RECENT DEVELOPMENT

Property Taxation of Indian Land After *County of Yakima v. Confederated Tribes and Bands of the Yakima Nation*

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In 1987, Yakima County, Washington, initiated foreclosure proceedings on properties belonging to the Yakima Indian Nation and its members. The county's foreclosure was precipitated by the property owners' failure to pay past due ad valorem and excise taxes. Despite vigorous arguments by the Yakima Nation, the United States, and the thirty-one Yakima Indian families likely to be rendered homeless by an adverse decision, the United States Supreme Court held in *County of Yakima v. Confederated Tribes and Bands of the Yakima Nation*,[1] that states have the power to impose ad valorem taxes on reservation land owned in fee by Indians.[2] This Recent Development provides a brief summary of that decision.

The Yakima Indian Reservation consists of about 1.3 million acres and is located in southeastern Washington. The United States holds eighty percent of the land in trust for the benefit of the Tribe or its individual members, and the other twenty percent is owned in fee by either the Tribe, individual members, or non-Indians.[3] Virtually all of the reservation is within Yakima County.[4]

Yakima County imposes ad valorem taxes on real estate

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1. 112 S. Ct. 683 (1992).

2. *Id.* at 694. The Court also held, however, that the states may not impose an excise tax on the sale of such lands. *Id.*

3. *Id.* at 687. Non-Indian ownership arose as a result of the rights that were distributed during the allotment era. *See id.* (citing Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 415 (1989)).

4. *Id.*

and excise taxes on the sale of real estate.[5] It has imposed and collected these taxes on the Reservation's fee lands without incident for decades.[6] This changed in 1987, when Yakima County initiated foreclosure proceedings against parties who had not paid their ad valorem or excise taxes. These attempts at collection caused the Yakima Nation to file suit for declaratory and injunctive relief. The Tribe claimed that federal law prohibited the imposition or collection of these taxes on fee-patented lands that were held either by the Tribe or its members.[7]

The District Court awarded the Tribe summary judgment and prohibited Yakima County from imposing or collecting taxes on fee-patented lands.[8] The Ninth Circuit Court of Appeals agreed that an excise tax could not be imposed; however, it held that an ad valorem tax would be impermissible only if it would have a " 'demonstrably serious' " impact on the " 'political integrity, economic security, or the health and welfare of the tribe.' "[9] The Ninth Circuit remanded the case to the District Court for such a determination. The Supreme Court granted certiorari to decide whether the tax was proper.[10]

Previously, the Supreme Court has held that states do not have the power to tax reservation lands and reservation Indians absent cession of jurisdiction or a federal statute that would permit taxation.[11] The Court has also historically withheld recognition of Congressional authorization to allow state taxation unless the intent of Congress is unmistakably clear.[12] In light of these holdings, Yakima County argued that Section

5. WASH. REV. CODE §§ 82.45.070, 84.52.030 (1989). An ad valorem tax is a tax that is assessed according to value. In the case of an ad valorem property tax, it is assessed with regard to the property's value. An excise tax is a tax assessed on the manufacture, sale, or consumption of certain commodities such as liquor, tobacco, and gasoline. Excise taxes are generally assessed on commodities that have inelastic demand curves, which means that the people who buy the product will tend not to reduce usage much if the tax causes the price to increase.

6. *Yakima Nation*, 112 S. Ct. at 687.

7. *Id.*

8. *Id.*

9. County of Yakima v. Confederated Tribes and Bands of the Yakima Nation, 903 F.2d 1207, 1218 (9th Cir. 1990) (quoting *Brendale*, 492 U.S. at 431), *aff'd*, 112 S. Ct. 683 (1992).

10. *Yakima Nation*, 112 S. Ct. at 687.

11. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973).

12. Montana v. Blackfeet Tribe, 471 U.S. 759, 765 (1985); *see also* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 215 n.17 (1987).

6 of the General Allotment Act[13] provided the county with express authority to tax the fee-patented lands.[14] Section 6 of the Act provides:

> At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, . . . then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside . . . . Provided, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed.[15]

In accepting Yakima County's argument, the Supreme Court cited to the Burke Act of 1906[16] as providing congressional authorization for the state taxation of Indian lands.[17] In particular, the Court stated that, through the Burke Act, Congress manifested its intent to permit state taxation by "specifically mentioning immunity from land taxation 'as one of the restrictions that would be removed upon conveyance in fee' " of Indian lands.[18]

The Yakima Nation contended, however, that, with respect to an Indian reservation, Section 6 was "a dead letter."[19] Specifically, the Yakima Nation argued that Congress repealed Section 6 when it terminated the allotment program and restored tribal sovereignty through the Indian Reorganiza-

13. General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 336, 339, 341, 342, 348, 349 (1989)). This Act, also known as the Dawes Act, gave the President authority to allot most tribal lands without first obtaining the consent of affected Indian nations. In order to prevent the quick sale or encumbrancing of the allotted land, the Act provided that each parcel would be held in trust by the United States for 25 years or more. After this period expired, a fee patent could be issued to the Indian allottee. *See Yakima Nation*, 112 S. Ct. at 686.

