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When Canons Go to War in Indian Country, Guess Who Wins? *Barrett v. United States*: Tax Canons and Canons of Construction in the Federal Taxation of American Indians

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SPECIAL FEATURES

WHEN CANONS GO TO WAR IN INDIAN COUNTRY, GUESS WHO WINS? *BARRETT V. UNITED STATES*: TAX CANONS AND CANONS OF CONSTRUCTION IN THE FEDERAL TAXATION OF AMERICAN INDIANS

*John Lentz**

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I. Introduction

The federal income taxation of American Indians is not a sexy topic. It is convoluted and technically elusive because it involves the interrelation of

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sovereign bodies in complex tax matters.¹ As a result of such complexity, most legal scholars completely avoid the subject.² This abstention is also due in part to the relatively rare occurrence when Indian law and the Internal Revenue Code (IRC) conflict.³

The intersection of federal income taxation and Indian law is of notable importance because “[t]he oxymoron of ‘limited sovereignty,’ and the environment of uncertainty is nowhere more apparent than in the area of taxation of Indian tribes.”⁴ The federal government often decides to tax tribes or tribal members in ways not contemplated at the time treaties were made or business deals conceived.⁵ The tribe suffers an imposition on its inherent sovereignty when its members are taxed in transactions that were intended by the tribe and Congress to be exempt from taxation.⁶ Such unintended taxation is detrimental to tribes because, as often noted, the “power to tax” is the “power to destroy.”⁷

One recent intersection of federal tax law and Indian law is found in the saga of *Barrett v. United States*.⁸ In *Barrett*, a tribal council chairman received a salary from trust fund earnings held by the Citizen Potawatomi Nation (the Nation) with the intent that the salary would remain exempt from

1. Scott A. Taylor, *An Introduction and Overview of Taxation and Indian Gaming*, 29 ARIZ. ST. L.J. 251, 251 (1997) (“Taxation in Indian Country is necessarily complex because it blends together the legal complexity that arises when three sovereigns are involved in a technically confusing area of tax law.”).

2. Erik M. Jensen, *American Indian Law Meets the Internal Revenue Code: Warbus v. Commissioner*, 74 N.D. L. REV. 691, 691 (1998) (“The relationship of the Internal Revenue Code to American Indians is not a hot topic in the academy for obvious reasons. Most Indian law scholars, like most scholars generally, avoid federal tax issues like the plague, and very few tax scholars dip into the American Indian law literature.”).

3. John Burgess, Note, *When Indian Law and Tax Law Collide: How Pull-Tab Games Got to the Supreme Court*, 49 CLEV. ST. L. REV. 325, 326 (2001).

4. George Jackson III, *Chickasaw Nation v. United States and the Potential Demise of the Indian Canon of Construction*, 27 AM. INDIAN L. REV. 399, 404 (2002-2003).

5. See Taylor, *supra* note 1, at 263 (“The treaties negotiated with Indians until the end of the treaty-making period did not contain any reference to federal taxation. Such references were not necessary because during this period Congress did not attempt to tax activity within Indian Country and the tribes probably believed that Congress would never tax member activity taking place within Indian Country.”).

6. Indeed, the subject of this article is a prime example of such an imposition on inherent sovereignty. See *infra* note 113 and accompanying text.

7. Attributed primarily to Justice Marshall in *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 327 (1819) (“An unlimited power to tax involves, necessarily, a power to destroy; because there is a limit beyond which no institution and no property can bear taxation.”).

8. 561 F.3d 1140 (10th Cir. 2009).

federal income taxation.⁹ This exemption was contemplated because of certain agreements with the Secretary of the Interior (Secretary) and certain statutes passed by Congress.¹⁰ The Internal Revenue Service (IRS) did not agree, assessed a tax deficiency, and ultimately triumphed.¹¹

This article examines the interrelation of federal income tax and Indian law as illustrated in *Barrett v. United States*. After analyzing both the district court's and the appellate court's handling of *Barrett*, this article suggests that three important lessons can be gleaned: (1) the Indian canons of construction, at least in the federal-tax arena, are dead; (2) tax canons always win if pitted against the canons of construction historically employed by courts to benefit American Indians; and (3) courts are quite hesitant to allow American Indians to claim tax exemptions, even where there are valid arguments that Congress intended to exempt certain income.

II. Background

Any discussion of either Indian law or tax law requires some initial foundation before more complicated matters are addressed. The following is a humble attempt to summarize some concepts necessary to understand the subject of this article.

A. Crash Course in Federal Indian Tax Law

The Sixteenth Amendment gives Congress the "power to lay and collect taxes on incomes, from whatever source derived."¹² Income, in turn, can be defined as "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion,"¹³ or "the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and end of the period in question."¹⁴ The general rule under the IRC is that "all income from whatever source derived" will be considered taxable.¹⁵ Included in the definition of gross income is compensation for services.¹⁶

9. *Id.* at 1144.

10. *Id.* at 1142-44.

11. *Id.* at 1144, 1149-50.

12. U.S. CONST. amend. XVI.

13. *Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955).

14. HENRY C. SIMONS, *PERSONAL INCOME TAXATION* 50 (1938) (commonly referred to as the "Haig-Simons definition of income").

15. I.R.C. § 61(a) (2006).

16. *Id.* § 61(a)(1).

Generally, the definition of “taxable income” includes the income of individual American Indians.¹⁷ There is, however, substantial case law and precedent holding that trust lands and income from those lands are exempt from federal taxation under the General Allotment Act of 1887.¹⁸ The general presumption of all income being taxable can be rebutted only by an express exemption pursuant to an Act of Congress or by the inclusion of an exemption in a treaty or agreement with a particular Indian tribe.¹⁹ The exemption, however, must be made in a clear and unambiguous manner.²⁰ Although

17. Compare *supra* notes 15-16 and accompanying text with *infra* note 24 and accompanying text. Because the assumption under the IRC is that “all income from whatever source derived” (including compensation for services) is taxable and there is no general exemption for individual American Indians in the IRC, the income of individual American Indians is presumed to be taxable.

18. Indian General Allotment Act of 1887, 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 381 (1994) (§§ 331-333 repealed 2000); see, e.g., *Squire v. Capoeman*, 351 U.S. 1, 10 (1956) (holding that the General Allotment Act of 1887 implicitly exempted income derived from trust lands covered by the Act from federal income taxation); *United States v. Daney*, 370 F.2d 791, 795 (10th Cir. 1966) (holding that federal statutes provided Choctaw land was tax-exempt and a lease bonus paid to a Choctaw Indian in exchange for an oil and gas lease was also tax-exempt because a tax on the bonus would be, in substance, a tax on the land); *Red Lake Band of Chippewa Indians v. United States*, 861 F. Supp. 841, 845-46 (D. Minn. 1994) (holding tribal member’s income was not exempt under the express exemption provided for pursuant to the General Allotment Act because logging was not conducted on allotted lands); *Dubray v. Comm’r*, T.C. Memo. 2004-278 (holding that, to the extent income was not from a buffalo restoration purpose on tribal lands, wages paid to taxpayer were “not exempt even if the income derived by the tribe from the land would be exempt in the hands of the tribe itself”); Rev. Rul. 59-349, 1959-2 C.B. 16 (holding that a statute exempting Indian land from federal taxation was equivalent to exempting income therefrom); I.R.S. Gen. Couns. Mem. 33,767 (Mar. 4, 1968) (analyzing the foregoing and applying those principles to Pueblo royalty income exempt pursuant to the Indian Appropriation Act of Mar. 3, 1905).

19. See, e.g., *Squire*, 351 U.S. at 6; *Estate of Poletti v. Comm’r*, 99 T.C. 554, 558 (1992), *aff’d*, 34 F.3d 742 (9th Cir. 1994); *Doxtator v. Comm’r*, T.C. Memo. 2005-113; Rev. Rul. 54-456, 1954-2 C.B. 49 (“[E]xemption from the payment of Federal income tax may not be implied, and that if exemption of Indians from the payment of such tax exists, it must derived [sic] plainly from the Federal tax statutes, or from treaties or agreements with the Indian Tribes concerned or some Act of Congress dealing with their affairs.”).

