IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

USCA Case No. 13-10566
United States District Court, Southern District of Florida
0:12-cv-62238-JIC

SEMINOLE TRIBE OF FLORIDA,
a federally-recognized Indian Tribe,

Plaintiff/Appellant,

v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE, and MARSHALL STRANBURG, as Interim Executive Director and Deputy Executive Director,

Defendants/Appellees.

PRINCIPAL BRIEF OF APPELLANT SEMINOLE TRIBE OF FLORIDA

GLEN A. STANKEE, B.C.S. (331848)
AKERMAN SENTERFITT
Las Olas Centre II
350 East Las Olas Blvd., Suite 1600
Fort Lauderdale, FL 33301
Telephone: (954) 759-8972
Facsimile: (954) 463-2224
glen.stankee@akerman.com

KATHERINE E. GIDDINGS, B.C.S. (949396)
KRISTEN M. FIORE (25766)
AKERMAN SENTERFITT
106 E. College Ave., Suite 1200
Tallahassee, Florida 32301
Telephone: (850) 224-9634
Facsimile: (850) 222-0103
katherine.giddings@akerman.com
kristen.fiore@akerman.com

ATTORNEYS FOR APPELLANT

USCA Case No. 13-10566

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Seminole Tribe of Florida v. State of Florida, et al.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE PURSUANT TO FRAP 26.1 AND 11TH CIR. R. 26.1-1

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure, and 11th Circuit Rule 26.1-1, Appellant certifies that the following persons have an interest in the outcome of this appeal, listed in alphabetical order with descriptions:

1. Akerman Senterfitt (Trial and Appellate Counsel for Plaintiff/Appellant)

2. Cohn, James I. (District Court Judge)

3. Fiore, Kristen M. (Appellate Counsel for Plaintiff/Appellant)

4. Giddings, Katherine E. (Trial and Appellate Counsel for Plaintiff/Appellant)

5. Glogau, Jonathan A. (Trial Counsel for Defendants/Appellees)

6. Larson, Michael J. (Trial Counsel for Plaintiff/Appellant)

7. Mellichamp, III, Joseph C. (Trial Counsel for Defendants/Appellees)

8. Seltzer, Barry S. (District Court Magistrate)

9. Seminole Tribe of Florida, a federally-recognized Indian Tribe (Plaintiff/Appellant)

10. Spencer, William S. (Trial Counsel for Plaintiff/Appellant)

11. Stankee, Glen A. (Trial and Appellate Counsel for Plaintiff/Appellant)

12. State of Florida, Department of Revenue (Defendant/Appellee)

13. Stranburg, Marshall as Interim Executive Director and Deputy Executive Director (Defendant/Appellee)

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a) and Eleventh Circuit Rules 28-1(c) and 34-3(c), Appellant Seminole Tribe of Florida requests oral argument. The issues in this case involve (**1**) whether the district court erred in dismissing the Tribe's complaint on the basis that the *Rooker-Feldman* doctrine deprived the court of subject-matter jurisdiction; and (**2**) whether the district court erred in dismissing the Tribe's complaint on the basis that the Tribe's claims are barred by the Tax Injunction Act. The Tribe respectfully submits this Court's decisional process will be aided by oral argument addressing these issues.

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C § 1331 ("Federal Question") because the Tribe asserted claims under the United States Constitution and laws of the United States, including the Indian Commerce Clause (U.S. Const., Art. 1, § 8, cl. 3) and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (U.S. Const., Am. XIV, § 1). The district court also had jurisdiction under 28 U.S.C. § 1362 ("Indian Tribes") because the Tribe is a federally-recognized Indian tribe.

The district court dismissed the Tribe's case with prejudice and directed the Clerk of Court to close the case on January 9, 2013. The Tribe timely filed its notice of appeal on February 5, 2013. This Court has jurisdiction over the Tribe's appeal pursuant to 28 U.S.C. § 1291 because it is an appeal from a final order of the district court disposing of all parties' claims.

STATEMENT OF THE ISSUES

I. Whether the district court erred in dismissing the Tribe's complaint on the basis that the *Rooker-Feldman* doctrine deprived the court of subject-matter jurisdiction.

II. Whether the district court erred in dismissing the Tribe's complaint on the basis that the Tribe's claims are barred by the Tax Injunction Act.

STATEMENT OF THE CASE

Nature Of The Case

In this case, the Tribe alleged the State of Florida, Department of Revenue and Marshall Stranburg, as Interim Executive Director and Deputy Executive Director of the Department of Revenue (collectively the "**Department**"), violated well-established federal law by taxing fuel it used on its reservation. The Tribe sought declaratory and injunctive relief accordingly. The Department sought to dismiss the action on various grounds, claiming in part the action was barred by the *Rooker-Feldman*[1] doctrine and the Tax Injunction Act[2]. The Tribe argued dismissal was inappropriate on those grounds because it was not challenging the validity of a state court judgment and the Tax Injunction Act did not bar the Tribe's claims. The district court disagreed and dismissed the action with prejudice.

Course Of Proceedings Below

The Tribe filed suit in the district court against the Department on November 14, 2012 seeking: (**1**) a declaration that the Indian Commerce Clause, the Equal Protection Clause, and/or the Indian Sovereignty Doctrine prohibits state taxation of fuel the Tribe uses on its reservation in the performance of essential government

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[1] *Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923), overruled on other grounds as recognized by *Crone v. Dep't of Human Svcs.*, No. 11-cv-02270-WJM-CBS, 2012 WL 5832438 (D. Co. Oct. 5, 2012); *Dist. of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

[2] 28 U.S.C. § 1341.

services; and (**2**) an injunction prohibiting the prospective imposition of that tax. (Doc 1.) The Department filed a motion to dismiss the Tribe's complaint, claiming in part the Tribe's suit was barred by the *Rooker-Feldman* doctrine and the Tax Injunction Act. (Doc 11.) The Tribe filed a response in opposition to the Department's motion to dismiss. (Doc 22.) The Tribe argued *Rooker-Feldman* was inapplicable to this case and the district court had jurisdiction notwithstanding the Tax Injunction Act. *Id*.

The district court held a hearing on the motion to dismiss on January 4, 2013. (Doc 26; Doc 31.) On January 9, 2013, the district court entered an order dismissing the Tribe's case with prejudice on two grounds: (**1**) *Rooker-Feldman* deprived the court of subject-matter jurisdiction; and (**2**) the Tribe's claims are barred by the Tax Injunction Act. (Doc 27.)

The Tribe filed a timely notice of appeal on February 5, 2013. (Doc 28.)

Statement Of The Facts

The Tribe is an organized Indian tribe that is recognized by the United States Secretary of the Interior with a governing body as defined in § 16 of the Indian Reorganization Act of June 18, 1934 (25 U.S.C. § 461 *et seq.*), and a sovereign Native American tribal government whose headquarters is located in Hollywood, Florida. (Doc 1 ¶ 7.) The Tribe has Indian reservations and other property held in trust by the United States of America for the Tribe's benefit throughout Florida, all

of which constitutes "Indian land" or "Indian country" (as those terms are used in federal law) and which are collectively referred to herein as "Tribal Land." (Doc 1 ¶ 8.) Pursuant to the Self-Determination and Educational Assistance Act (25 U.S.C. § 450 *et seq.*) and its Self-Determination Contracts with the United States of America, the Tribe provides the same essential governmental services on Tribal Land that states typically provide off Tribal Land, including, but not limited to, police and fire protection, emergency medical services, public schools, public transportation, garbage pick-up, business regulation, and road construction and maintenance ("Essential Governmental Services"). (Doc 1 ¶ 9.)

