

# American Indian Law Review

---

Volume 26 | Number 1

---

1-1-2001

## "Never Lay a Salmon on the Ground with His Head Toward the River": State of Washington Sues Yakamas over Alcohol Ban

Robert J. Haupt

Follow this and additional works at: <https://digitalcommons.law.ou.edu/air>

 Part of the [Indian and Aboriginal Law Commons](#), [State and Local Government Law Commons](#), and the [Taxation-State and Local Commons](#)

---

### Recommended Citation

Robert J. Haupt, *"Never Lay a Salmon on the Ground with His Head Toward the River": State of Washington Sues Yakamas over Alcohol Ban*, 26 AM. INDIAN L. REV. 67 (2001),  
<https://digitalcommons.law.ou.edu/air/vol26/iss1/3>

This Article is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in American Indian Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact [darinfox@ou.edu](mailto:darinfox@ou.edu).

# "NEVER LAY A SALMON ON THE GROUND WITH HIS HEAD TOWARD THE RIVER": STATE OF WASHINGTON SUES YAKAMAS OVER ALCOHOL BAN

Robert J. Haupt\*

## Table of Contents

"State Sues Yakamas Over Alcohol Ban" . . . . .	68
Is the Ban Necessary? Legitimate? . . . . .	69
Yakama Treaty of June 9, 1855 . . . . .	71
Who Is Going to Enforce the Ban? . . . . .	75
But This Is Not an Issue Only About the Sale of Alcohol — What Is the Law? . . . . .	76
Political Integrity, Economic Security, Health and Welfare . . . Further Recognized . . . . .	83
Indian Nations' Subjection to State Taxation . . . . .	83
What About the Yakama? Conclusion and Recommendations . . . . .	86
Postscript . . . . .	87

*The Creator made the Salmon. He planted the Salmon in the Rivers for the People. He taught them how to care for the Salmon which was created for them. "Do not neglect this important food," he said. "Always remember the Sacred Rules when you take care of Salmon. Never take more than you need, never lay a Salmon on the ground with his head toward the River. Place Salmon with his head facing away from the water." Thus the Creator gave the People these Sacred Laws. All along the River lived many Different People. There were many, many People catching and drying Salmon. That was the way it was when the Creator first made Salmon for the People. The People had everything placed for them — all the Sacred Foods; the Salmon, Deer, Roots, Berries, everything!<sup>1</sup>*

---

\*Managing member, Haupt Brooks Vandruff, PLLC, Oklahoma City, Okla. President, HG CORP, a national hotel and real estate firm with properties and offices in eighteen states. J.D., Oklahoma City University School of Law; B.A., Oklahoma Baptist University; Diploma, Seinan Gakuin University, Fukuoka, Japan.

The author thanks the faculty and staff of Oklahoma City University's School of Law for their support in researching and preparing this article, particularly Professor Blue Clark, Ph.D.

1. *Traditional Story*, at <http://www.indigenouspeople.org/natlit/yakama.htm> (last modified Dec. 7, 1998) (compiled by Glenn Welker).

This traditional Yakama (formerly Yakima)<sup>2</sup> story shows the close relationship between the Yakama people and the land in which they live. As well, it demonstrates the resourcefulness and common-sensibility by which they, as a People, view their world.

*"State Sues Yakamas Over Alcohol Ban"*

As published in the *Herald Republic* on Wednesday, September 20, 2000, one day earlier, the State of Washington filed a lawsuit in United States District Court in Spokane, Washington seeking a permanent injunction against the Yakama Nation and its ban on the sale or consumption of alcoholic beverages on its 1.3 million-acre reservation, "whose boundaries include towns and substantial non-Indian holdings deeded away by the Tribe."<sup>3</sup> The ban attempts to restrict all alcoholic activity on the reservation, both on privately and tribally owned property. Today, about 20% of the reservation is privately owned.<sup>4</sup> Some forty-seven businesses on the Yakama Reservation sell beer, wine, or liquor.

On April 4, 2000, the fourteen-member Yakama General Council voted 13-1 to approve the ban to go into effect September 17, 2000. At the time, little was certain of the effect or enforceability of the ban upon the reservation. Proponents, including local attorney and Tribal Councilman Jack Fiander, argue that the ban is necessary to curb the ill effects of alcohol on the Tribe and its membership. According to Fiander, the rate of fetal alcohol syndrome among children is roughly 500% higher on the Yakama reservation than in society as a whole.<sup>5</sup> Emphatically, Fiander adds, "Your big old 40-ounce malt liquor empties show up at every crime scene on the reservation."<sup>6</sup> It is found, too, that the effect of alcohol is seen disproportionately in traffic fatalities. Gary Carter, an environmental health officer for the Yakama Nation, cites a federal study that found "from 1993-1996, 78 percent of all motor-vehicle deaths on the reservation were alcohol-related, compared with 39 percent for

---

2. In 1994, the tribal council issued a resolution changing the spelling of the Tribe's name from "Yakima" to "Yakama," the spelling that appears on the June 9, 1955 Treaty with the United States government. There, delegates of the Yakama, Palouse, Pisuouse, Wenatshapam, Lkikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skin-pah, Wish-ham, Shyiks, Ochechotes, Kah Milt-pah, and Se-ap-cat confederated tribes and bands of Indians were joined together as the "Confederated Tribes and Bands of the Yakama Indian Nation." See 1992 Note, at <http://www.tcfm.org/tctour/museums/Yakama.html>; "Yakamas" Alter Spelling of Tribe, SEATTLE TIMES, Jan. 26, 1994, at B2.

3. Editorial, *Respect Tribal Sovereignty in Yakama Alcohol Ban*, SEATTLE TIMES, Sept. 25, 2000, at B6, available in 2000 WL 5564111.

4. Florangela Davila, *State Sues Tribe over Alcohol Ban*, SEATTLE TIMES, Sept. 20, 2000, at B2, available in 2000 WL 5555449.

5. Linda Ashton, *State Suit Challenges Tribe's Beer Ban*, SEATTLE TIMES, Oct. 8, 2000, at B7, available at 2000 WL 5557811 [hereinafter Ashton, *State Suit Challenges Ban*].

6. *Id.*

the state and 48 percent for the nation.<sup>7</sup> While the ban effects the nearly 5000 Yakama members who live on the reservation,<sup>8</sup> alcohol has long been banned from the parts of the reservation that are open only to tribal members. Also, neither the Yakama Legends Casino nor the tribally owned convenience store sells any alcoholic products. However, nearly 20,000 nontribal members live on the reservation. It is to these, Washington State Attorney General, Christine Gregoire argues in her petition to the U.S. District Court, that the ban cannot be applied.<sup>9</sup> There appears to be no attempt by the state to restrict the Tribe's ability or power to regulate its own members' conduct nor to restrict the sale of alcohol on its own tribally owned property.

