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Michael Minnis

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JUDICIALLY-SUGGESTED HARASSMENT OF INDIAN TRIBES: THE POTAWATOMIS REVISIT *MOE* AND *COLVILLE*

Michael Minnis*

Introduction

Pique over a 1975 Christmas party skit may have led to the judiciary's quiet "repeal" of the Indian commerce clause. According to reporter Bob Woodward, Justice William Rehnquist was responsible for a skit that apparently displeased Chief Justice Warren Burger. Thus, in January 1976,

when the next assignment sheet came around, Rehnquist got only one case from Burger — an insignificant [sic!] Indian tax dispute in Montana (*Moe v. Tribes of the Flathead Reservation*).

Rehnquist had nothing but contempt for Indian cases. Traditionally, [Justice William O.] Douglas had done more than his share. He had been the Court's expert. With his own Arizona background, Rehnquist was the logical replacement, but, he suspected that the assignment was Burger's way of telling him what he really thought of the Christmas party. Never one to let an opportunity pass, Rehnquist turned an opinion that was in favor of the Indians into an opinion that indicated in most cases they would lose. It wiped away decades of Douglas's opinions.¹

This "insignificant" case was *Moe v. Confederated Salish and Kootenai Tribes*,² which completed the emasculation of the Indian commerce clause and initiated a frustrating new Indian war. Since *Moe* Indian tribes throughout the United States have been fighting an escalating battle against state taxing authorities encouraged by this opinion.³ In *Moe* the Supreme Court refused a request by an Indian tribe for federal injunctive relief, after

* Attorney, Oklahoma City, Oklahoma. J.D., 1969, University of Oklahoma School of Law; B.A., 1966, University of Oklahoma. Minnis is president of Michael Minnis & Associates, P.C., a firm that represents several Indian tribes, including the Citizen Band Potawatomi Indian Tribe of Oklahoma.

1. B. WOODWARD & S. ARMSTRONG, *THE BROTHERS* 412 (1979).

2. 425 U.S. 463 (1976).

3. See *infra* notes 5-8 and accompanying text.

Montana had criminally prosecuted tribal members for selling cigarettes to non-tribal members in Indian Country without a state cigarette license and without collecting and remitting state cigarette taxes.⁴

We therefore agree with the District Court to the extent that the "smoke shops" sell to those upon whom the State has validly imposed a sales or excise tax with respect to the article sold, States *may require* the Indian proprietor simply to add the tax to the sales price and thereby aid the State's collection and enforcement thereof.⁵

The Supreme Court has yet to identify the law that creates this requirement, even though it reiterated and enlarged the mandate requirement in *Washington v. Confederated Tribes [Colville]*.⁶ States "require" persons to act by passing statutes. If the source of the requirement "to add the tax to the sales price" is state law, then a remedy for violation of that state's requirement would be provided. If state law applies to Indians and Indian tribes in Indian Country, states have no need for extralegal remedies. The Supreme Court has created an untenable dichotomy.

The cigarette seller in *Moe* was a tribal member selling in Indian Country. In *Colville* the Supreme Court sanctioned state seizure of cigarette shipments bound for a tribe that was not assisting Washington in collecting state taxes on tribal sales of cigarettes to non-tribal members.⁷ *Colville* was a substantive escalation of the Supreme Court's venture into federal Indian policy. Among other things, *Colville* brushed aside a federal law,⁸ found that a state could impose on a tribe unenforceable

4. The criminal prosecution portion of this case apparently only applies to states (like Montana) that have been granted criminal jurisdiction over tribal members in Indian Country. "Pursuant to P.L. 280, 67 Stat. 588, . . . the State of Montana assumed complete criminal and limited civil jurisdiction over the Indians residing on the Flathead Reservation." *Confederated Salish & Kootenai Tribes v. Moe*, 392 F. Supp. 1297, 1306 (D. Mont. 1975) (footnote omitted).

5. *Moe*, 425 U.S. at 483 (emphasis added).

6. 447 U.S. 134 (1980). "[We] therefore hold that the State may validly require the tribal smokeshops to affix tax stamps purchased from the State to individual packages of cigarettes prior to the time of sale to nonmembers of the Tribe." *Id.* at 159.

7. *Id.* at 161-62.

8. 18 U.S.C. § 1161 (1988). This law authorized Indian tribes to adopt with federal approval ordinances regulating the sale of alcohol and tobacco. The Supreme Court stated:

[W]e do not infer from the mere fact of federal approval of the Indian

duties (to keep records on cigarette sales, collect, and remit state cigarette taxes), and rejected federal injunctive relief against a state if the tribe seeking the injunction failed to perform the non-mandatory, state-imposed duties.⁹ Instead of resolving a tribal-state dispute, *Moe* and its progeny¹⁰ have greatly exacerbated it and have created a significant potential for physical violence and even open hostilities. In *Colville* the Supreme Court recognized Indian tribes as sovereigns, but suggested that states could interdict commerce with an Indian tribe as a means to force a tribal sovereign to cooperate in collecting state taxes.¹¹

The Supreme Court was given an opportunity recently to reexamine this judicially-created war between Indian tribes and states over cigarette taxes. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*,¹² the Oklahoma Tax Commission (Commission) complained to the Supreme Court that *Colville* granted states a right but not a remedy.¹³ In dicta the Supreme Court responded to this lament by listing several possible remedies which essentially reiterated that the Commission could lay siege to Indian Country until the tribe voluntarily cooperated in collecting Oklahoma taxes.¹⁴ Finally, the Supreme Court suggested that if these remedies prove unsatisfactory, the Commission should seek relief from Congress.¹⁵ Ironically, states

taxing ordinances, or from the fact that the Tribes exercise congressionally sanctioned powers of self-government, that Congress has delegated the far-reaching authority to pre-empt valid state sales and cigarette taxes otherwise collectible from nonmembers of the Tribe.

Colville, 447 U.S. at 156.

9. *Id.* at 155-56.

10. The third case in the original *Moe* trilogy was California State Bd. of Equalization v. Chemehuevi Indian Tribe, 474 U.S. 9 (1985) (per curiam) (injunction against California requiring tribe to collect tax *reversed* because legal incidence of tax "falls on the non-Indian consumers of cigarettes"). To date, none of the tribes in the *Moe* trilogy are cooperating in collecting state cigarette taxes. See Oklahoma Tax Comm'n v. City Vending, No. 65,602, slip op. at 3 n.5 (Okla. Apr. 23, 1991) (WESTLAW, 1991 WL 67002, *16) (Kauger, J., concurring specially). The State of Washington, in particular, has been active in honing its laws in a vain effort to create a remedy for the right to require Indian tribes to collect state taxes. See, e.g., WASH. REV. CODE ANN. §§ 82.24.040, 82.24.050, 82.24.250 (Supp. 1991).

11. *Id.* at 161-62.

12. 111 S. Ct. 905 (1991).

13. *Id.* at 907.

14. *Id.* at 912.

15. During oral argument, the Oklahoma Tax Commission attorney responded to this suggestion saying, "I believe Congress could do that [legislate a remedy for the state] if it wanted to. It just doesn't want to. . . . I don't think many Congressmen

probably did not seek congressional relief¹⁶ because the *Moe* decision apparently gave them — without legislation — a new right.

The frustration of the Commission and other state taxing authorities is understandable. The Supreme Court legislated a right that states may require tribes to collect state tax on cigarette sales to non-tribal members in Indian Country. The high court has yet to legislate an effective remedy.

In *Moe* and its offspring the Supreme Court has legislated a result consistent with how the Court perceives the parties should act, rather than interpreting what the law prescribes.

Background

Until these relatively recent decisions by the Supreme Court, the judiciary consistently held that Indian tribes in Indian Country were free from state control except to the extent authorized by federal law.¹⁷ This fundamental concept has a firm basis in the United States Constitution,¹⁸ in numerous treaties between Indian tribes and the federal government,¹⁹ and in several state constitutions.²⁰ Further, this tenet has an historical context: “[The] people of the States where they [Indian tribes] are found are often their deadliest enemies.”²¹ After all, those who created Oklahoma out of Indian Country are the very persons who first coveted and then pirated most of the Indian lands and rights.

The history of the Potawatomis is typical of the tribes moved to Oklahoma.²² They are a remnant of a vast Indian nation that

want to be put in a position faced with constituents who maybe feel differently about the issue than the State does.” Official Transcript of Proceedings Before the United States Supreme Court at 40-41, *Citizen Band Potawatomi* (No. 89-1322). In other words, because states cannot convince the legislature to pass laws, the federal judiciary should do so.

16. See, e.g., *id.* at 40 (“I think it’s amazing that the States haven’t gone to Congress”) (White, J.).

17. See Trade and Intercourse Acts, ch. 33, 1 Stat. 137 (1790); ch. 13, 2 Stat. 139 (1802); ch. 161, 4 Stat. 729 (1834); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

18. U.S. CONST. art. I, § 8, cl. 3 (commerce clause); *id.* art. III, § 2, cl. 2 (treaty clause).

19. See, e.g., Treaty of Feb. 27, 1867, United States-Potawatomi Tribe, art. 3, 15 Stat. 531, 532.

20. See, e.g., OKLA. CONST. art. I, § 3.

21. *United States v. Kagama*, 118 U.S. 375, 384 (1886).

22. See, e.g., A. DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 328 (1965 ed.).

inhabited most of the Great Lakes area for centuries until the white man arrived. Like most Indian tribes, the Potawatomis were pushed out of their native lands by the federal government and marched to various reservations.

