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FEDERAL RECENT DEVELOPMENTS

UNITED STATES SUPREME COURT

TAXATION: Legality of Motors Fuels and Income Taxes Within Indian Country

Oklahoma Tax Commission v. Chickasaw Nation, 115 S. Ct. 2214 (1995)

The Chickasaw Nation appealed a ruling by the United States District Court for the Eastern District of Oklahoma, which had granted the State of Oklahoma the power to impose several state taxes against the Tribe and its members. The Tenth Circuit Court of Appeals reversed the district court's ruling and held that without congressional authorization, the State could not impose a motor fuels tax on fuel sold by the Tribe at its retail stores situated on trust land and that the State could not tax the wages of tribal members employed by the Tribe but residing beyond Indian country.[1] The Supreme Court of the United States granted the State's petition for certiorari.

This case concerns the taxing authority of the State of Oklahoma over the Chickasaw Nation (the Tribe) and its members. The Court considered two questions: whether Oklahoma may impose a motor fuels excise tax upon fuel sold by Chickasaw Nation retail stores located on tribal trust land and whether Oklahoma may impose a state income tax upon members of the Chickasaw Nation who are employed by the Tribe but who live outside Indian country.[2]

The Chickasaw Nation, a federally recognized Indian tribe, contended that Oklahoma's fuels tax was levied on tribal retailers, not on distributors or consumers, and therefore was violative of the respect due to the Chickasaw Nation's sovereignty. The Tribe maintained that the State could not collect its fuels tax at tribal convenience stores without explicit congressional permission. The Tribe's contention of tax immunity is supported by the Court's ruling in *Montana v. Blackfeet Tribe*[3] in which the Court held, "the Constitution vests the Federal Government with exclusive authority over relations with Indian tribes. In recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory."[4]

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1. Chickasaw Nation v. Oklahoma Tax Comm'n, 31 F.3d 964 (10th Cir. 1994)
2. Oklahoma Tax Comm'n v. Chickasaw Nation, 115 S. Ct. 2214 (1995).
3. Montana v. Blackfeet Tribe, 471 U.S. 759 (1985).
4. *Id.* at 764.

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Also citing *Montana v. Blackfeet Tribe*, the State of Oklahoma maintained that the Chickasaw Nation was not inevitably but only "generally" immune from state taxation.[5] Oklahoma asserted that even if the legal incidence of the fuels tax falls on the Tribe as retailer, no tax immunity should be allowed because the State's interest in supporting the levy is compelling when compared with the Tribe's insubstantial interest. Furthermore, the State contended, the state tax would have no effect on tribal governance and self-determination. Thus, Oklahoma asserted, a balancing test approach would be appropriate — balancing the state and tribal interests. In the alternative, the State contended that the legal incidence of the tax did not fall on the retailers. Additionally, the State asserted for the first time that even if the tax were impermissible on other grounds, taxation of this type was authorized under the Hayden-Cartwright Act of 1936.[6] The State asserted that the Act expressly authorized States to tax motor fuel sales on "United States military or other reservations." Oklahoma maintained that the word "reservation" encompassed Indian reservations.

The Court dispensed with the State's late assertion of the Hayden-Cartwright Act as permitting state levies on motor fuels sold on Indian reservations, and refused to entertain the argument.[7] Because the State made no reference to the Hayden-Cartwright Act in the courts of first and second instance, and did not mention the 1936 legislation in its petition for certiorari, the Court declined to address the question of statutory interpretation. The Court held that "as a court of review, not one of first view, we will entertain issues withheld until merits briefing 'only in the most exceptional cases.' This case does not fit the bill."[8]

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5. *Id.*

6. 4 U.S.C. § 104 (1994). Section 10 of the Act reads in pertinent part:

> (a) All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State, Territory, or the District of Columbia, within whose borders the reservation affected may be located.
>
> (b) The officer in charge of such reservation shall, on or before the fifteenth day of each month, submit a written statement to the proper taxing authorities of the State, Territory, or the District of Columbia within whose borders the reservation is located, showing the amount of such motor fuel with respect to which taxes are payable under subsection (a) for the preceding month.

Id.

7. *Chickasaw Nation*, 115 S. Ct. at 2219.