Not all of the resistance to the ban is coming from non-tribal members. Ban protestor, Adrienne Wilson has called for the funding and development of programs to treat alcoholics and to "provide services for fighting alcoholism" rather than an outright ban.<sup>10</sup> However, it was this attempt to create funding for such programs that began the controversy. Late in 1999, before voting to ban the "possession, distribution, and sale of all alcohol within the reservation, including on those privately-owned lands,"<sup>11</sup> the Council had voted to tax the sale of alcohol within the boundaries of the reservation in order to provide funds for alcohol and drug treatment and drunk driving prevention and enforcement. That tax was to have begun January 4, 2000. Yet, Washington Governor Gary Locke promised to challenge the Tribe's alcohol tax in court. In response, the Yakama executive board then voted to replace the proposed tax with an outright ban.

### *Is the Ban Necessary? Legitimate?*

A reader might ask whether the controversy over the ban is simply tribal politics at work; whether it is an excuse to battle a sovereignty war between a tribe's independence and autonomy against that of a state's power to levy and collect taxes; or, whether there is a basic and legitimate need and/or justification for such tribal involvement in the management of its own affairs, here as it relates to alcohol consumption and the effect on the Yakama tribal members.

---

7. Ashton, *State Suit Challenges Ban*, *supra* note 5.

8. Total tribal enrollment is currently 8455, according to the Yakama Indian Nation Cultural Center, P. O. Box 151, Toppenish, Wash. 98948, (800) 874-3087. Not all members would live on or even near the reservation.

9. Linda Ashton, *Yakama Tribe Moves to Quash State Suit*, NEWS TRIBUNE (Tacoma, Wash.), Sept. 25, 2000, at B3, available in 2000 WL 5337914; Ashton, *State Suit Challenges Ban*, *supra* note 5.

10. Mike Barenti, *Alcohol Ban Has Foes in Tribe*, YAKIMA HERALD-REPUBLIC, Mar. 31, 2000.

11. *Id.*

It likely will not come as a surprise to a reader that the subjects of alcohol abuse and American Indians<sup>12</sup> are inextricably related. "Restrictions on traffic in liquor among the Indians began in early colonial times, in a few of the colonies," specifically Massachusetts, Pennsylvania, and New Jersey.<sup>13</sup> As well, Congress, itself adopted legislation authorizing the executive to take such steps as would appear to it necessary to control the spread of alcoholic beverages to the various Indian tribes.<sup>14</sup> It would not be radical to suggest that the operative word at the time and during most of the two hundred years since, is simply, "control"; control for the sake of control.

Today, although the issue of "control" has not disappeared, the source of the tribal concern arguably is more scientifically based or practically oriented. The attention appears justified. There are great and distinct differences between the various domestic races in the effect that alcohol has on their individual and collective health. For example, studies<sup>15</sup> have shown that while the precise numbers appear "highly variable" among the various American Tribes, alcohol abuse is a factor in five leading causes of death for American Indians, including motor vehicle crashes, alcoholism, cirrhosis, suicide, and homicide.<sup>16</sup> Mortality rates for crashes among American Indians are 550% greater than among the general population. There is a 380% gap between the groups in alcoholism rates. In fact, "among tribes with high rates of alcoholism, reports estimate that 75 percent of all accidents, the leading cause of death among American Indians, are alcohol related."<sup>17</sup>

Specifically noted by the Yakama Tribal Council was its concern over Fetal Alcohol Syndrome (FAS) and the suffering borne by children of "drinking mothers," based on a 1993 study.<sup>18</sup> Nationally, in the United States, rates for Fetal Alcohol Syndrome range from one to three per 1000.<sup>19</sup> In one study involving two groups of Southwestern Plains Indians, 10.7 of every 1000 children were born with FAS.<sup>20</sup> While the cause of FAS is

12. In this article, the terms "Indian," "American Indian," and "Native American" are used interchangeably. Most frequently "American Indian" will be used, as it appears to have been the dominant official reference to the aboriginal people of North America in documents throughout most of the United States history.

13. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 352 (Five Rings 1986) (photo. reprint of Univ. of N.M. photo. reprint 1971) (1942).

14. *Id.*

15. S.M. Manson et al., *Alcohol Abuse and Dependence Among American Indians, in ALCOHOLISM IN NORTH AMERICA, EUROPE AND ASIA* 113-30 (J.E. Helzer & G.J. Canino eds., 1992).

16. *Id.*

17. *Id.*

18. Ashton, *State Suit Challenges Ban*, *supra* note 5.

19. R.J. Sokol et al., *Significant Determinants of Susceptibility to Alcoholteratogenicity*, 477 ANNALS N.Y. ACAD. SCI. 87, 87-122 (1986).

20. P.A. May, *Fetal Alcohol Effects Among North American Indians: Evidence and Implications for Society*, 15(3) ALCOHOL HEALTH & RES. WORLD 87-102 (1986).

alcohol abuse, the root is not clearly genetic. In fact, it has been suggested that "cultural influences, patterns of alcohol consumption, nutrition, and differing rates of alcohol metabolism, or other innate physiological differences may account for the varying FAS rates among [different] communities."<sup>21</sup> With any political or governing body, the reasoning behind all of its decisions may not be fully documented or clearly discernable. Here, however, it certainly appears the tribal council's judgment demonstrated reasonable and appropriate concern for the physical and mental health of the greater Yakama community, for both tribal members and nonmembers alike, by voting to ban the possession, sale, and distribution of alcoholic beverages.

### *Yakama Treaty of June 9, 1855*

Like most, if not all, treaties between the United States government and American Indians, the Treaty with the Yakama as executed on June 9, 1855, was celebrated to great acclaim by the dominant "benefactors" [sic] of the treaty; but in fact, the Yakama's immediate dissatisfaction with the treaty led to the Yakima Wars (1855-1858). The Yakama had granted the United States "the right to build and use roads through the Yakama reservation" in exchange for some degree of protection of their rights to travel and to live in their traditional manner.<sup>22</sup> It was only after the U. S. army defeated the Yakama and their allies at the Battle of Four Lakes in 1858 that the treaty was acknowledged by the Yakama and effectively enforced by the federal government. The treaty ceded to the United States government the vast territory formerly held by the Yakama and their confederates. They were left with what is today approximately 1.3 million acres.

The Yakamas were widely diversified in their efforts to obtain food and sustenance. While they were agriculturalists and at times exploring hunters, even on occasion, crossing the Rocky Mountains in pursuit of bison and other large game, they were primarily fishermen, depending hugely on the salmon runs for their annual harvests. So fundamental to the life of the Yakama was the fishing that virtually the entire boundary of their reserved land was defined in terms of tributaries, spurs, divides, mouths and, of course, rivers.<sup>23</sup> Article 3 of the Treaty even provides for the "exclusive right of taking fish

---

21. J.M. Aase, *The Fetal Alcohol Syndrome in American Indians: A High Risk Group*, 3(2) *NEUROBEHAVIORAL TOXICOLOGY & TERATOLOGY* 153-56 (1986), available at <http://alcoholism.about.com/health/alcoholism/library/blnaa23.htm>.