Faced with a choice between [white] settlers' demand for the land and its promise to the Indians, the government took the predictable course. Often with the use of military action, it forced many tribes to cede their lands in exchange for money and a promise of exclusive control over smaller areas called reservations.²³

The removal of the Potawatomis to the lands west of the Great Lakes was fraught with fraud and chaotic planning. The Potawatomis were marched west under the supervision of greedy political hacks who were often disinterested in the welfare of their charges.²⁴ "Scores fell by the wayside. Mothers carried dead babies they could not bring themselves to abandon. In one town so many people dropped from heat, exhaustion, lack of water and proper food, if not from utter despondency, that a doctor was called, and he found 300 'cases of sickness.'"²⁵

Although the Potawatomis were pushed west in the late eighteenth century,²⁶ they were not removed from their Great Lakes homeland until the signing of the Treaty of Chicago in 1833.²⁷ In nearly every one of its treaties, the Potawatomis were promised by the federal government that the new land established for them would be theirs forever²⁸ and free from state control. After 37 years of being moved from place to place as the white settlers continued to push west, the Potawatomis were authorized by

23. V. DELORIA, JR., *AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY* 50 (1985).

24. R. EDMUNDS, *THE POTAWATOMIS: KEEPERS OF THE FIRE* 272 (1978).

25. J. TERRELL, *LAND GRAB — THE TRUTH ABOUT THE WINNING OF THE WEST* 90 (1972).

26. See, e.g., Treaty of Greenville, Aug. 3, 1795, United States-Greenville Tribe, 7 Stat. 49; Treaty with the Potawatomi, July 18, 1815, United States-Potawatomi Tribe, 7 Stat. 123. The Potawatomis and the Chippewas possess more treaties than any other Indian tribe in history. Lindquist, *Indian Treaty Making*, 26 *CHRONICLES OF OKLA.* 416, 443 (1948).

27. See Treaty With the Chippewas, Etc., Sept. 26, 1833, 7 Stat. 431, 442, reprinted in 2 C. KAPPLER, *INDIAN AFFAIRS LAW AND TREATIES* 402 (1904). By these treaties the Potawatomis ceded to the United States five million acres of land in Wisconsin, Illinois, and Michigan.

28. Treaty With the Pottowautomie Nation, June 5 & 17, 1846, United States-Potawatomi Nation, art. 4, 9 Stat. 853, 854 ("as their land and home forever").

federal treaty to purchase 576,000 acres in Indian Territory²⁹ for the purpose of establishing a reservation. They accomplished this purpose in 1870.³⁰

Under the terms of the treaty which authorized creation of the reservation, the Potawatomi were promised that their lands "shall never be included in the jurisdiction of any state."³¹ These promises have never been revoked and are implicitly protected in the federal laws which authorized statehood for Oklahoma³² and in the Oklahoma Constitution.³³

However, no sooner had the Potawatomi reservation been established than the federal government began an allotment policy. The ultimate purpose of this policy was to create surplus land within the Indian reservations for white settlement. Over the next 25 years, most of the Potawatomi land was reclaimed by the federal government and sold profitably to white settlers.³⁴

29. At the time Indian Territory consisted of what is presently the State of Oklahoma less the Panhandle. Potawatomi purchased their land from Seminole and Creek Cessions for \$199,796.08. Chapman, *The Pottawatomie and Absentee Shawnee Reservation*, 24 CHRONICLES OF OKLAHOMA 301 (1946). This purchase was pursuant to the Treaty of Feb. 27, 1867, United States-Potawatomi Tribe, art. 2, 15 Stat. 531, 532.

30. See, e.g., U.S. Office of Indian Affairs, Record Letters Sent, No. 11, at 7 (Nov. 9, 1870). The original reservation included much of what is presently Pottawatomie County, part of eastern Cleveland County, part of southeastern Oklahoma County, and a few acres of southwestern Lincoln County. See, e.g., HISTORICAL ATLAS OF OKLAHOMA 34, 50 (3d ed. 1986) (published by University of Oklahoma Press).

31. Treaty of Feb. 27, 1867, United States-Potawatomi Tribe, art. 3, 15 Stat. 531, 532.

32. See Act of May 2, 1890, ch. 182, § 1, 26 Stat. 81; Act of June 16, 1906, ch. 3335, §§ 1 & 3, 34 Stat. 267; Proclamation No. 6869, 34 Stat. 267 (1906).

33. See OKLA. CONST. art. I, § 3; *id.* art. X, § 6.

34. See Act of May 23, 1872, ch. 206, 17 Stat. 159, reprinted in 4 C. KAPPLER, INDIAN AFFAIRS LAWS AND TREATIES 946 (1929). The Potawatomi are the only tribe who purchased their reservation land. They purchased the land from Seminole and Creek cessions for \$119,790.75. See Chapman, *supra* note 29, at 305. It is not clear that the Federal Government paid anything to the tribe when it took half of the reservation lands. See Act of Sept. 18, 1891, 26 Stat. 1016, art. IV. The Indians were paid \$160,000 "for making homes and other improvements on the said allotments." White settlers paid the federal government \$1.50 per acre for the lands. 1 OKLAHOMA STATE GAZETTER AND BUSINESS DIRECTORY 56 (1898) [hereinafter OKLAHOMA STATE GAZETTER] (compiled and published by G.W. McMillen). Cf. 1 G. LITTON, HISTORY OF OKLAHOMA 396 (1957) (\$1.25 per acre). The federal government also apparently paid the Absentee Shawnees. The Absentee Shawnees were squatters on the Potawatomi reservation lands. Prior to selling the land to the Potawatomi, the federal government had temporarily placed the Absentee Shawnees on the Potawatomi reservation lands pending ratification of a treaty that was never approved. The Absentee Shawnees were paid some monies when a portion of the Potawatomi reservation was open to white settlement. These payments to the Absentee Shawnees are in no way payments to the Potawatomi for the land. The federal government tripled its money in, essentially, one day from taking these Potawatomi lands. See OKLAHOMA STATE GAZETTER, *supra*, at 56.

The government allotted some of the Potawatomi land for distribution to individual Indians, held some for the benefit of the Potawatomis in general, and opened the surplus lands to settlement by non-Indians. President Benjamin Harrison opened about 265,000 acres in surplus lands within the Potawatomi Reservations³⁵ for settlement by non-Indians on September 22, 1891.³⁶

Although this allotment policy disbursed and weakened the tribe, the Potawatomis retained a presence within their original reservation boundaries. In 1938 the Potawatomis organized a tribal government under the Oklahoma Indian Welfare Act.³⁷ Today the Potawatomis' tribal lands — exclusive of allotments — consist of approximately 371 acres.

As long as the Potawatomis maintained themselves on the welfare dole and the exercise of their sovereign rights did not result in any substantial benefit to the tribe, Oklahoma essentially ignored the tribe. This attitude changed when the Commission — apparently encouraged by the *Moe* and *Colville* decisions and by the increasing success of the Potawatomis in governing themselves and making effective use of their tribal sovereignty — decided to bring a cigarette tax assessment against the Potawatomis.³⁸

Indian Law

Although the recent Supreme Court decisions speak of Indian sovereignty as a mere “backdrop,”³⁹ the real underpinnings for

35. The allotments of the Potawatomi reservation land were authorized in 1872. See Act of May 23, 1872, ch. 206, 17 Stat. 159, reprinted in 4 C. KAPPLER, INDIAN AFFAIRS LAWS AND TREATIES 946 (1927). The allotments actually began in 1875 and continued for 15 years when (after passage of the Act of Feb. 8, 1887 (Dawes Act), ch. 119, 24 Stat. 388) the remaining reservation lands were allotted, held by the federal government for use of the Potawatomis, or the “surplus” sold to white settlers. See Act of Mar. 3, 1891, ch. 543, 26 Stat. 1016. The approximate apportionment was 287,470.89 acres allotted, 510.63 acres held by the federal government, 22,653.55 acres held for schools, and 265,241.93 “surplus” acres open for white settlement. OKLAHOMA STATE GAZETTER, *supra* note 34, at 56.

36. Proclamation No. 7 of 1891, 27 Stat. 989, 993 (1891), reprinted in 1 C. KAPPLER, INDIAN AFFAIRS LAWS AND TREATIES 949, 952 (2d ed. 1904).

37. Act of Sept. 18, 1891, 49 Stat. 1967 (current version at 25 U.S.C. §§ 501-510 (1988)).

38. Technically, the original assessment was against the Chairman of the Business Committee of the Citizen Band Potawatomi Indian Tribe of Oklahoma in his individual capacity. At the hearing on a preliminary injunction, the Commissioner withdrew the assessment against the Chairman and reasserted it against the tribe. See Citizen Band Potawatomi Indian Tribe v. Oklahoma Tax Comm'n, 888 F.2d 1303, 1304 (10th Cir. 1989), *aff'd in part & rev'd in part*, 111 S. Ct. 905 (1991).

39. See McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973). “The

this concept are *laws*, most particularly the United States Constitution. Indians are mentioned twice and Indian tribes are mentioned once in the U.S. Constitution:

(1) “*Indians not taxed*”⁴⁰ — The effect of this provision has been largely mooted by subsequent events, i.e., Indians are now taxed.⁴¹ However, this phrase has not been repealed. Thus, apportionment would be affected if any “*Indians not taxed*” still exist.

