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"MUST THE PALEFACE PAY TO PUFF?" CONFEDERATED SALISH AND KOOTENAI V. MOE

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INTRODUCTION

April 13, 1972 was not a good day for businessman Joseph Anthony Wheeler, Jr. Wheeler was the owner of two small but thriving discount cigarette stores. On that day, deputies from the Missoula County Sheriff's Department appeared at one store and arrested Wheeler for selling cigarettes (a) without a state license, and (b) without a state tax stamp affixed to each pack. The deputies stripped cigarette signs from the doors of the store, and subsequently confiscated 1,350 cartons of cigarettes. At the other store, the storekeeper employed by Wheeler was arrested on similar grounds by deputies from the Lake County Sheriff's Department. Wheeler was an enrolled tribal Indian living on the Flathead Reservation. The stores were on tracts of tribal trust land leased from the tribe, and were located within the boundaries of the Reservation.

From the time of Chief Justice Marshall's opinion in *Worcester v. Georgia*,[2] courts have been called upon to "reconcile the plenary power of the states over residents within their borders with the semi-autonomous status of Indians living on tribal Reservations."[3] On the present facts, a federal court was again called, this time to determine Montana's power to tax cigarette sales on the Flathead Reservation.

THE CASE

The case came before the federal court as *Confederated Salish and Kootenai v. Moe*.[4] The plaintiffs, including the Confederated Salish and Kootenai Tribes, the Tribal Chairman, and the two persons arrested, alleged that the Montana cigarette tax and licensing statutes, as applied to enrolled Indians residing on the Flathead Reservation, were unconstitutional and a violation of tribal sovereignty. The defendants contended that the State of Montana had the power to compel an Indian residing on the Flathead Reservation to collect the state's cigarette tax at the time of retail sale of the cigarettes.

Because of the special nature of the case,[5] a three judge federal

[1]The title of this article is a paraphrase of the rhetorical question posed by dissenting District Judge Smith in the principal case when he asked "Must the fee-patent Indian pay to puff?". Confederated Salish and Kootenai v. Moe, 31 St. Rep. 408, 430 n. 3 (1974).

[2]Worchester v. Georgia, 31 U.S. (6 Peters) 515 (1832).

[3]McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164 (1973).

[4]Confederated Salish and Kootenai v. Moe, *supra* note 1.

[5]C. A. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS, 189 (2nd ed. 1970). Speaking of 28 U.S.C. § 2281, Professor Wright says ". . . to be applicable a state

court was convened to hear the matter. The court held that it had jurisdiction, and proceded to consider the merits. Two issues were distinguished:

(1) Does Montana have the power to tax cigarettes sold by an Indian retailer to Indian customers on Reservation land?

(2) Does Montana have the power to require an Indian retailer to collect a tax for the state on cigarettes sold to non-Indian customer on Reservation land?

I. The first issue which had to be confronted was whether or not the Montana statutes[6] were unconstitutional as applied to the sale of cigarettes by an Indian retailer to Indian customers on Reservation land. Because the State of Montana had assumed limited civil jurisdiction[7] and exclusive criminal jurisdiction[8] over the Flathead Reservation two immediate questions had to be resolved. The court had to decide whether the Montana cigarette tax and licensing statutes were criminal in nature, and if not, whether the power to license cigarette dealers and tax cigarette sales was assumed under the limited civil jurisdiction the state could exercise over the Flathead Reservation. The court observed:

> . . . . taxing statutes are civil revenue collecting provisions even though they are subject to being enforced by criminal penalties. If the civil revenue collecting provisions are not applicable to the plaintiffs in the first instance, then neither are their criminal enforcement provisions.[9]

It thus found that the power to enforce cigarette and licensing statutes was not among the limited catagories of civil jurisdiction assumed by the state.

Relying almost exclusively on the United States Supreme Court's reasoning in *McClanahan v. State Tax Commission of Arizona*,[10] the three judge court held that the Montana statute was unconstitutional as applied to enrolled Reservation Indians selling cigarettes to other Reservation Indians.[11]

The narrow ground upon which *McClanahan* was decided appeared to adapt readily to the Montana factual context holding that the activities of an Indian cigarette *user* on reservation land were beyond the state's power to tax.