8. *Id.* at 2219 (citing Yee v. Escondido, 503 U.S. 519, 535 (1992)).

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The Court then turned to the State's call for a balancing test to determine whether the State's exaction was permissible. Weighing the relevant state and tribal interests, Oklahoma urged that the balance tilted in the State's favor. To support this claim, Oklahoma emphasized that the fuel sold was used almost exclusively on state roads, imposing a very substantial burden on the State but no burden at all on the Tribe.[9] As evidence that the levy did not reach any value generated by the Tribe on trust land, the State pointed to the fact that the fuel was neither produced nor refined in Indian country, and was generally sold to non-tribal members.[10]

The Court noted that it had, on previous occasions, balanced federal, state, and tribal interests in diverse contexts. For example, it engaged this balance when assessing state regulations that do not involve taxation[11] and state attempts to compel Indians to collect and remit taxes actually imposed on non-Indians.[12] The Court, however, stated that when a state attempts to levy a tax directly on an Indian tribe or its members residing within Indian country, rather than on non-Indians, a more categorical approach should be employed.[13] The Court cited *County of Yakima v. Confederated Tribes and Bands of the Yakima Nation*, a case in which it used this categorical approach, holding that "'[a]bsent cession of jurisdiction or other federal statutes permitting it,' a State is without power to tax reservation lands and reservation Indians."[14] The Court recalled several decisions holding state taxes unenforceable where the legal incidence rested on a tribe or on tribal members inside Indian country.[15]

The bearer of the legal incidence of a tax, the Court stated, is the decisive question. If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made within Indian country, the tax cannot be enforced without clear congressional authorization.[16] But if the legal incidence is borne by non-Indians, no categorical bar prevents the State from enforcing the tax. So, the proper question in the instant case was whether the legal

9. *Id.* at 2220.

10. *Id.*

11. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 214 (1987) (holding balancing interest affected by State's attempt to regulate on-reservation high-stakes bingo operation).

12. *See* Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 483 (1976) (holding balancing interests affected by State's attempt to require tribal sellers to collect cigarette tax on non-Indians).

13. *Chickasaw Nation*, 115 S. Ct. at 2220.

14. County of Yakima v. Confederated Tribes & Bands of the Yakima Nation, 502 U.S. 251, 258 (1992) (quoting Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973)).

15. *See, e.g.*, Bryan v. Itasca County, 426 U.S. 373 (1976) (involving tax on Indian-owned personal property situated in Indian country); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) (involving tax on income earned on reservation by tribal members residing on reservation).

16. *Chickasaw Nation*, 115 S. Ct. at 2220.

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incidence of Oklahoma's fuels tax rests on the Tribe (as retailer), the nontribal wholesalers who sell to the Tribe, or the nonmember consumers who purchase fuel from the Tribe.[17]

The Court found that a legal incidence test provides a bright-line standard which responds to the need for substantial certainty as to the permissible scope of state taxation authority in Indian country. The legal incidence test, with its bright-line rule, affords the State the opportunity to amend its tax laws to shift the burden if it is found that the State is unable to enforce a tax because it the legal incidence rests on the Indian tribes.[18] The legal incidence test may be contrasted with the balancing test advocated by the State which involves the daunting task of considering numerous factors which could "engulf the States' annual assessment and taxation process, with the validity of each levy dependent upon a multiplicity of factors that vary from year to year, and from parcel to parcel."[19]

The State of Oklahoma argued that even if the legal incidence test is the proper test to apply when determining whether a tax is permissible, the Tenth Circuit erred when it held that in this case, the Tribe (as retailer) bears the burden of the tax. However, the Supreme Court upheld the court of appeals ruling on this point finding it to be reasonable. This particular piece of legislation does not expressly identify who bears the tax's legal incidence, nor does it contain a "pass through" provision requiring distributors and retailers to pass the tax's cost on to consumers.