(2) “Congress shall have the power *** to regulate Commerce with Foreign Nations, and among the several States, and with the *Indian Tribes*”⁴² — The commerce clause was intended as a recognition of federal supremacy over the commerce described to preclude state interference.⁴³ However, commerce with Indian tribes is treated differently from other (state or foreign) commerce.

Tribal sovereignty was implicitly recognized in federal relations with Indian tribes. This recognition occurred both before and after adoption of the Constitution. The two powers were governed by treaties,⁴⁴ that is by a “compact made between two or more independent nations with a view to the public welfare.”⁴⁵ The Constitution empowers the executive to make treaties with

Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a *backdrop* against which the applicable treaties and federal statutes must be read.” *Id.* at 172 (emphasis added).

40. “Representatives and direct taxes shall be apportioned among the several states . . . excluding *Indians not taxed*.” U.S. CONST. art. I, § 2, cl. 3 (emphasis added). This phrase was repeated nearly 100 years later with the adoption of the U.S. CONST. amend. XIV, § 2 (“Representatives shall be apportioned among the several states according to their respective numbers . . . excluding *Indians not taxed*.”).

41. When the Constitution was adopted, most tribal Indians were not citizens and not subject to federal or state legislation. *See* 57 Interior Dec. 195 (1940) (*Indians not taxed*). Full citizenship for all Indians was not recognized until 1924. *See* Act of June 2, 1924, ch. 233, 43 Stat. 253 (current version at 8 U.S.C. § 1401(b) (1988)) (“citizen” includes “a person born in the United States to a member of an Indian . . . or other aboriginal tribe”). The codification is under title 8, “Aliens and Nationality.” Indians are now counted when apportioning the districts. *See* *Ely v. Klahr*, 403 U.S. 108, 118-19 (1971) (Douglas, J., concurring).

42. U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

43. *See, e.g.,* R. KIRK, *THE CONSERVATIVE CONSTITUTION* (1990). “The federal government’s power to regulate commerce, a principal objective of the Framers, had been meant to reduce barriers to trade among the several states.” *Id.* at 175.

44. *See* *United States v. Kagama*, 118 U.S. 375, 382 (1886). Prior to 1871, the federal government entered into 666 treaties with Indian tribes. *See* *Marks v. United States*, 161 U.S. 297, 302 (1896). The Potawatomis are the most treated tribe. *See supra* text accompanying note 16.

45. BLACK’S LAW DICTIONARY 1502 (6th ed. 1990).

the advice and consent of the Senate.⁴⁶ States are specifically barred from making treaties.⁴⁷ Although the Constitution was not amended and tribes did not by treaty relinquish their sovereignty, a rider to an appropriation bill in 1871 terminated Indian treaty making.⁴⁸ This rider was passed by an angered House of Representatives that was excluded from making Indian policy.⁴⁹ Implicit in the treaty-making power is that whatever occurs in Indian Country must be the subject of voluntary negotiation between the federal government and the Indian tribes. Following the dubious repeal⁵⁰ of the constitutional Indian treaty-making power, courts began to discuss the federal government's plenary authority over Indian tribes.⁵¹ This plenary authority is in patent conflict with the Executive's exercise of the constitutional Indian treaty power and with the commerce clause. If Congress possesses plenary authority over Indian tribes, what is the source of this power? The Constitution did not create an omnipotent state, but rather a limited government. Congress only has those powers specifically granted to it. A power to regulate commerce with Indian tribes is limited, not plenary. The same phrase is used to describe the power of Congress to regulate commerce "with foreign nations."⁵² Yet no one has

46. "He [the president] shall have Power, by and with the advice and consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." U.S. CONST. art. II, § 2.

47. "No State shall enter into any Treaty, Alliance, or Confederation." U.S. CONST. art. I, § 10.

48. "No Indian nation or tribe . . . shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty . . ." 25 U.S.C. § 71 (1988).

49. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 106-07 (1982 ed.).

50. The treaty-making power is constitutional. If relationships with Indian tribes are to be negotiated by treaties, Congress cannot abrogate to itself the power to dictate unilaterally to tribes by legislation. Thus, Congress has repealed the executive's power to make treaties with Indian tribes. This repeal has also deprived tribes of the power to negotiate the terms of their relationships. See W. CANBY, JR., AMERICAN INDIAN LAW 88 (2d ed. 1988) ("As an attempt to limit by statute the President's constitutional treaty-making power, the rider may well be invalid . . ."); McSloy, *American Indians and the Constitution: An Argument for Nationhood*, 14 AM. INDIAN L. REV. 139, 156 n.91 (1989) ("The 1871 act arguably violated the separation of powers doctrine for it eliminated the constitutionally enumerated power of the Executive to conclude treaties by legislative act rather than by constitutional amendment."). Only two authorized methods exist to repeal or amend the Constitution. See U.S. CONST. art. V. Neither method sanctions repeal or amendment by the judiciary or by Congress.

51. *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 83-84 (1977).

52. U.S. CONST. art. I, § 8, cl. 3.

suggested Congress has plenary power over foreign nations.⁵³

Moe and Colville Emasculate Indian Commerce Clause

The Indian commerce clause recognizes the exclusive federal authority over commerce with Indian tribes.⁵⁴ Selling cigarettes in Indian Country by a tribe to non-tribal members is patently Indian commerce and thus a subject that the state — absent federal authorization — should have no power to materially burden.

In a recent book Chief Justice William H. Rehnquist, in discussing the express grants of authority in the Constitution, said, “Probably the most important of these powers granted to Congress was the so-called ‘Commerce Power,’ which provided that Congress should have the power ‘to regulate commerce with foreign nations, and among the several states. . .’”⁵⁵

This partial quote of a very short clause from the Constitution is indeed how the Supreme Court is now construing the commerce clause. The Indian commerce clause has been ellipsed⁵⁶ by the judiciary.⁵⁷ After *Moe* “[i]t can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly

53. Compare with *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (“[W]hile the Interstate Commerce Clause is concerned with maintaining free trade among the states . . . , the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.”).

54. See, e.g., *THE FEDERALIST* No. 42, at 282 (J. Madison) (1965 ed.). The commerce clause was intended as a restraint “on the authority of the States.” By the commerce clause, the “States were, for practical purposes, forbidden to tax or restrain interstate or foreign commerce.” F. McDONALD, *NOVUS ORDO SECLORUM* 270 (1985).

55. W. REHNQUIST, *SUPREME COURT: HOW IT WAS, HOW IT IS* 116 (1987) (ellipsis in original).

56. The full clause reads: “The Congress shall have the power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes” U.S. CONST. art. I, § 8 (emphasis added).

57. According to Justice Rehnquist, only “discriminatory state action” is prohibited by the Indian commerce clause. Thus, states may burden commerce “with the Indian Tribes” with taxes or regulations, unless Congress has passed a law “pre-empting” the “state taxing authority.” *Colville*, 447 U.S. at 177 (Rehnquist, J., concurring in part, concurring in the result in part, dissenting in part). Of course, Congress can pass laws pre-empting state action whether the commerce clause existed or not. The original presumption (states have no power to regulate commerce with Indian tribes) has been reversed by judicial fiat.

touching the political and economic interests of the Tribes.”⁵⁸

Moe resulted from the judicial evolution away from a legalistic approach to Indian law and toward an amorphous pre-emption⁵⁹ balancing test premised on a backdrop. The statutes, treaties, and the federal constitution that controlled Indian policy ceased to be viewed as laws⁶⁰ and began to be referred to as a backdrop. Instead of deciding cases based on judicial principles of jurisdiction and law, cases were adjudicated on the basis of balancing⁶¹ the Indian interests with competing state interests. Predictably, if any significant state interest is found, states nearly always have a larger absolute interest that invariably prevails over the smaller absolute Indian interest, even though the Indians’ interest may be geometrically greater in a relative sense.⁶²

58. *Colville*, 447 U.S. at 157 (citing *Moe*, 425 U.S. at 481 n.17). The Court explains that the “taxes under consideration do not burden commerce that would exist on the reservations without respect to the tax exemption.” *Id.* This reasoning is circular. The purpose of the commerce clause was to bar states from using taxes or regulations to impede commerce “with Foreign Nations, among the States, and with the Indian Tribes.” Alexander Hamilton explained that this clause was intended to prevent “reprisals and wars.” “The opportunities which some States would have of rendering others tributary to them by commercial regulations would be impatiently submitted to by the tributary. . . . Would Connecticut and New Jersey long submit to be taxed by New York for her [New York’s] exclusive benefit?” THE FEDERALIST No. 7 (A. Hamilton). This truth also applies to Indian tribes that the states would render tributary.

59. “[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption” *McClanahan*, 411 U.S. at 172. The laws have not changed, but the fashion or trend apparently has.

60. “This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.” U.S. CONST. art. VI.

61. When the courts discuss balancing of rights, the discussion is often a prelude to judicial legislation. The judges, not the legislature, determine the laws that govern relationships when the result is based on judges’ subjective determinations of what is best (balanced). Although relying on a premise adverse to Indian tribes, Justice Rehnquist articulated why this method is wrong: “Balancing of interests is not the appropriate gauge for determining validity since it is that very balancing which we [sic] [the U.S. Constitution?] have [has] reserved to Congress.” *Colville*, 447 U.S. at 177 (Rehnquist, J., concurring in part, dissenting in part).

