a dispute with state governments. Tribes can no longer resort to the tomahawk,²⁷ nor can Tribes expect success in federal courts.²⁸

22. Michael Corkery, *Indians Say It May Be Fighting Time Again*, PROVIDENCE (R.I.) J., Aug. 25, 2003 at A1, available at 2003 WL 57186504 (quoting Robert N. Clinton, law professor, Arizona State University Law School).

23. *Narragansett Indian Tribe of Rhode Island v. Rhode Island*, 296 F. Supp. 2d 153, (D. R.I. 2003).

24. *Id.*

25. *Id.*

26. See, e.g., Cooperative Agreement between the New Mexico Taxation and Revenue Department and Santa Clara Pueblo Tax Commission (Jan. 29, 1998); Agreement between the Bay Mills Indian Community and the Michigan Department of Treasury (Apr. 9, 1997); Blackfeet Tribe – Montana Alcoholic Beverages Tax Agreement (May 24, 1995); Tax Agreement between the Minnesota Department of Revenue and the Lower Sioux Indian Community of Minnesota (Apr. 11, 1995); Agreement between the State of Minnesota and the White Earth Band of Chippewa Indians (Apr. 6, 1995); Tribal/State Tobacco Tax Compact between the Cherokee Nation and the State of Oklahoma (June 8, 1992); Tax Collection Agreement between the Standing Rock Sioux Tribe and the Department of Revenue of the State of South Dakota (Feb. 25, 1991); Tax Collection Agreement between the Department of Revenue of the State of South Dakota and the Rosebud Sioux Tribe of the Rosebud Indian Reservation (Dec. 15, 1977); Tax Collection Agreement between the Department of Revenue of the State of South Dakota and the Cheyenne River Sioux Tribe of the Cheyenne River Sioux Indian Reservation (June 17, 1976); Tax Collection Agreement between the Department of Revenue of the State of South Dakota and the Oglala Sioux Tribe of the Pine Ridge Indian Reservation (Dec. 30, 1970).

27. *Cherokee Nation v. Georgia*, 30 U.S. 1, 18 (1831) ("At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or his Tribe. Their appeal was to the tomahawk, or to the government.").

28. See David E. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1594 (1996) ("[A]s tribal assertions of jurisdiction became more extensive, the Court started to retreat from its modern-era affirmations of unextinguished tribal powers, altering the margins of the Tribes' jurisdiction in order to preserve the values and interests of the larger

I. HISTORY OF MICHIGAN TAX AGREEMENTS AND THE NEGOTIATIONS FOR A UNIFORM AGREEMENT

Fortunately, the recent experience for Michigan Indian Tribes so far has been more like Connecticut than Rhode Island. On December 20, 2002, seven of the twelve federally recognized Michigan Indian Tribes agreed to sign a tax agreement ("Agreement") with the State of Michigan. Those Tribes included the Little Traverse Bay Bands of Odawa Indians, the Little River Band of Ottawa Indians, the Pokagon Band of Potawatomi Indians of Michigan and Indiana, the Bay Mills Indian Community, the Sault Ste. Marie Tribe of Chippewa Indians, the Nottawaseppi Huron Band of Potawatomi Indians, and the Hannahville Indian Community.²⁹ Other Michigan Indian Tribes that participated in the negotiations,

society."); Katherine Collins, *Water: Fear of Supreme Court Leads Tribes to Accept an Adverse Decision*, HIGH COUNTRY NEWS, Oct. 19, 1992, reprinted in Harold Shepherd, *Conflict Comes to Roost! The Bureau of Reclamation and the Federal Indian Trust Responsibility*, 31 ENVTL. L. 901, 904 n.16 (2001):

In commenting on a determination by the Wind River Indian Reservation Tribes not to appeal an adverse decision of the Wyoming Supreme Court on water rights, Charles Wilkinson, [P]rofessor of Water Law at the University of Colorado, stated that the Tribes' case is "very compelling . . . [and] supported by a century of Western Water Law. But this U.S. Supreme Court, with the recent appointments, is, in its own way, probably the most radical court we've had since the late nineteenth century – in terms of overturning and moving away from existing, settled principles."

See also Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405 (2003); David Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Colorblind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001); Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177 (2001).

29. Tax Agreement Between the Little Traverse Bay Bands of Odawa Indians and the State of Michigan (Dec. 20, 2002), available at http://www.michigan.gov/documents/LTBB_Agreement_58762_7.pdf; Tax Agreement Between the Little River Band of Ottawa Indians and the State of Michigan (Dec. 20, 2002), available at http://www.michigan.gov/documents/LTRB_Agreement_5819-1_with_appendix_88260_7.pdf; Tax Agreement Between the Pokagon Band of Potawatomi Indians of Michigan and the State of Michigan (Dec. 20, 2002), available at http://www.michigan.gov/documents/PokagonBandTaxAgreement_85485_7.pdf; Tax Agreement Between the Bay Mills Indian Community and the State of Michigan (Dec. 20, 2002), available at http://www.michigan.gov/documents/BayMillsFinalTaxAgreement_61196_7.pdf; Tax Agreement Between the Sault Ste. Marie Tribe of Chippewa Indians and the State of Michigan (Dec. 20, 2002), available at http://www.michigan.gov/documents/SaultSteFinalTaxAgreement_61197_7.pdf; Tax Agreement Between the Hannahville Indian Community and the State of Michigan (Dec. 20, 2002), available at http://www.michigan.gov/documents/HannahvilleAgreement_58669_7.pdf. These agreements are cited collectively hereinafter as the "Agreement."

but did not sign the agreement were: the Keweenaw Bay Indian Community, the Saginaw Chippewa Indian Tribe of Michigan, the Lac Vieux Desert Band of Lake Superior Chippewa Indians, and the Grand Traverse Band of Ottawa and Chippewa Indians. The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan did not participate in the negotiations. In 2004, the Grand Traverse Band of Ottawa and Chippewa Indians agreed to participate in the tax agreement.³⁰

The Agreement negotiated between the Tribes and the State is a boilerplate agreement that describes exemptions, enforcement, administration, and termination. Each Tribe individually negotiated the agreement area with the State.

Prior to the negotiations leading up to the current tax agreements, a few Michigan Indian Tribes signed agreements with the State. The Bay Mills Indian Community, for example, signed a relatively advantageous tax agreement on April 9, 1997, that the State unilaterally terminated. Other Tribes interested in a tax agreement, such as the Grand Traverse Band, sought to reach an agreement with the State on terms at least as favorable as the Bay Mills agreement. The State chose to start from scratch, and invited all of the Tribes to the table at once, to negotiate one uniform agreement in the late 1990s. The stage was set up by the Executive Directive that recognized a "government-to-government relationship" with Michigan Tribes and the State.³¹

The Michigan Indian Tribes met with each other to discuss a proposal to present to the State and vice versa. The Tribes and the State first met in 1997 to lay out the parameters of a tax agreement, but did not begin serious, face-to-face negotiations until August 2001. The parties began to discuss common legal ground and areas of the law upon which they disagreed. After that stage, the parties engaged in the actual negotiating, or "horse trading," in which the State and the Tribes traded exemptions and legal strengths.

30. Tax Agreement Between the Grand Traverse Band of Ottawa and Chippewa Indians and the State of Michigan (2004), *available at* http://www.michigan.gov/documents/GTBTaxAgreement_96417_7.pdf.

31. See Executive Directive 2001-2, "Policy Statement on State-Tribal Affairs" (May 15, 2001), *available at* <http://www.mich.gov>; see also 2002 Government-to-Government Accord between the State of Michigan and the Federally Recognized Indian Tribes in the State of Michigan (Oct. 28, 2002), *available at* <http://www.michigan.gov/documents/Accordfinal534787.pdf> (last visited on Aug. 5, 2003). Executive Directive 2001-2 was based on the November 7, 2000 Executive Order on Indian Tribal Governments issued by President Clinton. See also Exec. Order No. 13,175 (2000). Former Governor Engler adopted this directive at the suggestion of John Petoskey, General Counsel for the Grand Traverse Band of Ottawa and Chippewa Indians.

A. Federal Indian Tax Law

The Tribes and the State met together at first to discuss where they agreed on the law. This part of the article addresses the broad contours of federal Indian tax law as it related to the state taxes at issue in the negotiations.

1. Tribes' Authority to Tax Indians and Nonmembers

Indian Tribes retain the authority to impose taxes on both tribal members and nonmembers, with qualifications. The Supreme Court upheld the Tribes' inherent taxation authority in *Washington v. Confederated Tribes of the Colville Indian Reservation*,³² *Merrion v. Jicarilla Apache Tribe*,³³ and *Kerr-McGee Corp. v. Navajo Tribe of Indians*.³⁴ In *Colville*, the Court held, "[t]he power to tax transactions occurring on trust lands and significantly involving a Tribe or its members is a fundamental attribute of sovereignty which the Tribes retain unless divested of it by federal law or necessary implication of their dependent status."³⁵ In *Merrion*, the Court held that the taxation authority "derives from the Tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services."³⁶ A Tribe's ability to tax its own members is thus derived from its inherent authority as a sovereign entity.

However, a Tribe's authority to tax nonmembers is limited. In the recent Supreme Court case *Atkinson Trading Co., Inc. v. Shirley*,³⁷ the Court held that, absent congressional delegation of authority, a Tribe lacks inherent power to tax nonmembers unless it meets two exceptions, known as the *Montana* exceptions,³⁸ from *Montana v. United States*.³⁹ First, "[a] Tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the Tribe or its members, through commercial dealings, contracts, leases, or other arrangements."⁴⁰ Second, "[a] Tribe may . . . exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the

32. 447 U.S. 134 (1980).

33. 455 U.S. 130 (1982).

34. 471 U.S. 195 (1985).

35. *Colville*, 447 U.S. at 152 (citing *United States v. Wheeler*, 435 U.S. 313 (1978)).

36. *Merrion*, 455 U.S. at 147.

37. 532 U.S. 645 (2001).

38. *Id.* at 649-51.

39. 450 U.S. 544 (1981).

40. *Id.* at 565-66.

economic security, or the health or welfare of the Tribe."⁴¹ In *Atkinson Trading*, the Court determined that "Montana's consensual relationship exception requires that the tax or regulation imposed by the Indian Tribe have a nexus to the consensual relationship itself."⁴² The Court determined that the second exception "grants Indian Tribes nothing beyond what is necessary to protect tribal self-government or to control internal relations."⁴³ The Supreme Court has never held that an Indian Tribe's taxation or regulation of a nonmember fits one of the two *Montana* exceptions.⁴⁴

In the recent cases *Big Horn County Electric Cooperative. v. Adams*⁴⁵ and *Burlington Northern Santa Fe Railroad Co. v. Assiniboine and Sioux Tribes of the Fort Peck Reservation*,⁴⁶ the Ninth Circuit was on the forefront of determining whether a Tribe may tax nonmember-owned businesses within the Tribe's reservation. In *Big Horn*, the court held that the Crow Tribe could not impose its utility tax on the utility cooperative doing business on a right-of-way created with the consent of the Tribe and the Department of Interior.⁴⁷ The court rejected the Tribe's argument that the utility company had entered into a consensual relationship, invoking the first *Montana* exception.⁴⁸ The court agreed that the utility had entered into a consensual relationship with the Tribe, but held that the Tribe's tax was on the property of the utility – not the activities – and therefore was outside the scope of the first exception.⁴⁹ The Crow Tribe attempted to invoke the second exception by arguing that it required the tax revenue to "finance important tribal services and [the revenue was], therefore, essential to the continued well-being of the Tribe."⁵⁰ The court rejected the argument, and held that any Tribe tax would fit the exception under the Tribe's theory and "effectively swallow *Montana's* main rule."⁵¹ The court expressly overruled an earlier case, *Burlington Northern Railroad. Co. v. Blackfeet Tribe of Blackfeet Indian*

41. *Id.* at 566.

42. *Atkinson Trading*, 532 U.S. at 656.

43. *Id.* at 658-59 (quoting *A-1 Contractors v. Strate*, 520 U.S. 438, 459 (1997)).

44. Dean B. Suagee, *The Supreme Court's "Whack-A-Mole" Game Theory in Federal Indian Law, A Theory That Has No Place in the Realm of Environmental Law*, 7 GREAT PLAINS NAT. RESOURCES J. 90, 97 (2002).

45. 219 F.3d 944 (9th Cir. 2000).

46. 323 F.3d 767 (9th Cir. 2003) [hereinafter *Burlington Northern II*].

47. *Big Horn*, 219 F.3d at 950.

48. *Id.* at 951.

49. *Id.* ("An ad valorem tax on the value of Big Horn's utility property is not a tax on the activities of a nonmember, but is instead a tax on the value of property owned by a nonmember, a tax that is not included within *Montana's* first exception.").