20. See, e.g., *Squire*, 351 U.S. at 6; *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 156 (1973); *Oklahoma Tax Comm’n v. United States*, 319 U.S. 598, 606-07 (1943); *Ramsey v. United States*, 302 F.3d 1074, 1079 (9th Cir. 2002); *Cook v. United States*, 86 F.3d 1095, 1097 (Fed. Cir. 1996); *Critzer v. United States*, 597 F.2d 708, 715 (Ct. Cl. 1979) (“Tax exemptions, even those affecting Indians, are not granted by implication. Rather, if Congress intends to exempt certain income, it must do so by a definite expression.”); *Estate of Peterson v. Comm’r*, 90 T.C. 249, 250 (1988).

individual Indians are members of a separate sovereign, they therefore are not exempt from federal income taxation unless a specific exemption applies.²¹

Though the reasons for so regulating are unclear, Indian tribes have always been considered exempt from federal income taxation. The IRS has “acknowledged this exemption and has reasoned that Congress did not intend to impose the income tax on tribes.”²² Individual tribal members, however, are another story.²³ Despite that there are specific exemptions contained in the IRC that pertain to American Indians, none exempt an individual Indian, on that basis alone, from federal income taxation.²⁴

There is a universal tax canon with respect to any exemption from income taxation: “[a]n exemption from Federal income taxation must be based upon

21. See Rev. Rul. 59-354, 1959-2 C.B. 24 (“There is no provision in the Federal income tax laws which would exempt Indians, as such, from income taxation. Accordingly, unless income of an Indian derived from a particular source is otherwise exempt, such income will be subject to tax in his hands the same as it would be in the hands of any other taxpayer.”); see also Rev. Rul. 67-284, 1967-2 C.B. 55 (“There is no provision in the Internal Revenue Code of 1954 which exempts an individual from the payment of Federal income tax solely on the ground that he is an Indian. Therefore, exemption of Indians from the payment of tax must derive plainly from treaties or agreements with the Indian tribes concerned, or some act of Congress dealing with their affairs.”); *Comm’r v. Walker*, 326 F.2d 261, 263 (9th Cir. 1964) (“A general Act of Congress applying to all persons includes Indians and their property interests. . . . Because the Internal Revenue Code is a general Act of Congress, it follows that Indians are subject to payment of federal income taxes, as are other citizens, unless an exemption from taxation can be found in the language of a Treaty or Act of Congress.”) (citing *Fed. Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960); *Squire*, 351 U.S. at 6). This latter view, that general Acts of Congress are assumed to apply to Indians is relatively new: “Prior to the Supreme Court’s 1931 decision in *Choteau v. Burnet*, 283 U.S. 691 (1931), general acts of Congress did not apply to Indians, ‘unless so expressed as to clearly manifest an intention to include them.’” *United States v. Brown*, 824 F. Supp. 124, 125 (S.D. Ohio 1993) (citing *Elk v. Wilkins*, 112 U.S. 94, 100 (1884)).

22. Taylor, *supra* note 1, at 252.

23. *Walker*, 326 F.2d at 264 (“If, under the law, the income of an organization is exempt from taxation, it does not follow that the income received by an employee as compensation for service rendered to such organization is also exempt from taxation.”).

24. Rev. Rul. 2006-20, 2006-1 C.B. 746 (“Although there are certain exemptions and other provisions throughout the Internal Revenue Code that apply to Native Americans, none of these exempt individual Native American taxpayers from federal tax.”). The only authority that comes close to a general exemption of American Indians with respect to federal tax is the general exemption of amounts paid to Indian tribal council members as compensation for their services with respect *only* to the definition of “‘wages’ for purposes of the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the collection of income tax at source on wages.” See, e.g., Rev. Rul. 59-354, 1959-2 C.B. 24.

express language in some statute or treaty.”²⁵ Part of the reason for such a canon is the overwhelming strength of congressional desire to tax “all income from whatever source derived” under section 61 of the IRC.²⁶ In apparent conflict with this universal tax canon are canons of construction applied to treaties and statutes involving American Indians.

*Worcester v. Georgia*²⁷ introduced the concept known as canons of construction as applied to the American Indian. There, Justice M’Lean authored a concurring opinion stating that “[t]he language used in treaties with the Indians should never be construed to their prejudice.”²⁸ Stated simply, “[a]greements between the Indians and the United States ‘are to be read as the Indians understood and would naturally understand them.’”²⁹ The primary reason, at least initially, for adopting certain canons of construction with respect to treaties is that the treaties, as originally negotiated, were the result of unequal bargaining power between Europeans accustomed to such matters and aboriginal peoples unfamiliar with European languages and customs.³⁰ Moreover, “[t]he canons of construction were primarily formulated and applied in an attempt to maintain consistency throughout the law, providing interpreters with a set of linguistic tools.”³¹ More modernly, the canons have

25. *Hill v. Comm’r*, 70 T.C.M. (CCH) 13 (1995) (citing *United States v. Anderson*, 625 F.2d 910, 913 (9th Cir. 1980); *Estate of Peterson v. Comm’r*, 90 T.C. 249, 250 (1988)); see also Rev. Rul. 58-320, 1958-1 C.B. 24 (“To be valid, exemptions to tax laws should be clearly expressed.”).

26. I.R.C. § 61 (2006).

27. 31 U.S. (6 Pet.) 515 (1832).

28. *Id.* at 582 (M’Lean, J., concurring).

29. *Cook v. United States*, 32 Fed. Cl. 170, 173-74 (1994) (quoting *Gila River Pima-Maricopa Indian Cmty. v. United States*, 467 F.2d 1351, 1355 (1972)).

30. Jensen, *supra* note 2, at 695-96 (“The canons [of construction] originated in treaty interpretation. Treaties with the Indian tribes have often been likened to contracts of adhesion, the powerful United States imposing its will on the relatively weak and powerless tribes. Everything, including the language used in the ‘negotiations’ and final document, favored the United States at the expense of the tribes. To implement those treaties in a fair and reasonable way, judges must try to understand what the affected tribal officials thought they were agreeing to, or would have thought if they had been able to imagine the nature of twentieth century controversies, regardless of the actual treaty language used.”).

31. Adam W. Kiracofe, Comment, *The Codified Canons of Statutory Construction: A Response and Proposal to Nicholas Rosenkranz’s Federal Rules of Statutory Interpretation*, 84 B.U. L. REV. 571, 574 (2004) (referencing generally WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION — STATUTES AND THE CREATION OF PUBLIC POLICY* 818 (3d ed. 2001)).

Scholars have divided the canons of construction into three distinct categories: textual canons, substantive canons, and reference canons. . . . Textual canons are

become a way of reassuring and protecting the fiduciary relationship between American Indians and the federal government.³² The canons apply equally to statutes enacted by Congress despite that their original purpose was to protect unfair bargaining in treaty-making.³³

There is a standard with respect to the interrelation of both tax and construction canons: there must be “a definite expression of exemption . . . in a statute” prior to further inquiry or application of any canon of construction.³⁴ This standard is somewhat muddled, however, by the notion that “tax exemptions secured to the Indians by agreement between them and the Government are to be liberally construed.”³⁵ The liberal interpretation of Indian treaties is limited by the “plain language” and “historical context” of the treaty.³⁶ In addition, “[t]ax exemptions can be granted only if the treaties

those canons whereby the interpreter, looking solely at the text of the statute, can apply a canon to resolve an ambiguity in the text. . . . Substantive canons are canons that provide interpretive guidance by taking into account the substance or subject area of the statute being interpreted. Under these doctrines, some statutes are construed strictly (i.e., criminal statutes, statutes in derogation of the common law, and statutes that infringe on a domestic or foreign state’s sovereign immunity), while others are construed liberally (i.e., civil rights statutes, securities statutes, and antitrust statutes). . . . Reference canons are the most all-encompassing of the canons. Reference canons refer the interpreter to interpretive guides that can be found outside of the text of the statute, “extrinsic aids” such as the previous common law solution to the problem the statute addresses, the legislative history of the statute, or agency interpretations of the statute.

Id. at 574-75 n.15.

32. David M. Blurton, *Canons of Construction, Stare Decisis and Dependent Indian Communities: A Test of Judicial Integrity*, 16 ALASKA L. REV. 37, 42 (1999) (“While the Indian law canons of construction initially were based on a policy of compensation for the unequal bargaining conditions under which Indian treaties were executed, the canons’ policy underpinnings evolved to rely increasingly upon the trust and fiduciary relationship the federal government has with Indians.”).

33. *Id.* (“When a question of statutory interpretation in connection with Indian rights reached the Court in 1918, the Court recognized as a general rule ‘that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians.’”) (quoting *Alaska Pac. Fisheries Co. v. United States*, 248 U.S. 78, 89 (1918)).

34. *See, e.g., Ramsey v. United States*, 302 F.3d 1074, 1076 (9th Cir. 2002); *id.* at 1079 (quoting *Karmun v. Comm’r*, 749 F.2d 567, 569 (9th Cir. 1984)).

35. *Cook v. United States*, 32 Fed. Cl. 170, 173 (1994) (quoting *Landman v. United States*, 71 F. Supp. 640, 647 (1947)); *see also Red Lake Band v. United States*, 17 Cl. Ct. 362, 381 (1989).

36. *Cook*, 32 Fed. Cl. at 174 (“Even though ‘legal ambiguities are resolved to the benefit of the Indians,’ courts cannot ignore plain language that, viewed in historical context and given

contain language that can be *reasonably* construed as conferring such exemptions.³³⁷

B. Some Recent and Relevant Precedent

Various courts have grappled with the conflict between tax and construction canons.³⁸ To the chagrin of many American Indians assessed deficiencies by the IRS, tax canons seem to triumph in the majority of cases.³⁹ Even where an exemption is contained in a parenthetical cross-reference to a portion of the IRC exempting certain income, courts are hesitant to uphold such an exemption if it is conceivable that the cross-reference was a drafting mistake, as in *Chickasaw Nation v. United States*.⁴⁰ In fact, the *Chickasaw Nation* case has been considered the “death-knell” of the canons of construction.⁴¹ One historical exception to this general trend, however, is evident in *Squire v. Capoeman*. There, the Court held that the General Allotment Act of 1887 *implicitly* exempted income derived from trust lands.⁴²

a ‘fair appraisal,’ clearly runs counter to a tribe’s later claims.”) (quoting *Or. Dep’t of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985)).