Fuel Tax—Chapter 206

Fla. Stat. Chapter 206 imposes various excise taxes ("Fuel Tax"), on the motor and diesel fuel (collectively "fuel") that is used in the state. (Doc 1 ¶ 11.) Fla. Stat. § 206.41 provides that, as a matter of "administrative convenience," Fuel Tax is pre-collected as and when the fuel is first removed from the rack by the terminal supplier. (Doc 1 ¶ 12.) Fuel Tax is passed on to the ultimate consumer of the fuel who pays it at the pump as part of the purchase price of the fuel. (Doc 1 ¶ 12.) The Fuel Tax is compensation to the State for use of its roadways. (Doc 1 ¶ 13.) The legislative purpose of the Fuel Tax is to collect funds for the construction and maintenance of the state's roadways from the persons who use them. (Doc 1 ¶ 13.) The Fuel Tax is designed as an excise tax so that persons who use the state's

roadways will contribute to the cost of their construction and maintenance in proportion to the quantities of fuel they consume on them. (Doc 1 ¶ 13.)

Fla. Stat. § 206.01(24) defines "use" of fuel as occurring when it is placed into the fuel tank of the vehicle in which it will be consumed. (Doc 1 ¶ 14.) All of the fuel involved here was purchased, and placed into the Tribe's vehicles' fuel tanks, at fueling stations located off Tribal Land, but was actually consumed by the Tribe on its reservation in the performance of Essential Governmental Services. (Doc 1 ¶ 18, 19.) Fla. Stat. § 206.41(4) provides various exemptions from the Fuel Tax. (Doc 1 ¶ 15.) Each exemption depends on how the fuel is actually used. (Doc 1 ¶ 15.) In the case of municipal or county governments, or school districts, a portion of the pre-paid Fuel Taxes are refunded to such governments or school districts for use in constructing and maintaining their own roadways. (Doc 1 ¶ 15.)

Whether fuel is subject to Fuel Tax depends on the purpose for which it is used. (Doc 1 ¶ 16.) Any consumer who pre-pays the Fuel Tax at the pump and then uses the fuel for an exempt purpose is entitled to a refund of the Fuel Tax. (Doc 1 ¶ 16.) The state does not construct or maintain any of the roadways on Tribal Land. (Doc 1 ¶ 17.) None of the Fuel Tax collected by the state is used to fund the construction or maintenance of roadways on Tribal Land. (Doc 1 ¶ 17.) All roadways on Tribal Land are constructed and/or maintained by the Tribe and/or

the federal government at no cost to the state. (Doc 1 ¶ 17.) There is no nexus between the Fuel Tax and the Tribe's use of fuel on Tribal Land. (Doc 1 ¶ 17.)

Between June 7, 2009, and March 31, 2012, the Tribe paid Fuel Tax on the fuel that it purchased at off-reservation fueling stations, but used on Tribal Lands to provide Essential Governmental Services, totaling $393,247.30. (Doc 1 ¶ 18.) On June 6, 2012, the Tribe filed an administrative claim for refund of such Fuel Tax which is still pending.[3] (Doc 1 ¶ 18.)

Previous State Court Proceedings

The Tribe sued the Department in state court for (**1**) a refund of Fuel Tax paid between January 1, 2004, and February 28, 2006, on fuel the Tribe purchased at fueling stations located off Tribal Land but used on Tribal Land to provide Essential Governmental Services; and (**2**) a declaration that fuel used by the Tribe on Tribal Land is exempt from Fuel Tax regardless of where it was purchased.[4] (Doc 1 ¶ 19.) The state court action involved a different tax period and sought an entirely different form of relief (*i.e.*, refund of Fuel Tax) than that sought in the district court in this case. (Doc 1 ¶ 19.)

[3] Although the district court indicated in its order granting the Department's motion to dismiss that this claim was denied (Doc 27 p. 2), it is still pending. The district court also referred to the administrative claim for refund as a part of "the present action", *id.*, but it is unrelated to the federal claim. Its only relevance to the federal action is that it demonstrates the ongoing imposition of the tax and, therefore, the need for injunctive relief.

[4] Defendant Stranburg was not a party to the state court case.

In the state court case, the Department conceded that Fuel Tax is imposed on the use of fuel, rather than on the retail sales and purchase transaction. (Doc 1 ¶ 20.) The Department contended that, under Fla. Stat. § 206.01(24), fuel purchased at fueling stations located off Tribal Land should be treated as having been used off Tribal Land since the vehicle was off Tribal Land when the fuel was placed in the fuel tank. (Doc 1 ¶ 20.)[5] The Department's concession that the "taxable event" of the Fuel Tax is the "use" of fuel eliminated the need to litigate various issues of federal law, including the validity of the Fuel Tax under the Equal Protection Clause and the Indian Sovereignty Doctrine, which are implicated only when the

[5] Fla. Stat. § 206.41(24) defines "use" of fuel as placing it into the fuel tank of the vehicle in which it will be consumed. It is designed to accommodate an Interstate Commerce Clause concern by eliminating the need to monitor the amount of fuel that is actually used by each vehicle in the state. It creates the legal fiction that fuel is used in its entirely the moment it is placed into the fuel tank of the vehicle in which it will be consumed. This legal fiction is permissible under the Interstate Commerce Clause (as long as fuel purchased outside the state but used in the state is exempted from the tax) because persons engaged in interstate commerce would not be subjected to multiple impositions of the tax if this tax scheme applied identically in every state. *See, e.g., Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995), superseded by statute on other grounds by 49 U.S.C. § 14505 (2004). The test of validity under the Indian Commerce Clause is much more stringent than under the Interstate Commerce Clause. "[T]he Interstate Commerce and Indian Commerce Clauses have very different applications." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). "[T]he Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes." *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 62 (1996), overruled in part on other grounds by *Central Virginia Cmty. Coll. v. Katz*, 126 S.Ct. 990 (2006).

Fuel Tax is characterized as a sales tax on the off-reservation retail sale and purchase transaction. (Doc 1 ¶ 20.) As a result, these issues of federal law have never been adjudicated. (Doc 1 ¶ 20.)

The state trial court correctly held that Fuel Tax does not apply to any fuel that is actually used by the Tribe on Tribal Land, regardless of where it was purchased or the purpose for which it was used. (Doc 1 ¶ 21.) Because the Fuel Tax scheme is not tailored to exempt fuel the Tribe uses on Tribal Land, the state trial court held that the entire Fuel Tax scheme is invalid as applied to any fuel used by the Tribe, including fuel that the Tribe uses off Tribal Land. (Doc 1 ¶ 21.)