62. See *Colville*, 447 U.S. at 156-57. The Indian cigarette sales and taxes on those sales formed a significant portion of the tribal assets. However, the state interest in collection of its cigarette taxes, though larger in absolute terms, was a relatively insignificant portion of Washington taxes. As the dissent noted, tribes are required to make a Hobson’s choice: “tax sales to non-Indians” losing the sale and the tax or “not taxing such sales” and likewise losing all tax revenue. *Id.* at 171 (Marshall, J., dissenting). Likewise, the Potawatomi cigarette sales and taxes are a significant source of tribal income (19% in 89-90 fiscal year). Oklahoma cigarette taxes, on the other hand, have since 1981 consistently been only two to three percent of state gross collections from taxes, licenses, and fees. See OKLA. TAX COMM’N ANN. REP. (1989).

For centuries state law did not penetrate Indian Country absent federal authorization. “[T]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the nation’s history.”⁶³ “[F]rom the very first days of our government, the federal government has been permitting the Indians largely to govern themselves, free from state interference.”⁶⁴ Nevertheless, in *Moe* and *Colville* the Supreme Court saw something it did not like, to-wit: Indians operating in Indian Commerce were not helping states collect cigarette taxes. In *Colville* the basis for the Supreme Court policy was further defined: the Supreme Court did not like the tribes “marketing a tax exemption.” The Court did not believe principles of federal Indian law authorized Indian tribes to market an exemption from state taxation to citizens who would usually buy cigarettes elsewhere.⁶⁵ The Supreme Court has never explained why the “marketing of a tax exemption” practiced by virtually every non-Indian government,⁶⁶ no matter how big or small — whether a city, town, or hamlet — is improper when practiced by an Indian government.⁶⁷ The Supreme Court is looking at the effects of tribal sovereignty — which are many — instead of focusing on law.

63. *McClanahan*, 411 U.S. at 168, cited with approval in Oklahoma Tax Comm’n v. City Vending, No. 65,602, slip op. at 8 (Okla. Apr. 23, 1991) (WESTLAW, 1991 WL 67002, *6).

64. Warren Trading Post Co. v. Arizona Tax Comm’n, 380 U.S. 685, 686-87 (1965).

65. *Colville*, 447 U.S. at 155.

66. Oklahoma and its political subdivisions constantly market tax exemptions. Oklahoma just held a special session for the sole purpose of passing a law allowing Oklahoma County to enact tax exemptions and credits to attract United Airlines to locate a repair facility in Oklahoma County. See 1991 Okla. Sess. Laws ch. 1, 5-12; *id.* ch. 2, 12-35.

67. An ethnic discrimination has often been behind Supreme Court Indian decisions: Indians are inferior to other persons. See, e.g., *United States v. Sandoval*, 231 U.S. 28, 39 (1913) (Indians are “essentially a simple, uninformed, and inferior people.”). Compare *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). “That opinion declared first that Negroes, whether or not they were slaves, had been regarded as persons of an inferior order . . .” W. REHNQUIST, *supra* note 55, at 142. Indians were also referenced as similar to Negroes. *Dred Scott*, 60 U.S. (19 How.) at 403-04. This bias may explain why tribes are not allowed to exercise governmental powers that every non-Indian community in the United States routinely takes for granted, e.g., offering lower taxes (*Colville*), prosecuting misdemeanors, or providing courts to resolve civil disputes. See, e.g., *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (“Indian Tribes do not have inherent criminal jurisdiction to try and to punish non-Indians” for misdemeanors committed in Indian Country). See also *Duro v. Reina*, 110 S. Ct. 2053 (1990).

The tribes are not offering a tax exemption. The tribes tax the cigarettes themselves.⁶⁸ The exclusive power to tax transactions occurring in a particular jurisdiction is an incident of sovereignty. The state is materially interfering with Indian commerce by attempting to impose a tax on the commerce and is having difficulty collecting that tax.

In reaching a result consistent with their prejudices, the Supreme Court established an unworkable anomaly. Thus, tribes "should cooperate" with the state in collecting state taxes. If a tribe does not cooperate, the judiciary will not protect the tribe from the predations of the state. Unless a law compels it, why should tribes collect and remit state taxes? In relinquishing portions of their sovereignty to the federal government through various treaties, the tribe bargained for the federal protection⁶⁹ from the states. The judiciary is now slowly eroding this shield.

In *Citizen Band Potawatomi* the Supreme Court went even further by suggesting possible state remedies when a tribe does not cooperate in collecting state cigarette taxes. Because of tribal sovereignty,⁷⁰ the Supreme Court recognized that states could not tax tribes.⁷¹ Instead, states were essentially encouraged to harass Indian tribes that did not follow inapplicable state laws. Tribes have no statutory duty to cooperate with the state in collecting state taxes. Because the tribe is not legally obliged to collect state taxes, the judiciary should not be suggesting ways to force the tribe to do that which is not required by law.

68. See, e.g., 48 Fed. Reg. 10,643 (1982). The Citizen Band Potawatomi Tribe of Oklahoma adopted the General Revenue and Taxation Act of 1984. Section 202 of this act levies a tax of eight cents per twenty cigarettes. This tax was preceded by the tribe's ordinance regulating the sale and use of tobacco. *Id.* at 10,645.

69. See, e.g., *Williams v. Lee*, 358 U.S. 217, 218 (1959) ("Through conquest and treaties they [Indian tribes] were induced to give up complete independence . . . in exchange for federal protection . . ."); see also Treaty with the Wiandot, Delaware, Chippewa, and Ottawa Nations, Jan. 21, 1785, United States-Wyandot, Delaware, Chippewa, and Ottawa Nations, 7 Stat. 16.

70. Justice Stevens would eradicate sovereign immunity. "The doctrine of sovereign immunity is founded upon an anachronistic fiction." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 111 S. Ct. 905, 912 (1991) (Stevens, J., concurring). Justice Stevens' dislike for the sovereign immunity doctrine is not limited to Indian tribes but extends to "all governments — federal, state, and tribal." *Id.* at 912. In an earlier opinion he explained the rationale for this opinion: "[C]hanges in our social fabric favor limitation rather than expansion of sovereign immunity. The concept that a sovereign can do no wrong and that citizens should be remediless in the face of its abuses is more a relic of medieval thought than anything else." *Pennhurst State School v. Halderman*, 465 U.S. 89, 164 n.48 (1984) (Stevens, J., dissenting). If governments have no immunity from suit, then judges become the sovereigns with absolute power.

71. *Citizen Band Potawatomi*, 111 S. Ct. at 908.

A central jurisdictional tenet of appellate courts is they only decide issues tendered by the parties. Courts do not decide hypothetical questions or attempt to resolve disputes not raised by the litigants.⁷² In *Citizen Band Potawatomi* the Supreme Court deviated from this basic tenet and in so doing deemphasized the rule's importance.⁷³

In *Citizen Band Potawatomi* only two basic questions were before the Court. *First*, did the district court and the Tenth Circuit err when granting and affirming the injunctive relief sought by the tribe? *Second*, did the Tenth Circuit err when reversing the district court order denying a motion to dismiss the Commission's counterclaim? The Supreme Court found in favor of the tribe on both issues. Ordinarily, this would have disposed of the litigation. However, the Supreme Court went further and reversed what may have been dicta in the Tenth Circuit opinion concerning Public Law 280.⁷⁴ In addition, the Supreme Court answered the Commission's lament about no remedies. Again, such an answer was unnecessary because the only issue was whether the remedy *chosen by* the Commission — tax assessment of an Indian tribe — was proper.⁷⁵ Having found that it was not proper, the Supreme Court had determined the case.

Nevertheless, the Supreme Court made several suggestions as to possible remedies that states could take when Indian tribes do not cooperate in collecting "valid state taxes."⁷⁶ These sug-

72. See, e.g., *Aetna Life Ins. v. Haworth*, 300 U.S. 227, 240-41 (1937).

73. In his recent book, Chief Justice Rehnquist discussed the *Dred Scott* case as the classic, tragic example of an appellate court that unnecessarily decided issues. W. REHNQUIST, *supra* note 55, at 133-44 (citing *Dred Scott v. Sanford*, 60 U.S. 397 (1857)). The unnecessary rulings made in this case had much to do with precipitating the Civil War. "[I]t exacerbated rather than ameliorated the clash of opinion over slavery." *Id.* at 143. *Among* the reasons for avoiding unnecessary dicta is that it is "seldom completely investigated." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821).

74. "Neither *Moe* nor *Colville* depended upon the State's assertion of jurisdiction under Public Law 280." *Potawatomi*, 111 S. Ct. at 911-12.

75. *Id.* at 908.

76. The Supreme Court is imprecise when describing what gives validity to the state taxes in Indian Country. One possible explanation may be that cigarette purchases by non-tribal members who leave Indian Country are then subject to the cigarette tax because the non-tribal buyers possess cigarettes in Oklahoma that do not bear Oklahoma tax stamps. "[T]he competitive advantage which the Indian seller doing business on tribal land enjoys over all other cigarette retailers . . . is dependent on the extent to which the non-Indian purchaser is willing to flout *his* legal obligation to pay the tax." *Moe*, 425 U.S. at 482 (emphasis added). Of course, state efforts to collect a cigarette tax from each individual buyer would be difficult. However, this difficulty is of no legitimate concern to the Supreme Court.

gested remedies included a new measure which was an expansion on musings by the Solicitor General concerning possible state actions against tribal officers.⁷⁷ Besides the fact that these suggestions were unnecessary dicta, they imply that a proper function of the Supreme Court is to gratuitously advise states on the method or the procedure of collecting taxes. If states have a problem collecting taxes, the remedy is a legislative one (either by the state legislatures or by Congress). The solution is not a judicially-created remedy. Further, the suggestions in *Citizen Band Potawatomis* were not only unnecessary and inappropriate, but also were so ambiguously articulated as to be very misleading.

