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Gas Tax Agreements in Indian Country

Jonathan White¹

It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions. . . .

This, then, must be the goal of any new national policy toward the Indian people: to strengthen the Indian's sense of autonomy without threatening his sense of community. We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group. And we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support. . . .

For years we have talked about encouraging Indians to exercise greater self-determination, but our progress has never been commensurate with our promises. . . .

This situation should be reversed.²

---President Richard M. Nixon, July 8, 1970

Introduction

After nearly 200 years of a shifting and confusing federal policy toward its indigenous peoples, the United States embarked upon an ambitious new direction during the mid-1960s. Still smarting from the diminishment of both tribal sovereignty and the trust land base as a result of the government's previous policy of termination, Indian tribes, bolstered by several recent court decisions and a burgeoning civil rights movement, began to demand more self-determination. The federal government agreed, and the successive decades have seen a dramatic increase in tribal sovereignty. However, along with sovereignty came added visibility and new conflicts, as the 565 federally-recognized tribes began to assert themselves against their own members and their neighbors. "Ultimately, during the modern era, the tribes have used their sovereign status in numerous, pragmatic ways to rise from the termination era and gain a place, new though it may be, in the community of governments in the United States."³ This has given tribes some momentum, but it has also generated a great deal of resistance.

One of the areas in which tribes have been reasserting sovereignty is taxation authority. Since 1995, tribes in Washington have been entering into agreements with the state, providing a mechanism under which tribes may keep the majority of the usual state gas taxes levied on consumers. This program has grown significantly, to the point

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² H.R.Doc. NO. 91-363, (1970).

³ CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME AND THE LAW* 54 (Yale University Press 1987).

where the majority of Washington tribes are now taking advantage of it. These agreements have provided millions of dollars of desperately needed revenue and jobs to Washington tribes, allowing tribes to provide much-needed transportation and police improvements within their respective reservations.

However, this cooperative form of shared sovereignty has also resulted in an incredible amount of controversy in the state, with non-tribal gas stations and conservative policy think-tanks alleging that the gas tax arrangement is illegal under the state Constitution and that the tribes are enjoying financial benefits which allow them to sell gasoline at greatly reduced rates. These reduced rates, argue opponents of the tax arrangements, allow tribes to undercut prices at gas stations operated by non-tribal members, putting them at a serious competitive disadvantage. The issue has generated additional heat since the beginning of the current economic recession and rise of the “tea party” movement, with many citizens complaining that the gas tax arrangements are nothing more than illegal giveaways of public funds to Indian tribes. The controversy has recently reached a tipping point, and in 2011 opponents of the gas tax agreements brought suit against the state and Governor Gregoire to challenge their constitutionality.⁴

This paper argues that gas tax agreements between the state and tribes cannot, and should not, be disturbed through legal actions undertaken by disaffected citizens. When challenging the legitimacy of government-to-government negotiations, the proper avenue for redress is the ballot box, not the court system. This paper will first discuss the legal background of taxation in Indian Country throughout the United States, showing how the United States Supreme Court has moved to sharply limit tribal sovereignty, especially in the area of taxation, over the past thirty years. The paper will next discuss the specifics of the Washington gas tax arrangements, including details of the provisions at stake in the case now before the Washington Supreme Court. The paper will then explain how cooperative taxation agreements between tribes and the state fit into the overall policy goals of the federal government, by allowing tribes to reassert sovereignty and provide needed services to their members. The paper will then discuss a current case, *Automotive United Trades Organization v. State of Washington*, first by identifying the parties to the case, and then by discussing the proceeding at court. The paper will briefly discuss the disposition of similar issues in other jurisdictions before concluding with analysis of the gas-tax-agreements issue in Washington and its relation to the larger goals of sovereignty and self-determination for Indian tribes.

Background – Taxation in Indian Country

The first major case dealing with the issue of taxation in Indian Country during the self-determination era was *Warren Trading Post v. Arizona State Tax Commission*.⁵ In that case, the state of Arizona levied a two percent tax on the gross proceeds, sales, and gross income of the plaintiff’s trading post, which sold goods to Indians on the

⁴ *Auto. United Trades Org. v. State*, No. 85661-3 (Wash. accepted for hearing and decision Sept. 7, 2011).

⁵ *Warren Trading Post Co. v. Arizona State Tax Comm’n*, 380 U.S. 685 (1965).

Navajo reservation.⁶ The Trading Post had been granted a federal license to trade with the Indians,⁷ and the Supreme Court looked specifically at the issue of whether Arizona had the authority to levy a tax on a business dealing with Indians in Indian Country.⁸ The Court then cited the agreement signed by Arizona upon its admission to the Union, in which the state expressly forfeited jurisdiction over Indian Country, in deference to the federal government, as a condition of admission.⁹

The Court relied on Justice John Marshall's famous holding in *Worcester v. Georgia*, in which he stated that the "treaties and laws of the United States contemplate that the Indian territory is completely separated from that of the states; and provide that all intercourse with them should be carried on exclusively by the government of the Union."¹⁰ The Warren Court then looked at specific regulations of Indian commerce, from the first statutes enacted under the Constitution, up to the present day, finding that the history of "these apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens."¹¹ The Court concluded with a strong reaffirmation of taxation as a positive method of promoting and strengthening tribal sovereignty:

Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities. And in compliance with its treaty obligations the Federal Government has provided for roads, education and other services needed by the Indians . . . *This state tax on gross income would put financial burdens on appellant or the Indians with whom it deals in addition to those Congress or the tribes have prescribed* (emphasis added), and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner. And since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax.¹²

⁶ *Id.* at 685.