In *Florida Department of Revenue v. Seminole Tribe of Florida*, 65 So. 3d 1094 (Fla. 4th DCA 2011), *rev. denied*, *Seminole Tribe of Florida v. Florida Department of Revenue*, 86 So. 3d 1114 (Fla. 2012), the Fourth District Court of Appeal reversed.[6] (Doc 1 ¶ 22.) Without discussion, and contrary to governing law,[7] the state appellate court ignored the Department's concession that the Fuel

[6] The appellate court instructed the trial court to enter summary judgment in favor of the Department, but it never did so. To date there has not been a state judgment formally entered against the Tribe. Nevertheless, the Tribe has regarded the appellate court opinion as a state court judgment.

[7] The fuel tax is compensation to the State for use of its roadways. *Acme Freight Lines v. Lee*, 143 Fla. 635 (1940). Fla. Stat., § 207.003 specifically provides that the tax on fuel used in commercial motor vehicles is imposed for the privilege of operating those vehicles on the State's public highways. Art. XII, section 9(c)(5), of the Florida Constitution, provides that the portion of the Fuel Tax that is imposed by § 206.41(1)(a) must be used "to finance the acquisition and

Tax is imposed on the use of fuel and assumed that the Fuel Tax is a sales tax on a retail sales and purchase transaction. It considered where and how the Tribe used the fuel to be irrelevant. (Doc 1 ¶ 22.) Based on this characterization, the state appellate court said that, under *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005), the Indian Commerce Clause did not apply. The state appellate court ignored the fact that *Wagnon* involved a Kansas fuel tax scheme under which the taxable event was the purchase of the fuel by the distributor. The legal incidence of the Florida Fuel Tax, on the other hand, is on the ultimate consumer who uses it. Fla. Stat., § 206.41(4)(a). The state appellate court also relied on the Department's representation that, as a matter of administrative policy, it elected not to tax fuel that the Tribe purchased at on-reservation fueling stations, regardless of where it is used, stating: "The Tribe reaps the benefit of untaxed fuel when it is purchased on tribal lands even if the fuel is used off of tribal lands. Common sense suggests that the tax should correspondingly be imposed if the fuel is purchased off

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construction of roads as defined by law; and . . . for the acquisition and construction of roads and for road maintenance". Florida law provides various exemptions from the Fuel Tax, each of which depends on how and where the fuel is used. For example, Fla. Stat., § 206.41(4)(c) exempts fuel that is used for agricultural purposes because it is not used on the state roadways. Section 206.01(24) defines "use" of the fuel because "use" is the "taxable event" that triggers the Fuel Tax. Fla. Stat., § 206.41(3) specifically exempts any fuel that is purchased in another state but used in Florida. If the Fuel Tax were imposed on the retail sales and purchase transaction, this exemption would serve no purpose since the retail sales and purchase transaction occurred outside the state.

the reservation regardless of where it is consumed." *Seminole Tribe*, 65 So. 3d at 1097 (emphasis added) (footnote omitted).

The appellate court did not interpret or apply the Indian Commerce Clause—believing the Clause was inapplicable. (Doc 1 ¶ 22.) The appellate court's mischaracterization of the Fuel Tax as a sales tax on the retail sales and purchase transaction implicates provisions of federal law in addition to the Indian Commerce Clause, including the Equal Protection Clause and the Indian Sovereignty Doctrine. (Doc 1 ¶ 22.) The Tribe has never been afforded an opportunity to litigate its Equal Protection and Indian Sovereignty claims. (Doc 1 ¶ 22.)

The state appellate court's decision left unresolved several critical issues: (**1**) whether the Fuel Tax is imposed on the use of the fuel (as the Department and Tribe both contend) or on the retail sales and purchase transaction, and, therefore whether the "taxable event" that triggered the Fuel Tax occurred on or off Tribal Land; (**2**) whether the application of the Indian Commerce Clause depends on where the fuel is actually used, or on where it is fictitiously deemed to be used by a state statute; (**3**) whether the Indian Sovereignty Doctrine invalidates state tax on fuel that is used by the Tribe to provide Essential Governmental Services; and (**4**) whether the Fuel Tax as applied to the Tribe's fuel is prohibited by the Equal Protection Clause in these particular circumstances. (Doc 1 ¶¶ 20, 22-23.) The

Tribe asked the Florida Supreme Court to review the state appellate court decision, but it declined jurisdiction. *Seminole Tribe of Fla. v. Fla. Dep't of Revenue*, 86 So. 3d 1114 (Fla. 2012).

This Case

The Tribe filed a complaint against the Department in the Southern District of Florida seeking declaratory and prospective injunctive relief on the basis the Department's imposition of the Fuel Tax violates federal law—specifically the Indian Commerce Clause, Indian Sovereignty Doctrine, and Equal Protection Clause. (Doc 1 ¶¶ 27-55.) The Department filed a motion to dismiss in response arguing in part that the previous state court proceedings barred the federal action under the *Rooker-Feldman* doctrine. (Doc 11.) The Department also argued the Tax Injunction Act barred the Tribe from seeking injunctive relief against the imposition of the Fuel Tax. *Id.*

The district court agreed with the Department and dismissed the action with prejudice. (Doc 27.) The district court reasoned *Rooker-Feldman* deprived the court of jurisdiction because the Tribe's claims "essentially seek review of the previous state-court action." *Id.* at p. 4. The court also determined that "because the fuel tax applies only to off-reservation activity, [the Tribe's] claims are barred by the Tax Injunction Act." *Id.*

This appeal ensued. (Doc 28.)

Standard Of Review

Whether a district court has subject-matter jurisdiction to hear a case is a question of law this Court reviews *de novo*. *Holston Invs., Inc. B.V.I. v. LanLogistics Corp.*, 677 F.3d 1068, 1070 (11th Cir. 2012) (citation omitted). Questions of statutory interpretation are also reviewed *de novo*. *Bankston v. Then*, 615 F.3d 1364, 1367 (11th Cir. 2010) (citation omitted).

SUMMARY OF THE ARGUMENT

***Rooker-Feldman* Doctrine.** The district court erred as a matter of law in applying *Rooker-Feldman* to deprive the court of subject-matter jurisdiction over the Tribe's claims. *Rooker-Feldman* is entirely inapplicable to this case because the Tribe is not challenging the validity of a state court judgment. The Tribe has not complained of any injuries caused by a state court judgment, or asserted that a state court judgment was entered in violation of its federal rights. It has not asked the district court to review, reverse, nullify or enjoin enforcement of any state court judgment. The Tribe has simply asked the district court to independently determine whether federal law allows states to tax fuel that Indian tribes use on their Tribal Land.

The district court improperly conflated *Rooker-Feldman* with issue preclusion. *Rooker-Feldman* does not deny a federal court subject-matter jurisdiction simply because the federal claim involves the same or similar legal issue involved in the state court action.

Even if the *Rooker-Feldman* doctrine barred the Tribe's Indian Commerce Clause claim, it could not bar the Tribe's Equal Protection or Indian Sovereignty claims because the Tribe did not have a reasonable opportunity to litigate those federal claims in the state court proceedings.