*Collecting Tax From Wholesalers
By Seizing Cigarette Shipments*

“States may of course collect the sales [sic] tax from cigarette wholesalers . . . by seizing unstamped cigarettes off the reservation.”⁷⁸ The cited authority for this suggested remedy is *Washington v. Confederated Tribes [Colville]*.⁷⁹ From the emphasized phrase it can be inferred that seizure is solely a state remedy against wholesalers. In *Colville* the State of Washington seized shipments of cigarettes from a wholesaler “outside the state, which are shipped directly to the respective Tribes by sealed cargo trucks of Interstate Commerce licensed carriers.”⁸⁰ The district court granted *Colville* injunctive relief.⁸¹ On direct appeal the Supreme Court reversed, holding that injunctive relief was not available where the tribes have “refused to fulfill collection and remittance obligations which the state has validly imposed.”⁸² In *Colville* the following facts are important:

77. “[T]he Commission could bring an injunctive action in an appropriate court to require tribal officers and the manager of the tribal store to collect and remit the taxes.” Brief for the United States as Amicus Curiae at 19 n.17, *Potawatomis* (No. 89-1322) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978)). In addition, the Native American Rights Fund filed a brief as amicus curiae in favor of the *Potawatomis* position obliquely referring to suits against tribal officials. “Whether there is a third remedy in the form of a suit against tribal officials for prospective injunctive relief is an issue about which amici express no opinion, but do note that such recourse was not even attempted by the State.” Brief Amici Curiae of the Cheyenne-Arapaho Tribes of Oklahoma, the Alabama-Coushatta Indian Tribe of Texas, the United Indian Nations of Oklahoma, in Support of Respondent at 11 n.6, *Potawatomis* (No. 89-1322).

78. *Potawatomis*, 111 S. Ct. at 912 (emphasis added).

79. 447 U.S. 134, 161-62 (1980).

80. *Confederated Tribes v. Washington [Colville]*, 446 F. Supp. 1339, 1347 (E.D. Wash. 1978).

81. *Id.* at 1362. (“The application of the State’s tax has been preempted” by federal law authorizing tribal sale of tobacco and “the State’s cigarette taxing scheme constitutes an interference with tribal self-government”).

82. *Washington v. Confederated Tribes [Colville]*, 447 U.S. 134, 161-62 (1980).

(a) The wholesaler was from outside the state.

(b) The cigarettes seized were the property of the wholesaler, i.e., the tribe had not yet purchased the cigarettes.

(c) The seizure occurred outside of Indian Country. "It is significant that these seizures take place outside the reservation, in locations where state power over Indian affairs is still considerably more expansive than it is within reservation boundaries."⁸³

(d) Washington had assessed the tribes for the unpaid cigarette taxes prior to the seizure.⁸⁴

(e) Washington had criminal jurisdiction within the Colville Indian Reservation.⁸⁵

These last two distinctions are important because they may have furnished the legal basis for the cigarette seizures. Under the federal Constitution,⁸⁶ and under most state constitutions,⁸⁷ states are not authorized to search and seize private property absent a valid warrant based on probable cause.

Federal law authorizes seizure of unstamped cigarettes as contraband in interstate commerce.⁸⁸ These laws provide that "contraband cigarettes means a quantity in excess of 60,000 cigarettes, which bear no evidence of the payment of applicable state cigarette taxes in the State where such cigarettes are found."⁸⁹ This law does *not* apply to "a common or contract carrier transporting the cigarettes under a proper bill of lading or freight bill which states the quantity, source, and destination of such cigarettes."⁹⁰ Further, the committee reports indicate this legislation was *not* intended to cover cigarette sales to Indian tribes.⁹¹

83. *Id.* at 162.

84. *Confederated Tribes v. Washington [Colville]*, 446 F. Supp. 1339, 1346 (E.D. Wash. 1978).

85. *Id.* at 1348.

86. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV; *see also id.* amend. XIV.

87. *E.g.*, OKLA. CONST. art. 2, § 30 ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches or seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, describing as particularly as may be the place to be searched and the person or thing to be seized.").

88. 18 U.S.C. §§ 2341-2346 (1988).

89. *Id.* § 2341(2).

90. *Id.* § 2341(2)(B).

91. "The phrase 'applicable state cigarette tax' makes it clear that this legislation

Taxing authorities in Washington state — where the Colville Indian Tribe is located — have persuaded local federal authorities to seize several cigarette shipments bound for Indian tribes. However, all attempts to date failed because the warrantless searches were found to be without probable cause, even though considerable circumstantial evidence existed that the drivers of the vehicles seized were transporting unstamped cigarettes to Indian tribes.⁹²

Interstate commerce is commerce moving from one state to another.⁹³ Intrastate commerce is commerce within Oklahoma that moves from a point in Oklahoma to another point in Oklahoma. Ordinarily, states have no authority to seize shipments in interstate commerce.⁹⁴ The same rule should apply to Indian commerce, i.e., that states have no authority to interfere with Indian commerce unless granted that authority by the federal government. Before lawfully seizing intrastate contraband, Oklahoma must either obtain a warrant based on probable cause or seize the material based upon a felony committed in its presence.

Consistent with the commerce clause, Oklahoma allows unstamped cigarettes to be lawfully shipped into and through the state. However, common carriers who ship unstamped cigarettes to a place in Oklahoma must file written reports.⁹⁵ Absent a reciprocating licensing agreement with the shipper's state, Oklahoma does not issue a license to a wholesaler who does not maintain a place of business within Oklahoma.⁹⁶ Every retailer

is not intended to affect transportation or sale by Indians or Indian Tribes acting in accordance with legally established rights." Act of Nov. 2, 1978, Pub. L. No. 95-575, 1978 U.S. CODE CONG. & ADMIN. NEWS (92 Stat.) 5538 (emphasis added); see also Act of Jan. 12, 1983, Pub. L. No. 97-449, 1983 U.S. CODE CONG. & ADMIN. NEWS (97 Stat.) 4220.

92. See *United States v. Simchen*, No. 88-3199 (9th Cir. Aug. 31, 1989); *United States v. Swiger*, No. 88-3200 (9th Cir. Aug. 31, 1989); *United States v. Brown*, No. 88-3201 (9th Cir. Aug. 31, 1989) (unpublished disposition of all three cases at 884 F.2d 1396 (aff'd 1989)) (text in WESTLAW).

93. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824).

94. Oklahoma implicitly admits as much: "The right of a common carrier in this State to carry unstamped cigarettes, as defined in this Article, shall not be affected by this Article." 68 OKLA. STAT. § 309(a) (1981).

95. *Id.* § 309(b).

96. 68 OKLA. STAT. § 304(a) (Supp. 1990). This requirement poses a problem for Indian tribes that may want to assist Oklahoma in collecting cigarette taxes. The tribe would have to concede, at least tacitly, that their Indian Country was in Oklahoma, i.e., part of Oklahoma's territorial jurisdiction.

who receives cigarettes from a wholesaler not required to secure a license (i.e., non-Oklahoma wholesalers) is required to affix an Oklahoma cigarette tax stamp to the cigarettes within seventy-two hours of receipt.⁹⁷

Oklahoma is authorized to seize “[a]ll unstamped cigarettes upon which taxes are imposed by this Article which shall be found in the possession, custody or control of any person, for the purpose of being . . . transported from one place to another in this State, for the purpose of evading” the Oklahoma cigarette tax.⁹⁸ Arguably, this statute does not authorize seizing shipments in transit from a place in another state to a place in Indian Country. Further, the seizure authorized by this statute is only lawful if probable cause exists to believe that the cigarettes to be seized are contraband, i.e., goods being transported in violation of the law. The Potawatomis, in selling cigarettes in Indian Country to tribal members, are clearly not violating the law. The Commission would need proof that the consignee tribe was selling to non-tribal members.⁹⁹ Even sales by a tribe to non-tribal members do not violate the laws of the State of Oklahoma because those laws do not apply to Indian tribes. In addition, Oklahoma must have probable cause to believe the driver is violating a law before stopping the vehicle transporting the cigarettes. Even if the stop is proper, Oklahoma cannot search the vehicle without a warrant unless contraband is in plain view.¹⁰⁰ The seizure of interstate cigarette shipments bound for Indian tribes is fraught with considerably more complexities than one could infer from the brief reference to *Colville* in the *Citizen Band Potawatomis* opinion.

*Collecting Tax From Wholesalers By Assessments*¹⁰¹

“[States may also collect the tax] by assessing wholesalers who supplied unstamped cigarettes to the tribal stores.”¹⁰² The

97. 68 OKLA. STAT. § 305(b) (1981).

98. *Id.* § 305(d).

99. See *Oklahoma v. Brooks*, 763 P.2d 707 (Okla. Crim. App. 1988) (indictment for selling unstamped cigarettes dismissed because no proof of sale to non-tribal members).

100. See, e.g., *Watt v. State*, 487 P.2d 961 (Okla. Crim. App. 1971); *Merwin v. State*, 277 P.2d 208 (Okla. Crim. App. 1954) (arrest of driver for broken tail light did not justify search of car and seizure of contraband liquor).