22. *Ninth Circuit Affirms Extensive Reliance on Experts*, 4(12) *FEDERAL DISCOVERY NEWS*, Nov. 1998. While not directly related to this article, this interesting authority discussed primarily the Ninth Circuit Court of Appeals' allowance of hearsay testimony from Will Yallup, in according him great deference as a tribal elder, in the Court's analysis of the meaning of the Treaty of 1855, an approach not generally recognized by law.

23. *Treaty Between the United States and the Yakama Nation of Indians, June 9, 1855*, art. 2, 12 Stat. 951, 952.

in all the streams, where running through or bordering said reservation."<sup>24</sup> The Yakama appear to have been gravely concerned about their ability to control their fishing grounds — their source of food.

Interestingly, in this rather brief document, a treaty of essentially only three pages, plus the signature pages, comprised of only eleven articles, an entire article<sup>25</sup> of the treaty is dedicated to the prohibition of alcoholic beverages. Specifically,

The said confederated tribes and bands of Indians desire to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same, and therefore, it is provided that any Indian belonging to said confederated tribes and bands of Indians, who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her annuities withheld from him or her for such time as the President [of the United States] may determine.<sup>26</sup>

It appears clear from the language of the Article that the federal authors sought to have the provision entered and enforced. Yet, it is to that same provision today, that the Yakama tribal leadership is pointing to as it attempts to seek benefits for its tribal membership. Even where the language is not completely clear, the Supreme Court has announced that ambiguities in treaties with American Indians must be resolved in favor of the tribes.<sup>27</sup> As well, a "treaty must therefore be construed, not according to the technical meaning of the words . . . , but in the sense in which they would naturally be understood by the Indians."<sup>28</sup>

There does not seem to be much of a question but that "federal statutes prohibiting alcohol do apply on the reservation," according to James Shively, the U. S. Attorney for Eastern Washington.<sup>29</sup> Jack Fiander, the Yakama tribal councilman/attorney claims that "Federal law prohibits alcohol on Indian lands . . . unless a tribal government passes a resolution seeking to allow it on a reservation. The reservation prohibition must be approved by the Security of the Interior before the federal law is usurped."<sup>30</sup> Title 18 U.S.C. § 1154(a) appears to support both Shively and Fiander's claims. This code simply prohibits the distribution of alcoholic beverages to Indians in Indian

---

24. *Id.* art. 3, 12 Stat. at 953.

25. *Id.* art. 9, 12 Stat. at 954.

26. *Id.*

27. *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930).

28. *Jones v. Meehan*, 175 U.S. 1, 11 (1899).

29. Mike Barenti, *State Sues Yakamas over Alcohol Ban*, YAKIMA HERALD-REPUBLIC, Sept. 20, 2000 [hereinafter Barenti, *State Sues Yakamas*].

30. Greg Tuttle & Tom Roeder, *Tribal Alcohol — Going Dry to Spur Change*, YAKIMA HERALD-REPUBLIC, Mar. 22, 2000.

Country<sup>31</sup> as it is referenced in 18 U.S.C. § 1161 and defined in § 1151. "Indian Country" includes:

all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.<sup>32</sup>

Despite the argument by opponents of the alcohol ban that "since non-Indians outnumber Yakamas on the reservation, it doesn't qualify as Indian Country and the federal laws prohibiting alcohol don't apply,"<sup>33</sup> any reading of 18 U.S.C. § 1161 indicates that the Yakama reservation clearly is Indian Country. While this code section addresses the distribution of alcohol to Indians, it seems to beg the question of how the sale of alcohol to non-Indians living on non-trust land within the borders of a reservation is affected. In *United States v. Mazurie*,<sup>34</sup> the Supreme Court of the United States makes clear that Article I, Section 8, Clause 3 of the United States Constitution grants Congress the power to regulate commerce with Indian tribes; more specifically, this article empowers Congress to prohibit, regulate, or control the sale of alcoholic beverages to tribal Indians, wherever located or to all individuals living within tribal reservation boundaries.<sup>35</sup> The *Mazurie* case is important because while other tribal governments, including the Navajo and Oglala Lakota Sioux at Pine Ridge, have banned alcohol on their tribal lands, they are distinguished from the Yakama by having virtually all of their reservation land still held in trust, or rather, not "deeded."<sup>36</sup> *Mazurie* demonstrates that this distinction

---

31. 18 U.S.C. § 1154(a) (2000).

32. *Id.* § 1151.

33. Mike Barenti, *State Wants Answers on Alcohol Ban*, YAKIMA HERALD-REPUBLIC, Sept. 12, 2000 [hereinafter Barenti, *State Wants Answers*].

34. 419 U.S. 544 (1975).

35. *Mazurie*, 419 U.S. at 554-55; see U.S. CONST. art. I, § 8, cl. 3 (commonly referred to as the "Indian Commerce Clause"); see also *Perrin v. United States*, 232 U.S. 478 (1914); *United States v. Nice*, U.S. 519 (1916).

36. "Deeded land" is tribal land that was sold to private owners, generally non-Indians, as was made available as "surplus" during the period of and after "allotment." This was made possible by the Dawes Act or General Allotment Act of 1887. Tribal communal property was allotted to individual tribal members in units roughly of 160 acres each. The surplus was then opened to purchase and/or development by white settlers. These "surplus" lands were the first "deeded properties" followed by the allotted land that was allowed to be sold after a 25-year statutory waiting period. Today, any land "deeded" or made private must have the approval of both the Secretary of the Interior and the United States Congress. General Allotment Act of 1887



does not matter; even with the checkerboard mix of tribal property and deed private property within the Yakama reservation. In *Mazurie*, the Court rejected the challenge by non-tribal members that they suffered by not being able to participate in the political or representative process of the tribe, to whose rules they were subjected.<sup>37</sup> Congress's ratification of Article 9 of the 1855 Treaty appears to remain valid and intact.