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statute or administrative order must be challenged, a state officer must be a party defendant, injunctive relief must be sought, and it must be claimed that the statute or order is contrary to the constitution of the Unied States.''

[6]REVISED CODES OF MONTANA, §§ 84-5606, 84-5606.2(j) (1947) [Hereinafter cited as R.C.M. 1947].

[7]R.C.M. 1947, § 83-801 *et. seq.*

[8]State ex rel. McDonald v. Dist. Court, 159 Mont. 156, 496 P.2d 78 (1972).

[9]Confederated Salish and Kootenai v. Moe, *supra* note 1 at 419.

[10]McClanahan v. State Tax Commn of Arizona, *supra* note 3.

[11]Confederated Salish and Kootenai v. Moe, *supra* note 1 at 421.

II. The *Confederated Salish and Kootenai* court was confronted with a more perplexing question in the second issue which it faced. It noted that ". . . the Supreme Court has not passed upon the question here presented."[12] It had to determine whether the State of Montana was precluded from requiring a member of the Tribes to pre-collect the tax if he wished to sell cigarettes to non-Indians on the Flathead Reservation.

The language of the Montana statutes was the basis of the quandary, as the cigarette tax is conclusively presumed to be a direct tax on the retail customer and pre-collected for convenience only.[13] The seller pays the tax to the wholesaler and in turn adds the tax to the purchase price of the cigarettes. The result is that in the sale without payment of the tax to a non-Indian, it is the non-Indian who reaps the benefits of the tax exemption, not the Indian seller.

In arriving at a solution of this problem the court discussed the federal pre-emption principles and federal regulation of Indian trading. It compared this case to *Warren Trading Post v. Arizona Tax Commission*,[14] and noted that unlike the Navajo Reservation, the Flathead Reservation had no licensed Indian Traders.[15] Thus a longstanding congressional policy of avoiding a burden of state taxation on persons licensed by the federal government to trade with the Indians was not a factor for consideration. Additionally, the court recognized that the doctrine of Indian sovereignty was not an inflexible or static doctrine but that "notions of Indian Sovereignty have been adjusted to take account of the state's legitimate interests in regulating the affairs of non-Indians."[16] Reasoning further on the basis of *Mescalero Apache Tribe v. Jones*,[17] holding that Indian Tribes were not totally immune from state taxation, it set forth the ground for an inference that a uniform non-discriminatory tax or obligation might be imposed.

The court resolved that the Indian retailer selling cigarettes to non-Indians is involved with non-Indians to a degree which would permit Montana to exercise its power and require the pre-collection of the tax imposed on non-Indians. Quite plainly the court had determined that this factual situation was easily within the inroads made on Indian Sovereignty set forth in *Williams*.[18] The court reasoned that (1) the collection of the tax would impose no burden on the class of reservation Indians, (2) that the collection of the tax would not interfere with the

[12] *Id.* at 425.

[13] R.C.M. 1947, § 84-5606(1). "All taxes paid pursuant to the provisions of this section shall be conclusively presumed to be direct taxes on the retail consumer pre-collected for the purpose of convenience and facility only."

[14] Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685 (1965).

[15] 25 U.S.C. §§ 261-264 (1970).

[16] Confederated Salish and Kootenai v. Moe, *supra* note 1 at 423 *quoting* McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164 (1973).

[17] Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

[18] Williams v. Lee, 358 U.S. 217, 219 (1959).

Tribe's right to be governed by its own laws, and (3) that it appeared to be a reasonable inference that the stores were established, not for the sole benefit of the Indian customers, but to attract prospective customers who were non-Indians but who could take advantage of not paying the cigarette tax by buying from the Reservation stores.[19]

Thus the three-judge court held that Montana could not apply the cigarette excise tax to the sale of cigarettes by a member of the Tribes to any Indian residing on the Reservation. Nor could the state require any member of the Tribe selling cigarettes on the Reservation to obtain a dealer's license. However, the State of Montana *could require* the Indian seller to pre-collect the excise tax on any sale made to a non-Indian.[20]

THE OTHER CASES

The cases involving Indian parties should not be categorically classed as "Indian Cases" if in so doing one overlooks fundamental differences of legal relationships. To apply the logical method of *reductio ad absurdum* to such a proposition would lead to the untenable conclusion that *legal status* can be equated with *race*. Thus, before considering the "cigarette tax" question further, it is necessary to provide a reference point based on four recent Supreme Court cases involving the legal relation of the state and Indian persons residing within its borders.