101. Shortly after the *Potawatomis* decision was announced, the Commission sent letters to cigarette wholesalers throughout Oklahoma and the United States threatening a tax assessment if the wholesalers sold cigarettes to Indian tribes located in Oklahoma. These letters, particularly those to out-of-state wholesalers, are a crude — if not illegal

cited authority for this suggested remedy is *City Vending of Muskogee, Inc. v. Oklahoma Tax Commission*.¹⁰³ This case merely holds that a company filing bankruptcy cannot defeat a claim by a state taxing authority when the bankrupt entity has not appealed from an adverse administrative finding that it owes the disputed tax.¹⁰⁴ In fact, the tax assessment against City Vending¹⁰⁵ was later struck down by the Oklahoma Supreme Court, relying partially on the *Citizen Band Potawatomi* decision.¹⁰⁶

Sales to an Indian tribe are exempt from Oklahoma sales taxes under an exemption for “[s]ales of tangible personal property or services to the United States government.”¹⁰⁷ Similarly, the cigarette tax does not apply to “all sales to the United States.”¹⁰⁸ Whether cigarette sales to Indian tribes are exempt under this statute from an Oklahoma cigarette tax has not been determined by the Oklahoma Supreme Court.¹⁰⁹ It has merely been deter-

— use of state power. Further, the Commission sent letters to tribal officers ostensibly seeking cooperation, but patently designed to intimidate and/or to create a predicate for the new “remedy” suggested in *Potawatomi* (suits against tribal officials).

102. *Potawatomi*, 111 S. Ct. at 912.

103. 898 F.2d 122 (10th Cir.), cert. denied, 111 S. Ct. 75 (1990).

104. *City Vending*, 898 F.2d at 124-25.

105. City Vending was assessed twice for not remitting cigarette taxes on sales to Indian tribes. The first assessment was for \$83,511.83. See *In re Cigarette Excise Tax*, No. P-85-151 (SC-85-002) (Okla. Tax Commission filed Sep. 3, 1985). City Vending objected to the assessment because sales to Indian tribes were statutorily exempt or alternatively in conflict with the commerce clause. The administrative law judge ruled that the statutory exemption did not apply and that the “Commission is without jurisdiction to determine the constitutional questions.” *Id.* at Findings, Conclusions and Recommendations 6 (Sep. 3, 1985). City Vending timely posted an appeal bond, but never appealed possibly because it was served with a second assessment of \$1,376,474.40. See *In re Protest of City Vending*, No. P-86-117 (Okla. Tax Com’n. filed May 13, 1986) (order no. 86-05-13-02). Approximately 24% of this second assessment was for the cigarette sales to the Potawatomis covered by the proposed assessment subsequently barred in *Potawatomi*.

106. See *Oklahoma Tax Comm’n v. City Vending*, No. 65,602, slip op. at 17 (Okla. Apr. 23, 1991) (WESTLAW, 1991 WL 67002, *10) (“The Commission’s order [assessing taxes against City Vending] . . . validates all taxes . . . and therefore . . . is void on its face.”) (emphasis added).

107. 68 OKLA. STAT. § 1356(A) (1981). “[T]he Tribe itself not only is exempt from payment of state sales taxes (such exemption is recognized and acknowledged by the defendants [the Oklahoma Tax Commission] in pleadings to this Court) . . .” *Citizen Band Potawatomi Indian Tribe v. Oklahoma Tax Comm’n*, No. CIV-87-0338W (W.D. Okla. Apr. 15, 1988) (order).

108. 68 OKLA. STAT. § 321 (1981).

109. In its recent *City Vending* opinion, the Oklahoma Supreme Court addressed

mined by an administrative law judge. Finally, *City Vending* does not stand as authority for the proposition that the Commission can assess a cigarette tax on wholesalers who sell cigarettes to Indian tribes outside of Oklahoma.¹¹⁰

Sue Tribal Officers for Damages

“We have never held that individual agents or the officers of a tribe are not liable for damages in actions brought by the State.”¹¹¹ The cited authority for this suggested remedy is *Ex parte Young*.¹¹² This case authorized a mandamus action against a state official; it did *not* authorize a suit for damages.¹¹³ *Ex parte Young* recognized the federal power to enjoin state prosecutions *only* where they pose a threat to a right protected by the federal Constitution.¹¹⁴ Because of the dubious authority cited and because the Court used a double negative (“never” and “not”),¹¹⁵ the meaning of the dicta is ambiguous at best. *Ex parte Young* is the seminal case for one of the rare exceptions to the rule that the federal judiciary cannot enjoin state action because of the eleventh amendment.¹¹⁶ It is a very narrow exception: “[I]n order to prevent irreparable damages to persons and property the federal courts may restrain the legal officers

an appeal of the Commission’s refusal to consider *City Vending*’s constitutional objection but did not discuss the claim to a statutory exemption. *Oklahoma Tax Comm’n v. City Vending*, No. 65,602, slip op. at 7 (Okla. Apr. 23, 1991) (WESTLAW, 1991 WL 67002, *4). “*City Vending*’s entire argument rested on the federal constitution.” *Id.*

110. During oral argument in *Potawatomi*, the Commission attorney admitted that Oklahoma did not have jurisdiction to tax wholesalers located outside of Oklahoma. “If they don’t have a presence within the state — if they merely ship on common carrier to a certain location, they have — there’s no sufficient nexus if they don’t have any trucks or warehouse or anything in Oklahoma, we can’t make these other wholesalers pay the tax.” Official Transcript at 13, *Potawatomi* (No. 89-1322). However, the Commission attorney added that the only way to enforce Oklahoma taxes against an out-of-state wholesaler “would be seizures of the shiploads of cigarettes coming in.” *Id.* This assertion puzzled Justice Kennedy who said, “I don’t see how you would have authority to seize and not authority to require that the tax stamp be affixed.” *Id.*

111. *Potawatomi*, 111 S. Ct. at 912.

112. 209 U.S. 123 (1908).

113. *Ex parte Young*, 209 U.S. 123, 154, 164-66 (1908).

114. *Id.* at 156.

115. *Potawatomi*, 111 S. Ct. at 912.

116. *Ex parte Young* is an “exception to the Eleventh Amendment principle of sovereign immunity.” *Green v. Mansour*, 474 U.S. 64, 71 (1985). “The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.” U.S. CONST. amend. XI.

of a state from taking proceedings in state court to enforce State legislation alleged to be unconstitutional."¹¹⁷ *Ex parte Young* "permitted suits against state officials to obtain prospective relief against violations of the Fourteenth Amendment."¹¹⁸ Although *Ex parte Young* has not been overruled, its holding has been narrowed by subsequent decisions¹¹⁹ and by Congress which reacted by restricting federal injunctive power.¹²⁰

Until *Ex parte Young*, the court had been careful to sustain the jurisdiction of the lower Federal Courts to enjoin the enforcement of unconstitutional legislation only after a finding of unconstitutionality, but *Ex parte Young* abandoned this rule by holding that the enforcement of a state's statute by the attorney general of the state through proceedings in state courts could be enjoined pending the determination of its constitutionality.¹²¹

In any event the case authority referenced for the suggested *damage* suit against tribal officials does not remotely support the proposition.

As Oklahoma Supreme Court Justice Yvonne Kauger recently noted, this suggested remedy may be ephemeral because

the immunity afforded Indian Tribes is coextensive with that of the United States. Albeit officials and agents of Indian tribes do not have the same immunity as the tribe itself, tribal immunity extends to such persons when they act in their representative capacity and within the scope of their authority.¹²²

Another barrier to suing tribal officials for damages is, absent federal authorization such as Public Law 280, states have no

117. ANNOTATED CONSTITUTION OF THE UNITED STATES OF AMERICA 628 (U.S. Gov't Printing Office 1953) [hereinafter ANNOTATED CONSTITUTION].

118. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 451 (1976).

119. *See, e.g., Dombroski v. Pfister*, 380 U.S. 479, 484 (1965) ("Since that decision [*Young*], considerations of federalism have tempered the exercise of equitable power . . ."); *Pennhurst State School v. Halderman*, 465 U.S. 89, 114 n.25 (1984) ("The broad ultra vires theory enunciated in *Ex parte Young* . . . has been discarded. . . . The authority-stripping theory of *Young* is a fiction that has been narrowly construed.")

120. *See, e.g.,* 28 U.S.C. § 2283 (1988).

121. ANNOTATED CONSTITUTION, *supra* note 116, at 629-30.

122. *Oklahoma Tax Comm'n v. City Vending*, No. 65-602, slip op. at 12 (Okla. April 23, 1991) (WESTLAW, 1991 WL 67002, *12) (Kauger, J., with Doolin, J., concurring specially) (footnote omitted).

jurisdiction over acts by Indians in Indian Country.¹²³ The only court that might have jurisdiction over a mandamus action would be the tribal court.

Potawatomi Case Blurred Indian/State Territorial Jurisdiction

Although the Supreme Court rejected the Indian commerce clause as an impediment to state taxation of Indian commerce in the *Moe* case, it has yet to address directly a substantive issue necessarily implicated by its decision, to-wit: territorial jurisdiction. The Court's decisions imply that states can validly impose taxes on transactions that occur in Indian Country. This conclusion necessarily implies that the state has territorial jurisdiction in Indian Country because the general rule consistently applied is that "a State may not tax persons, property or interests which are not within its 'territorial jurisdiction.'"¹²⁴ This taxation includes sales taxes¹²⁵ and means that the event subject to the tax, i.e., the sale or transfer of possession, must occur in the territory of the taxing authority.