50. *Id.*

51. *Id.*

Reservation,⁵² in which the court upheld the Blackfeet Tribe's ad valorem tax on nonmember-owned property.⁵³

In *Burlington Northern II*, the Ninth Circuit revisited tribal taxes imposed on the Burlington Northern railroad company; in this case, the ad valorem tax of the Assiniboine and Sioux Tribes of the Fort Peck Reservation.⁵⁴ The court dispensed with the Tribes' attempt to invoke the first *Montana* exception, comparing the Tribes' tax to the Crow Tribe's tax in *Big Horn*.⁵⁵ The Tribes made a showing that over 1,600 freight cars cross the reservation every day, hazardous materials are carried on the railroad, and there have been numerous fires and accidents with attendant fatalities.⁵⁶ Consequently, the court held that the Tribes had "shown some basis for believing that [Burlington Northern's] use of its right-of-way threatens serious harm to the Reservation"⁵⁷ The court remanded the case to the district court to allow the Tribes to conduct discovery on the second *Montana* exception.⁵⁸

However, the *Montana* rule has sharply curtailed the authority of Tribes to tax nonmembers. Because of the stringency of the *Montana* test, several courts have invalidated tribal taxes imposed on nonmembers and nonmember-owned businesses.⁵⁹

Because Indian Tribes do not have a property tax base, they are forced to use creative forms of economic development in order to finance basic governmental services for their members.⁶⁰ To date, the

52. 924 F.2d 899 (9th Cir. 1991) [hereinafter *Burlington Northern I*].

53. *Big Horn*, 219 F.3d. at 954.

54. *Burlington Northern II*, 323 F.3d 767, 768-69 (9th Cir. 2003).

55. *Id.* at 772.

56. *Id.* at 774.

57. *Id.*

58. *Id.* at 774-75. Other courts have also remanded for a factual determination of whether the second exception applies, but the remands did not result in published opinions. See *Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 27 F.3d 1294 (8th Cir. 1994) (remanding case to determine if Tribes' real property tax on nonmember property within the reservation met the second *Montana* exception).

59. See *Reservation Telephone Coop. v. Henry*, 278 F. Supp. 2d 1015 (D. N.D. 2003) (invalidating Fort Berthold Tribes' possessory interest tax on phone company property located on rights-of-way located on the reservation); *In re Haines*, 245 B.R. 401 (D. Mont. 2000) (holding that Crow Tribe could not collect sales tax owed by nonmember hotel and restaurant located on nonmember-owned fee land within the reservation boundaries during bankruptcy proceeding). But cf., *Yellowstone County v. Pease*, 96 F.3d 1169 (9th Cir. 1996) (holding that Crow Tribal Court had no jurisdiction to enjoin county property tax on fee land owned by Tribal Member within the reservation).

60. *Pueblo of Santa Ana v. Hodel*, 663 F. Supp. 1300, 1314 (D. D.C. 1987)

predominant economic development engines for Indian Tribes have been gaming, natural resource development, and retail sales of tobacco products. As tribal revenues in these areas have increased, state governments and nonmembers have attempted to preclude tribal revenue from being collected.⁶¹

2. State Authority to Tax Indian Tribes

It is not an overbroad generalization to state that states may not tax Indian Tribes. They simply may not. The Supreme Court has consistently held that states do not have the authority to tax Indian Tribes or their land since the 19th century.⁶² More recently in *Oklahoma Tax Commission v. Chickasaw Nation*,⁶³ the Court held that if the legal incidence of a state tax falls on the Indian Tribe, the state tax is preempted by federal law.⁶⁴ The Court originally articulated the federal preemption doctrine, as applied to state laws that affect Indians and Indian Tribes, in *Warren Trading Post Co. v. Arizona State Tax Commission*,⁶⁵ and then later in *White Mountain Apache Tribe v. Bracker*.⁶⁶

The ability of a state to enforce its tax laws against Indian Tribes even in circumstances where the state tax is not preempted by federal law is circumscribed by tribal sovereign immunity. In *Oklahoma Tax Commissioner v. Citizen Band Potawatomi Indian Tribe of Oklahoma*,⁶⁷ the Court held that, where the legal incidence of the state tax fell on nonmembers, the Tribe was obligated to collect that tax and remit

("[T]he Indians have no viable tax base and a weak economic infrastructure. Therefore they, even more than the states, need to develop creative ways to generate revenue.").

61. Corkery, *supra* note 22, available at 2003 WL 57186504

("The non-Indians will never give up," said Rick Jemison, the chief of staff to the president of the Seneca Nation in upstate New York, which is battling with that state for the right to sell tax-free cigarettes. "They always want what they don't have. They have proven that time and time again.").

62. *The Kan. Indians*, 72 U.S. 737 (1866); *The N.Y. Indians*, 72 U.S. 761 (1866).

63. 515 U.S. 450 (1995).

64. *Id.* at 459 ("If the legal incidence of an excise tax rests on a Tribe . . . , the tax cannot be enforced absent clear congressional authorization."); *see also* *Prairie Band Potawatomi Nation v. Richards*, 241 F. Supp. 2d 1295, 1307 (D. Kan. 2003) ("It is settled law that a state tax is unenforceable if the legal incidence of the tax falls on an Indian Tribe . . .") (citing *Chickasaw Nation*, 515 U.S. at 458); *Coeur d'Alene Tribe v. Hammond*, 224 F. Supp. 2d 1264, 1269 (D. Idaho 2002); *Baraga Products, Inc. v. Comm'r of Revenue*, 971 F. Supp. 294, 297 (W.D. Mich. 1997), *aff'd*, No. 97-1449, 1998 WL 49674 (6th Cir. July 23, 1998).

65. 380 U.S. 685, 690 (1965).

66. 448 U.S. 136, 142 (1980) ("The exercise of [state] authority may be preempted by federal law.") (citing *Warren Trading Post Co.*, 380 U.S. 685; *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164 (1973)).

67. 498 U.S. 505 (1991).

the money to the State.⁶⁸ However, the Tribe's immunity precluded the State's ability to bring suit against the Tribe to enforce the collection.⁶⁹ In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*,⁷⁰ the Court solidified the rule when it upheld the sovereign immunity, both on and off the reservation, of Indian Tribes,⁷¹ whether the Tribe acted in a governmental manner or in a commercial manner.⁷² Finally, state and federal courts consistently hold that corporations and other legal entities of the Tribe are also immune from suit.⁷³ It stands to reason that no matter where an

68. *Id.* at 512-13 (citing *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 482-83 (1976)).

69. *Id.* at 513-14.

70. 523 U.S. 751 (1998).

71. *Id.* at 754 (holding that its cases "have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred") (citing *Puyallup Tribe, Inc. v. Dep't of Game of Wash.*, 433 U.S. 165, 167 (1977)). *See also* *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1189 (9th Cir. 1998); *Sac and Fox Nation v. Hanson*, 47 F.3d 1061, 1064-65 (10th Cir. 1995); *In re Greene*, 980 F.2d 590, 593-97 (9th Cir. 1992); *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061, 1065 (1st Cir. 1979); *John v. Baker*, 982 P.2d 738, 758-59 (Alaska 1999); *Thompson v. Crow Tribe of Indians*, 962 P.2d 577, 581 (Mont. 1998); *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 295 (Minn. 1996); *Morgan v. Colo. River Indian Tribe*, 443 P.2d 421 (Ariz. 1968).

72. *Kiowa Tribe*, 523 U.S. at 754-55 (citing *Puyallup Tribe*, 433 U.S. at 167; *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991); and *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940)); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2d Cir. 2000); *Sac and Fox Nation*, 47 F.3d at 1064-65; *Multimedia Games, Inc. v. WLGC Acquisition Corp.*, 214 F. Supp. 2d 1131, 1135 (N.D. Okla. 2001); *Redding Rancheria v. Super. Ct.*, 88 Cal. Rptr. 2d 384, 388 (2001); *Seminole Tribe of Fla. v. Houghtaling*, 589 So.2d 1030, 1032 (Fla. App. 1991)). *See generally* *Md. Cas. Co. v. Citizens Nat'l Bank of West Hollywood*, 361 F.2d 517, 521 (5th Cir. 1966) (it is in commercial activities where Indian Tribes need the most protection).

73. *Barker v. Menominee Nation Casino*, 897 F. Supp. 389, 393 (E.D. Wis. 1995) ("[An] action against a tribal enterprise is, in essence, an action against the Tribe itself.") (quoting *Local IV-302 Int'l Woodworkers Union of Am. v. Menominee Tribal Enter.*, 595 F. Supp. 859, 862 (E.D. Wis. 1984)). *See, e.g.* *Huron Potawatomi, Inc. v. Stinger*, 574 N.W.2d 706 (1997) (citing *Citizen Band Potawatomi*, 498 U.S. at 509; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Mich. United Conservation Clubs v. Anthony*, 280 N.W.2d 883, 889 (Mich. Ct. App. 1979)). *See also* *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 29 (1st Cir. 2000) (housing authority); *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000) (Tribally-chartered community college); *Duke v. Absentee Shawnee Tribe of Okla. Hous. Auth.*, 199 F.3d 1123, 1125 (10th Cir. 1999) (housing authority created through state statute); *Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581, 583 (8th Cir. 1998) (housing authority); *EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246, 248 (8th Cir. 1993) (Tribally owned construction company); *Alzheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 809-10 (7th Cir. 1993) (wholly-owned Tribal corporation); *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 671 (8th Cir. 1986) (Tribal housing authority); *In re Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc.*, 658 N.E.2d

Indian Tribe operates, no matter what type of activity that Tribe is engaged in, and even if that Tribe is operating through a separate entity, the state may not enforce its tax against the Tribe.

There is one Supreme Court case which states that a state may tax an Indian Tribe's operations if it operates outside of Indian Country.⁷⁴ In *Mescalero Apache Tribe v. Jones*,⁷⁵ the Mescalero Apache Tribe established an off-reservation ski resort on land leased by the Tribe from the federal government in accordance with the Indian Reorganization Act.⁷⁶ The case arose when the State of New Mexico attempted to impose a use tax on the materials used to construct the resort and a sales tax on the resort's gross receipts.⁷⁷ The Court noted in a broad generalization, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State."⁷⁸ The Court held that the State's sales tax could be applied to the Tribe's resort,⁷⁹ but that the use tax could not be applied to materials affixed to the real estate owned by the federal government.⁸⁰

Jones is likely no longer good law. The Supreme Court in *Kiowa Tribe* swept aside the broad generalization made in *Jones* about off-reservation activities by expressly stating, "[t]o date, our cases have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred."⁸¹ More damning for *Jones*, the Court in *Kiowa Tribe* listed the Mescalero Apache Tribe's ski resort as an off-reservation commercial activity owned by an Indian Tribe that retained the Tribe's immunity from suit.⁸² *Jones* is a remnant of an older, outdated view of Indian law. The Supreme Court had not yet articulated the significance of the legal incidence

989, 993 (N.Y. 1995) (non-profit, state-chartered corporation). *But cf.* *Baraga Products, Inc. v. Comm'r of Revenue*, 971 F. Supp. 294, 296-97 (W.D. Mich. 1997) ("[A] corporation may be entitled to the protections of an Indian Tribe if it is acting as the Tribe's agent.") (citing *Enter. Mgmt. Consultants, Inc. v. State ex rel. Okla. Tax Comm'n*, 768 P.2d 359 (Okla. 1988)).

74. "Indian Country" is defined in 18 U.S.C. § 1151 (2001). Although § 1151 is a criminal statute, the definition is used for civil purposes as well. *See DeCoteau v. Dist. County Ct. for Tenth Jud. Dist.*, 420 U.S. 425, 427, n.2 (1975).

75. 411 U.S. 145 (1973).

76. *Id.* at 146.

77. *Id.* at 146-47.

78. *Id.* at 148-49. Preceding this general statement, the Court stated, "[g]eneralizations on this subject have become particularly treacherous." *Id.*

79. *Id.* at 157-58.

80. *Id.* at 158-59.

81. *Kiowa Tribe*, 523 U.S. 751, 754 (1998).

82. *Id.* at 758.

of state taxes,⁸³ nor had it articulated the federal preemption doctrine as it applies to Indian Tribes.⁸⁴ The Tenth Circuit has declined to view *Jones* as authority for the general proposition that a state may tax an Indian Tribe operating outside of Indian Country.⁸⁵

Though property taxes are outside the scope of the Michigan Tribal-State Tax Agreements and thus outside the scope of this article, it should be understood that states most likely may tax the real property of Indian Tribes that are not held in trust by the federal government. In *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*,⁸⁶ the Court held that a state's tax foreclosure of land owned by Indian Tribes is not considered a suit against the Tribe, but instead an *in rem* proceeding against the property.⁸⁷ As such, in *Cass County, Minnesota v. Leech Lake Band of Chippewa Indians*,⁸⁸ the Court held that where tribal land has been previously alienated by Congress under the General Allotment Act,⁸⁹ the State may impose a tax upon it.⁹⁰ However, the Second Circuit recently held in *Oneida Indian Nation of New York v. City of Sherill, New York*,⁹¹ that where a Tribe purchases land within its reservation and Congress never changed the status of the land, that is, where Congress never authorized the alienation of the reservation land, that land is not taxable by the state.⁹²

3. State Authority to Tax Indians

Where a tribal member resides in Indian Country, the state does not have taxing authority over that member. First, a state's ability to impose income taxes on Indians is limited. The Supreme Court held

83. *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 482 (1976).

84. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980).

85. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1255 (10th Cir. 2001) (citing *Cabazon Band of Mission Indians v. Smith*, 249 F.3d 1101, 1112 (9th Cir. 2004) (Browning, J., dissenting) ("[Since] the decision on *White Mountain Apache v. Bracker* in 1980, the Court has continued to reiterate the more flexible analysis used in that case, without any particular emphasis on it applying only in situations occurring on reservations;" and "[e]ven the Court in *Mescalero Apache Tribe v. Jones* recognized that the off-reservation application of non-discriminatory state law was only a generality and not carved in stone on Mt. Sinai.")).

86. 502 U.S. 251 (1992).

87. *Id.* at 264-65. (emphasis added).

88. 524 U.S. 103 (1998).

89. 25 U.S.C. §§ 331-334, 339, 341-342, 348-349, 358, 381 (2000). See generally FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 612-32 (Rennard Strickland, et al., eds., 1982).

90. *Cass County*, 524 U.S. at 113 (citing *County of Yakima*, 502 U.S. at 263; *Goudy v. Meath*, 203 U.S. 146, 149 (1906)).

91. 337 F.3d 139 (2d Cir. 2003), *cert. denied*, 124 S. Ct. 2904 (2004).

92. *Id.* at 156-57.

in *McClanahan v. State Tax Commission of Arizona*⁹³ that states have no authority to tax the reservation income of tribal members.⁹⁴ In *Oklahoma Tax Commission v. Sac and Fox Nation*,⁹⁵ the Court held that the tribal member may also be domiciled within Indian Country but not necessarily a reservation in order to enjoy the tax exemption.⁹⁶ However, Indians that live within another Tribe's Indian Country may be subject to state taxation.⁹⁷ Moreover, Indians living within their own Indian Country but whose income is derived off-reservation may be subject to state taxes. Finally, the Court held in *Oklahoma Tax Commission v. Chickasaw Nation*⁹⁸ that states may tax the income of tribal members domiciled outside of Indian Country, even if that income is derived entirely from within Indian Country.⁹⁹

States may not impose tax on personal property, such as motor vehicles, owned by tribal members domiciled in Indian Country and property housed or garaged in Indian Country. In *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*,¹⁰⁰ *Washington v. Confederated Tribes of the Colville Indian Reservation*,¹⁰¹ and *Sac and Fox*,¹⁰² the Court held that the state does not have authority to impose its motor vehicle tax and registration on Indians living in Indian Country. In *Moe*, the Court applied the federal preemption test to invalidate a Montana tax on personal property owned by Indians living on their own reservation.¹⁰³ In *Colville* and in *Sac and Fox*, Washington and Oklahoma imposed taxes on personal property owned by tribal members living in Indian Country, but tried to avoid

93. 411 U.S. 164 (1973).

94. *Id.* at 165 ("The [state income tax] is therefore unlawful as applied to reservation Indians with income derived wholly from reservation sources.").

95. 508 U.S. 114 (1993).

96. *Id.* at 124-25.

97. *LaRock v. Wis. Dept. of Revenue*, 606 N.W.2d 580, 585 (Wis. 1999) (citing *McClanahan*, 411 U.S. 145, 165; *Anderson v. Wis. Dept. of Revenue*, 484 N.W.2d 914, 922 (Wis. 1992)).

98. 515 U.S. 450 (1995).

99. *Id.* at 462-67.

100. 425 U.S. 463 (1976).

101. 447 U.S. 134 (1980).

102. 508 U.S. 114 (1993).

103. *Moe*, 425 U.S. at 480-81.

(The personal property tax on personal property located within the reservation; the vendor license fee sought to be applied to a reservation Indian conducting a cigarette business for the Tribe on reservation land; and the cigarette sales tax, as applied to on-reservation sales by Indians to Indians, conflict with the congressional statutes which provide the basis for decision with respect to such impositions.).

the prohibition in *Moe* by labeling the taxes "excise taxes."¹⁰⁴ The Court saw through the ruse and invalidated the taxes.¹⁰⁵

4. State Authority to Tax Nonmembers in Indian Country

Since there is no general bar to a state's authority to tax nonmembers in Indian Country, the question of whether a state has the authority is subject to the federal preemption test, first stated in *Warren Trading Post Co. v. Arizona State Tax Commission*.¹⁰⁶ The Court in *Colville* articulated the general rule of the preemption test as follows:

While the Tribes have an interest in raising revenues for essential governmental services, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate interest in raising revenues, and that interest is strongest when directed at off-reservation value and when the taxpayer is the recipient of state services.¹⁰⁷

As such, Indians and Indian Tribes acting as retailers are required to collect and remit state sales tax for purchases made by nonmembers in Indian Country. Applying the preemption test, the Supreme Court in *Department of Taxation and Finance of New York v. Milhelm Attea & Bros.*,¹⁰⁸ and *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*¹⁰⁹ held that the states' interests in

104. *Sac and Fox*, 508 U.S. at 127-28.

105. *Id.*

(Oklahoma's taxes are no different than those in *Moe* and *Colville*. Like the taxes in both those cases, the excise tax and registration fee are imposed in addition to a sales tax; the two taxes are assessed for use both on and off Indian Country; and the registration fees are imposed annually based on a percentage of the value of the vehicle. Oklahoma may not avoid our precedent by avoiding the name "personal property tax" here any more than Washington could in *Colville*.)

See also *Colville*, 447 U.S. at 163.

(The only difference between the taxes now before us and the one struck down in *Moe* is that these are called excise taxes and imposed for the privilege of using the vehicle in the State, while the Montana tax [in *Moe*] was labeled a personal property tax We do not think *Moe* and *McClanahan* can be this easily circumvented. While Washington may well be free to levy a tax on the use outside the reservation of Indian-owned vehicles, it may not under that rubric accomplish what *Moe* held was prohibited.)

106. 380 U.S. 685 (1965).

107. *Colville*, 447 U.S. at 156-57.

108. 512 U.S. 61 (1994).

109. 498 U.S. 505 (1991).

collecting tax revenue from nonmembers outweighed the Tribes' sovereignty interests,¹¹⁰ or the Tribes' interests in "offering a tax exemption to customers who would ordinarily shop elsewhere."¹¹¹

However, where the tax implicates value generated on the reservation, the state tax is preempted. In *Colville*, the Court held that a state tax is preempted where the tax is imposed directly on "value generated on the reservation by activities involving the Tribes."¹¹² The *Colville* Court relied on *McClanahan v. Arizona State Tax Commission*,¹¹³ where the Court found that Arizona could not tax tribal members' income where that income derived from the reservation.¹¹⁴ Thus, courts will invalidate a state tax on income generated on a reservation or within Indian Country.¹¹⁵

110. *Milhelm Attea*, 512 U.S. at 73-74; *Citizen Band Potawatomi*, 498 U.S. at 512-13 (citing *Colville*, 447 U.S. 134; *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976)).

111. *Milhelm Attea*, 512 U.S. at 73.

112. *Colville*, 447 U.S. at 156-57.

113. 411 U.S. 164 (1973).

114. *Id.* at 165.

115. See *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1045-46 (9th Cir. 2000) (holding that state tax on Tribal hotel sales to nonmembers is preempted) (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987)); *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 659-60 (9th Cir. 1989) (holding that state tax on timber produced on-reservation by nonmember company is preempted); *Indian Country U.S.A., Inc. v. Oklahoma ex rel. Okla. Tax Comm'n*, 829 F.2d 967, 986-87 (10th Cir. 1987) (holding that state tax on Creek Nation's high-stakes bingo enterprise invalid because "high-stakes bingo is not generally available within the state") (citing *Colville*, 447 U.S. at 155, 157); *Crow Tribe of Indians v. Montana*, 650 F.2d 1104, 1117 (9th Cir. 1981) ("In this case, the revenues sought to be taxed by Montana may ultimately be traced to the Tribe's mineral resources, a component of the reservation land itself. This is not a case where the Tribe is simply marketing a tax exemption, as where Tribes seek to sell tax-free cigarettes to non-Indians."); *Winnebago Tribe of Neb. v. Stovall*, 205 F. Supp. 2d 1217, 1225-26 (D. Kan. 2002) (granting temporary restraining order against state enforcement of motor fuel tax on fuel value generated in Indian Country), *aff'd*, 341 F.3d 1202 (10th Cir. 2003); *Flat Center Farms, Inc. v. State Dept. of Revenue*, 49 P.3d 578, 581-82 (Mont. 2002) (holding that state corporation license tax was inapplicable to Indian-owned corporation doing business on reservation because "the value the State wishes to tax is generated entirely in a sovereign state"), *cert. denied*, 537 U.S. 1046 (2002). *But cf.* *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 341-42 (1983) (invalidating state regulation of Tribal hunting and fishing activities, in part, because all revenue generated from activities was on the reservation); *In re Blue Lake Forest Products, Inc.*, 30 F.3d 1138, 1141 (9th Cir. 1994) (finding that Tribe's interest in debtor's proceeds in bankruptcy from timber sales outweighed other creditors because value was generated on the reservation); *Prairie Band of Potawatomi Indians v. Richards*, 276 F. Supp. 2d 1168, 1194 (D. Kan. 2003) (holding that state's motor vehicle registration requirements were preempted by Band's competing requirements).

B. Interests of the Michigan Indian Tribes

The Michigan Indian Tribes were motivated to meet with the State because the State began to charge sales and use tax on construction contractors doing business on reservation and trust land. The contractors, of course, passed the cost onto the Tribes. From the Tribes' points of view, the State's action to collect the tax from the contractors off the reservation was illegal. Moreover, by collecting the tax from the contractors, the State appeared to be challenging the Tribes to litigate or at least force negotiations. Many of the Michigan Tribes have plans to engage in economic development and government construction and this was a "big-ticket" item. The attorney for Little Traverse Bay Bands calculated that the State had collected hundreds of thousands of dollars from the Band's construction of its administration buildings on trust land, pure sovereign governmental functions that the State should not have been able to tax.¹¹⁶ The same was true for most Tribes, including the Grand Traverse Band.

The Tribes also generally wished to avoid litigating tax exemptions in the federal courts, which have not been receptive to tribal sovereignty as opposed to states' rights, particularly the Supreme Court. More importantly, neither the State nor the Tribes wished to litigate reservation boundaries at this time. Unlike most Tribes in the western United States, the boundaries of Michigan Tribes' reservations are not judicially defined,¹¹⁷ with the exception of the Keweenaw Bay Indian Community's reservation.¹¹⁸ The State had threatened to seek disestablishment¹¹⁹ or diminishment¹²⁰ of Michigan reservations in the event of litigation to establish taxation

116. See *Ramah Navajo School Board, Inc. v. Bureau of Revenue of N.M.* 458 U.S. 832, 838 (1982); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 155-56 (1973). See, e.g., *Williams v. Lee*, 358 U.S. 217, 220 (1959) (holding that, absent express Congressional acts to the contrary, states may not exercise jurisdiction if it would interfere with "the right of reservation Indians to make their own laws and be ruled by them").

117. John F. Petoskey, *Doing Business With Michigan Indian Tribes*, 76 MICH. B. J. 440, 445 (1997)

(The exterior boundaries of the Sault Ste. Marie Tribe of Chippewa Indians, the Bay Mills Indian Community, the Grand Traverse Band of Ottawa and Chippewa Indians, the Little Traverse Bay Band of Odawa Indians and the Little River Band of Ottawa Indians have not been subject to "exterior boundaries" litigation . . . Presumably, the boundaries still exist as defined in the original treaties.).

118. *Keweenaw Bay Indian Cmty. v. Michigan*, 784 F. Supp. 418 (W.D. Mich. 1991).

119. *DeCoteau v. Tenth Jud. Dist.*, 420 U.S. 425, 445 (1975) (holding that Lake Traverse reservation was disestablished).

120. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 341 (1998) (holding that ceded lands did not retain reservation status).

exemptions. Further, the cost of the litigation, especially the cost of expert witnesses required to testify on the reservation boundaries,¹²¹ was a deterrent to litigation.

As a general matter, all the Tribes agreed that taxes on tobacco, motor fuel, affixations to real estate, rental rooms, utilities, any purchases made by Indians living in Indian Country, and income of Indians living in Indian Country were invalid.

C. *The State of Michigan's Interest*

The State's stated motivation to negotiate with the Michigan Tribes stemmed mostly from its inability to collect valid taxes from non-tribal members in Indian Country. The State was concerned about Tribal and Tribal-member businesses exploiting tax exemptions to garner a competitive advantage over non-Indian businesses, or "marketing the exemption." Many tribal members on several reservations had established businesses such as smoke shops for the express purpose of marketing the exemption. Apparently, the State's efforts to enforce state taxes on these businesses had not deterred others from starting up their own. Tribal governments had not assisted the State in its enforcement actions.

The State had many of the same concerns about litigating tax exemptions as the Tribes. First, the State did not want to lose a tax exemption case as they had in *United States on behalf of the Saginaw Chippewa Indian Tribe v. Michigan*,¹²² or a reservation boundary case as they had in *Keweenaw Bay Indian Community v. Michigan*.¹²³ Secondly, and more importantly to the State, litigation costs would overwhelm the ultimate revenues collected.