⁷ 25 U.S.C. § 261 (giving the BIA commissioner "sole power" to appoint traders to the Indian tribes, and to regulate the manner in which they traded, including quantity of goods and pricing).

⁸ Warren Trading Post, *supra* note 4, at 685.

⁹ *Id.* at 686.

¹⁰ *Id.* at 687 (quoting *Worcester v. Georgia*, 31 U.S. 515, 557 (1832)).

¹¹ *Id.* at 690.

¹² *Id.* at 690-91.

Eight years later, the Supreme Court revisited the issue of the validity of state taxation in Indian Country in *McClanahan v. Arizona State Tax Commission*.¹³ In that case, the state of Arizona had withheld \$16.20 from the wages of an enrolled member of the Navajo tribe to cover her 1967 state income tax liability.¹⁴ The Arizona state courts had affirmed the tax even in light of the *Warren Trading Post* decision, holding that a state income tax levied upon an individual did not infringe upon a tribe's ability to govern itself.¹⁵

The Supreme Court reversed the Arizona courts, again applying *Worcester* to restate the doctrine that Indian nations were "distinct political communities" and that tribes had exclusive authority over all the lands within their territory.¹⁶ Employing a balancing test to weigh the interests of the federal government and tribes against those of the state, the Court thus reaffirmed the fact that, although there were some exceptions, state law had "no role to play" within reservation boundaries, absent an express act of Congress giving the state such authority.¹⁷ The Court also looked at the history of the treaties between the United States and the Navajo to find that the tribe had never expressly agreed to state authority; even if it had, the Court relied on the Indian Canons of Construction, which require treaty provisions to be construed "in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith."¹⁸ Thus, federal and tribal interests prevailed over any state interest, and the Court accordingly held in favor of tribal authority to tax as a means of upholding sovereignty:

When this canon of construction is taken together with the tradition of Indian independence described above, it cannot be doubted that the reservation of certain lands for the exclusive use and occupancy of the Navajos and the exclusion of non-Navajos from the prescribed area *was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision* (emphasis added). It is thus unsurprising that this Court has interpreted the Navajo treaty to preclude extension of state law—including state tax law—to Indians on the Navajo Reservation.¹⁹

Seven years later, in *Washington v. Confederated Tribes of the Colville Reservation*, the Supreme Court took another major case involving issues of state taxation in Indian Country.²⁰ *Colville* dealt with a set of facts similar to the current gas taxation controversy: Indian retailers were marketing and selling cigarettes for significantly less than their non-tribal competitors, and those competitors sued, alleging

¹³ *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973).

¹⁴ *Id.* at 166.

¹⁵ *Id.* at 165.

¹⁶ *Id.* at 170-71.

¹⁷ *Id.* at 168.

¹⁸ *Id.* at 174 (quoting *Carpenter v. Shaw*, 280 U.S. 363 (1930)).

¹⁹ *Id.* at 174-75.

²⁰ *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980).

the tribes were enjoying a competitive advantage.²¹ While reaffirming notions of sovereignty found in the preceding two cases, the Court distinguished this case from other cases involving similar issues, by discussing only the validity of the state's ability to impose the cigarette tax on non-tribal citizens.²² The Court quickly established the fact that the state had no authority to tax tribal members buying cigarettes on the reservation.²³ Thus, the main issue was whether the state could impose its own tax on its own citizens who went into the reservation to purchase cigarettes at a lower rate.

The Court found that taxes imposed by states on nonmembers do not frustrate federal interests because the federal courts could immediately strike down any taxes which they felt interfered with the trust relationship.²⁴ Next, the Court found that the state tax would indeed destroy the tribal competitive advantage, but at the same time, the Court did not think that any of the federal statutes passed for the benefit of Indians (Indian Reorganization Act, Indian Financing Act, etc.) granted tribes this advantage.²⁵ Next, the Court found that the state tax did not infringe on tribal self-government, because the tax only applied to sales to nonmembers.²⁶ The Court concluded that the cigarette tax did not "burden commerce" and that each sovereign government (the Colville Tribe and the state of Washington) was free to impose its own taxes without interfering with the other.²⁷

Colville represented a significant departure from the Court's previous jurisprudence on state taxation in Indian Country, as the Court began to use its own balancing test to favor state interests over those of the federal government and tribes. Nowhere in the Court's decision was there any discussion of the underlying fundamental principles of tribal sovereignty, as discussed in *Worcester*, which had informed so much of the basic rationale of the *Warren Trading Post* and *McClanahan* cases.²⁸ Instead, the Court focused primarily on the distinctions between tribal members and nonmembers or between trust lands and non-trust lands, as well as continually returning to the issue of the competitive advantage enjoyed by the tribal retailers.²⁹ While agreeing that tribes did have some legitimate reasons for such a taxation scheme, the Court ultimately held that "the State's interest in taxing these purchasers outweighs any tribal interest that may exist in preventing the State from imposing its taxes."³⁰ A strongly written concurrence in part, and dissent in part, by then-Justice Rehnquist, gave an indication of the court's coming direction on the issues of sovereignty and taxation: "If Indians are to function as quasi co-sovereigns with the

²¹ *Id.*

²² *Id.* at 136.