(1) *Williams v. Lee.*[21] This case involved a licensed Indian Trader who was a non-Indian, selling at retail on the Reservation to Indian buyers. The Court held that the state courts of Arizona did not have jurisdiction in a suit to collect for goods sold to the Indian buyers because jurisdiction was in the tribal court. To allow the state to exercise jurisdiction would undermine the authority of tribal courts over Reservation affairs and would infringe on the right of Indians to govern themselves.

(2) *Warren Trading Post v. Arizona Tax Commission.*[22] This case involved a licensed Indian Trader whose income from trading with Reservation Indians on the Reservation was subjected to a tax by the State of Arizona. The Court held that the state could not impose the tax burden on the trader or the Indians because the field of trading with Indians on Reservations was occupied by all-inclusive Congressional statutes and regulations.

(3) *Mescalero Apache Tribe v. Jones.*[23] The Supreme Court held that New Mexico could impose a non-discriminatory gross receipts tax on a ski resort operated by the tribe on land without the exterior boundaries of the Reservation. However, the state could not impose a use

[19]Confederated Salish and Kootenai v. Moe, *supra* note 1 at 427.
[20]*Id.* at 428.
[21]Williams v. Lee, *sura* note 18.
[22]Warren Trading Post v. Arizona Tax Comm'n, *supra* note 14.
[23]Mescalero Apache Tribe v. Jones, *supra* note 17.

tax on personalty installed as a permanent improvement at the resort which had become so intimately connected with the land that it was entitled to statutory exemption.

(4) *McClanahan v. Arizona State Tax Commission.*[24] Here the Court held that the State of Arizona could not impose its personal income tax on the income of an enrolled Tribal Indian residing on the Reservation whose income was wholly derived from a Reservation source.

With this reference point the treatment of the cigarette tax issue by other state and federal courts can be considered.

A. *Tonasket.* The cigarette tax question presented before the federal court in Montana is not *sui generis.* The question has been raised in two other states, Washington and Nevada, within the past few years. It was first litigated in the State of Washington in the case of *Tonasket v. State*[25] and involved a factual situation remarkably similar to the facts of the case considered by the *Confederated Salish and Kootenai* court.

In *Tonasket* a full blooded Colville Indian who owned and operated a retail cigarette store on alloted Reservation land was arrested for admittedly violating the Washington statutes[26] requiring him to obtain a license to sell cigarettes and to affix the state's tax stamp to cigarettes he sold. He showed no discrimination in his sales, he sold to Indian and non-Indian alike. The Washington supreme court held that the state had assumed jurisdiction under Public Law 280[27] and that the state's jurisdiction extended to all matters except those enumerated limitations contained in that act. Reasoning then that it was the intent of Congress to authorize states to apply their revenue laws to business activities of Indians because

> . . . there is expressed in the act no other limitation upon the right of the state to impose taxes upon and regulate the activities of an Indian under its general laws applicable to all citizens. . . . there is no room to imply other limitations upon the operation of the general laws of the state.[28]

The court specifically noted that *Warren* was not conclusive authority because *Tonasket* did not involve a licensed Indian Trader and more importantly the Navajos had not submitted to the jurisdiction of Arizona nor had Arizona assumed jurisdiction over them.

Mr. Tonasket appealed the Washington court's ruling and the United States Supreme Court agreed to hear the case. At the time the case was brought before the Supreme Court there were two other[29] Indian

[24]McClanahan v. State Tax Comm'n of Arizona, *supra* note 3.

[25]Tonasket v. State, 79 Wash. 2d 607, 488 P.2d 281 (1971) *vacated,* 411 U.S. 451 (1973).