Near the end of the negotiations, the State generated a list of "talking points" to the State Legislature that listed the following as justification for the adoption of the authorizing legislation in December 2002:¹²⁴ (1) the Tribes would "dictate" the terms of litigation because the Tribes have sovereign immunity; (2) state taxes currently go uncollected; (3) Tribal retailers enjoy competitive advantages and the State needs to "level the playing field;" (4) the State cannot enforce state law; (5) the Tribes purchase out-of-state to avoid state taxes; (6) the Tribes use old exemption certificates to receive sales tax exemptions on auto purchases for the Tribes and

121. *United States v. Michigan*, 471 F. Supp. 192, 204 (W.D. Mich. 1979) ("The Court heard extensive historical evidence and received voluminous documentation meant to provide a basis for interpreting the often ambiguous treaties in issue in this case.").

122. 106 F.3d 130 (6th Cir. 1997).

123. 784 F. Supp. 418 (W.D. Mich. 1991).

124. MICH. COMP. LAWS ANN. § 205.3(c) (West 2004).

tribal members; (7) tribal members and Tribes sell "vast quantities" of untaxed cigarettes to nonmembers; (8) Tribes register autos and some consumer goods for tribal members in order to avoid state taxes; and (9) Tribes will commence operating tax free outlet malls and auto dealerships.

II. DISCUSSION

A. *Summary of the Tax Agreement*

The Tax Agreement between the Michigan Indian Tribes and the State of Michigan is complex and difficult to understand. The tax exemptions for the Tribes and tribal members sometimes disappear once one leaves a certain parcel of land, and reappear once one crosses a particular section line into an obscure township. Tax exemptions may also disappear if one brings an item across one of the imaginary lines, government boundaries such as section lines and townships.¹²⁵

Few of the lines and boundaries affecting the exemptions contained in the agreement have any relationship whatsoever to reservation boundaries or Indian Country. The enforcement mechanisms, though strongly supporting tribal court and tribal police jurisdiction, are riddled with difficult time frames and notification procedures. The dispute resolution mechanism to handle problems between the Tribes and the State involves multifaceted forms of binding arbitration in which the most difficult problems may be selecting an acceptable panel of arbitrators.

However, the Agreement provides a level of certainty to state taxation questions in Indian Country in Michigan that was sorely lacking. The fact that most Michigan Tribes' reservation boundaries are either unknown or unrecognized by the State creates unique problems for Michigan Indian Country. This uncertainty has been detrimental to tribal governmental and business activities. Moreover, applying the federal preemption test is a risky proposition at best:

[Supreme Court] litigation has produced considerable confusion, largely as a result of apparent inconsistencies in the decisions applying [the balancing] test. Tribes, states, and potential investors cannot predict the outcome of the

125. It is interesting that, during negotiations, state negotiators brought forth maps with different township and section lines, lines that are sometimes much different than is commonly available or in use in the modern age. The negotiators referred to these lines as "surveyed" lines, ostensibly referring to the original Northwest Ordinance of 1787 surveys probably done in the late 18th and early 19th centuries. As such, when tribal negotiators discussed section and township lines prior to negotiations, they did not have the same materials as the state negotiators.

test as applied to a particular fact situation. Thus, neither the Tribe nor a potential investor can know for certain in advance whether proposed business activity will be subject to one or two taxes. If the proposed venture goes forward, it will bear a risk of double taxation that its off-reservation competitors do not face.

This confusion obviously discourages reservation economic activity and ultimately works to the disadvantage of all parties.¹²⁶

However, the State recognized tribal court decisions are valid in Michigan state courts in accordance with Michigan Court Rule 2.615, which provides a procedure to enforce Tribal Court judgments in State Courts.¹²⁷ The court rule, developed in the mid-1990s,¹²⁸ provided an additional basis for the agreement.

126. Petoskey, *supra* note 117, at 445-46.

127. MICH. CT. R. 2.615 states as follows:

(A) The judgments, decrees, orders, warrants, subpoenas, records, and other judicial acts of a tribal court of a federally recognized Indian Tribe are recognized, and have the same effect and are subject to the same procedures, defenses, and proceedings as judgments, decrees, orders, warrants, subpoenas, records, and other judicial acts of any court of record in this state, subject to the provisions of this rule.

(B) The recognition described in subrule (A) applies only if the Tribe or tribal court(1) enacts an ordinance, court rule, or other binding measure that obligates the tribal court to enforce the judgments, decrees, orders, warrants, subpoenas, records, and judicial acts of the courts of this state, and

(2) transmits the ordinance, court rule or other measure to the State Court Administrative Office. The State Court Administrative Office shall make available to state courts the material received pursuant to paragraph (B)(1).

(C) A judgment, decree, order, warrant, subpoena, record, or other judicial act of a tribal court of a federally recognized Indian Tribe that has taken the actions described in subrule (B) is presumed to be valid. To overcome that presumption, an objecting party must demonstrate that (1) the tribal court lacked personal or subject-matter jurisdiction, or (2) the judgment, decree, order, warrant, subpoena, record, or other judicial act of the tribal court (a) was obtained by fraud, duress, or coercion, (b) was obtained without fair notice or a fair hearing, (c) is repugnant to the public policy of the State of Michigan, or (d) is not final under the laws and procedures of the tribal court. (D) This rule does not apply to judgments or orders that federal law requires be given full faith and credit.

See also Grand Traverse Band Court Rule, Chapter 10 (Rules Regarding Enforcement and Recognition of Foreign Judgments).

128. Hon. Michael F. Cavanaugh, *Michigan's Story: State and Tribal Courts Try to Do the Right Thing*, 76 U. DET. MERCY L. REV. 709, 713-14 (1999).

1. *Terms of Art Created for the Agreement*

a. *The Agreement Area*

The "agreement area"¹²⁹ concept developed over the course of the negotiations in order to smooth over many of the difficulties created by the lack of a clearly designated Indian Country¹³⁰ for most Michigan Indian Tribes. The parties generally agreed that the State had no authority to enforce its tax laws on tribal members in Indian Country.¹³¹ Moreover, since the agreement area would define the geographic scope of many of the tax exemptions, its creation as a concept allowed the parties to extend or retract certain tax exemptions depending on how the negotiations developed.

Each Tribe negotiated individually with the State over its agreement area and, naturally, several problems developed. Each Tribe generally started from the position that its service area¹³² should be its agreement area. Grand Traverse Band, for example, has a six-county service area, much larger than its reservation boundaries but representative of its traditional core territory. The Tribal Council agreed to allow the State to negotiate the size of the agreement area down from a service area dream to a reservation boundaries goal. However, the State was unwilling to even discuss a service area-sized agreement area and unwilling to include provisions that implied the existence of extant reservation boundaries. Grand Traverse Band eventually negotiated an agreement area that approximated the total area of both its reservations combined but did not mirror the boundaries of the reservations.

The State's position was to limit the agreement area to trust lands and some tribally-owned fee land, as it had been prior to the commencement of the negotiations. This position was in line with the belief that many of the Tribes had regarding the State; that for

129. Agreement § II(A).

130. "Indian Country" was defined in accordance with the 18 U.S.C. § 1151 (2000) definition during the negotiations.

131. See *Williams v. Lee*, 358 U.S. 217 (1958) (holding that the states may not interfere with the right of reservation Indians to make their own laws and be governed by them); *White Mountain Apache v. Bracker*, 448 U.S. 136 (1980); *Ramah Navajo Sch. Bd. v. Bureau of Revenue of N.M.*, 458 U.S. 832 (1982).

132. The development of the "service area" concept began after the Supreme Court's decision in *Morton v. Ruiz*, 415 U.S. 199 (1974), in which the Court held that the Bureau of Indian Affairs could not define a Congressional entitlement for Indians "on or near the reservation" as "on the reservation." The "service area" concept then bled into tribal constitutions. See *Grand Traverse Band of Ottawa and Chippewa Indians Constitution*, Art. I, § 2 (defining "Service Area"), available at <http://thorpe.ou.edu/constitution/GTBcons3.html> (last visited Aug. 5, 2003). (The Grand Traverse Band's service area encompasses Leelanau, Grand Traverse, Antrim, Charlevoix, Benzie, and Manistee Counties.).

the State, the agreement area would be a huge factor in limiting the growth of Michigan Indian Tribes. In essence, the Tribes believed the State wanted to keep the Tribes where they were both geographically and economically. During the course of the negotiations, it appeared to many tribal negotiators that the State had come to the table on behalf of non-Indian businesses, almost like a trade union would negotiate on behalf of its constituents. The state negotiators often took positions that were more driven by politics than revenue enhancement and tax enforcement. The Tribes had come to the table to preserve what tax exemptions they felt should have been available from the beginning, which the State had cut off with one method or another. For the Tribes, tribal economic development and growth was a strong priority and would help the State economically, as gaming had done. Yet it appeared to some tribal negotiators that the State had come to the table to stop tribal economic growth in its tracks.

Since the State's original position on the agreement area was completely untenable to all but a few Tribes, the State ultimately conceded the point to an extent. However, the agreement area concept that would have broadly defined tax exemptions became splintered into six separate versions. The larger agreement area agreed to by the State included between two-and-a-half and ten townships. The three Ottawa Tribes each negotiated for about six townships each. This agreement area had the most relevance to tribal members.

b. Tribal and Trust Lands (TTL)

The remaining five forms of agreement area became known as tribal and trust Lands, or TTL.¹³³ Each of these five was a list of

133. Agreement § II(K):

- (1) all lands held in trust by the federal government for the benefit of the Tribe which are listed on Appendix A (K-1) and designated as Tribal and Trust Lands at the time this Agreement is executed,
- (2) all fee lands owned by the Tribe which are listed on Appendix A (K-2) and designated as Tribal and Trust Lands at the time this Agreement is executed,
- (3) all Tribal lands acquired after execution of this Agreement within an area identified for automatic Tribal and Trust Land status on Appendix A (K-3) so long as they are used for a Governmental Function,
- (4) all Tribal lands accepted into federal trust after execution of this Agreement which are located [within or outside] the area identified in Appendix A (K-4) [those areas within the Agreement Area where lands accepted into trust are or are not automatically afforded Tribal and Trust Land status], regardless of the use of such Tribal lands, and

parcels owned by the Tribe either in fee or in trust that would be included in various appendices to the agreement.

The first was a list of trust lands that would be included in all of the tax exemptions.¹³⁴ These parcels would have the full advantages of the Agreement, in accordance with federal law.¹³⁵ Trust lands excluded from the list would not have the full advantages of the Agreement. State law would control on these parcels.¹³⁶ Of course, several Tribes strongly objected to any agreement that would allow the State to impose its laws on trust land, and several refused to sign it, in part, because of this provision. The State refused, at least in the experience of the Grand Traverse Band, to allow trust land used for non-gaming economic development near urban centers such as Traverse City to be listed in this provision.

The second form of TTL would grant TTL status to the fee parcels listed in the appropriate appendix.¹³⁷ Here, the State generally agreed to include all non-economic development parcels away from urban centers in this category. Since activity on fee lands owned by the Tribes may be subject to state taxation,¹³⁸ this allowance by the State was a small victory for the Tribes. However, again the State limited the benefit to lands used solely for governmental purposes that were away from urban centers. The state negotiators listed hotels, resorts, industrial parks, and manufacturing facilities as

(5) all other lands acquired after execution of this Agreement by the Tribe that are mutually agreed upon in writing by the parties to this Agreement and identified in Appendix A (K-5).

134. Agreement § II(K)(1).

135. 25 U.S.C. § 465 (2000) ("[S]uch lands or rights shall be exempt from State and local taxation."). See e.g., *Williams*, 358 U.S. 217; *The Kansas Indians*, 72 U.S. 737 (1866); *Connecticut ex rel. Blumenthal v. United States Dept. of Interior*, 228 F.3d 82, 85 (2d Cir. 2000).

136. Agreement § I(A)(2) ("Except as modified in this Agreement, the provisions of State law relating to the taxes that are subject of this Agreement shall apply to the Tribe, Tribal Members, and Tribal Entities."); see also, Agreement § I(A)(1):

While this Agreement is in effect between the Tribe and the State it is agreed that (i) their respective rights will be determined by this Agreement with respect to the taxes that are the subject of this Agreement, (ii) neither party will seek additional entitlement or seek to deny entitlement on any federal ground (including federal preemption) whether statutorily provided for or otherwise with respect to the taxes that are the subject of this Agreement

137. Agreement § II(K)(2).

138. In 1997, the Sixth Circuit ruled that the State of Michigan could not assess property taxes on land owned by Michigan Indian Tribes in fee simple. See *United States on behalf of the Saginaw Chippewa Indian Tribe v. Michigan*, 106 F.3d 130 (6th Cir. 1997). The Supreme Court vacated that decision in 1998 in light of its decision in *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998). See *Michigan v. United States*, 524 U.S. 923 (1998).

examples of tribal economic development activities the State desired to curb.