In a recent opinion of the United States Supreme Court, *South Dakota v. Yankton Sioux Tribe*,<sup>38</sup> the Court appears at first glance to back off from its recognition of the 1858 treaty<sup>39</sup> with the Yankton Sioux. In its ruling, the Court found that the Yankton Sioux relinquished their rights and control to the non-allotted lands within its reservation by having executed an agreement with the federal government in 1894.<sup>40</sup> In that post Dawes Act agreement, after years of war, drought, flooding, and famine, the Yankton Sioux traded all "unallotted lands on the tribe's reservation" for \$600,000 or approximately \$3.60 per acre.<sup>41</sup> Even though the agreement referenced the 1858 treaty and the broad conditions of Yankton Sioux authority and autonomy over the reservation, the Supreme Court found that the reference was limited to the provisions of continued annuities.<sup>42</sup> What the Court did find was that the reservation had been "diminished" by the 1894 Agreement.<sup>43</sup> In cases that will be discussed in greater detail later in this paper,<sup>44</sup> the Court rejected the District Court's application of those cases to this situation. Specifically, the District Court noted that "the Tribe itself could not assert regulatory jurisdiction over the non-Indian activity on fee lands" and that "the Tribe could not invoke its inherent sovereignty under the exception"<sup>45</sup> to this rule when failure to make such an assertion would compromise the "political integrity, the economic security, or the health or welfare of the tribe."<sup>46</sup> Even the Tribe's attempt to prevent the establishment of a Waste Dump/Landfill on

---

(Dawes Act), 25 U.S.C. §§ 331-342 (2000).

37. *Mazurie*, 419 U.S. at 557-58.

38. 522 U.S. 329 (1998).

39. Treaty with the Yankton Sioux, Apr. 19, 1858, 11 Stat. 743.

40. Act of Aug. 15, 1894, ch. 290, 28 Stat. 286.

41. *Yankton Sioux Tribe*, 522 U.S. at 335, 338. In 1890, eighty-eight years after the 1892 agreement, the Court of Claims found that the Tribe had been cheated of nearly \$740,000 (in 1892 dollars) on this compensation, finding that the land at that time had a value of \$6.65 per acre. *Yankton Sioux Tribe v. United States*, 623 F.2d 159, 178 (1980), quoted in *Yankton Sioux Tribe*, 522 U.S. at 339.

42. *Yankton Sioux Tribe*, 522 U.S. at 337, 348.

43. *Id.* at 342.

44. *South Dakota v. Bourland*, 508 U.S. 679 (1993); *Montana v. United States*, 450 U.S. 544 (1981).

45. *South Dakota v. Bourland*, 508 U.S. 679, 692 (1993), quoted in *Yankton Sioux Tribe*, 522 U.S. at 341.

46. *Montana v. United States*, 450 U.S. 544, 566 (1981), quoted in *Yankton Sioux Tribe*, 522 U.S. at 341.

its reservation was found to be an insufficient threat to the "health and welfare" of the tribe and its members. By recognizing the diminishment of the reservation, and further concluding that the relinquished land was no longer "Indian country,"<sup>47</sup> the Court was able to circumvent the entire issue of sovereign conflict between the State of South Dakota and the Yankton Sioux Tribe. This case is distinguished from the case at hand involving the Yakama ban on alcohol in that there is no such intermediate treaty or agreement affecting the Yakama Treaty of 1855 in which its sovereignty is otherwise abrogated.

### *Who Is Going to Enforce the Ban?*

In threatening litigation, the Washington Attorney General's office demanded to know "how the ban will be enforced."<sup>48</sup> Jesse Chester of the Federal Bureau of Alcohol, Tobacco and Firearms indicated that this controversy is "not something we would get ourselves involved in."<sup>49</sup> City Manager of Toppenish, Washington, Jim Southworth stated, "There's no legal authority" for Toppenish police officers to become involved in enforcing the ban.<sup>50</sup> Statements made the previous week by Tribal Councilman Fianders indicated that the Tribe expected the U.S. Attorney's office to prosecute the violations under federal law prohibiting alcoholic beverages in Indian Country.<sup>51</sup> James Shivey, U.S. Attorney for Eastern Washington, and the chief federal law enforcement representative in the area has been clear that it is his office's job to enforce the appropriate federal law. While not quoted in any of the local articles, it is clear from the United States Supreme Court that unless it is granted by treaty or other congressional delegation tribes have no inherent criminal jurisdiction over non-Indians in tribal court.<sup>52</sup> As well, he has stated "since the Yakamas never passed a resolution allowing the sale of alcohol on the reservation, it probably shouldn't have been allowed in the first place."<sup>53</sup> Despite that impression, Shivey indicated that his office would review the statute(s) and make a decision on its role within the next thirty to sixty days.<sup>54</sup>

---

47. *Yankton Sioux Tribe*, 522 U.S. at 358.

48. Barenti, *State Wants Answers*, *supra* note 33.

49. *Enforcement Hot Potato*, at <http://alcoholism.about.com/library/weekly/aa000328b.htm> (visited Oct. 2, 2001).

50. *Id.*

51. Barenti, *State Wants Answers*, *supra* note 33.

52. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

53. Barenti, *State Sues Yakamas*, *supra* note 29.

54. *Id.*

*But This Is Not an Issue Only About the Sale of Alcohol —  
What Is the Law?*

The specific legal issue in this matter might be framed as whether an Indian tribal council can ban the possession, sale, and distribution of alcohol to both tribal members and nonmembers alike, on both trust and deeded private property within a reservation, despite objections by the government of the state in which the reservation exists. A broader question would be whose jurisdiction, state or tribal, will prevail when there is a conflict of law between the state and the Indian tribe, when the tribe's law is more restrictive than the state's? Even more specific than either of the above questions would be whether the ban can be enforced on non-Indians on private land within the exterior borders of the reservation? Within the boundaries of the Yakama reservation, there are cities that serve as extensions of the state, subject to local and state laws; there are private, unincorporated areas subject to the Yakima County government, also a subdivision of the state. Finally, there is the tribal government, recognized by treaty, statute, and case law to be a sovereign with unique powers and rights independent from the state in which it exists. Alcohol may be the question of the day; however, the real issue remains what is the authority of the Yakamas as a sovereign nation? Is the Tribe's sovereignty "absolute within the exterior boundaries of the reservation, or does it stop at the borders of the many deeded parcels within those boundaries?"<sup>55</sup> Before these issues can be resolved, more analysis must be made of the case law history relevant to the question.

The State of Washington is no stranger to questions involving jurisdictional conflicts with Indian Tribes. In 1980, in *Washington v. Confederated Tribes of the Colville Indian Reservation*,<sup>56</sup> the Supreme Court of the United States validated the imposition of tribal taxes on cigarettes purchased by non-Indians on tribal property.<sup>57</sup> Here, the Colville Tribe was joined by the Makah and the Lummi Tribes, altogether holding reservation land approximating the size of that of the Yakama. Similarly, not all of the reservation residents were tribal members. *Colville* is distinguished by the fact that the tax was imposed as a revenue generator, not as a health and safety device, as in the Yakama's ban. Other Federal courts have long since recognized the power of tribes to tax non-Indians who engage in business on reservation property.<sup>58</sup> In those cases, the Court appeared to weigh the significant interest of the Tribe in

---

55. *Proposed Alcohol Ban Would be Test of Rights*, YAKIMA HERALD-REPUBLIC, Mar. 22, 2000.

56. 447 U.S. 134 (1980).

57. *Id.* at 158-59.