²³ *Id.*

²⁴ *Id.* at 154 (citing *Oliphant v. Suquamish Tribe*, 435 U.S. 191 at 208-10 (1978); *United States v. Wheeler*, 435 U.S. 313 at 326 (1978)).

²⁵ *Id.* at 155-56.

²⁴ *See id.* at 156-57.

²⁷ *Id.* at 157-59.

²⁸ A noble dissent in part and concurrence in part from Justices Brennan and Marshall did attempt to invalidate the state tax based primarily on notions of tribal sovereignty and federal domination of the subject area. *Id.* at 164-73.

²⁹ *Id.* at *passim*.

³⁰ *Id.* at 161.

States, they like the States, must adjust to the economic realities of that status as every other sovereign competing for tax revenues, absent express intervention by Congress.”³¹

Justice Rehnquist would eventually have his say twenty-one years later, when, as Chief Justice, he wrote the unanimous opinion for the Court in *Atkinson v. Shirley*.³² While the facts of that case are not as applicable to the current controversy (it dealt with tribal taxation of a non-Indian owner of a hotel located within the boundaries of the Navajo reservation), the case did represent a significant setback for tribes as sovereigns and for the notion of taxation as a means of reinforcing that sovereignty. Relying on the arguably-inconsistent *Montana* test,³³ which states that tribes have no civil jurisdiction over non-Indians for activities taking place within non-Indian land except in situations where a consensual relationship or threat to tribal political integrity exists, the Court held that the modern notion of inherent sovereignty disallowed tribal jurisdiction over nonmembers, even if they were located within the reservation.³⁴ This was primarily based upon the status of the land in question (held in fee by the tribal non-member, and thus outside of the tribe’s trust land base), not upon whether creation of such a jurisdictional black hole would affect the tribe’s sovereignty.³⁵

This new direction from the Supreme Court, hinted at in Rehnquist’s dissent twenty five years prior in *Colville*, and ripened into a holding by way of *Atkinson*, further restricted notions of taxation as a means of supporting and encouraging tribal sovereignty. While purporting to treat tribes the same as states for the purposes of economic competition, the Court severely restricted their sovereign status by failing to equate it with that of a state (and arguably, by elevating the state in deeming state interests primary). Instead of giving tribes some leeway to develop a jurisdictional base through the implementation of one of the most basic functions of sovereignty (taxation and revenue generation), the Court instead poked large holes into the small amount of sovereignty tribes thought they had reserved, first by way of treaties, then by way of the precedents in *Warren Trading Post* and *Atkinson*. With the backing, or at least the implicit philosophical encouragement, of the highest court in the land, citizens and organizations have been challenging tribal sovereignty on several grounds in recent years. Because sovereign immunity prevents these plaintiffs from directly suing the tribes themselves, opponents of tribal sovereignty have instead directed their lawsuits at other targets, such as states.

³¹ *Id.* at 186.

³² *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 647 (2001).

³³ A discussion of the validity of the *Montana* test (derived from *Montana v. United States*, 450 U.S. 544 (1981)) is well beyond the subject or scope of this paper. Suffice it to say, for purposes of this paper, that the cases cited for its two famous “exceptions” do not necessarily support the propositions for which they are employed by the Court. The continued use of this test, under such circumstances, is a good example of one of the major problems within the realm of Federal Indian law: important and binding precedent is often casually discarded without reason or explanation, and new precedent is put in its place without much hindsight or policy-based justification.

³⁴ *Atkinson*, *supra* note 31, at 647.

³⁵ *Id.* at 654.

The Washington Gas Tax Agreements

Authority for the gas tax agreements between the state and the tribes is found in the Revised Code of Washington (RCW) and was most recently updated in 2007. Most of the current controversy comes from section 3 of the statute:

(3) If a new agreement is negotiated, the agreement must:

(a) Require that the tribe or the tribal retailer acquire all motor vehicle fuel only from persons or companies operating lawfully in accordance with this chapter as a motor vehicle fuel distributor, supplier, importer, or blender, or from a tribal distributor, supplier, importer, or blender lawfully doing business according to all applicable laws;

(b) Provide that the tribe will expend fuel tax proceeds or equivalent amounts on: Planning, construction, and maintenance of roads, bridges, and boat ramps; transit services and facilities; transportation planning; police services; and other highway-related purposes;

(c) Include provisions for audits or other means of ensuring compliance to certify the number of gallons of motor vehicle fuel purchased by the tribe for resale at tribal retail stations, and the use of fuel tax proceeds or their equivalent for the purposes identified in (b) of this subsection. Compliance reports must be delivered to the director of the department of licensing.³⁶