The third form of TTL would grant TTL status to after-acquired trust land parcels anywhere within designated bounds inside of the agreement area if used for governmental purposes.¹³⁹ This was known as "automatic TTL." The Tribes raised the problem of after-acquired trust parcels that may or may not move straight to the first category of TTL parcels. The Tribes took the position that trust land is trust land, either acquired before or after the Agreement's inception. The State countered by arguing, somewhat disingenuously, that it had would have no choice but to begin opposing tribal applications to take land into trust. Currently, Indian Tribes are having extreme difficulty completing the 25 C.F.R. Part 151 fee-to-trust acquisition process¹⁴⁰ because of political issues within the Department of Interior.¹⁴¹ With that express threat clouding the discussion, Tribes that were more motivated to sign the agreement had no choice but to accept the State's position. Other Tribes did not.

The State argued during negotiations over particular parcels to be included in this list that it intended to protect non-Indian businesses from tribal and tribal member businesses who may use the agreement to "market the exemption."¹⁴² Championing non-Indian businesses, the state negotiators refused to agree to TTL status for any after-acquired trust land near urban centers and other businesses.

139. Agreement § II(K) (3).

140. 25 C.F.R. §§ 151.10-151.11.

141. Letter from Gale Norton, Secretary of the Interior, to Cyrus Schindler, President, Seneca Nation of Indians 3 (Nov. 12, 2002) ("While I do not intend to signal an absolute bar on off-reservation gaming, I am extremely concerned that the principles underlying the enactment of IGRA are being stretched in ways Congress never imagined when enacting IGRA."); Press Release, Rep. Roy Blunt, *House Leadership Call for Halt to Off-Reservation Indian Gaming: Branson & Kansas City Sites Need Protection from Indian Casino Expansion* (July 25, 2003), available at <http://www.blunt.house.gov> (last visited July 30, 2003) (citing Letter from Rep. J. Dennis Hastert, Speaker of the House, Rep. Tom DeLay, House Majority Leader, Rep. Roy Blunt, House Majority Whip, and Rep. Eric Cantor, House Chief Deputy Whip, to Gale Norton, Secretary of the Interior (July 12, 2003))

(If the Department of Interior permits Indian Tribes to establish a reservation, take lands into trust and build a casino with little or no present or historical connection, the Department of Interior will effectively sanction reservation shopping. This would establish a dangerous precedent whereby Tribes could, and would, locate casinos in any state where gaming is allowed.);

Rick Alm, *Republicans Want Tribal Casino Sites Restricted*, K.C. STAR, July 22, 2003; Mark Simon, *Indian Casinos Facing Scrutiny: Feinstein Wants to Rein In Projects*, S.F. CHRON., July 21, 2003.

142. See Dep't. of Taxation and Fin. of N.Y. v. Milhelm Attea & Bros., 512 U.S. 61, 72 (1994) (quoting Washington v. Confed. Tribes of the Colville Indian Reservation, 447 U.S. 134, 155 (1980)).

The State negotiated, in effect, to defeat the very purposes of putting land into trust – freedom from state taxation. Several Tribes balked at this insistence and may have refused to execute the agreement for this reason.

During negotiations with Grand Traverse Band, the State created yet another form of TTL within this provision by negotiating for a limitation on the areas within the band's six-county service area in which the State would allow after-acquired land to automatically become TTL if used solely for governmental purposes. Since the State refused to acknowledge an agreement area that included the entire service area, the band negotiated for twenty-two to twenty-four townships throughout the service area, some outside the agreement area, that the band might develop infrastructure to provide direct services to tribal members such as housing, health care, or other social services.

The fourth form of TTL came to be known as the "economic development zone" or, the "economic development buffer zone." Here, the State agreed to categorize after-acquired trust land as TTL for purposes of all tax exemptions within an area inside the agreement area but outside of "buffer zones" protecting urban areas within the agreement area.¹⁴³ The State's earlier position was that all after-acquired trust land to be used for economic development purposes would be negotiable after the inception of the Agreement. In essence, the State could exercise a veto under the Agreement over any trust land to be used for economic development. The Tribes were not willing to concede this power to the State, especially since with federal fee-to-trust regulations unsettled¹⁴⁴ and the current national political thinking in regards to trust acquisitions, the State already had that power. The parties compromised by creating the "buffer zones."

The fifth form of TTL was a catchall provision allowing the State and the Tribes to negotiate for any other after-acquired lands, fee or trust, to be included within the TTL designation.¹⁴⁵

143. Agreement § II(K)(4).

144. A substantial effort had been made by the Clinton administration to establish clear guidelines regarding off-reservation acquisitions. *See* Acquisition of Title to Land in Trust, Final Rule, 66 Fed. Reg. 3452, 3455 (Jan. 16, 2001)

(We will accept title to land in trust outside a reservation or outside an approved TLAA only if the application shows that the acquisition is necessary to facilitate tribal self-determination, economic development, Indian housing, land consolidation or natural resource protection and that meaningful benefits to the Tribe outweigh any demonstrable harm to the local community.).

However, the Bush Administration withdrew these rules on November 9, 2001.

145. Agreement § II(K)(5).

2. *Tax Exemptions and Revenue Sharing*

The State and the Tribes negotiated over exemptions from six state taxes¹⁴⁶ – sales and use taxes, motor fuel taxes, tobacco taxes, income taxes, and the Michigan Single Business Tax – for both Indian tribal governments and individual Indians. Other taxes, such as property taxes, which in Michigan are within the province of local governments,¹⁴⁷ and real estate transfer taxes were not included in the negotiations and subsequently not dealt with in the Agreement.

Since several Michigan Indian Tribes have adopted their own sales tax codes and rely upon the revenues to provide direct services to tribal members,¹⁴⁸ the Tribes also negotiated for a sales tax revenue sharing scheme.

3. *Pre-Effective Date Requirements*

Prior to the effective date of the Agreement, and prior to December 15 of each year, each Tribe must submit to the State a current list of members and their addresses living in the agreement area,¹⁴⁹ a list of all tribal and tribal member-owned businesses in the agreement area,¹⁵⁰ and a list of all lands purchased by the Tribe or taken into trust for the Tribe.¹⁵¹ The tribal attorney must also "certify that the Tribe has taken all necessary steps to bind Tribal Members and Tribal Entities to the terms of this Agreement."¹⁵²

146. Agreement § I(B).

147. MICH. COMP. LAWS ANN. § 211.1 (West 2003).

148. See, e.g., 4 Grand Traverse Band Code § 407 ("Sales Tax on Restaurant and Lodge"), available at <http://www.narf.org/nill/Codes/gtcode/travcode4budget.htm> (last visited Aug. 6, 2003); Bay Mills Indian Community Ordinance Establishing a Tribal Use Tax on Persons Purchasing Accommodations on the Reservation of the Bay Mills Indian Community, available at <http://www.narf.org/nill/Codes/baymillscode/bmusetax.htm> (last visited Aug. 6, 2003); Sault Ste. Marie Tribe of Chippewa Indians Tribal Code §§ 43.201, ("Gross Receipts Tax"), available at <http://www.narf.org/nill/Codes/saultcode/ssmcode43tax.htm> (last visited Aug. 6, 2003).

149. Agreement § XIII(B)(1).

150. Agreement § XIII(B)(2).

151. Agreement § XIII(C).

152. Agreement § XIX(B).

*B. Taxes Involved in the Tax Agreement**1. Sales and Use Taxes**a. Exemptions for Tribal Government*

The Agreement provides a tax exemption to the Tribe or a Tribe-owned business entity for all purchases of tangible personal property if the items are used exclusively within Tribal or Trust Lands.¹⁵³

The Agreement also provides a tax exemption to the Tribe for purchases made within the broader agreement area for tangible personal property that will be primarily used for "Tribal Governmental Functions."¹⁵⁴ There is no restriction on where the property is used, unlike the previous provision.

There is a specific provision allowing for the exemption from taxes for affixations to real estate on Tribal and Trust Lands.¹⁵⁵ This provision allows the Tribes to construct administrative facilities, housing and other infrastructure projects, and economic development projects on trust land without the State imposing a tax on the materials used in their construction on the contractors, who would then pass it on to the Tribes. This provision alone likely saves each Michigan Indian Tribe signatory hundreds of thousands of dollars a year in construction costs. Of course, the Tribes argued vehemently that the State should have no power whatsoever to tax activity on trust lands. This provision ensures that the State cannot take an end-run around Tribal sovereignty to pad its treasury by pinching a Tribe's construction contractors, as is the current practice in Michigan.

"Tribal Governmental Functions" is a term of art that includes functions derived from the list provided in the Agreement.¹⁵⁶ "The one area that clearly is not subject to taxation by the federal or state government is when the Tribe is acting in its sovereign capacity, such as the current gaming operations on Indian reservations."¹⁵⁷ During

153. Agreement § III(A)(1)(a).

154. Agreement § III(A)(1)(b).

155. Agreement § III(A)(3)(a).

156. Agreement §§ III(A)(1)(b)(i)-(ix). Presumably, the term is analogous to the Internal Revenue Code's term, "essential governmental functions." See 26 U.S.C. § 7871(e) ("For purposes of this section, the term 'essential governmental function' shall not include any function which is not customarily performed by State and local governments with general taxing powers.").

157. Petoskey, *supra* note 117, at 446; see also, Multimedia Games, Inc. v. WLGC Acquisition Corp., 214 F. Supp. 2d 1131, 1135 (N.D. Okla. 2001); Redding Rancheria v. Super. Ct., 88 Cal. App. 4th 384, 388 (2001). *But cf.* Md. Cas. Co. v. Citizens Nat'l

negotiations, the Tribes resisted including a distinction between governmental functions and economic development functions,¹⁵⁸ but the State insisted on creating the distinction for certain taxes.

Importantly, "actual gaming activities" is a function included in the list of governmental functions.¹⁵⁹ The inclusion of gaming activities was an acknowledgement by the State that the Indian Gaming Regulatory Act¹⁶⁰ would likely preclude any attempt by the State to tax gaming activities, because of the federal preemption doctrine and the strong federal regulatory presence in Indian gaming.¹⁶¹ It appears redundant because, under federal law, Class III gaming must be conducted on trust lands¹⁶² or on reservation lands,¹⁶³ but it avoids the end-run tax problem created by the State.

Bank of West Hollywood, 361 F.2d 517, 521 (5th Cir. 1966) (holding that it is in commercial activities where Indian Tribes need the most protection).

158. Distinguishing between the economic development and governmental functions of an Indian Tribe is dangerous for the Tribes. Issues relating to the applicability of tribal sovereign immunity, application of labor and employment laws of general applicability; and the survival of Indian preference have been framed in this light. See, e.g., *Baraga Prod., Inc. v. Comm'r of Revenue*, 971 F. Supp. 294, 296 (W.D. Mich. 1997) ("[A] corporation has been held to be entitled to the same sovereign immunity as the Indian Tribe when it is organized under tribal laws; it is controlled by the Tribe; and it is operated for government purposes.") (emphasis added); *Flynt v. Cal. Gaming Control Comm'n*, 129 Cal. Rptr. 2d 167, 182 (Cal. Ct. App. 2002) ("We believe that Judge Kozinski's provocative dicta [in *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997)], when considered in context, can be best understood as casting constitutional doubt on Indian-run gaming monopolies formed solely for business purposes untethered to any declared federal objective of strengthening tribal self-government or promoting the Tribe's economic development."); *Dixon v. Picopa Constr. Co.*, 772 P.2d 1104, 1109-11 (Ariz. 1989) (holding a tribally-created corporation did not enjoy immunity because it was a simple business venture, having no responsibility for promoting tribal welfare or development); Transcript of Oral Argument at 34, *Inyo County, California v. Paiute-Shoshone Indians of the Bishop Cmty of the Bishop Colony*, 538 U.S. 701 (2003) ("[I]f what was formerly tribal government has now been so infused with a commercial character, that it seems to me calls tribal immunity into question generally.").

159. Agreement § III(A)(1)(b)(viii).

160. 25 U.S.C. § 2701-2721 (2000).

161. See *Casino Res. Corp. v. Harrah's Entm't, Inc.*, 243 F.3d 435, 437-39 (8th Cir. 2001); *State ex rel. Nixon v. Coeur D'Alene Tribe*, 164 F.3d 1102, 1108-09 (8th Cir. 1999); *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 548-50 (8th Cir. 1996); *Sungold Gaming (U.S.A.) Inc. v. United Nation of Ottawa, Chippewa, and Potawatomi Indians of Michigan, Inc.*, 1999 WL 33237035, at *2-4 (W.D. Mich. June 7, 1999); *Am. Vantage Cos. v. Table Mountain Rancheria*, 103 Cal. App. 4th 590, 595-96 (2002).

162. 25 U.S.C. § 2703(4)(B) (2000) (defining "Indian lands" to include all trust lands).

163. 25 U.S.C. § 2719(a)(1) (noting that Class III gaming may be conducted on any lands located within reservation boundaries); § 2703(4)(A) (defining "Indian lands" to include "all lands within the limits of any Indian reservation").

Vehicles used primarily for tribal gaming activities within 25 miles of a casino are exempt from state sales and use taxes.¹⁶⁴ "Primarily" is defined as 95 percent or more. The Little Traverse Bay Bands attorney requested the usage of the word "primarily" in this section because, on occasion, tribal gaming shuttles may be used to transport elders and other tribal members to and from tribal services outside the agreement area. Absent this provision, tribal vehicles intended for use in gaming activities, such as transporting gamers to and from a tribal casino, could be subjected to state use tax if they make their way outside the agreement area.