58. *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956); *cf. Morris v. Hitchcock*, 194 U.S. 384, 393 (1904).

taxing the non-tribal members against those of the non-Indians. The Yakama's interest in banning the sale of alcohol as a means of promoting the health and safety of its members and perhaps, nonmember residents, alike, would seem to be at least as great an interest as that of a tribe raising revenues by taxation.

Further supporting the power of the tribes to tax nonmembers on the reservation, the Supreme Court in *Colville* remarked that "the power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribe retains unless divested of it by federal law or necessary implication of their dependent status."<sup>59</sup> Two years earlier, the Court upheld a similar sales tax on cigarette sales to non-Indians in *Moe v. Salish & Kootenai Tribes*.<sup>60</sup>

*Montana v. United States*<sup>61</sup> is an often-cited case from 1981. The Supreme Court here reversed in part the decisions by the Ninth Circuit Court of Appeals. The *Montana* controversy involved the right of the Crow Tribe of Montana to restrict hunting and fishing on the reservation by any non-tribal member over that of the State of Montana's right to assert its authority over hunting and fishing regulations. Specifically, the Tribe sought to regulate and restrict the activity of non-Indians when fishing on fee-simple, deeded land.<sup>62</sup> The Supreme Court, in reversing the court of appeals, held that the title to the Big Horn River bed did not belong to the Tribe, but had in fact, passed to the State of Montana upon statehood; that absent some clear and overcoming condition in the pre-statehood period of relations with the Crow, there was a strong presumption against conveyance of such lands by the United States and that such lands were held by the United States government in trust for the future state.<sup>63</sup> It was considered that whoever controlled or 'owned' the riverbed would in turn control the right to govern the activity involving it.

Secondly, the Supreme Court reversed the Court of Appeals, holding that the Tribe could not prohibit, regulate, or control hunting and fishing by non-tribal members on deeded land owned by non-tribal members. The Tribe's power to regulate these activities on tribal property or on land held in trust for the tribe was not at controversy.<sup>64</sup> However, *Montana* is distinguished from the Yakama "ban" in that there was no clear relationship to "tribal self-government or to internal relations"<sup>65</sup> seriously involved in the Crow hunting and fishing question. In fact, in *Montana*, citing several supporting cases, the Supreme Court held that "a tribe may [ ] retain inherent power to exercise

---

59. *Colville*, 447 U.S. at 152; cf. *United States v. Wheeler*, 435 U.S. 313 (1978).

60. 425 U.S. 463 (1976).

61. 450 U.S. 544 (1981).

62. *Id.* at 547.

63. *Id.* at 547-54.

64. *Id.* at 557-66.

65. *Id.* at 564.

civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."<sup>66</sup> This holding is remarkable for it is, if not a change in direction, certainly a major clarification from the position taken by the Court in *Oliphant v. Suquamish Indian Tribe*<sup>67</sup> in which the Court recognized that "Indian tribes do not have the power, nor do they have the authority, to regulate non-Indians unless so granted by an act of Congress."<sup>68</sup> This approach is mirrored in the context of state's applying state laws that "generally are not applicable to tribal Indians on an Indian reservation except when Congress has expressly provided that state laws shall apply."<sup>69</sup> While the Crow matter in *Montana* is not one involving the health, welfare, and contemporary economic security of the Tribe, it would appear that the Yakama case is one precisely involving such.

Eight years after *Montana*, in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*,<sup>70</sup> in a very complicated plurality opinion authored by Justice White, the Court upheld the "checkerboard jurisdiction" limiting tribal governance from overly interfering with property uses of non-Indians on deeded fee property, unless those uses "imperil the political integrity, the economic security, or the health or welfare of the Tribe."<sup>71</sup>

In *Brendale*, two parties, *Brendale* and *Wilkinson*, were granted "Declaration[s] of Non-Significance" to develop private land by the Yakima County Planning Department despite protests by the Yakama Nation.<sup>72</sup> This controversy in *Brendale* involves the same Indian tribe, sharing the same history, as does the tribe that is the primary subject of this paper. In the 1855 treaty, the Yakama Nation gave up vast areas of land to the federal government while retaining what is now known as the Yakama reservation, a 1.3-million-acre area of land in southeast Washington. The land was retained for the Yakamas along with the other thirteen names then making up the confederacy's "exclusive use and benefit."<sup>73</sup> Today, approximately 80% of that land is held in trust by the United States government for the benefit of either the Tribe or individual tribal members. The remaining 20% is owned

---

66. *Id.* at 566 (emphasis added); *Fisher v. District Court*, 424 U.S. 382, 386 (1976); *Williams v. Lee*, 358 U.S. 217, 220 (1959); *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 128-29 (1906); *Thomas v. Gay*, 169 U.S. 264, 273 (1898).

67. 435 U.S. 191 (1978).

68. *Montana*, 450 U.S. at 549 (quoting *United States v. Montana*, 457 F. Supp. 599 (1978)).

69. *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 170-71 (1973).

70. 492 U.S. 408 (1989).

71. *Id.* at 431.

72. *Id.* at 417.

73. Treaty Between the United States and the Yakama Nation of Indians, June 9, 1855, art. 2, 12 Stat. 951, 952.

in fee by both Indians and non-Indians. This fee property is distributed throughout the reserved land in a "checkerboard pattern."<sup>74</sup>

The Yakama Reservation is divided into two parts: a "closed area" (two-thirds of the reservation) and an "open area" (one-third of the reservation). Most of the closed area is in Yakima County. The closed area is so designated because in 1972, the Bureau of Indian Affairs closed public access to non-tribal members to the federally maintained roads in the area.<sup>75</sup> Whereas most of the closed area land is trust property, about one-half of the open land is privately owned "fee land." Between 1970 and 1972, the Yakama Nation developed a comprehensive zoning plan. Similarly, during the same time, Yakima County did the same. Again, most of the closed area land is in Yakima County. Brendale owned land in the closed area. Wilkinson owned land in the open area of the reservation. While Brendale was part Indian, neither he nor Wilkinson were members of the Yakama Nation. Both parcels of land were in Yakima County. After the Yakima County Commissioners rejected the protest by the Yakama Nation over what was essentially the granting of permits to develop the respective properties, both of which were in conflict with the policy of the Yakama Nation, the Yakamas filed suit.<sup>76</sup>

The district court, citing, inter alia, *Montana v. United States*,<sup>77</sup> held that the Yakama Nation had exclusive zoning authority over Brendale and his property in the closed area, but not over Wilkinson and his property in the open area.<sup>78</sup> While the court seemed to accept arguments that the closed area was important in terms of food and fuel sources and other practical concerns, the primary emphasis appears to have been on the Tribe's recognition of greater identification with the closed lands than with the already open-accessed lands.