The Tax Injunction Act. The district court had jurisdiction over this action notwithstanding the Tax Injunction Act. Supreme Court case law firmly establishes the Act does not prevent an Indian tribe from accessing federal court to obtain prospective relief against state taxation of activities conducted on Tribal Land. The district court's attempt to condition jurisdiction upon the Indian tribe first proving that the taxable event of the state tax has occurred on Tribal Land, without allowing the Indian tribe to litigate that issue, is entirely inconsistent with that case law. The central issue in most cases challenging state taxation of Indian activities is whether the tax is being applied to an on or off-reservation activity because the answer to that issue determines the validity of the tax. In some of these cases, the state tax was found to apply to on-reservation activities, and in other cases it was not, but, until now, the Indian tribes were never denied the right to litigate the issue.

ARGUMENT

I. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN CONCLUDING THE *ROOKER-FELDMAN* DOCTRINE DEPRIVED THE COURT OF SUBJECT-MATTER JURISDICTION.

The district court erred as a matter of law in concluding the *Rooker-Feldman* doctrine deprived the court of subject-matter jurisdiction over the Tribe's claims. *Rooker-Feldman* is wholly inapplicable to this case. The Tribe has not complained of any injuries that were caused by a state court judgment, or contended that a state court judgment was entered in violation of its federal rights. Further, the Tribe has not asked the district court to review, reverse, reject, nullify, or enjoin enforcement of any state court judgment. The Tribe has simply asked the district court to independently determine whether states are permitted to tax fuel that Indian tribes use on their Tribal Land.

The district court erred in conflating *Rooker-Feldman* with issue preclusion. *Rooker-Feldman* does not deny a federal court subject-matter jurisdiction simply because the federal claim involves the same legal issue involved in the state court action.

Even if *Rooker-Feldman* applied to the Tribe's Indian Commerce Clause claim, it does not apply to bar the Tribe's Equal Protection and Indian Sovereignty claims because the Tribe did not have a reasonable opportunity to litigate those federal claims in the state court proceedings.

A. The Tribe Is Not Challenging The Validity Of A State Court Judgment.

The district court concluded the *Rooker-Feldman* doctrine deprived the court of subject-matter jurisdiction because:

> Here, a state court of competent jurisdiction entered an order dismissing Plaintiff's claim seeking a declaration that Plaintiff is exempt from the fuel tax.[8] Now, in this Court, Plaintiff seeks to relitigate the claim that the state court has already denied. . . . Thus, Plaintiff is asking the Court to review and reject a judgment of the state court that addressed precisely the same issues contained in the claims in the instant suit.

(Doc 27 p. 5-6.)

This holding is erroneous. The *Rooker-Feldman* doctrine is a narrow exception to a federal district court's jurisdiction. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp*., 544 U.S. 280, 284 (2005) ("The Third Circuit misperceived the narrow ground occupied by *Rooker–Feldman* . . . ."); *Green v. Jefferson Cnty. Comm'n*, 563 F.3d 1243, 1245 (11th Cir. 2009) ("[T]he *Rooker-Feldman* doctrine [is an] extremely narrow exception[] to the federal courts' 'virtually unflagging' duty 'to adjudicate claims within their jurisdiction.'") (citation omitted).

"The *Rooker-Feldman* doctrine 'makes clear that federal district courts cannot review state-court final judgments because that task is reserved for state

[8] In fact, the state court did not dismiss the Tribe's claim for a declaration that it is exempt from fuel tax. The state trial court ruled that state taxation of fuel that an Indian tribe uses on its reservation is prohibited. That judgment was reversed on appeal. *Fla. Dep't of Revenue v. Seminole Tribe of Fla.*, 65 So. 3d 1094 (Fla. 4th DCA 2011).

appellate courts or, as a last resort, the United States Supreme Court.'" *Figueroa v. Merscorp, Inc*., 766 F. Supp. 2d 1305, 1315 (S.D. Fla. 2011) (citation omitted), aff'd, 2012 WL 1648879 (11th Cir. May 11, 2012); *see also Casale v. Tillman*, 558 F.3d 1258, 1260 (11th Cir. 2009) (same). The doctrine applies to federal claims that were raised in the state court and federal claims that were not raised but are "inextricably intertwined" with a state court judgment, meaning the success of the federal claim would "effectively nullify" the state court judgment, or the federal claim "succeeds only to the extent that the state court wrongly decided the issues." *Figueroa*, 766 F. Supp. 2d at 1315; *Casale*, 558 F.3d at 1260.

In *Exxon*, 554 U.S. at 291, the Supreme Court explained the *Rooker-Feldman* doctrine is "confined to cases of the kind from which the doctrine acquired its name". It applies only in the very limited circumstances involved in the *Rooker* and *Feldman* cases—that is, where "the losing party in state court file[s] suit in federal court after the state proceedings end[], complaining of an injury caused by the state-court judgment and seeking review and rejection of that judgment." *Exxon*, 554 U.S. at 291. It does not apply in any other circumstances. "The [*Rooker-Feldman*] doctrine bars the losing party in state court 'from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights.' " *Brown v. R.J. Reynolds Tobacco Co.*, 611

F.3d 1324, 1330 (11th Cir. 2010) (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1005-06 (1994)); *see also Bolden v. City of Topeka*, 441 F.3d 1129, 1139 (10th Cir. 2006) ("When the state-court judgment is not itself at issue, the [*Rooker-Feldman*] doctrine does not prohibit federal suits regarding the same subject matter.").

"[B]arred claims are those 'complaining of injuries caused by state-court judgments'. . . In other words, an element of the [federal] claim must be that the state court wrongfully entered its judgment . . . [the] federal claim is not barred by *Rooker-Feldman* as a complaint of injury caused by a state court judgment just because it seeks relief inconsistent with that judgment." *Campbell v. City of Spencer*, 682 F.3d 1278, 1283 (10th Cir. 2012); *see also Weaver v. Texas Capital Bank*, 660 F.3d 900, 904 (5th Cir. 2011) (the *Rooker-Feldman* doctrine applies only "where a plaintiff seeks relief that directly attacks the validity of an existing state court judgment") (citing *In re Bayhi*, 528 F.3d 393, 402 (5th Cir. 2008)). Where the plaintiff does not complain of an injury caused by a state court judgment, the *Rooker-Feldman* doctrine simply does not apply. *Bates v. Harvey*, 518 F.3d 1233, 1241 (11th Cir. 2008). The application of the *Rooker-Feldman* doctrine is not concerned with whether the state court decided the legal issues correctly, but with whether its judgment was rendered in accordance with law. *Campbell*, 682 F.3d at 1283; *Great Western Mining & Mineral Co. v. Fox Rothschild, LLP*, 615 F.3d 159 (3rd Cir. 2010); *Turner v. Crawford Square*

Apartments, 449 F.3d 542 (3rd Cir. 2006); *Green v. Mattingly*, 585 F.3d 97 (2nd Cir. 2009); *Edwards v. City of Jonesboro*, 645 F.3d 1014 (8th Cir. 2011).