State taxes are inapplicable to rental rooms located within one-quarter mile of tribal gaming facility if the facility is located on tribal and trust lands.¹⁶⁵ Moreover, they are not subject to the revenue sharing described in more detail below. Restaurant food and beverage sales are exempt if located at a tribal gaming facility and on tribal and trust lands.¹⁶⁶

Also, the tax exemptions apply in the event a Tribe or its entities enter into a business relationship with another Tribe that is a signatory to the agreement.¹⁶⁷ Hopefully, these provisions will allow Tribes, as tribal governments, to avoid some of the difficulties inherent in owning non-gaming businesses.¹⁶⁸

b. Sales Tax Revenue Sharing

For the Michigan Indian Tribes that adopt a sales tax code and agree to collect the tax from all tribal and tribal-member entities doing business within their jurisdiction, the State agreed to incorporate a revenue sharing provision in the Agreement.¹⁶⁹ The revenue sharing scheme takes into account the State's interest in collecting taxes owed to it under state law by non-members and also the Tribes' interests in preserving their revenues as much as possible.

164. Agreement § III(A)(1)(d).

165. Agreement § III(A)(5).

166. Agreement § III(A)(6).

167. Agreement § III(A)(1)(c).

168. Robert L. Gips, *Current Trends in Tribal Economic Development*, 37 NEW ENG. L. REV. 517, 519 (2003):

Similar to other governments that run businesses, Tribes must address political interference with business decision-making and micromanagement by tribal governing bodies. The governmental need for funds often means that the surplus created by a profitable tribal business is stripped off for distribution to members or governmental programs rather than reinvested, as would happen in other businesses. Additionally, governmental employee work and incentive structures are often not the same as those required in a competitive business. Finally, governmental decision-making timetables are often much slower and more protracted than the business world tolerates.

169. Agreement §§ III(B), XII(D).

A tribal sales tax remains optional for the Tribes. This means that if they do not adopt their own sales tax code that mirrors the State's code, all taxes collected by the Tribes must be remitted to the State along with information as to the purchases made by tribal members.¹⁷⁰ Then the State will refund the tax revenue collected by the Tribe. The Tribe may then distribute the revenue back to the tribal members (or it may have already fronted the members the sales tax) or keep the money in the tribal treasury.

After a Tribe adopts a sales tax code that mirrors the State's, the Tribe may engage in revenue sharing.¹⁷¹ Revenue sharing applies only to purchases made within tribal and trust lands.¹⁷² The sharing is as follows: for the first \$5,000,000, one-third of the tax collected must be remitted to the state.¹⁷³ For the annual gross receipts exceeding \$5,000,000, the Tribe and the State split the revenues fifty-fifty.¹⁷⁴ If the Tribe does not wish to enact a sales tax code, then it must still share the revenue with the State in the same proportions.¹⁷⁵

The State will apply the state sales and use tax on all retailers outside of tribal and trust lands.¹⁷⁶ Revenue sharing does not apply to these transactions. Revenue sharing also does not apply to rental rooms within one-quarter mile of an Indian casino.¹⁷⁷

The revenue sharing provisions were intended by the parties to preserve revenues for each side as much as possible. In other states such as Minnesota, Nebraska, and Washington, Tribes and states had adopted tax agreements with widely varying percentages of splits that the parties took into consideration.

c. Exemptions for Tribal Members

The Tribes entered into negotiations arguing that the State could not impose taxes on the personal property of tribal members in Indian Country, relying upon *Moe v. Confederated Salish & Kootenai Tribes*.¹⁷⁸ The State agreed, but continued to argue that Indian Country in Michigan is limited to trust land and land owned by the Tribe in fee simple.

The first exemption for tribal members is the exemption from state sales and use taxes for any purchases of tangible personal

170. Agreement § XII(D)(2).

171. Agreement § III(B)(3).

172. Agreement §§ III(B)(3), XII(D)(2).

173. Agreement § III(B)(3)(a).

174. Agreement § III(B)(3)(b).

175. Agreement § III(B)(2).

176. Agreement § III(C)(1).

177. Agreement § III(A)(5).

178. 425 U.S. 463 (1975); see also *Okla. Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114 (1993).

property on land owned in trust or by the Tribe in fee simple.¹⁷⁹ There are no restrictions on the kinds of use the tribal member may have for the products, except that it must be used exclusively within tribal or trust lands. This provision allows tribal members to operate a business on tribal or trust lands and purchase materials for the business tax-free. The Tribes fought hard for this provision that, although limited in scope to tribal and trust lands, gave some economic development benefits to tribal members.

The second exemption and likely the most important politically for tribal leaders is the sales and tax exemption on products purchased for personal use for tribal members residing within the agreement area.¹⁸⁰ Tribal members can make purchases anywhere within the agreement area and expect that those purchases would be made tax-free. The administration of this exemption creates one of the more difficult problems faced by both the Tribes and the State. The parties created two schemes to solve the problem, allowing each Tribal Council to choose a method. The first scheme involves tribal certificates of exemption. The second method involves a refund formula to be distributed at the same time as income tax refunds.¹⁸¹

A third exemption, also very important for the tribal leaders politically, is the exemption for sales of automobiles, recreational watercraft, snowmobiles, and off-road vehicles.¹⁸² Tribal members residing within the agreement area may purchase these items tax-free. Virtually every tribal attorney in Michigan has dealt with the State on behalf of a tribal member living within the reservation boundaries attempting to purchase a car or truck tax-free. Since the tax on a \$10,000 car is \$600, the amount for each tribal member is significant. Though *Oklahoma Tax Commission v. Sac and Fox Nation*¹⁸³ indicates that the State may not tax vehicles purchased and garaged in Indian Country, the State has haphazardly clamped down on tax-free vehicles sales depending on its perception of the status of a Tribe's reservation boundaries. The State also often delayed refunding sales tax for several months.

Another big-ticket item for tribal members, the fourth exemption, was on state taxes on mobile and modular homes.¹⁸⁴ This exemption applies to tribal members living within the agreement area if the tribal member could prove that the home in question was the primary residence.

179. Agreement § III(A)(2)(a).

180. Agreement § III(A)(2)(b).

181. *Id.*

182. Agreement § III(A)(2)(c).

183. 508 U.S. 114 (1993).

184. Agreement § III(A)(2)(d).

A fifth exemption for tribal members is the exemption from state taxes on home construction, renovation, or improvement for primary residences.¹⁸⁵ This provision allows tribal members to construct homes, much of which may be financed with federal or tribal dollars, within the larger agreement area. For tribal members engaged in home construction or renovation, the exemption may be worth thousands of dollars.

A sixth exemption applies to personal property purchased for treaty fishing purposes.¹⁸⁶ As with Indian gaming, treaty fishing is an area of law that the State implicitly conceded was completely preempted by federal law through the recognition by federal courts of the treaty fishing rights preserved in the various treaties signed by the Michigan Indian Tribes.¹⁸⁷ The exemption applies for commercial treaty fishing anywhere the property is purchased or used.¹⁸⁸ The exemption applies for all other treaty fishing if the property is purchased within the agreement area.¹⁸⁹

The exemptions for tribal members in this section apply regardless of whether the personal property is jointly titled to a non-member spouse.¹⁹⁰

d. Certificates of Exemption or Refund Method

Once the Agreement is effective, each Tribe has the option of choosing to utilize certificates of exemption or the refund method to take advantage of the sales and use tax exemptions for most purchases.¹⁹¹ The Agreement authorizes the Tribes to show the certificate, along with a letter of authorization from the State (because there is no such thing as redundant paperwork), to vendors for personal property purchases, treaty fishing materials purchases, and construction materials purchases.¹⁹² The refund method simply allows the Tribes to seek reimbursement for sales and use taxes collected by vendors from the State.¹⁹³

The Tribes specifically negotiated for the option of using exemption certificates because of past history with the State. Several Tribes, including the Grand Traverse Band, had been attempting the refund method all along for purchases of materials on trust land, but

185. Agreement § III(A)(3)(b).

186. Agreement § III(A)(4).

187. *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979).

188. Agreement § III(A)(4)(b).

189. Agreement § III(A)(4)(a).

190. Agreement § III(A)(2)(e).

191. Agreement § XII(B).

192. Agreement § XII(B)(1)(b).

193. Agreement § XII(B)(2).

the Treasury Department bureaucrats were slow to approve the refunds – sometimes months behind – and often disapproved refunds for little or no reason. The State, on the other hand, argued that some Tribes and tribal members had abused letters of exemption authorized by the Tribes and negotiated for a pure refund system. As part of the agreement, the State promised to provide refunds within the 45-day state law period mandated to process refund requests or incur interest costs.

The Tribe also has the option of allowing tribal members to utilize the refund or certificate method.¹⁹⁴ The State agreed to the use of certificates for tribal members only because the Tribes agreed to be liable for abuses by tribal members, specifically, use of the certificate after termination of the Agreement.¹⁹⁵

Because the certificates may be floating around after the termination of the Agreement, the State insisted on a waiver of sovereign immunity from the Tribes that did not expire upon termination of the Agreement.¹⁹⁶

2. Tobacco and Motor Fuel Taxes

The State acknowledged during negotiations that it had no authority to tax tribal member purchases of tobacco products and motor fuels, as long as the purchases were made on trust land, and if the Tribal member also lived in Indian Country where the legal incidence of the tax fell on the purchaser.¹⁹⁷ However, the State believed that it had authority to impose a tax on all non-tribal members and non-Indians in accordance with *Washington v. Confederated Tribes of the Colville Indian Reservation*.¹⁹⁸

The tax exemption and administration provisions for the tobacco and motor fuel taxes are parallel to each other. In both instances, each individual Tribe must select one of two options for administration of the tax exemption – either the "refund method" or the "quota method."¹⁹⁹ Under both methods, each Tribe must identify to the State which retailers may sell tax-free tobacco products²⁰⁰ or motor fuels.²⁰¹

Under the quota method, each individual Tribe and the State negotiate for a cap or quota on the amount of tobacco products or

194. Agreement § XII(C)(1).

195. Agreement § XII(F)(2).

196. Agreement § I(G)(1)(c).

197. Okla. Tax Comm'n. v. Chickasaw Nation, 515 U.S. 450 (1995).

198. 447 U.S. 134 (1980).

199. Agreement §§ V(A), VI(A).

200. Agreement §§ VI(B)(2), VI(C)(4).

201. Agreement §§ V(B)(2), V(C)(4).

motor fuels the Tribe may purchase tax-free for a period of time.²⁰² Also, each Tribe may purchase these products from only one pre-identified wholesaler.²⁰³ Under the refund method, the Tribes would prepay state taxes on motor fuels and tobacco products and request a refund from the State.²⁰⁴

However, there is little practical difference between the quota method and the refund method – they both require the State to negotiate with each Tribe to determine a cap.²⁰⁵ The State's position regarding the amount of product the Tribes could sell should be limited to sales only to tribal members living in the agreement area. Several Tribes had established a relationship with its membership living off-reservation to come to the tribal retailer to purchase tax-free tobacco products and motor fuels and were unwilling to sever that relationship. Politically, it would be difficult for tribal leaders to restrict the sales to resident tribal members because other tribal members had an expectation of being able to enjoy tax-free purchases. Moreover, the Tribes wanted to be able to provide a tax exemption to both the Tribes and tribal member businesses. The State harshly balked at the Tribes' proposals in this regard, arguing that Tribes should not be allowed to "market the exemption." Ultimately, the State refused to back down and negotiated caps for each Tribe that reflected the Tribe's actual usage. A few Tribes, such as Bay Mills and Grand Traverse Band, had a history of seeking refunds from the State and therefore had a history of expected usage patterns. Other Tribes calculated their expected usage based on these figures. As for sales to tribal members residing outside the agreement area, the State allowed the Tribes to choose the quota method and decide through its allocation of quota how to distribute the benefit.

3. *Individual Income Tax*

As a general matter, the State has no authority to tax the reservation income of tribal members living on the reservation.²⁰⁶ However, since most Michigan Indian Tribes do not have clear reservation boundaries, it has not been conclusively litigated whether

202. Agreement §§ V(C)(1) (motor fuels), VI(C)(1) (tobacco products).

203. Agreement §§ V(C)(2) (motor fuels), VI(C)(2) (tobacco products).

204. Agreement §§ V(B)(1) and (7) (motor fuels), V(B)(1) and (7) (tobacco products).

205. Agreement §§ V(B)(3) and (C)(1) (motor fuels), VI(B)(3) and (C)(1) (tobacco products).

206. See *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164 (1973); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Zeuske*, 145 F. Supp. 2d 969 (W.D. Wis. 2000); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 (1987).

the State has authority to tax the income of tribal members living within the reservation boundaries reserved by the relevant treaty but not on trust land. Some Tribes have adamantly defended the rights of their members to maintain the exemption from state income tax. However, the State has hinted that it may pursue a reservation boundaries case in order to resolve the question. Since neither the States nor the Tribes wished to press the issue, both sides readily agreed to the provision in the Agreement on income tax.