The above concept is recognized in the Commission's stamp excise tax law.¹²⁶ This doctrine can be illustrated by the following analogy. Suppose Maine sought to compel Canada to collect Maine taxes on sales in Canada. The minimal burden on Canada to collect Maine taxes¹²⁷ would not give legal sanction to Maine's efforts. Absent a treaty, states have no right to require Canada or any other country or sovereign to collect Maine's taxes on transactions in Canada. Likewise, states cannot expect other states to be their tax collectors absent federal authorization. The same should be true of state taxation in Indian Country, i.e., absent a federal statute giving states jurisdiction in Indian Coun-

123. See, e.g., *McClanahan*, 411 U.S. at 171; *United States v. Mazurie*, 419 U.S. 544, 554 (1975).

124. *James v. Dravo Contracting Co.*, 302 U.S. 134, 138 (1937).

125. Florida "had no power or jurisdiction to levy and collect taxes on" transactions occurring outside 3-mile limit because it was beyond Florida territorial jurisdiction. *Straughn v. Kelly Boat Serv.*, 210 So. 2d 266, 267 (Fla. Dist. Ct. App. 1968).

126. "There is hereby levied upon the sale . . . of cigarettes *within* the State of Oklahoma, a tax . . ." 68 OKLA. STAT. § 302 (Supp. 1990) (emphasis added); see Savage, *Native Americans and the Constitution: The Original Understanding*, 16 AMER. IND. L. REV. 57 (1991). "'Within the limits of the state' or 'within the limits of the United States' implies, wrongly, that Native Americans or their lands were or are within the territorial boundaries, jurisdiction, or political boundaries of the state . . . and thus were or are subject to the . . . territorial jurisdiction of the state . . ." *Id.* at 72 n.53.

127. This standard is articulated in *Moe*, 425 U.S. at 483.

try, state laws and powers to tax should have no effect.¹²⁸ Territorial jurisdiction is a prerequisite to the taxing power.¹²⁹ “The State cannot legislate effectively concerning matters beyond her jurisdiction and within territories subject only to control by the United States.”¹³⁰

The concept of jurisdiction is the cornerstone of common law and constitutional jurisprudence. Jurisdiction confines the exercise of powers by governments only to those matters actually committed to government and over which the government has lawfully extended its powers.¹³¹ In a nutshell the question is: If states have jurisdiction in Indian Country, what is the law giving them that authority? The Solicitor General argued this question in a brief filed in the *Colville* case.¹³² However, the majority in *Moe* simply ignored this issue.¹³³

In holding that the federal tobacco statute “cannot be said to pre-empt Washington’s sales and cigarette taxes,”¹³⁴ the Supreme Court implied the existence of state territorial jurisdiction in Indian Country. Without jurisdiction in Indian Country, state law does not exist to be pre-empted.¹³⁵ However, the source of this presumed jurisdiction has never been defined.¹³⁶ Pre-emption

128. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980); *Warren Trading Post Co. v. Arizona State Tax Comm’n*, 380 U.S. 685, 691 (1965).

129. *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 342 (1954).

130. *Standard Oil Co. v. People*, 291 U.S. 242, 245 (1934).

131. WEBSTER’S NEW COLLEGIATE DICTIONARY 628 (G. & C. Merriam Co. 1977).

132. See Brief for the United States at 22-23, *Washington v. Confederated Tribes*, 447 U.S. 134 (1979) (No. 78-630).

133. Justice Rehnquist alluded to the territorial jurisdiction question in his opinion specially concurring and dissenting. “Here the State attempts to tax its citizens’ use of cigarettes purchased in a territory subject to the control of another sovereign [n.7 Indian reservations are not of course subject to the exclusive control of the tribe. The Federal Government and the States also have jurisdiction for some purposes.]” *Colville*, 447 U.S. at 181-82. No law is cited as the basis for the state jurisdiction, but the *Colville* Tribe was subject to some state jurisdiction by virtue of Public Law 280. Justice Rehnquist sanctioned the state’s extra-territorial taxation effort because it was similar to approved “use tax schemes.” However, the use tax schemes do not require other sovereigns to collect and remit use taxes. The taxpayer who resides in Oklahoma must pay the use tax, not the seller in another state. See, e.g., 68 OKLA. STAT. § 1402 (Supp. 1990) (“There is hereby levied and there shall be paid by every person storing, using or otherwise consuming, within this state . . .”).

134. *Colville*, 447 U.S. at 155.

135. Perhaps the answer is that the pre-emption concept has a unique definition when applied to Indians. See, e.g., *Oklahoma Tax Comm’n v. City Vending*, No. 65,602, slip op. at 15 (Okla. Apr. 23, 1991) (WESTLAW, 1991 WL 67002, *9) (“Pre-emption itself is a concept that, when used in the context of Indian Law, is *not bound by notions of pre-emption that have emerged in other areas of law*. *White Mountain*, 448 U.S. at 143.” (emphasis added)).

136. The Oklahoma Supreme Court recognizing the necessity for a legal basis for

is a legal construct that applies only where two or more sovereigns have jurisdiction.

Thus, when the Potawatomi responded to the Oklahoma Tax Commission's citation of the *Moe* trilogy, the tribe pointed out that the only known source of possible state jurisdiction in the Indian Country of the three tribes involved was Public Law 280.¹³⁷ The tribe further argued that a similar jurisdictional basis did not exist in Oklahoma.¹³⁸ Although rejecting this possible distinction,¹³⁹ the Supreme Court did not identify the law that provided Oklahoma territorial jurisdiction in Potawatomi Indian Country.

As articulated earlier, the consistent tenet of Indian affairs based on law was that the states had no power in Indian Country or over Indian tribes except that given them by the federal government. Even the federal government's power was limited to regulating commerce with the Indian tribes or exercising such

state jurisdiction in Indian Country posited a theory of residual jurisdiction. "If neither preemption nor infringement is involved, then the test shifts from one of 'strict compliance with PL-280' to the presence of state residuary powers." *State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77, 88 (Okla. 1985). The viability of this theory has been questioned. *See Seneca-Cayuga Tribe v. State ex rel. Thompson*, 874 F.2d 709 (10th Cir. 1989).

Whether or not this theory [of 'residual' state jurisdiction] is tenable as a matter of federal law, it addresses only the question of authority to regulate the Tribes, not the question of tribal amenability to suit. To understand it in the latter sense would be to give state courts jurisdiction when federal courts lack it, a result completely contrary to the history of federal primacy in the area of Indian law and policy.

Id. at 715 n.8.

137. In *Chemehuevi*, California was given limited criminal and civil jurisdiction over all Indian Country. *See* 28 U.S.C. § 1360 (1988); *Colville*, 447 U.S. at 164 n.32 ("The Colville Tribe consented in 1965 to the State's assumption of jurisdiction . . ."). The Colville Tribe offered to come under state jurisdiction pursuant to Public Law 280. WASH. REV. CODE ANN. §§ 37.12.010-.070 (1991); *Tonasket v. State*, 84 Wash.2d 164, 525 P.2d 744, 746 (1974) ("In January of 1965, the Colville Business Council issued Resolution 1965-4 requesting that the State of Washington assume criminal and civil jurisdiction over the Colville tribes and reservation . . . [The government] issued a proclamation assuming, on behalf of the state, the requested jurisdiction, which the state has since exercised."). In *Moe*, Montana had assumed jurisdiction over Indian law consistent with Public Law 280. *See Confederated Salish & Kootenai Tribes v. Moe*, 392 F. Supp. 1297 (D. Mont. 1975). "Pursuant to P.L. 280, 67 Stat. 588, . . . the State of Montana assumed complete criminal and limited civil jurisdiction over Indians residing on the Flathead reservation." *Id.* at 1306 (footnote omitted).

138. *Citizen Band Potawatomi Indian Tribe v. Oklahoma Tax Comm'n*, 888 F.2d 1303, 1307 (10th Cir. 1989), *aff'd in part & rev'd in part*, 111 S. Ct. 905 (1991) ("Oklahoma cites no federal law granting such jurisdiction.").

139. *See supra* text accompanying note 64.

additional authority as could be obtained by negotiating a treaty with the tribe. This general law is clearly and fully reflected in the Potawatomi experience.

Oklahoma has long recognized that it possesses no jurisdiction in Indian affairs because "federal jurisdiction of Indian lands and affairs were reasserted in the acts of Congress organizing the Oklahoma Territory and preparing the territory for statehood."¹⁴⁰ This policy is reiterated in the federal government's treaties with the Potawatomis and in the statutes authorizing statehood for Oklahoma. In the treaty which authorized creation of the Potawatomi reservation in Indian Territory, the U.S. government promised¹⁴¹ that the Potawatomi reservation lands would "*never* be included within the jurisdiction of any state."¹⁴² Although this promise has been indirectly and partially abrogated by subsequent federal enactments that removed much of the Potawatomi reservation lands, it has not been revoked as to those lands still held by the tribe.¹⁴³ In setting the boundaries of the Oklahoma Territory, and later in admitting Oklahoma to the Union, the federal government consistently required an acknowledgment that the new state would not exercise jurisdiction in Indian Country. The Organic Act setting the territory's boundaries stated

that nothing in this act shall be construed to impair any right now pertaining to any Indians or Indian Tribes in said territory under the laws, agreements and treaties of the United States, or to impair the rights of persons or property pertaining to said Indians, or to affect the authority of the government of the United States to make any regulation or to make any law respecting said Indians, their lands, property or other rights.¹⁴⁴

140. 10 Op. Okla. Att'y Gen. 464-65 (1978).