The State of Washington currently has gas tax arrangements, pursuant to RCW 82.36.450, with 22 of the 29 federally-recognized tribes in the state.³⁷

Under the terms of the agreements, the tribe collects the full amount of the State's current gas tax and submits the money to the State.³⁸ Of that revenue, 75 percent is then redistributed back to the tribe, which is legally obligated to use it for transportation purposes under section 3(b) of the RCW.³⁹ The state keeps the remaining 25 percent of the tax as its own revenue.⁴⁰ Tribes are then required to submit

³⁶ RCW 82.36.450. The legislative history behind this enactment contains an interesting note on legislative recognition and belief, which is applicable here:

"The legislature recognizes that certain Indian tribes located on reservations within this state dispute the authority of the state to impose a tax upon the tribe, or upon tribal members, based upon the distribution, sale, or other transfer of motor vehicle and other fuels to the tribe or its members when that distribution, sale, or other transfer takes place upon that tribe's reservation. While the legislature believes it has the authority to impose state motor vehicle and other fuel taxes under such circumstances, *it also recognizes that all of the state citizens may benefit from resolution of these disputes between the respective governments.*" [1995 c 320 § 1] [emphasis added].

³⁷ Wash. State Dep't of Licensing, *2010 Tribal Fuel Tax Agreement Report*, updated February 2011, <http://www.wsdot.wa.gov/NR/rdonlyres/97C37EB3-7DBC-4992-B790-CBAC914D7DDF/0/Apr192011Updated2010FuelTaxAgreementReport.pdf>.

³⁸ Scott Gutierrez, *Republicans want to revisit tribal gas tax refunds*, SEATTLEPI.COM (Mar. 16, 2011), <http://www.seattlepi.com/local/transportation/article/Republicans-want-to-revisit-tribal-gas-tax-refunds-1230552.php>.

³⁹ *Id.*

⁴⁰ *Id.*

annual reports to the state Department of Licensing (DOL) to show that they are complying with the regulation that they only using those funds for transportation-related purposes.⁴¹ However, these audit reports are exempt from public disclosure requirements, and the tribe is allowed to choose who can perform the audit.⁴² These agreements have generated significant funds for Washington tribes. According to the DOL, tribes received \$31.72 million from November 1, 2009, to December 31, 2010, under the gas tax agreements.⁴³

The Current Controversy and the Pending Case before the Washington Supreme Court

As can be expected in nearly every situation in which a tribe appears to be receiving a benefit that is not concurrently provided to all citizens, non-tribal entities have complained that tribes were getting special treatment. The issue was first raised by the Automotive United Trades Organization of Washington (AUTO), which bills itself as a “nonprofit trade association of motor fuel retailers and suppliers doing business in Washington state.”⁴⁴ AUTO, seeing the millions of dollars in reimbursements to tribes as lost potential revenue, contends that the money received by Washington tribes as a result of these gas tax agreements is being used for purposes other than what is strictly allowed in the statute.⁴⁵ Specifically, AUTO claims that tribes are using the money from the state reimbursements to subsidize fuel costs and permit tribal gas retailers to sell gas at a lower price than their non-tribal competitors.⁴⁶ In its brief, AUTO alleges constitutional violations and seeks an injunction on state refund payments to tribes under the gas tax agreements.⁴⁷

In its reply, the State immediately calls the challenge to the gas tax agreements an issue of sovereign immunity: “The effect of sovereign immunity, as with judicial or any other immunity, on a particular case may seem harsh, but *the recognition of immunities is a reflection of well established policy decisions*” (emphasis added).⁴⁸ In other words, while AUTO might have a legitimate complaint that its members are being treated unfairly, its recourse should be at the ballot box and not in the courts. “Implicitly recognizing the bar imposed by tribal sovereign immunity, the Plaintiff has sued only one of the parties to the agreement it seeks to eviscerate . . . [t]he reason Plaintiff has not included the Tribes in this suit is simple: the Tribes are immune from suit as sovereign governments.”⁴⁹

⁴¹ *Id.*

⁴² *Id.*

⁴³ Wash. State Dep’t of Licensing, *supra* note 36.

⁴⁴ AUTOMOTIVE UNITED TRADES ORGANIZATION HOME PAGE, <http://www.autowa.org/>.

⁴⁵ Brief of Appellant at 8-9, *Auto. United Trades Org. v. State*, No. 85661-3 (filed Apr. 15, 2011).

⁴⁶ *Id.*

⁴⁷ *Id.* at 1

⁴⁸ Memorandum in Support of State Defendants’ Motion to Dismiss First Amended Complaint For Failure to Join Indispensable Parties at 2, *Auto. United Trades Org. v. State*, No. 10-2-00599-1 (filed Nov. 12, 2010).

⁴⁹ Brief of Respondent at 3, *Auto. United Trades Org. v. State*, No. 85661-3 (filed June 24, 2011) (quoting *Okla. Tax Comm’n v. Citizen Band Potawatomi Tribe*, 498 U.S. 505, 511 (1991)).