The district court determined *Rooker-Feldman* applied because the Tribe's claims could "only succeed to the extent that the state court wrongly decided the issues—particularly the constitutionality of the fuel tax as applied to Plaintiff and Plaintiff's entitlement to an exemption." (Doc. 27 p. 6.) In its view, the *Rooker-Feldman* doctrine applied because the Tribe's federal claim for declaratory and injunctive relief could only succeed if the district court concluded states are prohibited from taxing fuel that Indian tribes use on their reservations. Since the state court reached the opposite result, the district court reasoned that agreeing with the Tribe would necessarily constitute a determination that the state court resolved the legal issue "wrongly" and, in effect, a "reversal" of the state court's conclusion. The district court clearly misinterpreted the *Rooker-Feldman* doctrine. The principle that a federal claim is barred where it could "only succeed to the extent that the state court wrongly decided the issues" does not apply to deprive the district court of jurisdiction to independently resolve a legal issue. It does not supplant the requirements that the plaintiff "complain[] of an injury caused by the state-court judgment and seek[] review and rejection of that judgment." *Exxon*, 554 U.S. at 291. This rule refers to federal claims of which a wrongly-decided state court judgment is an element—that is, federal claims in which the plaintiff

seeks to have the state court judgment reversed or nullified on the grounds the state court judgment itself caused injuries because it was entered in violation of the plaintiff's federal rights. *See Casale v. Tillman*, 558 F.3d 1258, 1260 (11th Cir. 2009); *Siegel v. LePore*, 234 F.3d 1163, 1172 (11th Cir. 2000); *Pennzoil Company v. Texaco*, 481 U.S. 1, 25 (1987) (Marshall, J., concurring), superseded by statute on other grounds as stated in *Sanchez v. Abderrahman*, No. 10-cv-3641 (CBA), 2012 WL 1077842 (E.D.N.Y. Mar. 30, 2012).

The rule appears to have originated with Justice Marshall's concurring opinion in *Pennzoil*. In that case, Pennzoil moved to dismiss Texaco's Federal action to enjoin enforcement of a state court judgment based on the *Rooker-Feldman* doctrine. *Pennzoil*, 481 U.S. at 6-7. Texaco argued that the doctrine applies only to a federal action that challenges the substantive merits of the state court judgment, and not to an action that challenges the constitutionality of the procedures for enforcement of that state court judgment. *Id*. at 25 (Marshall, J., concurring).

In Justice Marshall's view, these two challenges could not be separated because Texaco's entitlement to an injunction barring enforcement of the state court judgment necessarily depended on whether the state court judgment was correctly decided. *Id*. Because the claim for an injunction could succeed only if the federal court determined that the state court judgment was incorrect, the court

could not grant the injunction without reviewing the state court judgment. *Id*. "Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment." *Id*.

Only when a wrongly-decided state court judgment is an element of the federal claim does success of that federal claim depend on whether that state court judgment was wrongly decided. Because adjudication of those federal claims requires that the federal court review the state court judgment to determine whether it was wrongly decided, the *Rooker-Feldman* doctrine bars those claims. A litany of recent Eleventh Circuit cases illustrates this very limited scope of the doctrine.[9] *See, e.g., Alvarez v. Attorney Gen. for Fla.*, 679 F.3d 1257 (11th Cir. 2012); *Casale v. Tillman*, 558 F.3d 1258 (11th Cir. 2009); *Caffey v. Alabama Supreme Court*, 469 F. App'x 748 (11th Cir. 2012); *McSparin v. McSparin*, 489 F. App'x 348 (11th Cir. 2012); *Jallali v. Am. Osteopathic Ass'n*, 461 F. App'x 838 (11th Cir. 2012); *Manning v. Harper*, 460 F. App'x 872 (11th Cir. 2012); *Jackson v. Blevins*, 442 F.

[9] There do not appear to be any cases in which the *Rooker-Feldman* doctrine was applied to bar a challenge to the constitutionality of a state tax scheme, and it is doubtful that it would ever apply. The federal claim for prospective injunctive relief could never be the same claim as the state court claim for refund of taxes previously paid. They are entirely separate causes of action. The federal district court is not asked to review a state court judgment when the federal claim involves an entirely separate cause of action. A federal claim for prospective injunctive relief will necessarily relate to a different tax period than the tax period for which a refund of previously paid taxes was sought in the state court action.

App'x 466 (11th Cir. 2011); *Butler v. Wood*, 383 F. App'x 875 (11th Cir. 2010); *Cormier v. Horkan*, 397 F. App'x 550 (11th Cir. 2010); *Holt v. Vallis*, 395 F. App'x 604 (11th Cir. 2010); *Parker v. Potter*, 368 F. App'x 945 (11th Cir. 2010); *Paletti v. Yellow Jacket Marina*, 395 F. App'x 549 (11th Cir. 2010); *McGee v. Kell*, 335 F. App'x 3 (11th Cir. 2009).

In this case, the requested declaration that the United States Constitution prohibits state taxation of fuel used by an Indian tribe on its own Tribal Land does not require the federal court to find the state court incorrectly decided the issue or require the court to review the state court judgment. Where, as here, a wrongly-decided state court judgment is not an element of the federal claims, those claims can be adjudicated without having to review any state court judgment. Therefore, this case is not barred by *Rooker-Feldman* and is not analogous to *Jallali v. American Osteopathic Association*[10], upon which the district court relied. (Doc 27 p. 5.)

In *Jallali*, the district court determined *Rooker-Feldman* applied where the plaintiff complained the state court's dismissal of his complaint caused his injury because his civil rights were denied by that dismissal. *Jallali*, 2011 WL 2601257, at *3-4. If the district court granted the requested relief in *Jallali*, the state court judgment dismissing the complaint would have been nullified.

[10] *Jallali v. Am. Osteopathy Ass'n*, No. 11-60604-CIV-COHN/SELTZER, 2011 WL 2601257 (S.D. Fla. Jun. 30, 2011), *aff'd* 461 F. App'x 838 (11th Cir. 2012).

In this case, the Tribe does not complain that the state court judgment caused any injury or that a state court judgment violated or denied any of its federal rights, and it does not ask for relief that would nullify a state court judgment. The Tribe simply asked the district court to decide the purely legal issue of whether a state is permitted to tax fuel an Indian tribe uses on its own Tribal Land. There is absolutely no connection between the federal claim and the state court action except that they involve a common legal issue. As discussed in the next section, *Rooker-Feldman* does not apply to bar the Tribe's claims in these circumstances.

B. The Rooker-Feldman Doctrine Is Not Issue Preclusion.

The district court essentially concluded *Rooker-Feldman* deprived the court of subject-matter jurisdiction because the same legal issue is involved in both the state and federal actions. (Doc 27 p. 6) ("[The Tribe] is asking the Court to review and reject a judgment of the state court that addressed precisely the same issues contained in the claims in the instant suit.") (Emphasis added.) However, whether the federal court is bound by the state court's legal conclusion is governed by preclusion law, not the *Rooker-Feldman* doctrine.[11] *Exxon,* 554 U.S. at 284. "The *Rooker-Feldman* doctrine is distinct from issue preclusion". *Bates v. Harvey*, 518

[11] In fact, the Department did not raise issue preclusion (collateral estoppel) as a basis for dismissing the Tribe's complaint. (Doc 11.) And indeed it could not because the Equal Protection and Indian Sovereignty claims were never litigated in the state court proceeding given the Department's concession in that case that the tax was on the "use" of fuel.

F.3d 1233, 1240 (11th Cir. 2008) (citing *Agripost v. Miami-Dade Cnty.*, 195 F.3d 1225, 1229 n. 7 (11th Cir. 1999); *Lance v. Dennis*, 546 U.S. 459, 466 (2006)). "*Rooker-Feldman* does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts to stay or dismiss proceedings in deference to state-court actions." *Exxon*, 554 U.S. at 284.