The Court stated that when a statute does not express who bears the incidence of a tax, the question becomes one of a "fair interpretation of the taxing statute as written and applied."[20] The Court found that distributors, under the Oklahoma legislation, were no more than "agents of the State for tax collection."[21] Under the statute, sales between distributors are tax exempt[22] but sales from distributors to retailers are subject to taxation.[23] Distributors are required to first "remit" the tax due to the Oklahoma State Tax Commission "on behalf of a licensed retailer," and later collect the same amount from the retailer.[24] As payment for their services as "agents for the State," distributors are allowed to retain a small portion of the taxes they collect.[25] If a distributor remits taxes it subsequently is unable to collect

17. *Id.*
18. *Id.* at 2221.
19. *Id.* (quoting *Yakima*, 112 S. Ct. at 692).
20. *Id.*
21. *Id.* at 2222.
22. 68 OKLA. STAT. § 507 (1991).
23. *Id.* § 505(E).
24. *Id.* § 505(C).
25. *Id.* § 506(a).

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from the retailer, the distributor may deduct the uncollected amount from its future payments to the Tax Commission.[26]

By comparison, the Court stated that the fuels tax law contained no language indicating that retailers were simply collection agents who passed the burden of the tax on to the consumers.[27] The law does not set off the retailer's liability when consumers fail to make payments due, nor does it compensate retailers for their collection efforts.[28] The Court concluded by quoting from the Court of Appeals opinion: "The import of the language and the structure of the fuel tax statutes is that the distributor collects the tax from the retail purchaser of the fuel; the motor fuel taxes are imposed on the retailer rather than on the distributor or the consumer."[29]

The Court later turned to the issue of Oklahoma's income tax. The Tenth Circuit declared that the State may not tax the wages of members of the Chickasaw Nation who work for the Tribe, including those tribal members residing beyond Indian country.[30] However, the Supreme Court found that the Tenth Circuit decision conflicted with a well-established international principle of taxation: A taxing sovereignty may tax *all* the income of its residents, even income earned outside the taxing jurisdiction.[31] "That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized."[32] The Tribe attempted to block the State from exercising its ordinary prerogative to tax the income of every resident and preclude from state taxation the income of tribal members who live outside Indian country but work for the Tribe.[33] As support for its contention, the Tribe proffered the rule that Indians and Indian tribes are generally immune from state taxation.[34] The Court took note of the conspicuous absence of an assertion by the Tribe that the State tax infringed on tribal self-governance.[35] Rather, the Tribe chose to rely on the argument

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26. *Id.* § 505(C).

27. *Chickasaw Nation*, 115 S. Ct. at 2222.

28. *Id.*

29. *Id.* (quoting Chickasaw Nation v. Oklahoma Tax Comm'n, 31 F.3d 964, 971 (10th Cir. 1994)). Oklahoma has already created legislation which attempts to shift the legal incidence of its motor fuels tax to the *supplier*. H.R. No. 2208, Okla. 45th Legis., 2d Reg. Sess. (1995). As of February 15, 1996, the revised bill has passed both houses of the Oklahoma legislature. The bill requires licensed suppliers to collect Oklahoma's tax on behalf of the purchaser, presumably leaving market forces to insure reimbursement by tribal retailers. *Id.* § 22. The bill does, however, expressly prohibit any person (defined to include a tribe) from selling, using, delivering, storing, or importing motor fuel as to which the tax has not been paid or accrued by the supplier. *Id.* § 48.

30. Chickasaw Nation v. Oklahoma Tax Comm'n, 31 F.3d 964 (10th Cir. 1994).

31. *Chickasaw Nation*, 115 S. Ct. at 2222.

32. *Id.* (quoting New York *ex rel.* Cohn v. Graves, 300 U.S. 308, 312 (1937)).

33. *Chickasaw Nation*, 115 S. Ct. at 2223.

34. *See* McClanahan v. Arizona State Tax Comm'n, 93 S. Ct. 1257 (1973).

35. *Chickasaw Nation*, 115 S. Ct. at 2223.

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that the Oklahoma levy impaired rights granted or reserved to the Tribe by federal law via the Treaty of Dancing Rabbit Creek.[36] The Tribe asserted that it was immaterial that the tribal members, upon whom the State imposed its income tax, lived beyond Indian country. The State's income tax is a law "for the government of the Chickasaw Nation and their descendants. Descendant, as it is used in the Treaty, includes tribal members employed by the Tribe notwithstanding the fact that they live outside Indian country."[37]

The Court held that even a liberal construction of the Treaty would not support the Tribe's argument.[38] The Treaty of Dancing Rabbit Creek, by its terms, only applies to persons and property within the Chickasaw Nation's limits. The Treaty cannot be read, the Court wrote, to confer supersovereign authority to interfere with another jurisdiction's sovereign right to tax income, from all sources, of those who choose to live within that jurisdiction's limits.[39]

The Tribe, joined by the United States[40], urged the Court to read the Treaty from the viewpoint that a tax on government employees should be treated as a tax on the government.[41] Likewise, a tax on tribal members employed by the Tribe would be seen as an impermissible tax on the Tribe itself.