141. "[An Indian] treaty was not a grant of rights to Indians, but a grant of rights from them — a reservation of those not granted." *United States v. Winans*, 198 U.S. 371, 381 (1905), *quoted with approval in United States v. Wheeler*, 435 U.S. 313, 327 n.24 (1978).

142. Treaty of Feb. 27, 1867, art. 3, *United States-Potawatomi Tribe of Indians*, 15 Stat. 531, 532 (emphasis added).

143. Although portions of a treaty may be repealed by implication, the treaty itself is not repealed. *See Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968); *EEOC v. Cherokee Nation*, 871 F.2d 937, 938-39 (10th Cir. 1989); *see also* 25 U.S.C. § 71 (1988). "[N]o obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired." *Id.*

144. Act of May 2, 1890, ch. 182, § 1, 26 Stat. 81.

In granting Oklahoma's statehood, the Enabling Act stated that the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title in or to . . . all lands lying within said limits owned or held by any Indian, tribe or nation and that until the title to any such public lands shall have been distinguished by the United States the same shall be and remain subject to the jurisdiction, disposal and control of the United States.¹⁴⁵

Oklahoma's Constitution follows the Organic and Enabling Acts¹⁴⁶ in recognizing that Oklahoma should not have jurisdiction in Indian Country:

The people inhabiting the State do agree and declare that they forever disclaim all right and title in or to . . . all lands lying within said limits owned or held by an Indian, tribe or nation . . . The same shall be and remain subject to the jurisdiction, disposal and control of the United States.¹⁴⁷

As recently as 1978 the State of Oklahoma, through its chief law officer, acknowledged this jurisdictional limitation: "It appears, then, from the face and legislative history of the Congressional acts affecting Oklahoma, the Organic Act and Enabling Act, that *there was no intent to extend jurisdiction to Indians, Indian Tribes, or Indian Country* within the territories upon the attainment of statehood."¹⁴⁸

"Article I, Section 3 of the Oklahoma Constitution constitutes a legal impediment to the exercise of state court jurisdiction in Indian Country."¹⁴⁹ The limitations imposed by article I, section 3 of the Oklahoma Constitution have been recognized in federal court:

In the Constitution of the State of Oklahoma [article I, section 3], . . . we find the following language:

145. Act of June 16, 1906, ch. 3335, § 3, 34 Stat. 267.

146. "And Whereas, it appears that the said Constitution and government of the proposed State of Oklahoma . . . contains all of the six provisions expressly required by Section 3 of the said act [Enabling Act] to be therein contained." Proclamation No. 6869, 34 Stat. 267 (1906).

147. OKLA. CONST. art. I, § 3 (emphasis added). Because of treaties and constitutional disclaimers, "Congress has consistently acted upon the assumption that the States lacked jurisdiction over Navajos living on the reservation." *McClanahan*, 411 U.S. at 175.

148. 10 Op. Okla. Att'y Gen. 464, 467 (1978) (emphasis added). Cf. *DeCoteau v. District Court*, 420 U.S. 425, 428 (1975) ("It is common ground here that Indian conduct occurring on the trust allotments is beyond the State's jurisdiction, being instead the proper concern of tribal or federal authorities.")

149. *State v. Littlechief*, 573 P.2d 263, 265 (Okla. Crim. App. 1978); see also

“The people inhabiting the State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, * * * .”

It is therefore apparent that the original Fort Sill military reservation *was never a part of, or under the jurisdiction of, the Territory or State of Oklahoma* except as such jurisdiction has been specifically ceded to the State by Congress.¹⁵⁰

Although *Yellow Cab* concerned a federal installation on unappropriated public lands, the holding relies on the same clause in the Oklahoma Constitution. That section includes lands owned by Indian tribes.¹⁵¹ Thus, the result should be the same for Indian tribes, a result that, as previously noted, has been consistently supported by the Attorney General for the State of Oklahoma.

A possible answer to the question of territorial jurisdiction is that the Supreme Court implicitly concedes that Oklahoma has no territorial jurisdiction in Indian Country but is concerned that Oklahoma will have difficulty collecting its valid cigarette taxes if tribes do not cooperate.¹⁵²

Conclusion

Because the judiciary has created an intolerable situation by abdicating its responsibility to enforce laws and by ignoring the exclusive constitutional prerogative of Congress to regulate “Commerce . . . with Indian Tribes,” Congress should promptly

C.M.G. v. State, 594 P.2d 798, 799 (Okla. 1979), *cert. denied*, Oklahoma v. C.M.G., 444 U.S. 992 (1979).

150. *Yellow Cab v. Johnson*, 48 F. Supp. 594, 598-99 (W.D. Okla. 1942), *aff'd*, 137 F.2d 274 (10th Cir. 1943), *aff'd*, 321 U.S. 383 (1944) (emphasis added); *see also* United States v. State Tax Comm'n, 412 U.S. 363, 371 (1973), *rev'd*, 421 U.S. 599 (1975) (a state cannot require out-of-state vendors to collect and remit state taxes on liquor sold on federal military installations because “nothing occurs within the State that gives it jurisdiction to regulate the initial wholesale transaction.”). Compare *Organized Village v. Egan*, 369 U.S. 60, 69 (1962) (Alaska Constitution disclaimer clause — enacted long after Oklahoma’s and under vastly different circumstances — was not a bar to concurrent state jurisdiction so long as tribal self-government remained intact.). *See also McClanahan*, 411 U.S. at 167 (Arizona adopts similar interpretation of its disclaimer clause).

151. OKLA. CONST. art. I, § 3.

152. *See supra* text accompanying note 65.

reassert its exclusive constitutional function by directing states to leave Indian commerce alone except where specifically authorized by federal law.

Addendum

When the Supreme Court remanded *Citizen Band Potawatomi* to the Tenth Circuit, the Commission urged reconsideration of the Tenth Circuit order granting costs to the Potawatomis.¹⁵³ This motion was denied in an Order on Remand which was entered on May 16, 1991.¹⁵⁴

On remand to the district court the Commission argued over the form of the judgment to be entered on remand¹⁵⁵ and reargued costs.¹⁵⁶ The Potawatomis moved for sanctions. The court denied the Commission's motions and the Potawatomi's motion for sanctions.¹⁵⁷

153. See Oklahoma Tax Commission's Motion to Reassess Costs to Each Party, *Citizen Band Potawatomi* Nos. 88-2160 & 88-2172.

154. Order on Remand, *Citizen Band Potawatomi Indian Tribe v. Oklahoma Tax Comm'n*, 932 F.2d 1355 (10th Cir. Okla. 1991). "Cause is REMANDED to the District Court to the dismissal of the Oklahoma Tax Commission's counter claim and entry of an injunction prohibiting the Tax Commission from enforcing the challenged assessment for previously uncollected taxes against the Citizen Band Potawatomi Indian Tribe of Oklahoma." *Id.*

155. See Defendants' Motion to Settle Judgment, *Citizen Band Potawatomi*, No. CIV-87-0338-W (July 22, 1991).

156. See Motion to Reassess and Determine Costs, *Citizen Band Potawatomi*, No. CIV-87-0338-W (May 23, 1991).

157. Order of Dismissal and Entry of Injunction, *Citizen Band Potawatomi*, No. CIV-87-0338-W (July 31, 1991). The Order of Dismissal reads as follows:

Following receipt of the mandate issued by the United States Court of Appeals for the Tenth Circuit after its decision in *Citizens Band Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Commission*, 888 F.2d 1303 (10th Cir. Okla. 1989), the plaintiff moved for entry of judgment consistent with the mandate. No opposition to this motion was filed and the Court entered judgment on January 4, 1990.

Subsequently, the United States Supreme Court granted the defendants' Petition for Writ of Certiorari and, upon review, affirmed in part and reversed in part the opinion of the Tenth Circuit. *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 111 S. Ct. 905 (1991). On February 26, 1991, the case was remanded to the Tenth Circuit.

On May 16, 1991, the Tenth Circuit in its Order on Remand stated that 'we affirm our previous decision except for that language in the opinion that conflicts with the decision of the Supreme Court.' *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Commission*, 932 F.2d 1355 (10th Cir. Okla. 1991). The matter was then remanded to this Court with directions to dismiss the defendants' counterclaim and to enter an injunction prohibiting the defendants from enforcing the challenged assessment for previously uncollected taxes against the plaintiff.

The Judgment entered by this Court on January 4, 1990, dismissed the defendants' counterclaim and enjoined the defendants from enforcing the challenged assessment for previously uncollected taxes against plaintiff.

Nevertheless, the Commission, on August 23, 1991, filed a Notice of Appeal. The Commission alleges in its brief to the Tenth Circuit that the district court order violated the Supreme Court's mandate and, in a new argument, stated that an equity court could impose the Commission's wishes. The Commission's second argument requests the appellate court to direct the lower court to act upon a legal argument which had never been before any tribunal.

Thus, the Judgment of January 4, 1990, is consistent with the the Tenth Circuit's Order on Remand of May 16, 1991. Therefore, this Court pursuant to the Order on Remand ADOPTS that portion of its Judgment of January 4, 1990, and ADJUDGES that such portion shall remain and is hereby in force and effect.

Id.