The Supreme Court has repeatedly held the *Rooker-Feldman* doctrine does not deny subject-matter jurisdiction simply because the federal claim involves the same legal issue involved in the state court action. In *Feldman* itself, the Supreme Court distinguished between specific challenges to state court judgments, which are barred, and general challenges to the rules the state court applied, which are not. The *Feldman* court specifically held that the federal district court had jurisdiction to independently decide the same legal issue the state court decided (*i.e.*, whether the accreditation requirement was constitutional). 460 U.S. at 485-87. Even though "the plaintiffs' success in the permitted [federal] challenge to the rule would establish that the denial of the waiver had been improper, and would likely lead to a later successful request for a waiver", *id.*, that challenge was not barred by the *Rooker-Feldman* doctrine because it did not attack the validity of the state court judgment itself and, therefore, did not require the court to review that judgment.

In *Exxon*, the Supreme Court advised the *Rooker-Feldman* doctrine does not prohibit a "district court from exercising subject-matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court." 554 U.S. at 293; *see also Skinner v. Switzer*, 131 S.Ct. 1289, 1297 (2011) ("[I]f a Federal plaintiff presents an independent claim, it is not an impediment to the exercise of Federal jurisdiction that the same or related question aired between the parties in state court."); *Campbell*, 682 F.3d at 1283 ("The *Rooker-Feldman* doctrine does not bar an action just because it seeks relief inconsistent with, or even ameliorative of, a state-court judgment."); *Bolden*, 441 F.3d at 1139 ("When the state-court judgment is not itself at issue, the doctrine does not prohibit federal suits regarding the same subject matter, or even the same claims, as those presented in the state-court action. The doctrine that governs litigation of the same subject matter or the same issues is res judicata—specifically, claim preclusion and issue preclusion.").

As the Tenth Circuit explained in *Campbell*, 682 F.3d at 1283-84:

> [A] Federal-court claim is not barred by *Rooker-Feldman* as a complaint of injury caused by a state court judgment . . . just because it seeks relief inconsistent with that judgment. For example, a plaintiff who lost a civil-rights claim against a defendant in state court would not be barred by *Rooker-Feldman* from bringing an identical civil-rights claim in federal court. The defendant would have to rely on preclusion doctrine, not *Rooker-Feldman*, for relief from the new claim.

As we stated in *Bolden* [441 F.3d at 1143]:

> Appellate review—the type of judicial action barred by *Rooker-Feldman*—consists of a review of proceedings already conducted by the 'lower' tribunal to determine whether it reached its result in accordance with law. When, in contrast, the second court tries a matter anew and reaches a conclusion contrary to a judgment by the first court, without concerning itself with the bona fides of the prior judgment . . . it is not conducting appellate review, regardless of whether compliance with the second judgment would make it impossible to comply with the first judgment. In this latter situation the conflict between the two judgments is to be resolved under preclusion doctrine, not *Rooker-Feldman*.

(citation omitted). In *Lance*, 546 U.S. at 464-66, the Supreme Court explained:

> In *Exxon* . . . we warned that the lower courts have at times extended *Rooker-Feldman* 'far beyond the contours of the *Rooker and Feldman* cases' . . . superseding the ordinary application of preclusion law. . . . *Rooker-Feldman*, we explained, is a narrow doctrine. . . The District Court erroneously conflated preclusion law with *Rooker-Feldman*. . . . *Rooker-Feldman* is not simply preclusion by another name. The doctrine applies only in 'limited circumstances' . . . where a party in effect seeks to take an appeal of an unfavorable state-court decision to a lower federal court. . . A more expansive *Rooker-Feldman* rule would tend to supplant Congress' mandate . . . that federal courts `give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged'.

(citing *Baker v. General Motors Corp*., 522 U.S. 222, 246 (1998)).

In this case, the district court improperly conflated *Rooker-Feldman* with issue preclusion. Thus, whether or not the state court action involved the same legal issues as this action is irrelevant to the application of *Rooker-Feldman*.

C. The Tribe Did Not Have A Reasonable Opportunity To Litigate Its Equal Protection and Indian Sovereignty Claims In State Court.

Even if *Rooker-Feldman* applied to the Tribe's Indian Commerce Clause claim, it would not apply to its Equal Protection or Indian Sovereignty claims because the Tribe did not have a reasonable opportunity to litigate those claims in the state court proceedings.[12] *See Wood v. Orange Cnty.*, 715 F.2d 1543, 1547 (11th Cir. 1983) ("The [*Rooker-Feldman* doctrine] can apply only where the plaintiff had a reasonable opportunity to raise his federal claim in state proceedings. Where the plaintiff has had no such opportunity, he cannot fairly be said to have 'failed' to raise the issue. Moreover, an issue that a plaintiff had no reasonable opportunity to raise cannot properly be regarded as part of the state case."); *Casale*, 558 F.3d at 1260 ("[*Rooker-Feldman*] does not apply, however, where a party did not have a 'reasonable opportunity to raise his federal claim in state proceedings.'") (citation omitted).

The district court rejected this argument, stating:

> Here, in the state court case, both parties asserted that the fuel tax was a tax on the use of fuel, rather than a sales tax. The state court, however, concluded that the fuel tax fell on the off-reservation

[12] In the state court action, the Tribe challenged the validity of the state's tax scheme based solely on the Indian Commerce Clause. In this case, the Tribe challenged the state's tax scheme under the Equal Protection Clause and the Indian Sovereignty Doctrine as well. The Equal Protection Clause and the Indian Sovereignty Doctrine claims did not seek any different or additional relief from what the Tribe sought under its Indian Commerce Clause claim. They are simply additional reasons why the state's tax scheme is unconstitutional.

> purchase of fuel. Plaintiff contends that, if [the Department] had argued in state court that the tax was a sales tax, Plaintiff would have asserted that the tax, as applied to Plaintiff, violates the Equal Protection Clause. [The Department] did not so argue. Thus, Plaintiff asserts that it did not have a fair opportunity to raise its Equal Protection claim. The Court disagrees. Plaintiff still could have argued that the fuel tax was a use tax or that, in the alternative, it was a sales tax that violated the Equal Protection Clause. The state court did not bar Plaintiff from so arguing. Nor has Plaintiff pointed to any state court procedures that prevented it from making that argument. Rather, Plaintiff made the strategic choice to not raise its alternative arguments. Therefore, the Court concludes that Plaintiff had a reasonable opportunity to argue its federal claims in state court, and accordingly, Plaintiff's claims are barred by the Rooker-Feldman doctrine.

(Doc 27 p. 7 (emphasis added.)

This conclusion is flawed for multiple reasons. **First**, the *Rooker-Feldman* doctrine does not bar the Tribe's Equal Protection and Indian Sovereignty claims for the same reasons that it does not bar its Indian Commerce Claim—the claims do not complain of any injuries caused by a state court judgment, assert that a state court judgment was entered in violation of the Tribe's federal rights, or ask the district court to review, reverse, nullify, or enjoin enforcement of any state court judgment.