At trial, the case turned largely on procedural issues, with the trial court holding that tribes are necessary parties to any litigation which would deprive them of their contractually-expected fuel payments.⁵⁰ This decision was based on CR 19, which requires the joinder of necessary parties to any case that could affect their interests.⁵¹ Tribal sovereign immunity, which was never waived, prevented AUTO from joining the tribes as a defendant. When AUTO tried to amend its complaint to include the tribes, that motion was denied.⁵² In his motion to dismiss the case for lack of a necessary party, Grays County Superior Court Judge Gordon Godfrey lamented that the procedural issues raised by CR 19 did not allow him to decide the case on its merits: “I do find one thing repugnant in the whole situation, that in our system of government . . . there is no judicial remedy [for those wishing to challenge the legitimacy of such agreements]. I do believe that . . . this is an issue that needs to be addressed by our Supreme Court.”⁵³

On September 7, 2011, the Washington State Supreme Court agreed with Judge Godfrey, accepting review of the case.⁵⁴ The Supreme Court will ultimately decide whether sovereign immunity prevents the joinder of a tribe as a necessary party to litigation challenging government-to-government negotiations between two sovereign entities. The Supreme Court will need to overturn significant precedent if it holds that the tribes should be joined to the litigation, because two recent appellate decisions have upheld CR 19’s dismissal requirements in cases similar to the current case (see below). Both cases involved challenges to state/tribal agreements by individuals who were not parties to the negotiations and who were unhappy with how those negotiations turned out. But in both cases, the tribes were deemed necessary and indispensable parties, requiring that both cases be dismissed.

In *Matheson v. Gregoire*, a Puyallup tribal member brought suit against the tribe, seeking the nullification of taxation agreements between the tribe and the State regarding cigarettes.⁵⁵ A state statute, similar to those in the *AUTO* case, governed those agreements; the revenue-sharing agreements were also similar, with the State agreeing to refund 70 percent of revenue from cigarette taxes.⁵⁶ The tribe is then obligated to peg the tribal-imposed tax at the same level as that of the state, and to only buy cigarettes from state-licensed wholesalers.⁵⁷ The appellate court dismissed the

⁵⁰ *Id.* at 8.

⁵¹ Joinder of Persons Needed for Just Adjudication, WASH. CT. R. 19.

⁵² Order Denying Motion, Judge Gordon Godfrey, *Automotive United Trades Organization v. Washington; Christine Gregoire*. No. 10-2-00599-1, Grays County Superior Court, Feb. 15, 2011.

⁵³ Erik Smith, *Republicans Fume About Indian Gas-Tax Deal*, WASHINGTON STATE WIRE, Mar. 20, 2011, http://www.washingtonstatewire.com/home/8105-republicans_on_the_warpath_about_indian_gas_tax_money.htm.

⁵⁴ Letter Accepting Review of Case, *Auto. United Trades Org. v. State*, No. 85661-3 (filed Sept. 7, 2011).

⁵⁵ *Matheson v. Gregoire*, 139 Wn. App. 624, 627-28 (2007).

⁵⁶ *Id.*

⁵⁷ *Id.*

case, ultimately holding that “the tribal interest in immunity overcomes the lack of an alternative remedy or forum for plaintiffs.”⁵⁸

Two years later, a similar case, *Mudarri v. State*, involved a challenge, this time from a non-tribal business competitor, to agreements signed between the Puyallup tribe and the State, permitting the tribe to operate electronic scratch ticket games.⁵⁹ This case featured a nearly identical constitutional attack on the state-tribal agreements to the *AUTO* case. Again, the court dismissed, primarily on CR 19 grounds, but also because the Court found the tribe to be a necessary party to any action seeking to invalidate a contract to which the tribe is a party.⁶⁰ The Court took the additional step of holding that, because of sovereign immunity, the plaintiff’s claims could not be adequately adjudicated, and that therefore the entire matter should be dismissed.⁶¹

Matheson and *Mudarri* involved lawsuits that had the ultimate goal of effectively nullifying state-tribal agreements. But in both of those cases, the plaintiffs did not join the necessary parties (the tribes themselves). Under CR 19(a), whether a party is necessary depends on whether the absent party has a legally protected interest relating to the action.⁶² Such an absent party is necessary if the matter to be decided in its absence would “(A) as a practical matter impair or impede [its] ability to protect that interest, or (B) leave any of the persons already parties subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations be reason of [its] claimed interest.”⁶³

The 9th Circuit supported reasoning similar to the holdings in *Matheson* and *Mudarri* through its decision in *Wilbur v. Locke*.⁶⁴ That case involved a cigarette tax agreement between the Swinomish tribe and the State that, like the agreements in the present case, provided the tribe with tax money that the tribe agreed to spend for “essential government purposes.”⁶⁵ Again, the plaintiffs (here, members of the tribe itself, who believed that *any* agreement on taxation between the state and the tribe was illegal under the Commerce Clause of the United States Constitution) did not join the tribe as a party to the suit. At trial in federal court, the State moved to dismiss pursuant to FRCP 19.⁶⁶ This motion was denied, because the district court held that the tribe was not a necessary party.⁶⁷ But the 9th Circuit reversed the district court, and dismissed the action, primarily on the basis that the tribe was a necessary and indispensable party.⁶⁸

⁵⁸ *Id.* at 636.