The Court, however, found no reason to believe that those who drafted and signed the Treaty meant to incorporate this now-defunct view.[42] The purpose of the Treaty was to separate the Tribe from the States. Under the

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36. *Id.*; *see* Treaty with the Choctaw (Treaty of Dancing Rabbit Creek), U.S.-Choctaw Nation, Sept. 27, 1830, art. 4, 7 Stat. 333, 333-34, *reprinted in* 2 INDIAN AFFAIRS: LAW AND TREATIES 310, 311 (Charles J. Kappler ed., photo. reprint 1975) (1904) [hereinafter KAPPLER'S]. The Treaty provides in pertinent part:

> The Government and people of the United States are hereby obliged to secure to the said Chickasaw Nation . . . the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Chickasaw Nation . . . and their descendants . . . but the U.S. shall forever secure said Chickasaw Nation from, and against, all [such] laws . . . .

Id.

37. *Chickasaw Nation*, 115 S. Ct. at 2224.

38. *Id.* at 2224 (citing County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247-48 (1985) (holding treaties should be construed liberally in favor of the Indians)).

39. *Chickasaw Nation*, 115 S. Ct. at 2224.

40. The United States is not a disinterested party. It formed an alliance with the Tribe for revenue enhancement purposes. In computing ones federal income tax, an employee is allow to deduct any state income tax as an itemized deduction under 26 U.S.C. § 164(a)(3). Thus, an exemption of wages from state income tax increases federal income tax revenue.

41. This now-repudiated view, first espoused in Dobbins v. Commissioners of Erie County, 41 U.S. 435 (1842), became know as the Dobbins rule. *But see* Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 480 (1939) (holding that the theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is not longer tenable).

42. *Chickasaw Nation*, 115 S. Ct. at 2224.

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Treaty, the Tribe moved across the Mississippi River to unsettled lands to put distance between the Tribe and the States.[43] The Court also found it unlikely that the signatories even gave thought to a State's authority to tax tribal members living outside of Indian country because they did not expect any members to be living there.[44] Furthermore, if taxes on wages earned by tribal employees were categorized as taxes of the Tribe itself, it would require an exemption for all employees of the Tribe. The exemption would have to extend to tribal members as well as nonmembers.

The Court affirmed the judgment of the Court of Appeals as to the motor fuels tax, reversed the judgment as to the income tax, and remanded the case for proceedings consistent with the Court's opinion.[45]

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WATER RIGHTS: Off-Reservation Stream Adjudication

Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476 (D.C. Cir. 1995).

The United States creates federal reservations by withdrawing land from the public domain and reserving that land for a particular, specific purpose. Courts have long applied the federal reserved water rights doctrine to reserved lands, giving the United States the appurtenant unappropriated waters necessary to accomplish the purposes for which the reservation was created.[46]

On November 19, 1987, an Idaho state court ordered the general stream adjudication of water rights for the Snake River basin. The United States was joined pursuant to the McCarran Amendment,[47] which waives sovereign immunity in water rights adjudications, including water rights held in trust by the government for an Indian tribe. Consequently, in 1990, the Fort Hall Water Rights Agreement, later ratified as the Fort Hall Water Rights Act of 1990[48] — between the United States, the Shoshone-Bannock Tribes, the State of Idaho, and Idaho water users — was reached quantifying federal reserved water rights within the boundaries of the Fort Hall Reservation as well as trust lands appurtenant to the reservation. The agreement, however,

43. *Id.*

44. *Id.*

45. The Court implied that some justiciable issues may remain in regards to income taxation, noting in *Chickasaw Nation* that "[t]he Tribe's claim, as presented in this case, is a narrow one. The Tribe does not assert here its authority to tax the income of these tribal members. Nor does it complain that Oklahoma fails to award a credit against state taxes for taxes paid to the tribe." *Id.* at 2223 n.13.