37. *Cook*, 32 Fed. Cl. at 174 (citing *Lazore v. Comm’r*, 11 F.3d 1180, 1185 (3d Cir. 1993); *Dillon v. United States*, 792 F.2d 849, 853 (9th Cir. 1986); *Holt v. Comm’r*, 364 F.2d 38, 40 (8th Cir. 1966)).

38. See, e.g., *Choate v. Trapp*, 224 U.S. 665 (1912); *Squire v. Capoeman*, 351 U.S. 1 (1956); *Chickasaw Nation v. United States*, 534 U.S. 84 (2001); *Cass Cnty. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998); *Holt*, 364 F.2d 38; *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985); *Little Six, Inc. v. United States*, 210 F.3d 1361 (Fed. Cir. 2000); *Ramsey*, 302 F.3d 1074; *United States v. Anderson*, 625 F.2d 910 (9th Cir. 1980); *Karmun v. Comm’r*, 749 F.2d 567 (9th Cir. 1984); *Confederated Tribes of Warm Springs Reservation v. Kurtz*, 691 F.2d 878 (9th Cir. 1982); *Hoptowit v. Comm’r*, 709 F.2d 564 (9th Cir. 1983); *Warbus v. Comm’r*, 110 T.C. 279 (1998); *Ho-Chunk Nation v. Wis. Dep’t of Revenue*, 754 N.W.2d 186 (Wis. Ct. App. 2008).

39. See, e.g., *Chickasaw Nation*, 534 U.S. 84; *Cass County*, 524 U.S. 103; *Ramsey*, 302 F.3d 1074; *Anderson*, 625 F.2d 910; *Karmun*, 749 F.2d 567; *Kurtz*, 691 F.2d 878; *Hoptowit*, 709 F.2d 564; *Warbus*, 110 T.C. 279; *Ho-Chunk Nation*, 754 N.W.2d 186.

40. 534 U.S. at 89-90 (holding that an explicit parenthetical reference to IRC Chapter 35 was “simply a drafting mistake” where “the language outside the parenthetical” reference was unambiguous with respect to “reporting and withholding of taxes” on “winnings from gaming” or “wagering operations” as applicable to tribes under the Indian Gaming Regulatory Act, based on the canon that “[w]hen Congress enacts a tax exemption, it ordinarily does so explicitly”).

41. Matthew L.M. Fletcher, *Sawnawgezewog: “The Indian Problem” and the Lost Art of Survival*, 28 AM. INDIAN L. REV. 35, 62 (2003-2004); Graydon Dean Luthey, Jr., Comment, *Chickasaw Nation v. United States: The Beginning of the End of the Indian-Law Canons in Statutory Cases and the Start of the Judicial Assault on the Trust Relationship?*, 27 AM. INDIAN L. REV. 553 (2002-2003); Jackson III, *supra* note 4, at 419.

42. *Squire*, 351 U.S. at 10.

Where exempt trust lands are not involved, however, courts have routinely and stubbornly denied claims of exempt income by American Indians.⁴³

Recent cases suggest that an American Indian claiming an exemption from income taxation for a salary received as a tribal council member will not fare well.⁴⁴ In addition, there is a judicial-practicality problem in finding a particular tax exemption for American Indians. The problem exists because treaties entered into with individual tribes were not written in modern language, were ambiguous, were “contracts of adhesion,” and did not contemplate the issue of taxation as to each Indian tribe.⁴⁵ One such variation is exemplified by distribution plans of trust fund monies between the Nation and the Secretary, approved by Congress.⁴⁶

43. See, e.g., *Jourdain v. Comm’r*, 71 T.C. 980, 986-87, 989 (1979). The court held that a chairman of a tribal council received taxable compensation because of his salary even though the funds used to pay his salary were from tax-exempt trust funds held by the United States. The court ignored the taxpayer’s argument that the salary was exempt because it was from funds on the sale of reservation lands and his argument that a tax exemption should be liberally construed because of the guardian-ward relationship between the tribe and the United States, relying on *Elk v. Wilkins*, 112 U.S. 94, 100 (1884) and *Walker v. Comm’r*, 37 T.C. 962 (1962). The court stated that such arguments for the liberal interpretation of statutes because of a guardian-ward relationship as upheld by *Elk v. Wilkins* and *Walker v. Comm’r* are no longer valid. *Jourdain*, 71 T.C. at 986-87; see also *Hoptowit v. Comm’r*, 78 T.C. 137, 142 (1982) (holding that the canons of construction demand that ambiguous language in a treaty or statute should be construed in favor of Indians, but that “[t]his principle ‘comes into play, [] only if such statute or treaty contains language which can reasonably be construed to confer income [tax] exemptions’”) (quoting *Holt v. Comm’r*, 364 F.2d 38, 40 (8th Cir. 1966)); *Allen v. Comm’r*, 91 T.C.M. (CCH) 673 (2006) (holding that a tribal council member’s salary was not exempt even though taxpayer argued that he was exempt by virtue of being a political organization under I.R.C. § 527(c)(1)(A)); *Doxtator v. Comm’r*, T.C. Memo. 2005-113 (holding that a judicial officer’s salary was not exempt despite taxpayer’s arguments that she was an exempt officer of a sovereign).

44. See *supra* note 43 and accompanying text.

45. See, e.g., Jensen, *supra* note 2, at 695-96; see also *supra* note 5 and accompanying text.

46. See *infra* Part II.C (The Potawatomi Nation and Handling of Their Judgment Funds).

C. The Potawatomi Nation and Handling of Their Judgment Funds

In the 1940s and 1950s, the Potawatomi Nation successfully brought land-takings claims pursuant to the Indian Claims Commission Act.⁴⁷ The Indian Claims Commission Act was remedial in that it was designed “to settle ‘claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands or compensation agreed to by the claimant.’”⁴⁸ The Nation was finally awarded judgments against the United States in the 1970s.⁴⁹ “Eighty percent of those awards were distributed pro-rata to all members,”⁵⁰ while “[t]he remaining twenty percent were to be held in perpetual trust by the Secretary, ‘with the income from such funds to be used for specific activities of the Tribe, including health aids, prosthetics and scholarships.’”⁵¹

On April 22, 1983, the Nation and the Secretary submitted a plan (1983 Plan) “for the use and distribution” of the remaining trust funds⁵² as required by the Indian Tribal Judgment Funds Use or Distribution Act of October 19, 1973.⁵³ That Act provided that

[w]ithin one year after appropriation of funds to pay a judgment of the Indian Claims Commission or the Court of Claims to any Indian tribe, the Secretary of the Interior shall prepare and submit to Congress a plan for the use and distribution of the funds. Such plan shall include identification of the present-day beneficiaries, a formula for the division of the funds . . . and a proposal for the use and distribution of the funds.⁵⁴

47. Indian Claims Commission Act of 1946, Pub. L. No. 79-726, 60 Stat. 959 (1946) (repealed 1978).

48. Appellants’ Brief in Chief at 6, *Barrett v. United States*, 561 F.3d 1140 (10th Cir. 2009) (No. 08-6017) (citation omitted).

49. *Barrett v. United States*, No. CIV-06-0968-HE, 2007 WL 4303050, at *1, 2007 U.S. Dist. LEXIS 89693, at *3 (W.D. Okla. Dec. 5, 2007).

50. *Id.*

51. *Id.* (quoting Stipulation ¶ 17).

52. Plan for the Use and Distribution of the Potawatomi Nation Judgment Funds, 48 Fed. Reg. 40,567, 40,567 (Sept. 8, 1983) [hereinafter Potawatomi Distribution Plan].

53. Indian Tribal Judgment Funds Use or Distribution Act, 25 U.S.C. §§ 1401-1408 (2006); see also H.R. Rep. No. 93-377, at 3 (1973), *reprinted* in 1973 U.S.C.C.A.N. 2311, 2312. (providing “for the use or distribution of Indian judgment funds appropriated in satisfaction of awards of the Indian Claims Commission and the Court of Claims without further legislation”).

54. 25 U.S.C. § 1402(a).