⁵⁹ *Mudarri v. State*, 147 Wn. App. 590, 594 (2008).

⁶⁰ *Id.* at 604.

⁶¹ *Id.* at 605.

⁶² WASH. CT. R. 19, *supra* note 50.

⁶³ *Id.*

⁶⁴ *Wilbur v. Locke*, 423 F.3d 1101, 1113-14 (9th Cir. 2005).

⁶⁵ *Id.* at 1104-05.

⁶⁶ Analogous to WASH. CT. R. 19, *supra* note 50.

⁶⁷ *Wilbur*, *supra* note 63, at 1105.

⁶⁸ *Id.* at 1114.

The Court held that “because the Tribe has an interest in retaining the rights granted by the tax agreement, the requirement of a ‘legally protected’ interest is satisfied.”⁶⁹

The *Matheson/Mударри/Wilbur* line of cases is practically indistinguishable from the *AUTO* case, both in terms of facts and in terms of relevant law. The trial court was well within its discretion dismissing *AUTO*’s suit, regardless of Judge Godfrey’s consternation in doing so. However, while this issue seems well settled in Washington, it is less settled elsewhere. Considering the United States Supreme Court’s recent moves to limit nearly all forms of tribal sovereignty to their bare minimum, a jurisdictional split between state or federal courts could easily lead to a situation in which the Supreme Court agrees to take another look at the whole state/tribal tax-sharing arena.

Very recently, in *Salton Sea Venture, Inc. v. Ramsey*, a federal district court had the opportunity to review a similar case from southern California.⁷⁰ In *Salton Sea*, the owners of a fuel station/convenience store brought suit against a tribally-operated gas station, alleging, among several other issues, that the tribe was selling gas at illegally low rates, which had a negative effect on the plaintiff’s business.⁷¹ In an opinion that continually relied on and referred to tribal sovereignty and immunity, Chief Judge Irma Gonzalez denied the plaintiffs’ motion for a preliminary injunction primarily on FRCP 19 grounds.⁷² Judge Gonzalez found that the first three factors of FRCP 19 weighed in favor of dismissal,⁷³ and that the only factor weighing in favor of the plaintiff was the lack of an alternative forum.⁷⁴ Relying on 9th Circuit precedent, Judge Gonzalez said that “tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs.”⁷⁵

Conversely, in *StoreVisions v. Omaha Tribe of Neb.*, the Nebraska State Supreme Court recently issued an opinion limiting the effect, or at least the incidence, of sovereign immunity.⁷⁶ Although that case involved more of a contractual issue, and turned largely on issues of waiver of sovereign immunity (discussed in the *AUTO* and other Washington cases, *supra*, but not the key issue in those cases), the Nebraska

⁶⁹ *Id.* at 1112.

⁷⁰ *Salton Sea Venture, Inc. v. Ramsey*, No. 11cv1968-IEG (WMG), 2011 WL 4945072 (S.D. Cal. Oct. 18, 2011) *preliminary motion for injunction denied*.

⁷¹ *Id.* at 1.

⁷² *Id.* at *passim*.

⁷³ *Id.* at 8-9. “Plaintiff’s action seeks to place restrictions on the sale of fuel at the Red Earth Travel Center. Therefore, the Torres-Martinez tribe and the Selnak-is Corp. would suffer severe prejudice by not being parties to an action that challenges their ability to sell fuel at their travel center and raise revenue to support the tribal economy. In addition, because the sale of fuel at the Red Earth Travel Center is the focus of Plaintiff’s action, no partial remedy can be fashioned that would not implicate those interests or would eliminate the prejudice to those two non-parties. Further, adequate relief could not be awarded without including the Torres-Martinez tribe and the Selnak-is Corp. as part of the injunction because they own and control the travel center at issue. Accordingly, the first three factors likely all favor dismissal of the action.” *Id.* at 6.

⁷⁴ *Id.* at 9.

⁷⁵ *Id.* at 6, quoting *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1022 (9th Cir. 2002).

⁷⁶ *StoreVisions v. Omaha Tribe of Neb.*, 281 Neb. 238, 240 (2011), *cert. denied* 132 S.Ct. 1016 (2012).

Supreme Court's refusal to apply accepted Supreme Court precedent⁷⁷ led the Omaha Tribe to file a recent petition for certiorari to the United States Supreme Court, alleging that the "Nebraska Supreme Court erred in allowing StoreVisions to rely on the representations of two tribal council members, attribute those actions to being those of the tribe, and conclude the tribe had waived sovereign immunity."⁷⁸ Although the Supreme Court declined to grant certiorari in that case,⁷⁹ it is certainly an issue upon which advocates of tribal sovereignty and self-determination should remain focused.

Analysis and Conclusion

The United States has enjoyed the benefits and privileges—as well as the responsibilities—of self-determination for over two centuries. Roughly forty years ago, the nation embarked upon a policy designed to finally allow Indian tribes to experience many of the benefits of self-determination. President Nixon's call for the nation to finally live up to its promises was inspired at the time, and Indian tribes today have arguably never been better off. Borrowing a familiar form of nomenclature from Hollywood, the self-determination era might well be characterized as Promise II. But are we, as a nation, truly living up to Promise II?