Second, the district court's conclusion ignores the fact that the Tribe did not assert its claims under the Indian Sovereignty Doctrine and Equal Protection Clause in state court because those claims had no application until the state appellate court ignored the Department's concession that the Fuel Tax is an excise

tax on the "use" of fuel and mischaracterized it as a sales tax on the retail purchase and sales transaction. Based solely on this mischaracterization of the tax, issues emerged of whether state taxation of fuel used by the Tribe on its reservation in the performance of Essential Governmental Services is barred by the Equal Protection Clause and/or Indian Sovereignty Doctrine.

Since the state appellate court's mischaracterization of the Fuel Tax was unforeseeable and well outside the issues framed by the pleadings in the state court case, the Tribe did not have a reasonable opportunity to raise and litigate its Equal Protection and Indian Sovereignty claims. Consequently, *Rooker-Feldman* would not bar these claims even if it barred the Tribe's Indian Commerce Clause claim.

II. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN CONCLUDING THE TAX INJUNCTION ACT BARS THE TRIBE'S ACTION.

The district court had jurisdiction over this action notwithstanding the Tax Injunction Act (the "**Act**").[13] The Supreme Court has recognized the Act does not prevent an Indian tribe from accessing federal court to obtain prospective relief against an unlawful state tax scheme.

The Act generally bars federal actions to enjoin the imposition of state taxes. However, the Supreme Court held in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 474-75 (1976), that 28 U.S.C. §1362[14] overrides the Act and allows an Indian tribe to bring an action in federal court to challenge the constitutionality of a state tax scheme. After first recognizing the Act did not apply to suits "brought by the United States to protect itself and its instrumentalities from unconstitutional state exactions," *Moe*, 425 U.S. at 470, the Court reasoned:

> Looking to the legislative history of § 1362 . . . we find an indication of congressional purpose to open the federal courts to the kind of claims

[13] The Tax Injunction Act (28 U.S.C. § 1341) provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

[14] 28 U.S.C. §1362 provides: "The district courts shall have original jurisdiction of all civil actions brought by an Indian Tribe or band with a governing body duly recognized by the Secretary of the Interior wherein the matter in controversy arises under the Constitution, laws or treaties of the United States."

> that could have been brought by the United States as trustee, but for whatever reason were not so brought. Section 1962 is characterized by the reporting House Judicial Committee as providing "the means whereby the tribes are assured of the same judicial determination whether the action is brought in their behalf by the Government or by their own attorneys." [H.H.Rep. No.2040, 89th Cong., 2d Sess., 2-3 (1966), U.S. Code Cong. & Admin. News at 3145, 3146-47]. While this is hardly an unequivocal statement of intent to allow such litigation to proceed irrespective of other explicit jurisdictional limitations, such as § 1341, it would appear that Congress contemplated that a tribe's access to federal court to litigate a matter arising "under the Constitution, laws, or treaties" would be at least in some respects as broad as that of the United States suing as the tribe's trustee.

Moe, 425 U.S. at 472-73. Accordingly, the Court concluded that because the Act would not bar the United States from seeking to enjoin enforcement of the state tax law on behalf of the tribe, the tribe itself could maintain its suit against the state. *Id*. at 474-75; *see also Osceola v. Fla. Dep't of Revenue*, 893 F.2d 1231, 1233-34 (11th Cir. 1990) (relying on *Moe* in recognizing that because Indian lands are regarded as an instrumentality of the United States, Indian tribes can avail themselves of the exception to the Tax Injunction Act just like the United States can); *Gila River Indian Cmty. v. Waddell*, 967 F.2d 1404, 1407 (9th Cir. 1992) ("The barrier posed by 28 U.S.C. § 1341 to suits in federal court challenging the assessment, levy or collection of State taxes does not apply to actions commenced by an Indian tribe." (citing *Moe*, 425 U.S. at 470-75; *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 659 (9th Cir. 1989)).

Moe eliminated any doubt concerning an Indian tribe's right to maintain an action in federal court to challenge an unconstitutional tax scheme. However, in this case, without explanation or authoritative support, the district court accepted the Department's argument that *Moe* only allows challenges to state taxation of an Indian tribe's on-reservation activities, and then determined that the Fuel Tax is not imposed on the Tribe's on-reservation activities. (Doc 27 p. 10.) Specifically, the district court determined *Moe* did not apply because "the applicability of the [Act] in this case hinges on the locus of the fuel tax." (Doc 27 p. 9.) The district court held that the "locus" of the fuel tax occurred off-reservation because (**1**) the retail purchase transaction occurred off-reservation, and (**2**) Fla. Stat. § 206.41(24) treats fuel as being used when it is placed into the fuel tank of the vehicle in which it will be consumed. (Doc 27 p. 9-10.)

The district court's holding that *Moe* conditions an Indian tribe's right to challenge the constitutionality of a state tax scheme on the tribe first establishing that the "locus" of the tax occurs on-reservation is patently incorrect. Whether the "locus" of the tax is on or off-reservation is the pivotal issue in most state tax cases involving Indian tribes. In the district court's view, the Tribe must first win its case on the merits before the district court has jurisdiction to decide it. And, it will not allow the Tribe to litigate that issue on the merits.

This case involves only the tax on fuel that the Tribe uses on its reservation in performing Essential Governmental Services. If the Fuel Tax is imposed on the use of fuel, as both parties agree, the "locus" of the tax clearly occurs on-reservation since that is where the fuel is used. In determining that the "locus" of the tax occurred off-reservation, the district court looked no further than the facts that the fuel is placed into the fuel tanks, and the retail purchase transaction occurs at off-reservation fueling stations. In doing so, it necessarily decided that the "taxable event" of the Fuel Tax is the purchase of the fuel and/or that the application of the Indian Commerce Clause depends not on where the fuel is actually used but on where it is fictitiously deemed to be used by a state statute. [15] This constituted approval of the state's argument that a state may avoid the constitutional limitations on its taxing authority by statutorily deeming an on-reservation activity as having occurred off-reservation.

[15] This conclusion is contrary to the Supreme Court's holding in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). Like Florida, Arizona taxes the use of fuel. *Id*. at 139-40. Like Florida, Arizona has a statute that creates the legal fiction that fuel purchased in the state has been used on the roadways of the state (rather than the roadways on the reservation). *Id*. Consistent with the district court's conclusion, all of the fuel in *Bracker* would have been treated as having been used off-reservation and the Indian Commerce Clause would not have applied to invalidate the state tax on that fuel. However, the Supreme Court held that the Indian Commerce Clause barred the Arizona tax on fuel actually used on-reservation. *Id*. at 148-51. In its view, a state cannot avoid the limitations on its taxing authority by statutorily deeming an on-reservation activity to have occurred off-reservation.

The critical issue in most state tax cases involving Indian tribes is whether the tax is being applied to an on- or off-reservation activity because that answer determines the validity of the tax.[16] In some of these cases, the state tax was found to apply to on-reservation activities, and in other cases it was not, but, until now, the Indian tribes were never denied the right to litigate the issue.