The Act further provided that “[n]one of the funds which are distributed per capita or held in trust pursuant to a plan approved under the provisions of th[e] chapter . . . shall be subject to Federal or State income taxes.”⁵⁵

The 1983 Plan contained two aspects: a per-capita distribution and a programming provision.⁵⁶ Under the programming provision, the Citizen Potawatomi Nation was to receive thirty percent of the allocated funds, which must “be utilized in a Ten-Year Tribal Acquisition, Development, and Maintenance Plan”⁵⁷ (Ten-Year Plan). Under the general provisions of the 1983 Plan, section 6(b) included a provision that became the central focus of litigation to come. The provision stated that

[n]one of the funds distributed per capita or made available under this plan for programming shall be subject to Federal or State income taxes, nor shall such funds nor their availability be considered as income or resources nor otherwise utilized as the basis for denying or reducing the financial assistance or other benefits to which such household or member would otherwise be entitled under the Social Security Act or, except for per capita shares in excess of \$2,000, any Federal or federally assisted programs.⁵⁸

The 1983 Plan thus reiterated the congressional enactment under 25 U.S.C. § 1407, which dictated that “[n]one of the funds” distributed under such a plan would “be subject to Federal or State income taxes.”⁵⁹

In 1985, the Secretary approved the Nation’s budget and the Ten-Year Plan, which permitted distributions for “development” as acceptable programming disbursements under the 1983 Plan. “Development” was defined as “those activities and/or actions undertaken by the Tribe to in some way cause growth, building up, expansion, strengthening, increased effectiveness or other evolutionary process toward the progress of the Tribe economically and/or socially, and/or governmentally.”⁶⁰ The tribal business committee was

55. *Id.* § 1407; Potawatomi Distribution Plan, *supra* note 52, at 40,568 (reiterating that federal and state income taxation do not apply to the funds in the Plan or those distributed per capita).

56. Potawatomi Distribution Plan, *supra* note 52, at 40,567-68.

57. *Id.* at 40,568.

58. *Id.*

59. 25 U.S.C. § 1407.

60. Barrett v. United States, No. CIV-06-0968-HE, 2007 WL 4303050, at *1, 2007 U.S. Dist. LEXIS 89693, at *5 (W.D. Okla. Dec. 5, 2007) (quoting Stipulation, Exhibit 3).

required to prepare annual “line-item budgets” disclosing the intended uses of the programming funds, subject to the general council’s and Secretary’s approval.⁶¹

Congress later enacted the American Indian Trust Fund Management Reform Act of 1994.⁶² Pursuant to the Act, “the Tribe members voted to withdraw all trust funds from the control and management of the Secretary of the Interior, and to place control and management of the trust funds with the Tribe. . . . After withdrawal, the funds maintained their status as trust funds.”⁶³ The tribe submitted an Investment Management Policy (the 1996 Policy) to the Secretary for approval, outlining the purposes and uses of the funds. The 1996 Policy reiterated the goals of the 1983 Policy “as those in effect during the Secretary of the Interior’s tenure as manager of the trust funds (i.e., to acquire real estate, develop the Tribe, and maintain Tribe property).”⁶⁴ Because the Secretary approved the tribe’s 1996 Policy, the Nation has control over the funds and “[t]he Business Committee determines how the earnings are spent.”⁶⁵

In *Barrett v. United States*, the plaintiff, John “Rocky” Barrett, Jr., was a member and chairman of the Nation.⁶⁶ Barrett concluded that he could receive payment from the trust fund earnings held by the Nation as exempt income because of the 1983 Plan. The business committee agreed.⁶⁷ Accordingly, “[i]n 2001, [Barrett and his wife] did not include in their reported income the sum of \$48,057.64 that Barrett was paid out of the trust fund earnings.”⁶⁸ The IRS did not agree with Barrett’s assumption and assessed a tax deficiency for

61. Brief of Citizen Potawatomi Nation as Amicus Curiae in Support of Petitioners, *cert. denied by*, *Barrett v. United States*, 130 S. Ct. 396 (2009) (No. 09-32).

62. American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. §§ 4001-4061 (2006); *Barrett*, 2007 WL 4303050, at *2, 2007 U.S. Dist. LEXIS 89693, at *6.

63. *Barrett v. United States*, 561 F.3d 1140, 1143 (10th Cir. 2009).

64. *Id.*

65. *Barrett*, 2007 WL 4303050, at *2, 2007 U.S. Dist. LEXIS 89693, at *6 (citing CONST. OF THE CITIZEN POTAWATOMI NATION art. 5, § 3). “There is reserved to the Citizen Potawatomi Nation Indian Council the authority to approve all actions of the Business Committee, or to delegate specific authority to the Business Committee to take particular actions, prior to any such action of the Business Committee becoming effective, which results in: (a) the appropriation and budgeting of moneys of the Council held in trust by the Tribe as the proceeds of any claim against the United States, including interest earned thereon for expenditure for the benefit of the tribe.” CONST. OF THE CITIZEN POTAWATOMI NATION art. 5, § 3.

66. *Barrett*, 2007 WL 4303050, at *1, 2007 U.S. Dist. LEXIS 89693, at *2.

67. *Id.*, 2007 WL 4303050, at *2, 2007 U.S. Dist. LEXIS 89693, at *8.

68. *Id.*

\$19,355.00, a penalty of \$3,871.00, and accrued interest of \$2,552.47.⁶⁹ The Barretts paid the deficiency and filed a lawsuit in the District Court for the Western District of Oklahoma seeking a refund. Although a deficiency was assessed against both Barrett and his wife, the reason for the deficiency was solely a result of Barrett's salary paid from the funds but not included on the couple's tax return as taxable income.⁷⁰

D. Barrett v. United States

Barrett v. United States represents the latest attempt of an American Indian to claim a tax exemption for income received as a paid council member. What makes this case unique is that the taxpayer could actually point to a specific exemption stated in a disbursement plan approved by the Secretary and Congress.⁷¹ The courts dealing with the matter, however, did not find the exemption specific enough or the category of exemption applicable to Barrett's salary.⁷²

1. District Court

In response to the Barretts' suit, the United States moved for summary judgment.⁷³ In its summary judgment memorandum, the United States stressed that "federal courts have consistently held that income received by members of registered Indian tribes such as the Citizen Potawatomi Nation is subject to federal income tax."⁷⁴ In subsequent filings with the district court in support of its argument, the United States asserted that "[e]ven if the Court [found] that the 1983 [Plan] would ordinarily apply to Barrett's income, the [1983 Plan] does not override the extensive and unambiguous case law providing that any tax exemption must be clearly and expressly stated."⁷⁵

A fundamental tenet of the United States' argument was that there was no explicit exemption of federal income taxation for Barrett's salary. Although the 1983 Plan included a subsection exempting the trust funds from federal

69. *Id.*

70. *Id.*

71. *See id.*, 2007 WL 4303050, at *1, *3, 2007 U.S. Dist. LEXIS 89693, at *4, *9.

72. *See id.*, 2007 WL 4303050, at *3, 2007 U.S. Dist. LEXIS 89693, at *12; *see also* Barrett v. United States, 561 F.3d 1140, 1145-46 (10th Cir. 2009).

73. Memorandum in Support of United States' Motion for Summary Judgment at 1, Barrett v. United States, No. CIV-06-0968-HE (W.D. Okla. Dec. 5, 2007).

74. *Id.* at 3 (citing *Squire v. Capoeman*, 351 U.S. 1, 6 (1956)).

75. Brief in Opposition to Plaintiffs' Motion for Summary Judgment at 12, Barrett v. United States, No. CIV-06-0968-HE (W.D. Okla. Dec. 5, 2007) (citing *Lafontaine v. Comm'r*, 533 F.2d 382 (8th Cir. 1876); *United States v. Anderson*, 625 F.2d 910, 917 (9th Cir. 1980)).

income taxation, the United States argued that because the Secretary has no authority to exempt income, the only appropriate and relevant exemption in the case was the exemption adopted by Congress in the Indian Tribal Judgment Funds Use or Distribution Act (Distribution Act).⁷⁶ Under the Distribution Act, “only certain trust fund distributions and earnings are exempted from taxation: 1) funds distributed per capita to tribe members, 2) funds held in trust by the government, and 3) interest and investment income on the trust funds.”⁷⁷ According to the United States, the 1983 Plan did not expand any exemptions contained within the Distribution Act.⁷⁸ It thus asserted that the 1983 Plan “was not intended to reach beyond the provisions of the . . . [Distribution Act] and applies only to those tax exemptions previously authorized by Congress or by treaty.”⁷⁹

Because the United States found no applicable exemption in the 1983 Plan or the Distribution Act, it also argued that the salary paid to Barrett could not be exempt under the Nation’s Ten-Year Acquisition Plan.⁸⁰ This is because, as the United States argued, the only way that Barrett’s salary could be exempt under the Ten-Year Plan was if his salary fit within the programming expenditures as set forth in that plan.⁸¹ In addition, the Ten-Year Plan expired well before the year Barrett started receiving salary money from the trust fund.⁸² The United States argued that even if the Ten-Year Plan were still applicable at the time Barrett received his salary, there was no indication that the payment of his salary benefitted the development of the *entire* tribe or that the payment of Barrett’s salary was ever included in a secretarial budget approved by the tribe, as required under the 1983 Plan.⁸³

In response to the United States, Barrett asserted that the 1983 Plan, as agreed between the Nation, the Secretary, and approved by Congress,

76. *Id.* at 5-8.

77. *Id.* at 7 (citing 25 U.S.C. § 1407(1) (2006)).

78. *Id.* at 8.

79. *Id.* at 8.

80. *Id.* at 9.

81. *Id.* at 9-10.

82. *Id.* at 11-12.