General federal policy toward Indian self-determination should be reflected at the state level. Gas tax revenues support tribal sovereignty by allowing tribes to assume many of the responsibilities and obligations associated with sovereignty. Tribes receive the revenue from taxes imposed on gasoline sold on the reservation, and, like the state of Washington, tribes are constitutionally obligated to spend those revenues on transportation-related projects. Gas tax agreements generate significant revenue for tribes and help them to build and maintain critical infrastructure on their reservations. A cursory glance at the most recent report from the Washington Department of Licensing reveals some of the extensive transportation projects embarked on in just the past two years, including massive improvements to roads co-managed by the State and the tribes, mass transit/infrastructure development on several reservations, police services, and parking expansions.⁸⁰

Although AUTO complains that the revenues from the gas tax agreements have been improperly used to give the tribes an illegal competitive advantage in the highly regulated fuel sales market, AUTO does not include any substantive evidence of this practice in its complaint. Instead, AUTO includes among its exhibits such expenditures as a boat launch, hiking trail, and pedestrian tunnel, somehow claiming that these expenditures are unrelated to transportation.⁸¹ AUTO fails to include such important

⁷⁷ See *id.* at 245 (referring to *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("a waiver of sovereign immunity cannot be implied but must be unequivocally expressed"); and see *also* *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 756 (1998) ("Tribal immunity is a matter of federal law and is not subject to diminution by the States.")).

⁷⁸ Petitioner's Brief for Certiorari at 13, *StoreVisions v. Omaha Tribe of Neb.*, No. 11-508 (*cert. denied* Jan 09, 2012).

⁷⁹ *Omaha Tribe of Neb. v. StoreVisions*, 132 S.Ct. 1016 (2012) (mem).

⁸⁰ Wash. State Dep't of Licensing, *supra* note 36, at 5-6.

⁸¹ Brief of Appellant, *supra* note 44, at 9.

considerations as the fact that the tribes are subject to a regulated auditing and reporting requirement, which was made more stringent as a result of the 2007 amendments to RCW 82.36.450. Also, one of the most visible reasons for the controversy—the apparent difference in gas prices between tribal and non-tribal retailers as shown in a study by the Washington Policy Center⁸²—does not in itself prove that gas tax revenues are being used to subsidize prices. As the tribes argue, their prices are generally the same as other low-cost retailers such as Costco and Safeway.⁸³ Furthermore, tribes could be reducing costs through other mechanisms, such as charging lower rent to retailers, engaging loyal customers, lowering overhead costs, and providing fewer ancillary services. While the pricing discrepancy certainly engages the public on the issue, nobody is asking why AUTO is not suing Costco.

During a recession, everyone tends to focus on the cost issue, but it is also important to step back and take a look at the larger policy issue. Gas tax revenues, like revenues from Indian gaming and the sale of cigarettes, while obviously not the ideal methods of raising revenue, still help to fill the massive void created by over 200 years of broken treaty promises and failed federal policies toward Indians and Indian tribes. For example, the Swinomish tribe relinquished all claims to its traditional territory via treaty, and in exchange it was promised significant support from the United States.⁸⁴ Over the next 150+ years, the Swinomish struggled to provide crucial social resources and basic services to its members, as the support promised in the treaty never materialized. Today, the tribe owns and operates a very large Chevron station which has been highly successful.⁸⁵ In 2009 and 2010, the tribe used the proceeds from its gas station for the following transportation improvements:

WSDOT Roundabout Extension Project – The purpose of this \$2 million project is to construct a new roadway extension south of SR20 from an existing roundabout and interchange road that serves several economic enterprises located in the area. Activities included preliminary engineering, design, NEPA compliance, and federal permitting. Tribal Staff continue to work with federal, state, and county agencies on this important project.

Swinomish Village Road Improvements and Reconstruction – Work continued on various road improvement projects adjacent to tribal housing. Specifically, the Tribe supported improvements to correct deficiencies in the road-related storm-water drainage system in the Swinomish Village. Activities included preliminary engineering, design, NEPA, and right of way. Additionally, plans were completed for the reconstruction of Sahalie Drive, a residential roadway.

⁸² Amicus Curiae Memorandum of the Washington Policy Center in Support of Petition for Review at 4-5, *Auto. United Trades Org. v. State*, No. 85661-3 (filed Aug. 4, 2011).

⁸³ Keith Eldridge, *Study: Washington Tribes Taking Unfair Advantage of Gas Tax Rebate*, Oct. 6, 2011, 5:01 PM PST, <http://www.komonews.com/news/local/131299294.html?tab=video&c=y>.

⁸⁴ Treaty of Point Elliott, Jan. 22, 1855, http://www.historylink.org/index.cfm?DisplayPage=output.cfm&File_Id=2629.

⁸⁵ SWINOMISH TRIBAL COMMUNITY HOME PAGE, *see* Enterprises, Chevron, <http://www.swinomish.org/Enterprises/Chevron.aspx>.