The Court of Appeals for the Ninth Circuit held that the Yakama Nation had exclusive zoning authority over both lands. The Ninth Circuit recognized that the "very nature" of zoning is "to protect against the damage caused by uncontrolled development, which can affect all of the land of the reservation."<sup>79</sup> This concern is the court's recognition of the primacy of "health and welfare" of its membership in a Tribe's mission.<sup>80</sup>

The United States Supreme Court framed the issue a bit differently than the courts below, asking "whether the Yakima Nation has the authority, derived either from its treaty with the United States or from its status as an independent sovereign, to zone the fee lands owned by Brendale and

---

74. *Brendale*, 492 U.S. at 415.

75. *Id.*

76. *Id.* at 419.

77. *Montana*, 450 U.S. at 544.

78. *Brendale*, 492 U.S. at 420.

79. *Id.* at 420-21 (quoting *Confederated Tribes & Bands of the Yakima Indian Nation v. Whiteside*, 828 F.2d 529 (1987)).

80. *Id.*

Wilkinson.<sup>81</sup> The plurality opinion reinstated the District Court's decision holding that the Yakama Nation did have primary interest in zoning in the "closed" area, but not in the "open" area. However, as with any non-majority opinion, the analysis requires some counting of votes.

Justices White, Rehnquist (Chief Justice), Scalia, and Kennedy wrote the plurality opinion. They held that:

(1) The prior history of the land use had foreclosed the Tribe from asserting its primary control over all land, particularly over the open areas;<sup>82</sup>

(2) As a general rule, the Tribe would not have authority over nonmembers even in the closed area without Congressional delegation; and<sup>83</sup>

(3) An exception to the general rule is when nonmembers' conduct "threatens, or has some direct effect on, the political integrity, the economic security, or the health or welfare of the tribe."<sup>84</sup> But, the exception does not apply in this instance of the Tribe's protest of Wilkinson's project in the open area.<sup>85</sup>

On the question of Wilkinson and his land in the open area, White and the others announced the judgment of the Court in rejecting the Yakama's protest. These four justices would have likely expanded that denial to the Yakama's protest of Brendale's plan, as well.

Justices Stevens and O'Connor announced the Court's decision regarding Brendale and his land in the closed area. They considered the definiteness of the Tribe's restrictions over the closed area. They looked to the language in the original treaty. They gave deference to the Yakama's right to control members in all areas and nonmembers in the closed areas. The Tribe's historical and aboriginal authority over the land was to be recognized in the closed area.<sup>86</sup>

Justices Blackmun, Brennan, and Marshall dissented to the extent that they would have held the tribal sovereignty of the Yakamas to be determinative in both instances.<sup>87</sup> It appears that Blackmun and his fellow dissenters would have a tribe and its sovereignty subject to the same "rational basis" test that a state sovereign is subjected to in constitutional law analysis, whether the zoning issue here is "rationally related to a legitimate state interest."<sup>88</sup> In *Cotton Petroleum Corp. v. New Mexico*,<sup>89</sup> the Court recognized that the possibility of joint and/or conflicting sovereign authority was more than just a possibility, but is increasingly likely with ongoing economic development

---

81. *Id.* at 421-22.

82. *Id.* at 429.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 433-34.

87. *Id.* at 448-49.

88. *Id.* at 429 (quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955)).

89. 490 U.S. 163 (1989).

and progress. A footnote in Blackmun's dissent quotes Felix Cohen in his *Handbook of Federal Indian Law*,

the settled doctrine of the law of nations is, that a weaker power does not surrender its independence — its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.<sup>90</sup>

It is likely not insignificant that it was a footnote to a dissenting opinion that such strong language is found, indicating deference and support for the "weaker" sovereign's authority, despite its 'inferior' position. As part of the Court's explanation in *Oliphant* noted, "inherent criminal jurisdiction" over non-Indians is inconsistent with the dependent status of the tribes.<sup>91</sup> Yet later, that same court did allow for a tribe's retention of "civil jurisdiction over . . . non-Indians."<sup>92</sup>

However, in the Court's analysis in *Brendale*, the Court does recognize that "an Indian tribe's treaty power to exclude nonmembers of the tribe from its lands is not the only source of Indian regulatory authority."<sup>93</sup> The authority of a tribe's exclusion of nonmembers is historical and predates the European settlement of the New World.<sup>94</sup> This authority is independent from that granted and negotiated with the federal government.<sup>95</sup>

The four-justice plurality in *Brendale* cited "congressional delegation" as a source of tribal power.<sup>96</sup> With the development and strengthening of tribal governments, it appears that there will be more frequent conflicts between state authority and tribal protection by federal legislation. While this is largely an exercise in determining congressional intent, the history of tribal sovereignty must be considered as well.<sup>97</sup> This analysis is not a mechanical analysis of traditional standards of preemptive studies.<sup>98</sup> More than anything, this is a fact-based analysis of the situation and the legislation involved,

---

90. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 235 (Rennard S. Strickland et al. eds., 1982).

91. *Oliphant*, 435 U.S. at 212; *Duro v. Reina*, 495 U.S. 676, 684 (1990).

92. *Colville*, 447 U.S. at 152.

93. *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 426 (1989).

94. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982).

95. *Wheeler*, 435 U.S. at 322-34; *Oliphant*, 435 U.S. at 208.

96. *Brendale*, 492 U.S. at 426.

97. *Cotton Petroleum Corp.*, 490 U.S. at 176; *McClanahan*, 411 U.S. at 172; *Rice v. Rehner*, 463 U.S. 713, 719 (1983).

98. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980), quoted in *Cotton Petroleum Corp.*, 490 U.S. at 176.



balancing the interests of the various state, federal, and tribal parties involved.<sup>99</sup> However, as a general rule, it appears that courts are now resolving 'close calls' in this interest analysis "in favor of tribal independence."<sup>100</sup>

An example of this analysis is found in the case of *South Dakota v. Bourland*,<sup>101</sup> a controversy involving the Cheyenne River Sioux Tribe's prohibition of nontribal members hunting and fishing on lands formerly held in trust for its benefit by the U.S. government. These lands, had since been conveyed to private parties, Indians and non-Indians, tribal members and nonmembers, as deeded fee property, still within the reservation territory. Here, the United States Army Corps of Engineers constructed a large reservoir recreational area which tribal members and nonmembers alike were allowed to use for hunting and fishing. The Cheyenne River Act that authorized the creation of this reservoir area granted to the Tribe and tribal members certain rights of use and access to the area, including the "right to hunt and fish."<sup>102</sup> The Sioux Tribe contended that it retained a right to regulate others' hunting and fishing, as well, in this area, to the point of refusing even to recognize hunting or fishing licenses issued by the State (South Dakota). The United States Supreme Court held that it could find "no evidence in the relevant treaties or statutes that Congress intended to allow the Tribe to assert regulatory jurisdiction over these lands pursuant to inherent sovereignty."<sup>103</sup> In this case, the Court noted that as a "tribe . . . lost the right of absolute use and occupation of lands so conveyed, the Tribe no longer had the incidental power to regulate the use of the lands by non-Indians."<sup>104</sup> With that, the Court developed a rule of law that

when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands. The abrogation of the greater, right, at least in the context of the type of area at issue in this case, implies the loss of regulatory jurisdiction over the use of the land by others.<sup>105</sup>

One additional aspect of the analysis must be addressed: how does the existence of a treaty affect this consideration? The Supreme Court specifically discussed this in *Bourland*. The Court wrote, "what is relevant . . . is the effect . . . occasioned by that policy on Indian treaty rights tied to Indian use

---

99. *Ramah Navajo Sch. Bd. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 838 (1982), quoted in *Cotton Petroleum Corp.*, 490 U.S. at 176.