The Agreement exempts all non-business and business income for tribal members living within the agreement area from state income taxes.²⁰⁷ Treaty fishing income is also excluded from state income taxes insofar as it is exempted from federal income taxation.²⁰⁸

The State agreed to broadly expand the exemption from state income taxes as a main feature of its determination to enter into the Agreement. The State's concession was surprising for two reasons. First, since reservation boundaries were not settled for most Tribes, the State had previously argued that all tribal members not living on trust land were not in a Tribe's Indian Country. Second, the agreement area for most Tribes extended, in some places, far beyond the areas where even the Tribes believed reservation boundaries extended. For example, the Grand Traverse Band and the State tentatively agreed to include Grand Traverse County, which includes Traverse City and several hundred tribal members in the agreement area, even though Traverse City is not within the reservation boundaries in either Grand Traverse Band's 1836²⁰⁹ or 1855²¹⁰ treaty reservations.

207. Agreement §§ IV(A) and (B).

208. Agreement § IV(C).

209. The portions of the Grand Traverse Reservation established by the 1836 Treaty of Washington ultimately included Old Mission Peninsula and portions of Acme Township in Grand Traverse County, Michigan. *See e.g.*, Report of Dr. James M. McClurken at 30-49; *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attny. for the W. Dist. of Mich.*, 198 F. Supp. 2d 920 (W.D. Mich. 2002) (describing how the federal government delayed the creation of the 1836 reservation and forced the Grand Traverse Band leaders to accept Old Mission Peninsula in lieu of the east shore); *Grand Traverse Band of Ottawa and Chippewa Indians* 198 F. Supp. at 925 ("Although [the Turtle Creek Casino site is] 1.5 miles outside the 1836 reservation, evidence suggests that the site was located within the contemplated reservation, which was not designated for four years after the treaty was signed."). The 1836 Treaty reserved 20,000 acres for the Band. *See also*, Treaty of Washington, 7 Stat. 491, art. II (1836) ("[O]ne tract of twenty thousand acres to be located on the [east] shore of Grand Traverse bay . . .").

210. The Grand Traverse Reservation established by the 1855 Treaty of Detroit includes Leelanau, Suttons Bay, Leland, Centerville, and Bingham townships in Leelanau County, Michigan, and parts of Milton Township in Antrim County, Michigan. *See* Treaty of Detroit, art. I, cl. 5, 11 Stat. 621, 621 (1855); *see* Leelanau

The Tribes also made concessions of a lesser character. The Tribes agreed to report casino winnings to the State in the same manner as they reported them to the federal government.²¹¹ Prior to the agreement, the Tribes had refused to provide this information, arguing that federal law preempted the taxation and the requirement for withholding and reporting. Also, the Tribes agreed to report earnings made by professional performers at the Indian casino.²¹²

4. *Michigan Single Business Tax*

The Michigan Single Business Tax ("SBT") is the general business tax levied by the State of Michigan. "The tax is on what a business has added to the Michigan economy, not on what the business has derived from this state's economy."²¹³

Under the Agreement, businesses owned by Tribes, tribal members, or by other tribal businesses are exempt from the SBT.²¹⁴ The parties agreed that any combination of signatory Tribes, their members, and their wholly owned businesses might be exempt from this tax. The agreement area for the purposes of this tax would extend to the agreement areas of all the various signatory Tribes involved in a partnership.²¹⁵

The extension of the agreement area for the purposes of the SBT exemption was intended by the State to be a benefit extended to the Tribes and its members. The State came in with the position that Tribes should not be able to create partnerships that cross agreement areas, but the Tribes objected. Ultimately, the State conceded the point.

5. *Other Tax Agreement Provisions*

a. *Sovereign Immunity Waivers*

The Tribes agreed to a waiver of sovereign immunity in order to allow the State to enforce the dispute resolution provisions.²¹⁶

Transit Co. v. Grand Traverse Band of Ottawa and Chippewa Indians, No. 1:92-CV-240, at 2 (W.D. Mich., Feb. 1, 1994) ("Article I, clause fifth of the Treaty of 1855 reserved to the Grand Traverse bands land in the vicinity of the Tribe's current reservation at Peshawbestown.") (on file with author). The Senate removed the northern tip of Leelanau Township from the reservation when it ratified the treaty in 1856. *See also* Ratification of Treaty of Detroit by Senate, 11 Stat. 621, art. I (1856).

211. Agreement § IV(E) (2).

212. Agreement § IV(E) (3).

213. *Columbia Associates, L.P. v. Dep't. of Treasury*, 649 N.W.2d 760, 766 (Mich. Ct. App. 2002).

214. Agreement § VII(C).

215. Agreement § VII(A) (2) (defining "Expanded Agreement Area").

216. Agreement § I(G) (1).

Initially, the waiver was tailored to allow the State to sue in tribal court to force the Tribes into arbitration and to enforce the award, if any, in tribal court.²¹⁷ If the tribal court does not compel arbitration or enforce the award within fourteen business days, then the State may seek redress in state courts.²¹⁸ Critically, the waiver survives the termination of the Agreement.²¹⁹ The state negotiators argued that, absent survival of the waiver, a Tribe might terminate the Agreement and keep money that it may owe to the State. The Grand Traverse Band Tribal Council refused to execute the Agreement, in part, because of the survival of the waiver.

The second waiver regarded the certificates of exemption that the Tribes may choose to utilize.²²⁰ Here, the State must give the Tribe ten business days to respond to its notice of intention to bring suit to enforce sales and use taxes owed through the use (or misuse) of the certificates of exemption.²²¹ Importantly, the State may bring suit to enforce its rights under the certificates of exemption against the Tribe, even if a tribal member caused the injury to the State.²²² Again, the waiver survives the termination of the Agreement.²²³

The State's waiver for purposes of enforcement derives from current law,²²⁴ a waiver through the Michigan Court of Claims. However, the State legislature may remove the waiver in future legislation,²²⁵ potentially leaving the Tribes with a distinct disadvantage in that event – the Tribes do not have a parallel provision in their waiver language.

b. State Law as a Backdrop

The State's position throughout negotiations was that any agreement with the Tribes on state tax exemptions would have to be treated as though state law was the backdrop. The Agreement states, "[e]xcept as modified in this Agreement, the provisions of State law relating to the taxes that are subject of this Agreement shall apply to the Tribe, Tribal Members, and Tribal Entities."²²⁶ The State wanted to treat the Agreement as an amendment to the current state tax laws. The state negotiators insisted that there could be no

217. Agreement § I(G)(1)(b).

218. *Id.*

219. *Id.*

220. Agreement § 1(G)(1)(c).

221. *Id.*

222. *Id.*

223. *Id.*

224. Agreement § I(G)(2).

225. *Id.* ("In the absence of legislative modification, this waiver shall survive the termination of this Agreement.") (emphasis added).

226. Agreement § I(A)(2).

Agreement otherwise; they wanted control over changes to the Agreement by limiting the ability of the Tribes to alter it unilaterally.

The Tribes initially objected to this language and view of the Agreement. The Tribes wanted the Agreement to stand alone, as other agreements between the Treasury Department and a few other Tribes had done. Also, the Tribes worried that the provision would amount to an admission of state jurisdiction over Indian Country.²²⁷ However, the built-in protections from state jurisdiction in other provisions in the Agreement satisfied most tribal attorneys.

c. Enforcement Mechanisms and Jurisdiction

The parties needed to provide for enforcement of the Agreement's provisions against tribal members, non-member Indians, and non-Indians, both on and off trust land, and within and outside Indian Country. Furthermore, the parties needed to provide for enforcement of the Agreement against two sovereign entities – the individual Tribes and the State. The State made it clear during negotiations that one of its main goals in coming to agreement with the Tribes was to enforce state law against non-Indians and against tribal members on trust land. Agreeing to state law enforcement over persons in Indian Country – particularly on trust land – was a difficult step for many Tribes. The Tribes required the State to notify tribal law enforcement before engaging in enforcement actions in Indian Country as a compromise. As such, the enforcement mechanisms are the most extensive and complicated provisions in the agreement.

i. Indian Country Concepts in the Agreement

Though the Tribes and the State wished to dispense with the difficulty and vagueness of Indian Country for purposes of defining tax exemptions within the Agreement, it was still necessary to incorporate Indian Country into the Agreement for purposes of enforcing it.²²⁸ The agreement area concept served to adequately

227. As is widely known by many Indian Law practitioners:

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. It must always be remembered that the various Indian Tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government.

McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 172 (1973) (emphasis added).

228. Agreement § XIII(D)(1) states:

The parties recognize that (i) tax enforcement actions, and (ii) the process of audit, assessment and appeals of tax assessments, under this Agreement may be affected by jurisdictional issues where a Tribal Member or Tribal Entity or property is located within the Tribe's Indian Country. The parties

define boundaries for tax exemption purposes, but the State and the Tribes could not bind individual Indians to the agreement area in the event the State began criminal enforcement proceedings against tribal members.

The Tribes successfully convinced the State that individual Indians would argue that the State has no enforcement authority over them in Indian Country,²²⁹ and that would quickly result in disputes over reservation boundaries. Since neither party wished for potential litigation in this regard, the State agreed to a compromise. In a case where the State attempts to enforce state law against a tribal member in an area where the State and Tribe dispute the existence of Indian Country, then the State may petition the tribal court for relief.²³⁰ It was always a goal of the parties to avoid the Indian Country jurisdictional problems and the State's agreement to concede to tribal court jurisdiction for enforcement purposes in disputed territory was a gigantic leap forward for the Tribes.

ii. Enforcing Against Tribal Members and Tribal Entities

The enforcement provisions concerning tribal members and tribal entities are complicated. First, the State may audit tribal members and entities regarding the six taxes at issue in the agreement, but must provide thirty days written notice.²³¹ Second, under Michigan Court Rule 2.615, the State may petition the tribal court to grant recognition and enforcement of the state court order or judgment, and the tribal court must rule within fourteen days.²³² The State may also compel, through petition to the tribal court, the tribal member or entity to comply with an audit request or other tax enforcement action.²³³ Upon the issuance of a tribal court order, the

intend to avoid such effects by providing in certain instances identified in this Agreement for Tribal enforcement or joint Tribal/State enforcement.

229. See *People v. Bennett*, 491 N.W.2d 866, 867 (Mich. Ct. App. 1992) (discussing criminal defendant's argument that he was within Indian Country and therefore outside the jurisdiction of state courts); see also *People v. Bowen*, 1996 WL 33357554, at *3 (Mich. Ct. App. Oct. 11, 1996) (holding that a non-enrolled Indian committing a crime in Indian Country was outside the scope of the state's criminal jurisdiction). But cf. *United States v. Dakota*, 666 F. Supp. 989, 994 (W.D. Mich. 1985) ("The doctrine of Indian sovereignty protects the Indian Tribes from the assertion of state authority."); *Huron Potawatomi, Inc. v. Stinger*, 574 N.W.2d 706, 709 (Mich. Ct. App. 1997) ("However, state laws are generally not applicable to tribal Indians on an Indian reservation except where Congress has explicitly provided that state law shall apply.") (citing *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164 (1973)).

230. Agreement § XIII(D)(7).

231. Agreement § XIII(D)(2).

232. Agreement § XIII(D)(4).

233. Agreement § XIII(D)(6).

Tribe must provide tribal law enforcement, with the assistance of state officers, in performing the enforcement action.²³⁴

The Agreement allows the State to exercise its authority under state law to conduct pre-judicial tax enforcement actions²³⁵ without first petitioning the tribal court for a search warrant.²³⁶ The Agreement provides that the State must give notice to tribal law enforcement before raiding a business or residence in Indian Country (or disputed Indian Country).²³⁷ The Tribe must provide tribal law enforcement officers to assist the state officers.²³⁸ After the enforcement action is undertaken, the affected tribal member or entity must then affirmatively choose to object before the tribal court or else the case will be heard in state court.²³⁹

There are strict deadlines for tribal court actions within the Agreement. For example, upon a final tax assessment or denial of refund where the tribal court has jurisdiction, the tribal court must provide a ruling on appeal within one year.²⁴⁰ Also, if the State asks the tribal court for a search warrant related to a tribal member, tribal entity, or Tribe, then the court must decide within fourteen days to issue the warrant.²⁴¹ Failure of the tribal court to meet timeframes allows the State to declare the Tribe out of compliance with the Agreement and invoke the dispute resolution provisions.²⁴² The Tribes with separation of powers provisions in their constitutions²⁴³ may have problems enforcing the strict deadlines against the tribal courts. However, tribal court judges will most likely understand the necessity of swift action and can take advantage of the opportunity to showcase the efficiency of their courts.

234. *Id.*

235. These enforcement actions are defined in Agreement § XIII(D)(9)(b) as actions in furtherance of a jeopardy assessment; inspection of vending machines or places where tobacco products are sold or stored; seizure of contraband consistent with the Tobacco Products Tax Act; and inspections or seizures consistent with this Agreement authorized under the Motor Fuel Tax Act or the Motor Carrier Fuel Tax Act.