Tribal Road Maintenance Projects - Work on these road maintenance projects continues with staff meeting with engineers on preliminary design and permitting for surface repair of Squi Qui Lane, and for surface overlays of selected roads within the Swinomish Village. Activities include mowing, brush cutting, ditch maintenance, patch repair, crack sealing, street sweeping, equipment maintenance, and signage.

Transportation Planning and Administration – Additional transportation planning work and administrative expenses related to future road projects.

Police Services - Including tribal and non-tribal local government police agencies that provide road patrol services.⁸⁶

Reading this report, it is difficult to find substance in AUTO's complaint.

However, even just a cursory glance through media commentary on the AUTO case reveals that the real issue is a classic misunderstanding of the fact that tribes are sovereign entities. For example, a recent KOMO "Problem Solvers" Investigation "revealed" nothing about the legal mechanisms designed to give tribes a chance to act as sovereigns. On the other hand, the report immediately cited the nebulous Washington Policy Center study (see above) and contained several quotes on the unfairness of the arrangement. "We're working on the skinniest margin we can, and they don't have to pay state tax. So that's their luck," said Mike Leake, general manager of a non-tribal gas station. "They use it to their advantage is what they do," said Gary Carpenter, a customer at a non-tribal gas station. "It's not fair."⁸⁷ A considerable number of other local stations and newspapers have filed similar stories and opinions, and none have discussed tribal sovereignty, instead preferring to focus on unfairness,⁸⁸ excessive state overreach,⁸⁹ and transparency.⁹⁰ It is not surprising, therefore, that this attitude has spread throughout the general public, who have already been conditioned by the media to be suspicious of anything the state of Washington does benefitting tribes.

Not surprisingly, the tribes are facing a well-funded and extremely resourceful adversary in the AUTO case: the Washington business establishment. A list of amicus briefs submitted on behalf of AUTO reads like a who's-who of big business in the state.⁹¹ Considering the amount of political influence these groups must have, it seems

⁸⁶ Wash. State Dep't of Licensing, *supra* note 36, at 10-11.

⁸⁷ ELDRIDGE, *supra* note 82.

⁸⁸ Erik Smith, *State Will Give Tribes \$427 Million in Gas Tax Money Over 10 Years, While Transportation Budget Runs a Billion Short*, WASHINGTON STATE WIRE, Apr. 4, 2011, http://www.washingtonstatewire.com/home/8565-state_will_give_tribes_427_million_in_gas_tax_money_over_10_years_while_transportation_budget_runs_a_billion_short.htm.

⁸⁹ *Id.*

⁹⁰ GUTIERREZ, *supra* note 37.

⁹¹ See amicus briefs submitted on behalf of AUTO by Associated General Contractors of Washington, Association of Washington Business, National Federation of Independent Business, Washington Oil Marketers' Association, and Washington Policy Center. No amicus briefs have been submitted on behalf of the State. Wash. Courts Home page,

that they would have the resources to pursue a resolution to this issue through the proper forum: the ballot box. And, it seems, they have done so, as House Bill 2013 was introduced earlier in 2011,⁹² purporting to amend the RCW to require that the gas tax agreements conform to Washington constitutional standards requiring the use of highway revenue.⁹³ However, a detailed comparison of HB 2013 and Article 40 show no substantive difference in how sovereigns must spend highway revenue. Instead, HB 2013 differs from Article 40 by focusing on additional transparency, by forcing the state to choose an auditor in conjunction with the tribe (currently, the tribe chooses the auditor) and by removing the clause which currently protects the tribe's business records as personal information. Even the bill's own sponsor concedes that it will not pass: "I am not delusional," State Rep. Mike Armstrong, R-Wenatchee, said. "I know this bill isn't going to go anywhere. I introduced it just to have a discussion. And it sure has caused some discussion to take place."⁹⁴

Hopefully, as this discussion continues to take place, members of the Washington legislature will remember the "Promise II" President Nixon made to Indian people over forty years ago. The Supreme Court, while initially moving to uphold this promise through its strong affirmations of sovereignty, has changed direction in recent years. While Washington law appears solid on sovereign immunity through the consistent use of CR 19 by its courts, other jurisdictions are not so settled, and it is difficult to say how the United States Supreme Court would decide should the issue reach its docket again. Still, the underlying proposition embodied in Washington law is a strong one: disaffected citizens cannot sue sovereign entities engaged in government-to-government negotiations, just because they do not like the outcome of those negotiations. AUTO and its amicus supporters should direct their efforts and considerable resources toward the proper forum for an adjudication of their dispute: the legislature and the ballot box.

http://www.courts.wa.gov/appellate_trial_courts/coaBriefs/index.cfm?fa=coabriefs.briefsByTitle&courtId=A08&firstLetter=all, scroll to "Automotive United Trades Organization v. State of Washington et al."

⁹² H.B. 2013, 62nd Leg., Reg. Sess. (Wash. 2011), *available at*

<http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/House%20Bills/2013.pdf>.

⁹³ See WASH. CONST. art. II, § 40.

⁹⁴ SMITH, *Republicans Fume*, *supra* note 52.