83. *Id.* at 10; *see also* Potawatomi Distribution Plan, *supra* note 52, at 40,567 (“All expenditures of funds, including the initial \$500,000 from the interest account to commence the implementation and administration of the ten-year plan, shall be subject to the preparation by the Tribal Business Committee of an annual tribal budget, with specific line item budgets covering the proposed uses of such funds for the year, which shall be subject to approval by the General Council and the Secretary.”).

exempted the payments to Barrett from federal income taxation.⁸⁴ Barrett contended that the Distribution Act exempts the funds because the funds were distributed pursuant to a plan approved by that Act.⁸⁵ Barrett's primary argument was that the compensation he received that flowed from tax-exempt trust fund earnings had "been impressed with tax exemption to their recipients," and [t]he 'Tribe, as a governmental act, ha[d] made the conscious decision to pay the Chairman from the[] funds.'"⁸⁶

Barrett also argued that the salary's exemption was contemplated under the Ten-Year Plan, where appropriate expenditures were defined to include "development," as that term is defined.⁸⁷ Barrett's argument thus was that because his role as chairman of the tribe increased the "effectiveness and evolutionary process of the [t]ribe"⁸⁸ and therefore qualified as "development," the salary was indeed part of an acceptable, tax-free distribution under the Ten-Year Plan.⁸⁹

Because the Ten-Year Plan expired well before 2001 (the year Barrett took his salary), Barrett argued that the tribe's 1996 Policy carried forward the programming aspects of the Ten-Year Plan, contemplated by the 1983 Plan.⁹⁰

84. Plaintiffs John A. Barrett, Jr., and Sheryl S. Barrett's Response to Defendant's Motion for Summary Judgment at 3, *Barrett v. United States*, No. CIV-06-0968-HE (W.D. Okla. Dec. 5, 2007).

85. *Id.* at 4 (quoting 25 U.S.C. § 1407 (2006)) ("None of the funds which . . . are distributed per capita or held in trust pursuant to a plan approved under the provisions of this chapter . . . including all interest and investment income accrued thereon while such funds are so held in trust, shall be subject to Federal or State income taxes.") (alteration in original).

86. *Barrett v. United States*, No. CIV-06-0968-HE, 2007 WL 4303050, at *2, 2007 U.S. Dist. LEXIS 89693, at *9 (W.D. Okla. Dec. 5, 2007) (alteration in original) (citation omitted).

87. See Plaintiffs John A. Barrett, Jr., and Sheryl S. Barrett's Response to Defendant's Motion for Summary Judgment, *supra* note 84, at 5 (defining the development as including "those activities and/or actions undertaken by the Tribe to in some way cause growth, building up, expansion, strengthening, increased effectiveness or other evolutionary process toward the progress of the Tribe economically and/or socially and/or governmentally").

88. *Id.* at 6; see also *Barrett*, 2007 WL 4303050, at *3, 2007 U.S. Dist. LEXIS 89693, at *10-*11 (noting that Barrett's argument emphasized that the funds used to pay his salary were included as proper uses of tax-exempt monies under the 1983 Plan and by definition constituted "development" under the Ten-Year Plan and the Distribution Act, which provide that the funds held in trust were to be tax-free so long as programming expenditures were used "to build . . . the tribal land base, develop[] [] the tribe's assets and [] provide for maintenance and care of the tribal property").

89. Plaintiffs John A. Barrett, Jr., and Sheryl S. Barrett's Response to Defendant's Motion for Summary Judgment, *supra* note 84, at 6-10.

90. Plaintiffs John A. Barrett, Jr., and Sheryl S. Barrett's Reply to Defendant's Brief in Opposition to Plaintiff's Motion for Summary Judgment at 5, *Barrett v. United States*, No.

The United States countered by stating that the 1996 Policy failed to express any intent to carry forward the Ten-Year Plan.⁹¹ According to the United States, even if the Ten-Year Plan was carried forward by the 1996 Policy, “neither the Secretary of the Interior nor Congress approved any applicable tax exemption to apply beyond those annually-authorized expenditures under the Ten-Year Plan.”⁹²

Barrett contended that the United States was wrong.⁹³ Barrett argued that the 1996 Policy, approved by the Secretary pursuant to the Indian Trust Fund Management Program, “specifically states that ‘[t]he purpose and use of the earnings from the Investment Accounts, will continue to be consistent with the original claims settlements.’”⁹⁴ In addition, Barrett argued that this continuation of the 1983 and Ten-Year Plans’ programming exemption is “consistent with 25 U.S.C. § 4023(c)(1) which requires the Secretary of the Interior to ensure that the ‘purpose and use of the judgment funds identified in the previously approved judgment fund plan will continue to be followed by the Indian Tribe in the management of the judgment funds.’”⁹⁵

The district court framed the scope of its decision as two issues: “whether the compensation Barrett received in the year 2001, as the Tribe’s Chairman, is taxable income to him and, if so, whether the plaintiffs are liable for the penalty assessed pursuant to 26 U.S.C. § 6662.”⁹⁶ The court began with the

CIV.-06-0968-ITE (W.D. Okla. Dec. 5, 2007).

91. Brief in Opposition to Plaintiffs’ Motion for Summary Judgment, *supra* note 75, at 11 (“The 1996 Policy outlines the Tribe’s proposed investment and use strategy for the trust fund moneys after the Tribe gained control of the funds in 1996. It outlines several specific expenditures of the trust fund monies and does not state any intent to carry forward the ten-year acquisition plan. In fact, in the entirety of the 36-page Investment Management Policy, the ten-year plan is mentioned only once.”).

92. Brief in Opposition to Plaintiffs’ Motion for Summary Judgment, *supra* note 75, at 12.

93. Plaintiffs John A. Barrett, Jr., and Sheryl S. Barrett’s Reply to Defendant’s Brief in Opposition to Plaintiffs’ Motion for Summary Judgment, *supra* note 90, at 3.

94. *Id.* at 3. Title 25 U.S.C. § 4023 (2006) provides:

(a) In general. The Secretary is authorized to approve plans under section 4022 of this title for the withdrawal of judgment funds held by the Secretary. . . .

(c) Secretarial duties. In approving such plans, the Secretary shall ensure—(1) that the purpose and use of the judgment funds identified in the previously approved judgment fund plan will continue to be followed by the Indian tribe in the management of the judgment funds.

Id.

95. Plaintiffs John A. Barrett, Jr., and Sheryl S. Barrett’s Reply to Defendant’s Brief in opposition to Plaintiffs’ Motion for Summary Judgment, *supra* note 90, at 3 (emphasis removed).

96. Barrett v. United States, No. CIV-06-0968-HE, 2007 WL 4303050, at *2, 2007 U.S.

general premise that compensation is “taxable income ‘unless an exemption is created by treaty or statute.’”⁹⁷ Because an exemption must be approved by Congress, the court first noted that Congress failed to object to the 1983 Plan, which, under the terms of the plan, made it effective.⁹⁸ The court also noted that Congress approved only certain uses of trust fund monies under the Distribution Act.⁹⁹ Therefore, no matter how the 1983 Plan defined “development” or like terms, the use of trust fund monies must be confined to this narrow exemption.¹⁰⁰

The Distribution Act allowed the 1983 Plan to distribute exempt monies from the trust fund held by the Secretary,¹⁰¹ but did not set out specific parameters. The 1983 Plan was therefore created to fulfill this function,¹⁰² but there was no reason to believe that Congress intended the plans created under the Distribution Act to expand the exemption it expressed. The court, without more, stated that the payment of compensation to Barrett was not a “programming expenditure” as defined in the 1983 Plan and allowed by the Distribution Act.¹⁰³

The court sided with the United States and found that even if the salary paid to Barrett would be exempt under the 1983 Plan or the Ten-Year Plan, the plans had long expired by the time the salary was paid.¹⁰⁴ Moreover, the 1996 Policy failed to explicitly refer to the 1983 Plan, the Ten-Year Plan, or their guidelines.¹⁰⁵ The court criticized Barrett for applying provisions of statutes intended to benefit the tribe for his own pecuniary benefit.¹⁰⁶ It stated that

Dist. LEXIS 89693, at *8-9 (W.D. Okla. Dec. 5, 2007).

97. *Id.*, 2007 WL 4303035, at *3, 2007 U.S. Dist. LEXIS 89693, at *9 (quoting *Allen v. Comm’r*, 91 T.C.M. (CCH) 673 (2006)).

98. *Id.*, 2007 WL 4303050, at *3 n.9, 2007 U.S. Dist. LEXIS 89693, at *10 n.9 (“A distribution plan became effective unless, within sixty days after its submission to Congress, a joint resolution was enacted disapproving it.”).

99. *Id.*, 2007 WL 4303050, at *3, U.S. Dist. LEXIS 89693, at *10.

100. *Id.* (“While Congress, by its inaction, approved the 1983 Plan, there is no evidence that it also approved the Guidelines. The Guidelines, through its definitions of pertinent terms, could not expand the income exemption created by Congress.”).

101. *Id.*, 2007 WL 4303050, at *3, 2007 U.S. Dist. LEXIS 89693, at *11.

102. *Id.*

103. *Id.*

104. *Id.*, 2007 WL 4303050, at *3, 2007 U.S. Dist. LEXIS 89693, at *11-12.

105. *Id.*, 2007 WL 4303050, at *3, 2007 U.S. Dist. LEXIS 89693, at *12.