236. Agreement § XIII(D)(9)(a).

237. *Id.*

238. *Id.*

239. Agreement § XIII(D)(10)(b).

240. Agreement § XIII(D)(11).

241. Agreement § XIII(D)(6).

242. Agreement § XIV(B).

243. See, e.g., GRAND TRAVERSE BAND CONST., Art. V, § 6, available at <http://thorpe.ou.edu/constitution/GTBcons3.html> (last visited Aug. 6, 2003); LITTLE RIVER BAND CONST., Art. VI, § 9, available at <http://thorpe.ou.edu/constitution/ottawa2.html> (last visited Aug. 6, 2003).

iii. Enforcing Against the Tribe

The State's enforcement authority over a signatory Tribe is greatly extended by the Agreement, but remains significantly limited. First, tribal officials may not be criminally prosecuted for violations of state law or the Agreement.²⁴⁴ Second, the State may conduct an audit of the Tribe in regards to any of the six taxes at issue, but must provide thirty days written notice.²⁴⁵ Third, the State may not seize tribal assets in order to enforce a tax liability under the Agreement.²⁴⁶ Fourth, the State may conduct unauthorized inspections of tribal facilities for the purpose of discovering only contraband, motor fuel or tobacco products,²⁴⁷ and may only seize those items that can be viewed in plain sight.²⁴⁸ Finally, the State must go to tribal court for a search warrant to search and seize items in tribal facilities.²⁴⁹

iv. Enforcing Against Non-Tribal Members

The parties agreed to allow the State to enter Indian Country and enforce state law against non-members provided that the State give notice of the enforcement action to tribal law enforcement.²⁵⁰ The purpose of this provision was to ensure that tribal law enforcement could accompany state officers and avoid conflict. Many non-members in Indian Country reside with tribal members and have come to expect that state officers have no jurisdiction over them, whether or not that expectation was reasonable. Although many Michigan Indian Tribes already have cross-deputization agreements with local law enforcement,²⁵¹ the provision offers a safeguard. Other than the notice requirement, state law enforcement procedures would apply without amendment.

d. Dispute Resolution

The parties agreed to arbitration as the dispute resolution program. However, prior to arbitration, the complaining party must

244. Agreement § XIII(C)(1).

245. Agreement § XIII(C)(2).

246. Agreement § XIII(C)(3).

247. Agreement § XIII(C)(4)(a).

248. Agreement § XIII(C)(4)(b).

249. Agreement § XIII(C)(4)(b)(i).

250. Agreement § XIII(B).

251. Brief of Amicus Curiae National Congress of American Indians *et al.* at 15-26 (describing cross-deputization agreements involving the Grand Traverse Band of Ottawa and Chippewa Indians and the Little River Band of Odawa Indians and describing positive relationship between Michigan Tribes and local law enforcement), *Inyo County, California v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701 (2003).

submit a written statement of the dispute,²⁵² and the responding party may file a written response within ten days.²⁵³ Based on these documents, the parties must meet and attempt to reach a resolution.²⁵⁴ If either party is dissatisfied, the parties may proceed to arbitration.

If the parties elect to go to arbitration, each party names one arbitrator. The two arbitrators then agree on a third arbitrator.²⁵⁵ At that point, any signatory Tribe may choose to intervene as a party in the arbitration.²⁵⁶ The purpose of this provision was to assure the State that it would have to arbitrate a disputed provision in the Agreement only once. Because the determination of a disputed provision in the Agreement would be binding on every Tribe,²⁵⁷ each Tribe wanted the opportunity to make its argument and participate. The timetable for arbitration is very strict. The parties first submit comments on the issues to be arbitrated.²⁵⁸ After fourteen days, the panel decides which of those issues will be decided.²⁵⁹ At that point, a ninety day time period begins in which the parties may engage in discovery, provide written arguments, and provide oral arguments if requested by the panel.²⁶⁰ The panel must resolve the issues within that same ninety day period.²⁶¹ Whether it is possible to arbitrate complex issues created by the Agreement when the State and as many as seven Tribes are parties in arbitration, is beyond the scope of this article.

e. Termination

The Tribes strongly argued for a termination date as far off into the future as possible. The Tribes were concerned that a new state governor or administration would simply terminate the Agreement for political reasons. Former Michigan Governor John Engler did exactly that in the 1990s with a few Michigan Tribes. The State, on the other hand, argued that no termination date was needed. State negotiators relied on the rhetoric of a government-to-government relationship in order to convince the Tribes that the Agreement should be terminable without cause, at the will of the parties. Finally,

252. Agreement § XIV(B)(1)(a)-(e).

253. Agreement § XIV(B)(2).

254. Agreement § XIV(B)(3).

255. Agreement § XIV(C)(1).

256. Agreement § XIV(C)(2).

257. Agreement § XIV(C)(7).

258. Agreement § XIV(C)(3).

259. *Id.*

260. *Id.*

261. *Id.*

the State argued that an agreement that could be terminated only for cause would generate the potential for additional litigation.

Ultimately, the State agreed to a two-year period in which the Agreement could be terminated only for cause.²⁶² For terminations prior to the end of the two-year period, the Agreement provided for a list of reasons that would justify immediate termination²⁶³ and an arbitration provision to resolve any other termination matters.²⁶⁴ After the two-year period, the Agreement could be terminated by either party for any reason or no reason at all.²⁶⁵ However, the parties agreed to a thirty-day "cooling off" period in which the State would meet with the Tribe to discuss its disputes or problems associated with the Agreement.²⁶⁶

Upon the termination of the Agreement, the parties must engage in a final accounting of the amounts due to the other, if any.²⁶⁷ If the parties cannot agree, the Agreement provides for yet another arbitration.²⁶⁸ It is possible under the Agreement that a Tribe and the State could engage in three separate arbitrations over one dispute.

f. Most Favored Nation Clause

A few Tribes lobbied for a "most favored nation" clause that would allow each signatory Tribe to re-open negotiations on the Agreement in the event another Tribe received a concession from the State. The State adamantly refused to accede to such a clause, arguing that it wanted each individual agreement to contain the same model language. Nevertheless, each signed agreement contains widely varying agreement areas depending on a particular Tribe's bargaining power and geographic position. For example, the Sault Ste. Marie Tribe of Chippewa Indians, a Tribe with a lineal descendancy and massive numbers of enrolled members, a large land base, and incredible wealth,²⁶⁹ negotiated an agreement area that included nearly 10 townships, while the Nottawaseppi Huron Band of

262. Agreement § XV(A).

263. Agreement § XV(B)(1)(a)-(i).

264. Agreement § XV(B)(3)-(4).

265. Agreement § XV(A).

266. *Id.*

267. Agreement § XV(C)(1).

268. *Id.*

269. The Sault Tribe owns the Greektown Casino in Detroit, Michigan, which generates over a quarter billion dollars per year in revenues. *See* Becky Yerak, *Detroit Casinos Post Their Second-Best Month: Extra day, promotions fuel gains, execs say*, DET. NEWS, June 12, 2003, at 1B. It also owns several smaller casinos in the Upper Peninsula of Michigan. *See* Becky Yerak, *State Sees Slow Growth in Indian Casinos: Report Cities Fewer New Games, Facilities*, DET. NEWS, June 1, 2003, at 1B.

Potawatomi Indians, a recently-recognized Tribe²⁷⁰ with a smaller enrollment, much smaller land base, and no casino revenues, could negotiate for only two-and-a-half townships.

CONCLUSION

The major advances made by the Michigan Indian Tribes in the tax agreement negotiations with the State include tribal court jurisdiction, acknowledgment of Indian Country by the State, and the preservation of certain big-ticket tax exemptions on trust land. The major concessions made by the Tribes include a waiver of immunity with no end date, encroachment of state criminal and civil enforcement jurisdiction on trust land, and agreement that the State could impose its taxes on some parcels of trust land.

Importantly, both the State and the Tribes avoided litigation over reservation boundaries and the extent of Indian Country in Michigan, while staying out of federal courts entirely. Litigation for purposes of enforcement of the Agreement will start in tribal courts in most instances, an important acknowledgement by the State of the validity of tribal courts. Arbitration as the form of dispute resolution between the State and the Tribes allows the Tribes to avoid state courts, except for purposes of enforcing the arbitration awards.

The certainty that comes with the Tax Agreement allows the Tribes to plan for the future in terms of business plans, project financing, and the provision of government services to tribal members. The Tribes may acquire significant additional sales tax revenue through the revenue sharing provisions and save money through the State's recognition of several tax exemptions. Tribal members will be granted some limited tax exemptions to assist their own small businesses and will enjoy the benefit of paying less state income and sales taxes. For many unemployed, undereducated, and elderly tribal members who earn little or no income, a few hundred dollars saved is substantial.

The Tax Agreement's revenue sharing provisions may also encourage the signatory Tribes and the State to cooperate economically. Since the State agreed to share a portion of the sales and use taxes regardless of where the value of the products sold was generated, it is possible that Tribes will pursue business activity to create reservation-based value,²⁷¹ or even off-reservation-based value, in which the Tribes and the State will share tax revenues.

270. The Bureau of Indian Affairs recognized the Nottawaseppi Band of Potawatomi Indians in 1995. Final Determination for Federal Acknowledgment of the Huron Potawatomi, Inc., 60 Fed. Reg. 66,315 (Dec. 21, 1995).

271. See *Dep't. of Taxation and Fin. of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. 61, 72 (1994); *Washington v. Confed. Tribes of the Colville Indian Reservation*, 447 U.S.

Assuming the cooperation between the State and the Tribes regarding enforcement goes well, the Agreement may have other advantages. Hopefully, the Tax Agreement will encourage the Tribes and the local governments to enter into cooperation agreements as to law enforcement, zoning, environmental regulation, and other areas of civil and criminal regulation and enforcement.

Both the State of Michigan and the Michigan Indian Tribes had their own agendas when they negotiated the Tax Agreement. Underlying every detail about tax enforcement, administration, and exemption was the sincere desire to avoid a situation where one sovereign's property is seized because another sovereign labels that property contraband, a situation that many Michigan Tribes have faced, a situation that caused the terrible fracas at Narragansett.

At one time in the history of relations between the State of Michigan and the Tribes, the State's local governments attempted to use their power to tax as a means of destruction. On the Little Traverse Bay Bands Reservation in the mid-nineteenth century, an Emmett County official summed up the policy of the local government when he said that the tax rate for Indian land would be raised until the area had "relieved itself of the presence of Indians."²⁷² Fortunately, those attitudes have been driven underground and are no longer expressed as controlling policy.

Now, Michigan Indian Tribes are stronger political players, often the largest employer in their regions, and contribute millions in revenue every year to local governments in accordance with their gaming compacts.²⁷³ Michigan Tribes are an important economic engine, given their mandate to construct housing, health clinics, and public safety and administration buildings. Michigan Tribes' economic development initiatives, from resorts and casinos to gas stations and light manufacturing, are an important part of the State's

134, 156-57 (1980) ("While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services."). *But cf.* *Prairie Band Potawatomi Nation v. Richards*, 241 F. Supp. 2d 1295, 1309 (D. Kan. 2003), *rev'd* 379 F.3d 979 (10th Cir. 2004) ("While the Tribe certainly has an interest in raising revenues, that interest is at its weakest when goods are imported from off-reservation for sale to non-Indians.").

272. Bruce A. Rubenstein, *Justice Denied: An Analysis of American Indian-White Relations in Michigan, 1855-1889* (1974) (unpublished Ph.D. dissertation, Michigan State University) (on file with Author).

273. See, e.g., *Gaming Revenue to Benefit 53 Causes*, TRAVERSE CITY (MICH.) RECORD-EAGLE, Feb. 6, 2003 ("The Grand Traverse Band of Ottawa and Chippewa Indians will distribute more than \$1.1 million to area schools, governments and other organizations as part of its semiannual grant awards reflecting 2 percent of its electronic gaming revenue."), available at <http://www.record-eagle.com/2003/feb/06Tribe.htm> (last visited Apr. 25, 2003).

recovery from the national recession. In many ways, non-Indian communities located near Indian communities have become dependent, economically and politically, on the local Tribes.

The State of Michigan recognized the importance of Michigan Tribes when it negotiated the Tax Agreement. The State realized the benefits of this cooperation. No Michigan Indian Tribe wants what happened at Narragansett to happen on their reservations. As Jim Harrison wrote:

It is easy enough to forget that a nation has a soul history, and that a nation's honor depends on its capacity to right the wrongs it has committed. As an instance it was popular for decades to speak about the treaties Russia had broken, when it was difficult indeed to find a single treaty among thousands that our government had kept with our Native Americans. If the government fails to protect its minorities how does it differ in quality from so many foredoomed totalitarian states. We must give up the notion, over and over, that the government is trustworthy, right down to the local level, without the relentless vigilance of its citizens.²⁷⁴

The Tax Agreement is, in many ways, a new treaty, one between the Tribes and the State, and should be honored as such. The blueprint, as complicated, troubling, and hopeful as one would expect when so many sovereigns, bureaucrats, and lawyers are involved, is there, ready to be followed. Other agreements – zoning, environmental protection, public safety cooperation, and so on – should follow. The time for destruction is over.

Migwetch.²⁷⁵

274. Jim Harrison, *Introduction*, GEORGE WEEKS, MEM-KAE-WEH: DAWNING OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS ix, ix-x (1992).

275. "Thank you." See FREDERIC BARAGA, A DICTIONARY OF THE OJIBWAY LANGUAGE 258 (1878) (Minn. Historical Society Press 1992).