[26]REVISED CODE OF WASHINGTON ANNOTATED, §§ 19.91.120, 82.24.050, 82.32.030 (1962) [Hereinafter cited as R.C.W. 1962].

[27]Act of August 15, 1953, 67 Stat. 588.

[28]Tonasket v. State, *supra* note 25 at 285.

[29]Mescalero Apache Tribe v. Jones, *supra* note 17 and McClanahan v. Arizona Tax Comm'n, *supra* note 3.

tax questions pending. Additionally the Washington state legislature had undertaken an amending of the statutes concerned.[30] As a result, in a per curiam opinion,[31] the Supreme Court vacated the Washington judgment and remanded the case for reconsideration in light of its opinions in the other tax cases and the Washington legislature's action.

On reconsideration the Washington court *reaffirmed*[32] its earlier holding that the State of Washington had the *authority* to extend its civil excise taxes to Indian retailers selling to non-Indians within the exterior boundaries of the Colville Reservation. However the court went on to say that the legislative exemption[33] adopted by the state relieved the Indian retailers from collecting the tax in sales made to non-Indian customers.

B. *Moses.* Prior to the disposition of the state law questions by the Washington court in *Tonasket,* a similar question was before the Ninth Circuit Court of Appeals in the case of *Moses v. Kinnear.*[34] Like *Tonasket, Moses* involved the Washington cigarette tax statutes. Unlike the activity undertaken in *Tonasket,* the cigarette sales in *Moses* were without the exterior boundaries of the Reservation, yet on Indian trust land.

The Ninth Circuit noted ". . . while *McClanahan* would prevent the imposition of a state excise tax on the sale of cigarettes by a member of the tribe to Indians on the Reservation, *it does not reach the question of imposition of such a tax on sales to non-Indians."*[35] (Emphasis added). *Moses* was remanded to the federal district court pending the final determination of *Tonasket* by the state court.

C. *Walker River Paiute.* In *Walker River Paiute Tribe v. Sheehan,*[36] the federal court in Nevada considered the cigarette tax question. Unlike *Confederated Salish and Kootenai, Moses,* and *Tonasket, Walker River Paiute* was similar to the factual situttion involved in *Warren.* The retail seller was a duly licensed Indian Trader who leased from the Walker River Paiute Tribe a store on Reservation land which he operated as a smoke shop. The cigarettes he sold were unstamped and there-

[30]R.C.W. 1962, § 82.24.250. "For purposes of this section, the term 'person authorized by chapter 82.24 R.C.M. to possess unstamped cigarettes' shall mean a wholesaler or retailer licensed pursuant ato the provisions of chapter 19.91 R.C.W., the United States or an agency thereof, and *any Indian Tribal organization authorized to possess unstamped cigarettes."* (Emphasis added).

§82.24.260. "Notwithstanding any other provisions of this chapter, a person may acquire and physically possess, if acquired and possessed for purposes other than resale, four hundred or less cigarettes at any single time without incurring tax liability under this chapter, R.C.W. 28A.47.440 and R.C.W. 73.32.130.

[31]Tonasket v. State, 411 U.S. 451 (1973).

[32]Tonasket v. State, ... Wash. 2d ....., 525 P.2d 744, 754 (1974).

[33]*Id.* at 755.

[34]Moses v. Kinnear, 490 F.2d 21 (9th Cir. 1974).

[35]*Id.* at 26.

[36]Walker River Paiute Tribe v. Sheehan, 370 F. Supp. 816 (D. Nevada 1973).

fore in violation of a Nevada law.[37] Again, his sales were non-discriminatory.