106. *Id.*, 2007 WL 4303050, at *5, 2007 U.S. Dist. LEXIS 89693, at *20 (“Not only is it contrary to general principles of taxability of payments to tribal members, but it also substantially misreads the statutes in question, taking provisions of them which are directed to taxation of the Tribe and applying them instead to taxation of the recipients of tribal funds. It

even if the salary was tax exempt under the 1983 Plan, the 1996 Policy did not indicate “an intent to exempt wage disbursements from taxation or to include the broad definition of ‘development.’”¹⁰⁷ The court emphasized the established rule that “amounts received by an Indian for services performed as a member of a tribal council are taxable, even if the monies ‘had their origin in funds which were held in trust by the Government.’”¹⁰⁸ Next, the court held that “[d]ue to the absence of an exemption ‘based upon clearly expressed language in a statute or treaty,’ the undisputed facts establish that the \$48,057.64 Barrett received as compensation from the Tribe was taxable income.”¹⁰⁹ Finally, the court held that it was not “objectively reasonable” for Barrett to determine that his salary was exempt.¹¹⁰ The district court thus granted the United States’ motion for summary judgment.¹¹¹

2. Tenth Circuit Court of Appeals

Barrett appealed.¹¹² On appeal, Barrett’s argument was largely the same as in the district court, but he did offer a few new challenges. First, Barrett contended that a decision by the Nation, the Secretary, and approval (albeit indirectly) by Congress, cannot be questioned by the IRS.

The Tribe’s decision to compensate the Chairman of the Tribe from the trust funds, and that such compensation would fit within the parameters of the allowed uses of the trust funds, can not reasonably be questioned. For the Federal government, in the form of the IRS, to now step back into an area in which Congress and the Secretary of the Interior have conferred and approved

applies the various tax exemption provisions in ways and contexts outside their proper scope.”).

107. *Id.*, 2007 WL 4303050, at *3, 2007 U.S. Dist. LEXIS 89693, at *12.

108. *Id.*, 2007 WL 4303050, at *4, 2007 U.S. Dist. LEXIS 89693, at *13 (quoting *Hoptowitz v. Comm’r*, 78 T.C. 137, 146-48 (1982), *aff’d*, 709 F.2d 564 (9th Cir. 1983)).

109. *Id.*, 2007 WL 4303050, at *4, 2007 U.S. Dist. LEXIS 89693, at *15 (quoting *Doxator v. Comm’r*, 89 T.C.M. (CCH) 1259 (2005)).

110. *Id.*, 2007 WL 4303050, at *5, 2007 U.S. Dist. LEXIS 89693, at *18-19 (“If the present motion turned only on the issue of the plaintiffs’ subjective good faith, the court would likely conclude that sufficient evidence has been presented to create a fact question as to that issue. However, as noted above, the taxpayer’s determination must have been in good faith and with ‘reasonable cause.’ The latter standard is an objective one and the question hence becomes whether plaintiffs have presented sufficient evidence, under the standards applicable to summary judgments, to create a material question of fact as to the objective reasonableness of the position they took as to the taxability of the disputed income. The court concludes they have not.”).

111. *Id.*, 2007 WL 4303050, at *6, 2007 U.S. Dist. LEXIS 89693, at *21.

112. *Barrett v. United States*, 561 F.3d 1140, 1141 (10th Cir. 2009).

substantial discretion for the Tribe, is contrary to the strong Federal policy of tribal self governance.¹¹³

Barrett thus contended that, on the basis of sovereignty and separation of powers, the IRS had no right to challenge the exemption of his salary.

Barrett also challenged the district court's finding that the exemption expressed in the 1983 Plan was for the Nation but not any of the tribal members individually.

[C]ontrary to the finding of the district court, the Barretts do not take 'provisions of [statutes] which are directed to taxation of the Tribe' and apply them to the Barretts. The exemption from income taxation contained in the 1983 Plan is not directed at the Tribe. As was well known at the time Congress approved the 1983 Plan, '[i]ncome tax statutes do not tax Indian tribes.' The district court's reading of the 1983 Plan, contrary to rules of statutory construction, would render the words in the 1983 Plan exempting the funds used for programming from income taxation superfluous.¹¹⁴

Therefore, as Barrett argued, the 1983 Plan's exemption from federal income taxation of the programming use of the trust fund monies would be pointless if only applicable to the Nation because Indian tribes are not and have never been federally taxed on income.¹¹⁵

Respecting the question of whether the 1983 Plan's exemption was carried forward to the date of Barrett's salary, Barrett maintained that it was the intention of all parties to extend the exemption under the 1996 Policy.

The continuation of the 1983 Plan and the Ten-Year Plan under the Investment Management Policy [1996 Policy] is not only evident in the Investment Management Policy itself but is required under the express terms of the 1983 Plan and 25 U.S.C. § 4023, which required the purpose and use of any judgment funds withdrawn from the Secretary of the Interior "will continue to be followed by the Indian tribe." This was done by the Tribe.¹¹⁶

113. Appellants' Brief in Chief, *supra* note 48, at 19.

114. *Id.* (citation omitted) (citing *United States v. Brown*, 334 F.3d 1197, 1207 (10th Cir. 2003) ("[C]ourt[s] should refrain from construing a statute so as to render words superfluous.")).

115. *Id.* at 28.

116. *Id.* at 23.

Barrett thus contended that the 1983 Plan's exemption remained alive and well in 2001, the time at which Barrett received the salary at issue.

The circuit court did not accept Barrett's arguments. First, the court stated that "[t]he express exemption . . . [under the] 1983 Plan, [section] 6(b), does not encompass the compensation paid to Barrett."¹¹⁷ Instead, the court insisted that "[t]he funds available under the 1983 Plan for programming were the funds authorized by the Ten-Year Plan."¹¹⁸ The Ten-Year Plan only authorized funds for use in, among other things, development of the tribe.¹¹⁹ Despite Barrett's insistence that his role as chairman contributed to the development of the tribe, the court noted that such a role did not fit within the term "development" as defined by the Ten-Year Plan.¹²⁰ Without explaining why, the court concluded that Barrett's salary did not contribute to an "evolutionary process" toward the tribe's economic, social, and/or governmental progress, and thus did not qualify as "development."¹²¹

Echoing the district court, the tenth circuit noted that the exemption in the 1983 Plan was not specific enough to constitute a basis for exempting Barrett's salary.¹²² "[T]he Supreme Court 'has repeatedly said that tax exemptions are not granted by implication' and that if Congress intends a tax exemption, 'it should say so in plain words.'"¹²³ The court thus stated that Barrett's argument fails because the alleged exemption does not explicitly include compensation for council members in the sphere of exemption.¹²⁴ The 1983 Plan instead referenced the funds distributed for "programming."¹²⁵

117. *Barrett*, 561 F.3d at 1145.

118. *Id.*

119. *Id.*

120. *Id.* at 1146 (quoting Citizen Band Potawatomi General Council Resolution, U.S.-Pot., § 1.4, Dec. 1984, Pot-85-1 (more commonly known as "Ten-Year Tribal Acquisition Development, and Maintenance Plan")) (defining development as "those activities and/or actions undertaken by the Tribe to in some way cause growth, building up, expansion, strengthening, increased effectiveness or other evolutionary process toward the progress of the Tribe economically and/or socially, and/or governmentally").

121. *Id.*

122. *Id.*

123. *Id.* (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 156 (1973)); cf. *Squire v. Capoeman*, 351 U.S. 1, 7 (1956) (holding that the General Allotment Act of 1887 implicitly exempted income derived from trust lands from federal taxation).

124. *Barrett*, 561 F.3d at 1146.

125. Potawatomi Distribution Plan, *supra* note 52, at 40,568 ("None of the funds distributed per capita or made available under this plan for programming shall be subject to Federal or State income taxes, nor shall such funds nor their availability be considered as income or resources nor otherwise utilized as the basis for denying or reducing the financial assistance.").

Moreover, the court noted that the goal of tribal self-sufficiency does not override the requirement that tax exemptions be stated explicitly.¹²⁶ The circuit court thus affirmed the district court's decision to award summary judgment to the United States.¹²⁷

3. *Petition for Writ of Certiorari*

After suffering two defeats in federal court, Barrett filed a petition for a writ of certiorari in the United States Supreme Court.¹²⁸ In his petition, Barrett argued that the tenth circuit upheld the breach of an agreement between the Nation and Congress by affirming the district court's granting of summary judgment.¹²⁹ Barrett argued that the congressional exemption under the 1983 Plan and the Ten-Year Plan should be measured under two principles: that the tribe did not need any exemptions from federal income taxation because it had never been subject to such taxes, and that individual tribal members can be exempted from federal income taxation by congressional enactments.¹³⁰

Against this backdrop, Barrett asserted that Congress intended to provide the Nation's citizens with an exemption from taxation under the 1983 Plan, and, in allowing the Nation to take over the trust fund in 1996, Congress left the Nation to exercise its sovereign powers in managing and distributing the proceeds earned on the trust fund.¹³¹ In exercising its sovereign power, Barrett alleged that the Nation determined that his duties were integral to the development of the tribe and accordingly awarded a salary from the trust fund monies.¹³² Therefore, as Barrett argued, the tenth circuit's decision "chill[s] the Citizen Potawatomi Nation's ability to rely upon the agreement with Congress, and to use its sovereign power to appropriate income tax exempted funds."¹³³

The United States replied as before, arguing that the 1983 Plan's terms did not cover Barrett's salary, and, even if they did, the 1983 Plan's exemption

126. *Barrett*, 561 F.3d at 1146 (citing *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991)).