46. Cappaert v. United States, 426 U.S. 128, 138 (1976); Arizona v. California, 373 U.S. 546, 601 (1963); Winters v. United States, 207 U.S. 564, 575-78 (1908).

47. 43 U.S.C. § 666 (1988).

48. Pub. L. No. 101-602, 104 Stat. 3059.

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did not settle the Shoshone-Bannock claims to water rights in the Snake River basin *beyond* the reservation. The Tribes based their claim on the 1868 Treaty of Fort Bridger[49] which reserved to the Tribes the right to hunt upon the unoccupied lands of the United States so long as game could be found thereon.[50] Thus, the Tribes asserted that water necessary for this purpose — federal reserved waters — must also have been reserved.

Although the BIA began instream flow quanitifications in 1989, the merits of the Tribes' contentions were not considered until 1992 when the Interior Department asked the Shoshone-Bannock Tribes to submit documentation and arguments supporting their claim to off-reservation waters. Prompted by the state district court order that all remaining federal claims to Snake River waters be filed by March 23, 1993, the Interior Department accelerated its efforts to evaluate the merits of the Shoshone-Bannock claim.

In November 1992, the Regional Solicitor informed the Shoshone-Bannock Tribal Council he would recommend against the Justice Department filing a claim for off-reservation water on behalf of the Tribes. However, he asked the Tribes to supplement their claims with historical information and informed the Tribes that the United States had hired a historical expert to investigate. Two more meetings occurred and information was exchanged. Nevertheless, on March 4, 1993, the Regional Solicitor recommended the United States not file on behalf of the Tribes and informed the Tribes of this decision on March 22, the day before the mandated deadline. The Shoshone-Bannock then commenced the instant action against the Attorney General seeking, among other things, a declaratory judgement that the United States had violated its trust responsibility by refusing to file the claims and an order compelling the Attorney General to file the tribal claims.

On March 24, 1993 the district court granted a temporary restraining order requiring the United States to file the claims in Idaho state court.[51] The district court later denied the Tribes' motion for a preliminary injunction and dismissed the claims.[52] The Tribes appealed, asking the federal court to force the United States to file on their behalf.[53]

The circuit court acknowledged the fact that the Attorney General's authority to control the course of the federal government's litigation is presumptively immune from judicial review, whether the action is a civil or criminal matter.[54] However, the court noted, the Attorney General's power

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49. Treaty with the Eastern Band Shoshone and Bannock (Treaty of Ft. Bridger), July 3, 1968, 15 Stat. 673, *reprinted in* KAPPLER'S, *supra* note 36, at 1020.

50. *Id.* at art. IV, 15 Stat. at 674, *reprinted in* KAPPLER'S, *supra* note 36, at 1021.

51. Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476, 1479 (1995).

52. *Id.* The district court found that the Tribes were neither likely to succeed on the merits of their claim nor likely to suffer irreparable harm if the motion were denied. *Id.*

53. The Interior and Justice Departments concluded the Tribes' claims were without merit and thus would not file and defend the claims in the state adjudication. They did not deny the Tribes' rights to proceed on their own. *Id.* at 1480.

54. *See, e.g.*, Wayte v. United States, 470 U.S. 598, 607 (1985); Newman v. United States,

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to supervise litigation in which the United States is interested is not without limitation.[55] Constitutional, as well as statutory rights, may limit Attorney General discretion.[56] Finding no such restriction upon discretion in this area, the court held that the Attorney General's refusal to assert the tribal claims in the Idaho water rights adjudication was presumptively within her discretion under statutory law.[57]

Referring to the fiduciary capacity in which the United States acts on behalf of Indian tribes, the court maintained that a tribe "cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty."[58] The court rejected the Tribes' position that the "mere existence" of the Treaty of Fort Bridger required the federal government to protect whatever claims to off-reservation water the Tribes wish to make.[59] Moreover, the court noted that professional ethics, as well as Idaho's counterpart to Federal Rule of Civil Procedure 11,[60] also precluded obligating the Attorney General from filing what she considers meritless claims.[61]

Holding that the scope of the United States's duty to an Indian tribe depends on the underlying substantive law giving rise to that obligation, the circuit court decided the Treaty did not suggest that the United States could be forced to litigate apparently meritless claims simply at the insistence of the Tribes.[62] Thus,the court wrote, "to the extent that the government had some duty to evaluate the Tribes' position before rejecting it, it fulfilled that obligation" and could not be forced to further pursue the tribal claims.[63]

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382 F.2d 479, 480 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966); Community for Creative Non-Violence v. Pierce, 786 F.2d 1199, 1201 (D.C. Cir. 1986); Morris v. Gressette, 432 U.S. 491, 500-01 (1977); United States v. California, 332 U.S. 19, 27-29 (1947).