The court in Nevada noted that perhaps the most significant aspect of *McClanahan* was its reaffirmation of *Warren*.[38] Significantly this court held that a decision protecting from state taxation sales to non-Indians was not precluded by *Warren* or *McClanahan* because neither had reached the question. Nor did the Supreme Court's decision in *Mescalero* preclude placing sales to non-Indians outside the state's power to tax.[39]

CONCLUSION

To reconcile the cases it is necessary to note the myriad factual permutations and nuances. The three-judge holding in Montana is consistent with the ultimate determination by the Washington court in *Tonasket*. Both Montana and Washington had assumed limited jurisdiction respectively over the Flathead and Colville Reservations. Similarly the tax sought to be enforced was a tax on the retail consumer rather than the Indian seller or trader in both cases, though Montana's statutory language is likely to bear less scrutiny than the Washington exception[40] should either statute be the subject of the litigation in the future. Though reaching different conclusions concerning the imposition of the tax on sales made to non-Indians, the Montana case did not involve a licensed Indian Trader as did the Nevada case. Additionally the Nevada tax was on an activity undertaken on the Reservation whereas Montana's tax is presumed to be a tax on the purchaser.

The holding in *Confederated Salish and Kootenai*, is the only case in which a federal court has determined that a state can require an Indian retail seller to pre-collect a state tax on cigarettes sold to non-Indians. Like the holdings of *McClanahan* and *Warren*,[41] the holding of *Confederated Salish and Kootenai* is likely to be very limited in its application. It is unlikely that, absent a legislative exception similar to that in the Washington statute,[42] the court's interpretation of the Montana statute would stand if the same issue arose on any of the other reservations in the state. This premise is based on the fact that the Flathead Reservation is the only Indian Reservation in the state in which Montana has assumed jurisdiction, even though in a limited sense, in civil

[37]Nevada Revised Statutes, § 370.270 (1973) [Hereinafter cited N.R.S. 1973].

[38]Walker River Paiute Tribe v. Sheehan, *supra* note 36 at 821.

[39]*Id.* at 822.

[40]R.C.M. 1947, § 84-5606, is a conclusive presumption so the federal decision is likely to be determinative even if the matter should come before the state court. R.C.W. 1962, § 82.24.260, operates only when the non-Indian purchaser buys less than two cartons of cigarettes. It would appear that if the non-Indian purchaser buys more than two cartons at one time the question litigated and appealed to the United States Supreme Court in Tonasket will again be at hand.

[41]Walker River Paiute Tribe v. Sheehan, *supra* note 36 at 821.

[42]See R.C.W. 1962, § 82.24.250, *supra* note 30.

matters. It is equally as unlikely that the case will stand as authority in any other case excepting those with a precise factual similarity.

The four cigarette tax cases suggest that it is possible to identify some key questions which must be considered when one is confronted with a jurisdictional issue concerning the state's power to tax Indian citizens.

1. Has the state assumed civil[43] or criminal[44] jurisdiction either under Public Law 280 or Title IV of the 1968 Civil Rights Act?[45]

2. If the state has assumed civil jurisdiction, does it extend to the power to tax?[46]

3. Is there a federal statute or treaty prohibiting or authorizing[47] the state to exercise the power to tax?[48]

4. What is the nature of the tax? Is it a tax on the activity or is it a tax on a use?[49]

5. Is the nature of the activity engaged in tribal or is it an individual endeavor?[50]

6. Where does the activity take place? Is it within the exterior boundaries of the Reservation on land allotted to the individual tribal member or is it on land held in trust for the tribe?[51] Is it without the exterior boundaries on trust land?[52]

7. What is the status of the individual undertaking the activity? Is he enrolled in the tribe and living on the Reservation?[53] Is there a special status such as an Indian Trader?[54]

[43]Note, *State Civil Jurisdiction Over Tribal Indians A Re-Examination*, 35 MONT. L. REV. 340 (1974).

[44]State ex rel. McDonald v. Dist. Court, supra note 8.

[45]25 U.S.C. §§ 1321-1326 (1970). See Kennerly v. Dist. Court, 400 U.S. 423 (1971); also Security State Bank v. Pierre, ... Mont. ....., 511 P.2d 325, 30 St. Rep. 482 (1973).

[46]Tonasket v. State, *supra* note 32.

[47]25 U.S.C. §§ 261-264 (1970).

[48]Mescalero Apache Tribe v. Jones, *supra* note 17; McClanahan v. Arizona State Tax Comm'n, *supra* note 3; Warren Trading Post v. Arizona Tax Comm'n, *supra* note 14.