127. *Id.* at 1149.

128. *Petition for a Writ of Certiorari, Barrett v. United States*, 130 S. Ct. 396 (2009) (No. 09-32).

129. *Id.* at 10.

130. *Id.* at 12 (citing FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 231 (Rennard Strickland et al. eds., 1982); I.R.C. § 7871 (2006); Rev. Rul. 67-284, 1967-2 C.B. 55)).

131. *Id.* at 13.

132. *Id.* at 13-14.

133. *Id.* at 16.

was not explicit enough to overcome the general tax canon that all gross income shall be taxed.¹³⁴ The Nation submitted an *Amicus Curiae* Brief in support of Barrett that was similar in substance to Barrett's argument.¹³⁵ Barrett's petition for certiorari was denied on October 13, 2009.¹³⁶

III. Analysis

Although the district court and the circuit court agreed that Barrett's case was ripe for summary judgment, there are reasons to believe that the courts did not necessarily handle the issues appropriately. First, there is an unresolved issue as to whether the 1996 Policy actually carried forward the 1983 Plan's exemption of income taxation and whether there was congressional intent for the 1996 Policy to do so. Second, there is a question whether section 6(b) of the 1983 Plan was actually explicit enough to overcome the tax canon that all tax exemptions must be express. Finally, there is uncertainty as to whether the canons of construction should have been applied – something the courts brushed aside.

A. Congress Intended that the 1983 Plan's Exemption Provision for Programming Distributions Be Carried Forward by the 1996 Policy

Because the district court found that the 1996 Policy failed to explicitly assert that it was a continuation of the 1983 Plan's exemption from federal income taxation, the court held that there was no reason to believe that the 1996 Policy actually carried forward the 1983 Plan's exemption as approved by Congress.¹³⁷ Barrett, however, offered the argument that Congress implicitly allowed such a continuation under a part of the Indian Trust Fund Management Reform Act of 1994, which provides:

(a) In general. The Secretary is authorized to approve plans under section 4022 of this title for the withdrawal of judgment funds held by the Secretary . . . (c) Secretarial duties. In approving such plans, the Secretary shall ensure—(1) that the purpose and use of the judgment funds identified in the previously approved judgment

134. Brief for the United States in Opposition at 5-6, *Barrett v. United States*, 130 S. Ct. 396 (2009) (No. 09-32).

135. Brief of Citizen Potawatomi Nation as *Amicus Curiae* in Support of Petitioners, *supra* note 61.

136. *Barrett v. United States*, 130 S. Ct. 396 (2009).

137. *Barrett v. United States*, No. CIV-06-0968-HE, 2007 WL 4303050, at *3 (W.D. Okla. Dec. 5, 2007); U.S. Dist. LEXIS 89693, at *11-12.

fund plan will continue to be followed by the Indian tribe in the management of the judgment funds.¹³⁸

Congress thus explicitly seems to have given the Secretary the authority to ensure that the trust fund monies, in the hands of the tribe, would maintain the same purpose and use as provided for in the previous plan. That “previous plan” was the 1983 and Ten-Year Plans combined.¹³⁹ The prescribed continuation of the plans under section 4023 therefore allows the 1996 Policy to carry on the purposes and uses designated in the Ten-Year Plan, as demanded by the 1983 Plan.

One such purpose was the use of programming distributions from the trust fund monies to increase the development of the tribe. The 1983 Plan exempted such programming distributions from federal income taxation.¹⁴⁰ The 1996 Policy thus did not necessarily have to state explicitly that it was carrying forward the 1983 and Ten-Year Plans because the purposes and uses defined by those earlier plans were automatically carried forward by statute. In any event, there was cause to analyze this provision. The court, however, failed to do so because it felt that even if the previous plans were carried forward by the 1996 Policy, the exemption contained in the 1983 Plan defined by the Ten-Year Plan was not explicit enough to satisfy the tax canon that exemptions are to be explicitly expressed.¹⁴¹

B. Section 6(b) of the 1983 Plan and Its Progeny Contained an Explicit Exemption for Federal Income Taxation

One reason to believe that the funds distributed for Barrett’s salary from the trust fund monies under the 1983 Plan were exempt from federal income taxation is that Congress explicitly exempted programming distributions in section 6(b) of the 1983 Plan.¹⁴² This is an explicit deviation from the general rule regarding the taxation of damages.¹⁴³ These funds placed into trust were

138. 25 U.S.C. § 4023 (2006).

139. See 25 U.S.C. § 1407(1), (3) (2006); *Barrett*, 2007 WL 4303050, at *1, 2007 U.S. Dist. LEXIS 89693, at *5; Potawatomi Distribution Plan, *supra* note 52, at 40,568; Brief of Citizen Potawatomi Nation as Amicus Curiae in Support of Petitioners, *supra* note 61, at 3.

140. See 25 U.S.C. § 1407(1), (3); Potawatomi Distribution Plan, *supra* note 52, at 40,568.

141. *Barrett v. United States*, 561 F.3d 1140, 1146 (10th Cir. 2009).

142. Potawatomi Distribution Plan, *supra* note 52, at 40,568.

143. I.R.C. § 104 (2006) (excluding only the following damage awards from gross income: “amounts received under workmen’s compensation; . . . any damages . . . on account of personal physical injuries or sickness; amounts received through accident or health insurance . . . ; amounts received as a pension, annuity, or similar allowance . . . ; amounts received . . . as disability income . . . as a [] result of a terroristic or military action).

restitutionary in that they were funds to repay the various Indian Nations for appropriated lands.¹⁴⁴ Ordinarily, only amounts paid to persons to compensate them for personal physical injury are exempt from income taxation.¹⁴⁵ Congress decided to alter the outcome with respect to the Indian judgment funds by explicitly exempting them from taxation in certain circumstances.¹⁴⁶ The question then becomes whether this explicit exemption covers salaries paid to tribal members like Barrett.

Because both the district court and Tenth Circuit Court of Appeals insisted that the use of trust fund monies must be pursuant to the terms of the Ten-Year Plan, they agreed that Barrett's salary was not among the enumerated programming uses exempt from income taxation.¹⁴⁷ One permitted use was for "development."¹⁴⁸ Without explaining why, the courts dismissed the notion that payment of Barrett's salary fell within this exempt use.¹⁴⁹ Instead, both courts focused on the fact that an exemption for salaries paid to council members was not explicitly stated, relying on the tax canon that exemptions, to be effective, must be clearly stated.¹⁵⁰

There are two problems with the courts' handling of this issue. First, whether Barrett's activities as chairman during the 2001 tax year were sufficiently beneficial and all-encompassing to constitute a contribution to the development of the tribe is a factual issue. If there was such a factual issue, summary judgment was not appropriate in district court.¹⁵¹ Second, by stating

144. See Appellants' Brief in Chief, *supra* note 48, at 6.

145. See I.R.C. § 104 (excluding only the following damage awards from gross income: amounts received under workmen's compensation; any damages on account of personal physical injuries or sickness; amounts received through accident or health insurance; amounts received as a pension, annuity or other allowance; amounts received as disability income as a result of terroristic or military action).

146. See 25 U.S.C. § 1407(1), (3) (2006).

147. *Barrett v. United States*, 561 F.3d 1140, 1145 (10th Cir. 2009); *Barrett v. United States*, No. CIV-06-0968-HE, 2007 WL 4303050, at *3, 2007 U.S. Dist. LEXIS 89693, at *12 (W.D. Okla. Dec. 5, 2007).

148. *Barrett*, 561 F.3d at 1146 (quoting Citizen Band Potawatomi General Council Resolution, U.S.-Pot., § 1.4, Dec. 1984, Pot-85-1 (more commonly known as "Ten-Year Tribal Acquisition Development, and Maintenance Plan")) (defining development as "those activities and/or actions undertaken by the Tribe to in some way cause growth, building up, expansion, strengthening, increased effectiveness or other evolutionary process toward the progress of the Tribe economically and/or socially, and/or governmentally").

149. *Id.* at 1145; *Barrett*, 2007 WL 4303050, at *3, 2007 U.S. Dist. LEXIS 89693, at *12.

150. See *Barrett*, 561 F.3d at 1145-46; *Barrett*, 2007 WL 4303050, at *3-4, 2007 U.S. Dist. LEXIS 89693, at *9-10, *12-13.

151. *Wolf v. Prudential Ins. Co. of America*, 50 F.3d 793, 796 (10th Cir. 1995) ("Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions

that the clause exempting programming distributions in the 1983 Plan was not specific enough to encompass Barrett's salary under the term "development" as defined by the Ten-Year Plan, the court essentially deemed the 1983 Plan's exemption, approved by Congress, defunct.