14. *Yakima Nation*, 112 S. Ct. at 688.

15. 25 U.S.C. § 349 (1989).

16. Burke Act of 1906, ch. 2348, 34 Stat. 182. This Act gave the President the option of issuing a patent in fee simple before the expiration of the relevant trust period if the allottee was found to be competent and capable of managing his own affairs. *Id.* at 182. This proviso also removed all restrictions on the sale, encumbrance, or taxation of the land. *Id.* at 183. *See Yakima Nation*, 112 S. Ct. at 686, 688.

17. *Yakima Nation*, 112 S. Ct. at 688.

18. *Id.* (quoting *Yakima Nation*, 903 F.2d at 1211).

19. *Id.* at 688-89.

tion Act of 1934.[20]

In support, the Tribe cited a number of subsequent congressional actions,[21] in addition to a Supreme Court case, *Moe v. Confederated Salish and Kootenai Tribes*.[22] The Yakima Nation argued that *Moe* repudiated the Allotment Act's continuing jurisdiction.[23] In *Moe*, the State of Montana tried to impose cigarette sales taxes, personal property taxes, and vendor licensing fees on the Indian residents of a reservation that was located entirely within the state. Montana based its jurisdiction on Section 6 of the General Allotment Act. Montana did not, however, limit its claimed tax authority to either the allottees on the reservation or to activities occurring on allotted reservation fee land. Rather, Montana claimed taxing authority over the entire reservation, including trust land, and argued that any plan of divided jurisdiction was inequitable.[24] The Supreme Court rejected Montana's claim of reservation-wide jurisdiction. Instead, the Court reasoned that because Congress repudiated, through the Indian Reorganization Act, the policies underlying the General Allotment Act, the latter Act did not even grant Montana plenary jurisdiction over the Indians residing on reservation fee lands.[25] The *Moe* Court stated:

> The State has referred us to no decisional authority—and we know of none—giving the meaning for which it contends to § 6 of the General Allotment Act in the face of the many and complex intervening jurisdictional statutes directed at the reach of state law within reservation lands . . . . Congress by its more modern legislation has evinced a clear intent to eschew any such 'checkerboard' approach within an existing Indian reservation, and our cases have in turn followed Congress' lead in this area.[26]

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20. Ch. 576, 48 Stat. 984 (codified at 25 U.S.C. § 461 (1989)). This Act brought the allotment policy to an abrupt halt by eliminating the Secretary of the Interior's power to issue a fee patent prior to the end of the 25-year trust period. *Id.* Significantly, this Act represented a return to the pre-Dawes Act era policy of Indian self-determination and sovereignty. *See Yakima Nation*, 112 S. Ct. at 686-87, 688-89.

21. *Yakima Nation*, 112 S. Ct. at 689.

22. 425 U.S. 463 (1976).

23. *Yakima Nation*, 112 S. Ct. at 689.

24. *Id.*

25. *Moe*, 425 U.S. at 479.

26. *Id.* In *Yakima Nation*, the Court points out the curious argument of the Tribe, which apparently condemns a checkerboard approach (by which the tax assessor would have to make parcel-by-parcel determinations of taxability), while advocating a checkerboard solution of its own. In particular, the Tribe advocated an approach

Thus, the Yakima Nation argued that if, under *Moe*, Section 6 no longer gives states plenary jurisdiction over the reservation fee land owners, then Section 6 could not support the exercise of the narrower jurisdiction asserted by Yakima County.[27] Yakima County conceded that the *Moe* Court did not address the Burke Act proviso to Section 6, which was critical to Yakima County's analysis. But the Yakima Nation nevertheless argued that real estate taxes were not at issue in *Moe*, thereby making the proviso irrelevant.[28] The Yakima Nation reasoned that because a proviso can operate only within the principal provision it modifies,[29] "neither the language of § 6 proper nor the proviso can be considered effective after *Moe*."[30]

The Supreme Court reasoned, in turn, that the Yakima Nation misunderstood *Moe* and the General Allotment Act's structure.[31] In particular, the Court pointed out that *Moe* had not impliedly repealed Section 6, relying on the "cardinal rule . . . that repeals by implication are not favored" and the fact that the *Moe* Court made no mention of an implied repeal.[32] The Court then distinguished *Moe* on the basis that, in that case, "Montana's construction of § 6 . . . would [have] extend[ed] the State's in personam jurisdiction beyond the section's literal coverage . . . ."[33]

As for the structure of the General Allotment Act, the Court cited *Goudy v. Meath*[34] for the proposition that Congress had authorized, under the Act, the taxation of fee-patented land.[35] This holding, the Court indicated, was confirmed when Congress added the Burke Act proviso, which explicitly removed all restrictions on taxation once an allottee received a portion of land in fee simple.[36]

Finally, in holding that Congress explicitly authorized the

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whereby the state could only tax parcels owned by nonmembers of the Tribe. *Yakima Nation*, 112 S. Ct. at 690.