[49]*Id.*

[50]It would appear that if the Tribal organization acts to make the activity a tribal revenue producing activity, it would sufficiently affect the status of the parties to the extent that the *Williams* general test becomes more exclusive, ending to diminish the state's jurisdictional base. Another factor affecting the status is whether the individual involved can effectuate a statutory exemption, such as the Indian Trader status resulting in the state's jurisdictional interest being further diminished. As an example see the Colville Tobacco Ordinance, 37 Fed. Reg. 25181 at 25182 (1972).

[51]Confederated Salish and Kootenai v. Moe, *supra* note 1; also Tonasket v. State, *supra* note 32.

[52]Mescalero Apache Tribe v. Jones, *supra* note 17; also Moses v. Kinnear, *supra* note 34.

[53]Mescalero Apache Tribe v. Jones, *supra* note 17; Warren Trading Post v. Arizona Tax Comm'n, *supra* note 14; Williams v. Lee, *supra* note 18; *see* also State ex rel. Mary Iron Bear v. Dist. Court, ... Mont. ....., 512 P.2d 1292, 30 St. Rep. 482 (1973) and Bad Horse v. Bad Horse, ... Mont. ....., 517 P.2d 893, 31 St. Rep. 22 (1974).

[54]25 U.S.C. §§ 261-264 (1970). An inference can be drawn from the statutory language of 25 U.S.C. § 264 such that a full blooded Indian involved in retail sales to Indians

8. Does the operation of the tax pertain exclusively to Indians or are there non-Indians involved to such a degree that there is a legitimate state interest?[55]

It is clear that despite the seeming inroads on the doctrine of Indian sovereignty noted in *Williams v. Lee*,[56] the doctrine is still a fundamental consideration in resolving the state tribal jurisdictional conflict. Though the test ". . . has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them",[57] it should be considered in light of Justice Marshall's *caveat* in *McClanahan*.

> . . . it could vastly oversimplify the problem to say that nothing remains of the notion that reservation Indians are a separate people to whom state jurisdiction, and therefore state tax legislation may not extend.[58]

EPILOGUE

On the basis of a lengthy dissent[59] the *Confederated Salish and Kootenai* court has taken the unusual step of agreeing to rehear part of the principal case.

Dissenting District Judge Russell Smith found it to be:

> self-evident that if a non-Indian is required to pay a larger load of state and local taxes to provide services for the Indian who, because of his race, is exempt from those taxes, then the non-Indian has been subjected to a racial discrimination and deprived of equal protection of the laws. The cases dealing with the subject of Indians and state taxation have not explored this side of the coin. I think it must be explored before a conclusion can be reached in this case.[60]

The dissent would hold that the Indians on the Flathead Reservation are sufficiently within Montana's jurisdiction to be entitled to state services and, except for trust land, to be subject to state taxation. Thus the Indians' being exempted from payment of the Montana tax solely on the ground of being Indian places an unequal tax burden on the non-Indians. The conclusion being "race alone could never be a valid basis for classification."[61]

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on the Reservation has the same statutory exemption as the Licensed Indian Trader. Mr. Tonasket was a full blood Indian *see* Tonasket, *supra* note 32) and the Bureau of Indian Affairs reasoned that he did not need the Federal License because of his heritage. The factor was mentioned by the Washington court on its reconsideration of the cigarette tax question.

[55]Williams v. Lee, *supra* note 18. A consideration which was mentioned in both the principal case and *McClanahan* is the extent of state services supplied to Reservation Indians and the concomitant federal subsidy in the maintenance of such services.

[56]Williams v. Lee, *supra* note 18.

[57]*Id.*

[58]McClanahan v. State Tax Comm'n of Arizona, *supra* note 3.

[59]Confederated Salish and Kootenai v. Moe, *supra* note 1 at 428.

[60]*Id.*

[61]*Id.* at 434.

The conclusion which Judge Smith reaches, that race is not a basis for tax classification, is undoubtedy tautological. But, is race the sole criterion of the special status given to the relation of Indians and states by the federal courts?