Moe itself involved the issue of whether the Montana personal property tax on automobiles was being applied to on or off-reservation activities.[17] The vehicles were owned by Indians and used on and off the reservation. Since the taxable event of that tax was held to be the ownership of the vehicle, the Court determined that the Indian Commerce Clause prohibited the state from taxing vehicles that were owned by Indians who resided on-reservation, but it did not

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[16] The validity of the state tax scheme depends on whether that taxable event occurs on or off-reservation and whether the legal incidence of the state tax rests with the Indian tribe. The Indian Commerce Clause categorically bars a state tax if the taxable event occurs on-reservation and the legal incidence rests with an Indian or Indian tribe. If the taxable event occurs on-reservation, but the legal incidence of the tax rests with someone other than an Indian or Indian tribe, the state tax is not categorically barred, but it is invalid if it burdens an on-reservation activity of an Indian tribe the regulation of which is preempted by federal law, unless the tax is narrowly tailored to compensate the state for services it specifically provides in connection with that particular on-reservation activity. *Bracker*, 448 U.S. at 150-51.

[17] The district court described *Moe* as a case involving state taxation of cigarettes sold on the reservation. (Doc 27 p. 8.) While *Moe* did involve state cigarette taxes, the district court apparently overlooked that it also involved state tax on vehicles. 425 U.S. at 468-69.

prohibit the state from taxing vehicles that were owned by Indians who resided off-reservation.

Whether a state tax was being applied to on or off-reservation activities also was the central issue in several other Supreme Court cases after *Moe*. In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), Washington applied its property tax to vehicles that were owned by Indians and used on and off the reservation. Because the taxable event of the tax was held to be the use of vehicles, the Court held that the Indian Commerce Clause prohibited the state from taxing any on-reservation use of the vehicles.[18]

In *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005), the issue was whether the Kansas fuel tax was being applied to on or off-reservation activities. The taxable event of that tax was held to be the distributor's purchase of the fuel. Because that transaction occurred off-reservation, the Court held that the Indian Commerce Clause did not apply to prohibit the tax. *Id*. at 99.

In *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995), the issue was whether the Oklahoma fuel tax was being applied to on or off-reservation activities. The taxable event was held to be the purchase of the fuel by

[18] The Court determined that the state would be allowed to tax off-reservation use of vehicles once the state amended its statute. However, as written, the entire tax statute was invalid as applied to Indian owned vehicles because it did not distinguish between on and off-reservation use. If the statute were amended to exempt on-reservation use, it would be valid as to off-reservation use of the vehicles. *Colville*, 447 U.S. at 162-64.

the retailer. Since that transaction occurred on-reservation, and the legal incidence of the tax rested with the Indian retailer, the Court held that the Indian Commerce Clause prohibited the tax. *Id*. at 457-62.

Whether the state tax was being applied to on or off-reservation activities was the central issue in each of these cases. In some cases, the state tax was found to apply to on-reservation activities, and in others it was not; but the Indian tribes were never denied the right to litigate the issue as occurred in this case. Here, the district court clearly has jurisdiction to decide that issue as it relates to the Florida Fuel Tax.[19] The district court's refusal to apply *Moe* wrongly deprived the Tribe of the right to challenge an unlawfully imposed state tax.

The district court apparently determined that it was bound by the state appellate court's characterization of the Fuel Tax as a sales tax on retail purchase transaction. However, whether the district court is bound by the legal conclusion

[19] In this case, the validity of the tax depends on whether the taxable event of the Florida fuel tax is the retail purchase of the fuel, or the use of the fuel. If the taxable event is held to be the use of fuel, as both parties have repeatedly agreed, the validity of the tax depends on whether Indian Commerce Clause looks to where the fuel is actually used, or to where it is fictitiously deemed to be used by a state statute. Stated another way, the issue is whether a state may avoid the constitutional limitations on its taxing authority by statutorily deeming an on-reservation activity as having occurred off-reservation.

of the state court is governed by preclusion law.[20] Issue preclusion does not apply in this case and the Department has not contended otherwise.

Issue preclusion (or collateral estoppel) is a judicial doctrine that "bars relitigation of the same issues between the same parties in connection with a different cause of action." *M.C.G. v. Hillsborough Cnty. Sch. Bd.*, 927 So. 2d 224, 226 (Fla. 2d DCA 2006) (citations and emphasis omitted). Under Florida law, issue preclusion does not apply unless the "thing sued for" is the same in both cases. *See Zikofsky v. Mktg. 10, Inc.*, 904 So. 2d 520, 523 (Fla. 4th DCA 2005); *Accardi v. Hillsboro Shores Improvement Ass'n*, 944 So. 2d 1008, 1012 (Fla. 4th DCA 2005); *S.E.L. Maduro, Inc. v. M/V Antonio de Gastaneta*, 833 F.2d 1477, 1483 (11th Cir. 1987). In the state court, the "thing sued for" was a refund of taxes on fuel used between January 1, 2004, and February 28, 2006, while the "thing sued for" in the federal case was prospective declaratory and injunctive relief. (Doc. 1 ¶¶ 19, 27-55.)

At bottom, the Act does not bar the Tribe's action. Supreme Court case law firmly establishes the Act does not prevent an Indian tribe from accessing federal court to seek prospective relief against state taxation of activities on Tribal Land—

[20] "In considering whether to give preclusive effect to state court judgments, federal courts must apply that state's law of collateral estoppel." *Agripost, Inc. v. Miami-Dade Cnty.*, 195 F.3d 1225, 1229 n.7 (11th Cir. 1999) (citing *Vazquez v. Metropolitan Dade Cnty.*, 968 F.2d 1101, 1106 (11th Cir. 1992)).

even though the ultimate determination might be that the tax is applied only to activities conducted off Tribal Land.

CONCLUSION

The Tribe respectfully requests this Court reverse the district court's order dismissing the Tribe's action with prejudice and direct that the case be re-opened for adjudication on the merits.

Respectfully submitted,

s/Katherine E. Giddings

GLEN A. STANKEE, B.C.S. (331848)
AKERMAN SENTERFITT
Las Olas Centre II
350 East Las Olas Blvd., Suite 1600
Fort Lauderdale, FL 33301
Telephone: (954) 759-8972
Facsimile: (954) 463-2224
glen.stankee@akerman.com

KATHERINE E. GIDDINGS, B.C.S. (949396)
KRISTEN M. FIORE (25766)
AKERMAN SENTERFITT
106 E. College Ave., Suite 1200
Tallahassee, Florida 32301
Telephone: (850) 224-9634
Facsimile: (850) 222-0103
katherine.giddings@akerman.com
kristen.fiore@akerman.com

ATTORNEYS FOR APPELLANT

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 9,706 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii). This brief complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

s/Katherine E. Giddings
KATHERINE E. GIDDINGS, B.C.S.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 29, 2013, I electronically filed the foregoing Initial Brief with the Clerk of the Court by using the CM/ECF system. I also further certify that the foregoing document was sent by United States Mail to Jonathan A. Glogau, Chief, Complex Litigation, Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-1050 (Trial and Appellate Counsel for Defendants/Appellees State of Florida, Department of Revenue et. al.) and Joseph C. Mellichamp, III, Chief, Revenue Litigation Bureau, Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-1050 (Trial Counsel for Defendants/Appellees State of Florida, Department of Revenue et. al.).

s/Katherine E. Giddings
KATHERINE E. GIDDINGS, B.C.S.