100. *Cotton Petroleum Corp.*, 490 U.S. at 177.

101. 508 U.S. 679 (1993).

102. *Id.* at 684 (emphasis omitted).

103. *Id.* at 695.

104. *Id.* at 688; *Brendale*, 492 U.S. at 423-24.

105. *South Dakota v. Bourland*, 508 U.S. at 689.

and occupation of reservation land."<sup>106</sup> A treaty must prevail as the final consideration in this analysis.

*Political Integrity, Economic Security, Health and Welfare . . . Further Recognized*

A few years after *Brendale*, in another case involving the County of Yakima and the Confederated Tribes and Bands of the Yakama Indian Nation,<sup>107</sup> the United States Supreme Court held that Yakima County could, in fact, assess private fee-patented land within the reservation with Ad Valorem taxes, but could not, however, assess excise tax on the conveyance of the same lands.<sup>108</sup> Here, the controversy involved the county's attempt to foreclose on lands on which liens had been placed due to unpaid ad valorem or excise taxes. The properties in question were fee-patent lands on the reservation held by the Tribe or tribal members. While the bulk of the discussion and analysis of the court in this case involved the provisions of the General Allotment Act of 1887 (Dawes Act),<sup>109</sup> it is important to notice that the Court, in upholding the Ninth Circuit Court's opinion, recognized that "the ad valorem tax would be impermissible only if it would have a 'demonstrably serious' impact on the 'political integrity, economic security, or the health and welfare of the tribe.'"<sup>110</sup> As an aside, the Court held that the Indian General Allotment Act of 1887 would not tolerate the imposition of excise taxes on fee-patent reservation land for the Act allows the taxation "of . . . land," but not on all activities involving or related to land.<sup>111</sup>

*Indian Nations' Subjection to State Taxation*

*Yakima County*<sup>112</sup> is a case touching on several issues of Indian tribal sovereignty, but first, it is a state tax case. A state's right to control AND TAX American Indians and their tribes on reservation land has been at the foundation of discussions on sovereignty issues since the beginning of the

---

106. *Id.* at 692, quoting *Montana*, 450 U.S. at 560.

107. *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992).

108. "Ad valorem" or "of value" taxes are commonly referred to as Real Estate Taxes; they are typically assessed each year by the County in which the property exists based on the assessed or determined value of the property. Excise taxes might more commonly be called "Sales Taxes" on the sale, conveyance, or transfer of land or property.

109. 25 U.S.C. §§ 331-342 (2000). The Dawes Act along with the policy of allotment ended with the passage and execution of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, after which the federal policy officially returned to one encouraging tribal self-government and self-determination. See *County of Yakima*, 502 U.S. at 255.

110. *County of Yakima*, 502 U.S. at 257 (quoting *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 903 F.2d 1207, 1218 (9th Cir. 1990)).

111. *Id.* at 269.

112. *Id.* at 251.

United States. In *Worcester v. Georgia*,<sup>113</sup> Chief Justice John Marshall premised that "Indian nations [constitute] distinct political communities, having territorial boundaries, within which their authority is exclusive."<sup>114</sup> Granted, that recognition may seem today at best, naïve, if not completely discarded, given the 168-year history since those words were uttered.<sup>115</sup> In that same opinion, the "Court concluded that within reservations, state jurisdiction would generally not lie. The assertion of taxing authority was not excepted from this principle."<sup>116</sup> This aspect of Marshall's opinion seems to have survived. In *Mescalero Apache Tribe v. Jones*,<sup>117</sup> the Court wrote that "absent cession of jurisdiction or other federal statutes permitting it," a state could not tax tribes and tribal members on reservations.<sup>118</sup> Even more, Congress' intent to authorize such state taxation must be made "unmistakably clear."<sup>119</sup>

How rigorous is the "unmistakably clear" requirement? Apparently, it is an extremely rigorous and demanding requirement. In *Seminole Tribe of Florida v. Florida*,<sup>120</sup> the Seminole Tribe sued the State of Florida and its governor in federal court for failing to negotiate in good faith toward the creation of a gaming compact. The Eleventh Circuit Court of Appeals dismissed the suit finding that federal courts had no jurisdiction over the matter; that the State had not consented to being subject to federal judicial authority.<sup>121</sup> The United States Supreme Court affirmed the Court of Appeals finding that there was no clear intent by Congress to abrogate the sovereign immunity bar from suit by Florida's own citizens, absent its consent. The Court further found that even if such consent were granted, it would have been unconstitutional; that is, it would have been beyond the scope authorized for Congress by the Constitution.<sup>122</sup> The Seminole Tribe relied in its action on language in the Indian Gaming Regulatory Act<sup>123</sup> and specifically in 25 U.S.C. § 2701(d)(3), in which the obligation to negotiate in good faith is imposed upon the state. The Tribe acknowledged that Congress would not have normally been qualified to create such a private cause of action against the State. However, in this instance, Congress had given Florida authority

113. 31 U.S. (6 Pet.) 515 (1832).

114. *Id.* at 556-57.

115. *McClunahan*, 411 U.S. at 172; *Organized Village of Kake v. Egan*, 369 U.S. 60, 71-73 (1962).

116. *Id.* at 557, quoted in *County of Yakima*, 502 U.S. at 257; *The Kansas Indians*, 72 U.S. 737 (1867); *The New York Indians*, 72 U.S. 761 (1867).

117. 411 U.S. 145 (1973).

118. *Id.* at 148.

119. *Montana v. Blackfoot Tribe*, 471 U.S. 759, 765 (1985).

120. 517 U.S. 44 (1996).

121. Other issues involving the naming of the governor and the doctrine of *Ex parte Young*, 209 U.S. 123 (1908) are ignored for purposes of this article.

122. *Seminole Tribe*, 517 U.S. at 76.

123. Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (2000).

over the Seminole Tribe that it would not have otherwise had; ergo, Congress was not so much taking away from Florida's sovereignty, as it was reducing that authority which Congress had granted it. The Supreme Court rejected this line of reasoning by finding that in § 2710(d)(7) of the Act, a remedy was provided for by Congress for the occasion when a state or a party might not be acting in compliance with the Act.<sup>124</sup> Likely, it was the technical, lengthy and unpromising nature of this remedy that caused the Seminole Tribe to seek direct judicial remedy and resolution. Regardless, the Court took that provision to represent Congress' intention of an alternative remedy in lieu of the abrogation of the State's own sovereign immunity against suit by one of its own. The rest of the discussion involving the inability of Congress to even make such an abrogation, had it in fact done so, is worthy of many other articles beyond the scope of this paper.

There is similar language requiring clear congressional intent in other opinions involving limitations on tribal rights.<sup>125</sup> An example of an arena in which such authorization was clear is in *Department of Taxation & Finance of N.Y. v. Milhelm Attea & Bros., Inc.*<sup>126</sup> There, the State of New York required wholesalers licensed by the Bureau of Indian Affairs (BIA) selling cigarettes to Indians living on reservations to comply with some burdensome administrative requirements to collect, report, and process cigarette taxes on sales to Indians. The wholesalers sued alleging that the regulations, or rather the authority to make such regulations, was preempted by the Indian Trader Statutes.<sup>127</sup> The United State Supreme Court reversed the Court of Appeals, holding that the "state [s] [] valid interest in ensuring compliance with lawful taxes that might easily be evaded through purchases of tax-exempt cigarettes on reservations . . . outweighs tribes' modest interest in offering a tax exemption to customers who would ordinarily shop elsewhere."<sup>128</sup> Moreover, the regulations did not impose "excessive burdens on [the] Indian traders."<sup>129</sup> The Court refused to accept the Court of Appeals' justification that here, the taxing effort affected what were largely non-Indian sales to reservation Indians, whereas other decisions involved sales to non-Indians by tribes and/or tribal members.<sup>130</sup> What *Milhelm Attea* does is "soften" the unmistakably clear required language found above. However, had the tax burden involved more than a nominally burdensome reporting requirement in the case

---

124. *Seminole Tribe*, 511 U.S. at 74.

125. *Menominee Tribe v. United States*, 391 U.S. 404, 412-13 (1968); *United States v. Dion*, 476 U.S. 734, 738 (1986).

126. 512 U.S. 61 (1994).

127. *Indian Trader Statutes*, 25 U.S.C. § 261 (2000); *Warren Trading Post Co. v. Ariz. Tax Comm'n*, 380 U.S. 685 (1965).

128. *Milhelm Attea & Bros.*, 512 U.S. at 73 (emphasis added).

129. *Id.* at 75.

130. *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505 (1991); *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976).

involving the New York Indians, it is likely that the Court would have gone the other way, and rejected the state's interest position. Perhaps, Justice Marshall's holding in *Worcester* of Indian sovereignty was not so much naïve, as it was interrupted.

### *What About the Yakama? Conclusions and Recommendations*

What is the likely resolution of the pending lawsuit between the State of Washington and the Yakama Indian Nation? There have been no recent reported developments in the proceedings, although unquestionably, discussions and negotiations are being held by and between the parties and their respective counsel.

In support of the Yakama is the plain and clear language of their 1855 Treaty. To this treaty, there was no intervening treaty or agreement, as was suffered by the Yankton Sioux.<sup>131</sup> Moreover, the language of 18 U.S.C. § 1154 clearly restricts the sale and distribution of alcoholic beverages in Indian Country. Later, § 1161 makes clear that Indian Country remains such, even when part of the reservation has become deeded private property. The Indian Commerce Clause makes clear that Congress has "the power to prohibit or regulate the introduction of alcoholic beverages into Indian country."<sup>132</sup>

The State of Washington must argue under *Brendale*<sup>133</sup> to claim that the Yakama may have the authority to ban the sale and distribution of alcohol on tribal trust lands, but not in the private deeded areas. Just as was found in *Merrion*,<sup>134</sup> the historical use and relationship between the parties and their rights can have a profound effect upon the current status of those rights. Today, forty-seven alcohol-selling businesses remain within the Yakama reservation. The treaty has been in effect since 1855 and the precursor to the current 18 U.S.C. § 1154 has been around more than twenty years longer than that. Today, it may be a challenge for the Yakama to attempt to gain enforcement support for their claim that this is not only the law, but has been the law for 170 years.

Both parties likely will try to apply *Montana*<sup>135</sup> and its standard that states' sovereign interests prevail unless a threat is made to the tribe's "political integrity, economic security, or health and welfare." The State will argue that if the presence of a waste dump<sup>136</sup> within the reservation is an insufficient threat to a tribe's "health and welfare," then certainly the presence of alcoholic beverages on the reservation would fail to satisfy the similar test. The Yakama, on the other hand, will argue that while the waste dump threat

---

131. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 342 (1998).

132. U.S. CONST. art. I, § 8, cl. 3; *Mazurie*, 419 U.S. at 558-59.

133. *Brendale*, 492 U.S. at 420.

134. *Merrion*, 455 U.S. at 141.

135. *Montana*, 450 U.S. at 566.

136. *Yankton Sioux*, 522 U.S. at 339.

to the Yankton Sioux was speculative, the harm caused the tribe and its reservation's residents, tribal members, and nonmembers, is currently so great, and supported by such thorough documentation, that steps must immediately be taken to curb such harm.

It would appear likely that the State will prevail in its suit against the Yakama and its ban on alcoholic beverages on the reservation; thus the Yakama Tribal Council will lose. I suspect that the court will find that there is no threat sufficient for the tribe to justify the ban on nonmembers on private deeded property. This ban is likely to be beyond the scope of the Tribe's apparent authority and is in conflict with Washington state regulatory law.

However, all is not lost. It appears clear that the Yakama are correct in finding that alcohol is banned on the reservation by both the Treaty of 1855 and by 18 U.S.C. § 1154. The Tribe should immediately file a claim against the federal government for failing to enforce its own law and the terms of the treaty that it made with the Yakima [sic]. That process and the strategy accompanying it is beyond the attempted scope of this paper.

In 2000, the Yakama appear to be trying to live by the words of their ancestors — "not to neglect" those issues that support the Tribe and its members and to follow the common-sensible approach to living in their ancient world "which was created for them."

#### *Postscript*

In December 2000, United State District Judge Robert Whaley granted the motion for dismissal filed by the Yakama at least in part, "based on the tribe's assurance that it did not plan to enforce the ban on nontribal members."<sup>137</sup> Yakama councilman, Jack Fiander confirmed he did not anticipate the tribe's enforcement. So, left unanswered is the question "whether the tribe has the right to enforce its ban against nontribal members."<sup>138</sup>

---

137. Peggy Anderson, *Judge Dismisses State's Challenge of tribe's Liquor Ban*, NEWS TRIBUNE, Dec. 16, 2000, at B3, available in 2000 WL 5342695.

138. *Id.*