27. *Yakima Nation*, 425 U.S. at 690.

28. *Id.*

29. *Id.* (citing United States v. Morrow, 266 U.S. 531 (1925)).

30. *Id.*

31. *Id.*

32. *Yakima Nation*, 112 S. Ct. at 690 (quoting Posadas v. National City Bank, 296 U.S. 497 (1936)).

33. *Id.*

34. 203 U.S. 146 (1906).

35. *Yakima Nation*, 112 S. Ct. at 690-91.

36. *Id.* at 691.

state taxation of Indian lands, the Court rejected the Yakima Nation's claim to self-governance under the Indian Reorganization Act. The Court stated as follows:

> Turning away from the statutory texts altogether, the Yakima Nation argues that state jurisdiction over reservation fee land is manifestly inconsistent with the policies of Indian self-determination and self-governance that lay behind the Indian Reorganization Act and subsequent congressional enactments. This seems to us a great exaggeration. While the in personam jurisdiction over reservation Indians at issue in *Moe* would have been significantly disruptive of tribal self-government, the mere power to assess and collect a tax on certain real estate is not. In any case, these policy objections do not belong in this forum. If the Yakima Indian Nation believes that the objectives of the Indian Reorganization Act are too much obstructed by the clearly retained remnant of an earlier policy, it must make that argument to Congress.[37]

Having thus held, the Court then distinguished the two separate taxes sought to be imposed by Yakima County as follows: (1) under an ad valorem tax, the owner is liable on the assessment date[38] and the tax is assessed against the land[39] and (2) under an excise tax, the seller is taxed on the sale[40] and the tax is assessed against the person involved in the transaction.[41] Thus, because the ad valorem tax is a burden only on the property itself, the Court held that "this tax constitutes 'taxation of . . . land' within the meaning of the Allotment Act, and is therefore prima facie valid."[42] The Court then held, however, that while states have the power to tax land, "the excise tax remains a tax upon the Indian's activity of selling the land, and thus is void, whatever means may be devised for its collection."[43]

Writing separately, Justice Blackmun agreed with the majority opinion that Yakima County could not impose an excise tax on the sale of Indian land. Justice Blackmun dissented, however, to the extent that the County could impose

37. *Id.* at 692.

38. Timber Traders, Inc. v. Johnston, 87 Wash. 2d 42, 47, 548 P.2d 1080, 1083 (1976).

39. WASH. REV. CODE § 84.60.020 (1989).

40. *Id.* § 82.45.080.

41. Mahler v. Tremper, 40 Wash. 2d 405, 409, 243 P.2d 627, 629 (1952).

42. *Yakima Nation*, 112 S. Ct. at 692.

43. *Id.* at 694.

an ad valorem tax.[44] In his view, it was not "unmistakably clear" that Congress intended to allow the states to tax Indian-owned fee-patented land.[45] Rather, Justice Blackmun believed that the majority had merely implied congressional intent and, in doing so, had "dramatically devalue[d] longstanding federal policies intended to preserve the integrity of our Nation's Indian tribes."[46]

Specifically, according to Justice Blackmun, the majority made three related errors in arriving at its decision.[47] First, the majority mistakenly relied on the Burke Act proviso—a proviso that speaks to an obsolete clause of Section 6 of the Dawes Act.[48] Second, the majority acted on its own intuition that it would be "strange" for land that was alienable and encumberable not to be taxable.[49] Third, the majority failed to give effect to the intervening statutes that reflect a complete turnaround in federal Indian policy, which is now aimed at preserving tribal sovereignty and the Indian land base.[50]

Thus, in speaking to the effect of the Court's decision, Justice Blackmun opined that the majority had erroneously focused its inquiry on whether the Dawes and Burke Acts had been repealed, instead of whether Congress had pre-empted state law. In particular, Justice Blackmun stated that the state taxation of Indian lands cannot be reconciled with the principles of tribal integrity and self-determination underlying the Indian Reorganization Act.

44. *Id.* (Blackmun, J., concurring & dissenting).

45. *Id.* Justice Blackmun stated: "I have wandered the maze of Indian statutes and case law tracing back 100 years. Unlike the Court, however, I am unable to find an unmistakably clear intent of Congress to allow the states to tax Indian-owned fee-patented lands." *Id.*

46. *Id.* at 694.

47. *Id.*

48. *Id.* at 695.

49. *Id.* at 695-96.

50. *Id.* at 696.