Congress indirectly approved the 1983 Plan with its general category of programming uses stated in categorical form. One of the permitted programming distributions was for development of the tribe, defined by the Ten-Year Plan.¹⁵² If Barrett's salary does not fit this definition of development, it is unclear what actually would. Under the 1983 Plan, it is clear that per-capita distributions to tribal members would be tax-exempt as to individual members.¹⁵³ The programming distributions, as defined by the Ten-Year Plan, would be tax-exempt to the persons receiving those funds, so long as the payment was for certain activities causing, among other things, development of the tribe.¹⁵⁴ The courts, in applying the tax canon strictly, made it unclear whether this congressional exemption would fit any use.

For example, suppose the Nation, rather than paying Barrett's salary, decided to build a gymnasium with the earnings. This use is clearly for the development of the tribe, as it arguably furthers the economic, social, and governmental progress of the tribe. A strict application of the tax canon, however, would not exempt a payment to the contractor to build the gymnasium because, as the district court insisted and the circuit court agreed, the 1996 Policy allegedly carrying forward the plans did not indicate "an intent to exempt wage disbursements from taxation or to include the broad definition of 'development.'"¹⁵⁵

Under this example, there is no income as to the Nation, and even if it did receive some form of income, there otherwise would be no taxation on the income for federal purposes because tribes do not pay federal income tax. It is therefore unclear whether the exemptions contained in the 1983 and Ten-Year Plans have any force at all under a strict application of the tax canon. If

on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. When applying this standard, [a court must] examine the [case] in the light most favorable to the party opposing summary judgment.") (citations omitted).

152. See *Barrett*, 2007 WL 4303050, at *1, 2007 U.S. Dist. LEXIS 89693, at *5.

153. See *Potawatomi Distribution Plan*, *supra* note 52, at 40,567-68.

154. See *Barrett*, 2007 WL 4303050, at *3, 2007 U.S. Dist. LEXIS 89693, at *5.

155. *Barrett*, 2007 WL 4303050, at *3, 2007 U.S. Dist. LEXIS 89693, at *12; see also *Barrett*, 561 F.3d at 1145-46 (noting Barrett's argument that his salary constituted a tax-exempt programming distribution because the exemptions under the 1983 or the Ten-Year Plans fail to explicitly include compensation for council members in the sphere of exemption).

the exemption is not specific enough to include wage disbursements or payments to persons as compensation for services, it is effectively useless as to the Nation and its members.

There is something very odd, therefore, with the strict application of the tax canon in this case. It was used by the courts to defeat congressional intent to provide an exemption to the members of the Nation. This offends the well-established rule that statutes should be construed to give weight to all provisions so that none will be useless or rendered void or absurd.¹⁵⁶ It would be absurd to suppose that Congress agreed to the 1983 Plan with a wink, knowing that the language was too vague to allow any exemption whatsoever.

C. Canons of Construction Should Have Been Applied and Would Have Altered the Outcome

Because the 1983 and Ten-Year Plans were indeed created for the benefit of an Indian tribe, the courts should have applied the canon of construction dictating that statutes passed for tribal benefit be liberally construed.¹⁵⁷ By failing to do so, the court favored the tax canon to the detriment of the tribe. This is at odds with the prescription that “tax exemptions secured to the Indians by agreement between them and the Government are to be liberally construed.”¹⁵⁸

The language of the “development clause” in the Ten-Year Plan is ambiguous. Indeed, what constitutes the promotion of social, economic growth is a general category of uses and is subject to vast interpretation. Had the courts properly analyzed the clause under a canon of construction, they would have liberally construed its language.¹⁵⁹ The very fact that Congress approved such general language suggests that it intended the language to be interpreted in a somewhat liberal fashion.

The American Indian Trust Fund Management Reform Act of 1994 allowed the tribe to withdraw the trust funds and manage them in its capacity as

156. *Corley v. United States*, 129 S. Ct. 1558, 1567 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)) (“[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”); *see also* *Lowe v. S.E.C.*, 472 U.S. 181, 219 (1985) (citing *Conn. Dep’t of Income Maint. v. Heckler*, 471 U.S. 524, 530 n.15 (1985)) (“[It is a] fundamental axiom of statutory interpretation that a statute is to be construed so as to give effect to all its language.”).

157. *See* *Blurton*, *supra* note 32, at 42.

158. *Cook v. United States*, 32 Fed. Cl. 170, 173 (1994) (quoting *Landman v. United States*, 71 F. Supp. 640, 647 (1947)); *see also* *Ramsey v. United States*, 302 F.3d 1074, 1079 (9th Cir. 2002); *Cook*, 32 Fed. Cl. at 174; *Blurton*, *supra* note 32, at 42.

159. *See* *Blurton*, *supra* note 32, at 42.

rightful owner of the funds held in trust as compensation for appropriated lands.¹⁶⁰ This statute also carried forward the tax-exempt nature of certain uses of the funds.¹⁶¹ Though a statute, it should still be interpreted liberally. There is precedent for holding that statutes are to be viewed as functional equivalents to treaties, and thus, at least in part, canons of construction apply with respect to liberal interpretation and the resolution of ambiguities.¹⁶² The ambiguous language contained in the plans therefore should be interpreted in favor of the beneficiaries – the individual American Indians.

Perhaps the canons of construction are indeed dead as to American Indians, as viewed by some authors and justices of the Supreme Court.¹⁶³ At one time, however, the canons of construction favoring American Indians were alive and well. Take for instance *Squire v. Capoeman*, where the Court interpreted a statute in favor of American Indians to the defeat of the tax canon that exemptions are to be interpreted narrowly.¹⁶⁴

160. See 25 U.S.C. §§ 4001-4061; *Barrett v. United States*, 561 F.3d 1140, 1143 (10th Cir. 2009); *Barrett v. United States*, No. CIV-06-0968-HE, 2007 WL 4303050, at *2 (W.D. Okla. Dec. 5, 2007), 2007 U.S. Dist. LEXIS 89693, at *6.

161. See CONST. OF THE CITIZEN POTAWATOMI NATION art. 5, § 3; 25 U.S.C. §§ 4001-4061; *Barrett*, 561 F.3d at 1143; *Barrett*, 2007 WL 4303050, at *2, 2007 U.S. Dist. LEXIS 89693, at *6; see also *supra* Part III.A.

162. See *Blurton*, *supra* note 32, at 42-43 (“While at first it may appear that the [*Choate v. Trapp*, 224 U.S. 665 (1912)] Court’s leap in applying Indian law canons to federal statutes should have involved further policy development, in fact the Court made the leap as a matter of parity. . . . [S]tatutes could be viewed as functional equivalents to treaties between the United States and Indian tribes. . . . The transfer of canons of interpretation from a treaty to statutory context also transferred untouched the following two tenets: (1) terms should be liberally construed for the benefit of Indians; and (2) ambiguities should be resolved in favor of the Indians.”).

163. See e.g., Erik M. Jensen, *Taxation and Doing Business in Indian Country*, 60 ME. L. REV. 1, 37-39 (2008) (“The majority in *Chickasaw Nation* not only avoided giving weight to the Indian canons; it also effectively concluded that when a tax canon (the one requiring that exemptions from taxation be construed narrowly) conflicts with the Indian canons, it is the tax canon that should prevail. Facing canons aimed in different directions, the Court could not ‘say that the pro-Indian canon is inevitably stronger—particularly where the interpretation of a congressional statute rather than an Indian treaty is at issue.’ . . . The bottom line is that, although the [tax and construction] canons have not been explicitly repudiated by the Supreme Court, it may well be that their time has come and gone, except, perhaps, for treaty interpretation.”); see also *supra* note 41 and accompanying text.

164. *Id.* at 37 (“As the dissenters [in *Chickasaw Nation*] pointed out, that proposition [that tax canon wins over canon of construction] was contrary to prior law: the ‘Court has repeatedly held that, when these two canons conflict, the Indian canon predominates.’ The case of *Squire v. Capoeman* . . . was the quintessential example of the Indian canons’ trumping the tax canon, and, like *Chickasaw Nation*, it was a case involving interpretation of a statute, not a treaty. The

Some may feel the canons of construction should not apply in Barrett's case because the issue presented in his case is not a typical Indian-rights question. Barrett's salary is not something one automatically contemplates when one ponders American Indian rights. Yet, applying the 1983 Plan and its progeny narrowly and strictly enforcing the tax canon in this case negatively affects both the well-being of the tribe and the ability of a sovereign to use otherwise tax-exempt funds in a manner it feels appropriate.

IV. Conclusion

What is to be taken away from this case and others like it? First, the canons of construction, at least as applied to exemptions from taxation, are dead. Second, whenever the tax canon requiring express exemption meets the canons of construction intended for the benefit of American Indians, the tax canon will invariably trump its rival. Finally, courts are hesitant and even antagonistic toward American Indians claiming exemptions from federal taxation. Perhaps this attitude toward a tribal council chairman is something applied to all taxpayers, but, at least in this instance, it took place to the detriment of a sovereign body of peoples – a sovereign the federal government has, in the past, pledged to protect.

Court's dismissal of this prior authority seemed to be an indication that the Indian canons are no longer in favor.").