55. *Shoshone-Bannock*, 56 F.3d at 1481.

56. *Wayte*, 470 U.S. at 608; *see also* United States v. California, 332 U.S. 19, 19 (1947); Swift v. United States, 276 U.S. 311, 331 (1928).

57. *Shoshone-Bannock*, 56 F.3d at 1481. The court cited the authority-conferring statute, 25 U.S.C. § 175, as imposing only a "discretionary duty" of representation, not as withdrawing discretion from the Attorney General. Moreover, the court compared the Attorney General's decision not to file on behalf of the Tribes with an agency refusal to enforce its regulations, which are presumptively unreviewable. *Id.*

58. *Id.* at 1482.

59. *Id.*

60. The Federal Rules of Civil Procedure require all pleadings, written motions and other papers be signed by at least one attorney of record. F.R.C.P. 11(a). By presenting such to the court, the attorney is certifying to the best of his knowledge, it is not being presented for any improper means, the claims contained therein are warranted by existing law or by a nonfrivolous argument, and the allegations have evidentiary support. F.R.C.P. 11(b)(1)-(3). Sanctions are provided for violations of this rule. F.R.C.P. 11(c).

61. *Shoshone-Bannock*, 56 F.3d at 1481.

62. *Id.*

63. *Id.*

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAND CONSOLIDATION: Indian Land Consolidation Act Amendments

Youpee v. Babbitt, 67 F.3d 194 (9th Cir. 1995).

Once again, courts have ruled that the escheat provision of the Indian Land Consolidation Act (ILCA)[64] "effects an unconstitutional taking" in violation of the Fifth Amendment.[65]

The escheat provision of ILCA is an attempt to solve the problem of severely fractionated Indian land.[66] In the late 1800s and early 1900s, Indian lands that belonged to a tribe were allotted to individual Indians.[67] When an allottee died intestate, the allotment would pass to several heirs with undivided interests. Over the years, ownership of these parcels of land has become severely fractionated into many undivided interests.[68]
Frequently, one parcel of land will have dozens of owners, or one individual will own fractional shares in as many as forty different allotments. The income from many of these parcels is slight, and in some instances amounts to a mere one cent per month.[69]

Congress has twice sought to remedy this problem by means of the Indian Land Consolidation Act. Through this Act, Congress attempted to consolidate ownership in fractionated land by forcing such land to escheat to the tribe when it no longer met its definition of productive land (i.e., a two percent interest in a parcel incapable of earning $100 over a period of two years was subject to escheat). In *Hodel v. Irving*,[70] Congress' first attempt was found to be an unconstitutional taking because it effectively banned both descent and devise of land, amounting to an uncompensated taking.[71] Consequently, Congress amended the Act in 1991.[72] However, in the instant case, the Ninth Circuit Court of Appeals again found the amended escheat provision to be an unconstitutional taking.[73]

The amended Act still effectively prohibited both descent and devise of unproductive land, but narrowed the class of land subject to escheat and created a narrow exception allowing a limited form of devise under certain conditions. A "fractional interest" subject to escheat to the tribe was defined

64. Indian Land Consolidation Act § 207, 25 U.S.C. § 2206 (1994).
65. Youpee v. Babbitt, 67 F.3d 194, 200 (9th Cir. 1995).
66. *Id.* at 195.
67. *Id.* at 196 (citing General Allotment Act of 1887, ch. 119, 24 Stat. 388, and Fort Peck Allotment Act of 1908, ch. 237, 35 Stat. 558).
68. *Id.* (citing Hodel v. Irving, 481 U.S. 704, 708 (1987)).
69. *Id.*
70. 481 U.S. 704 (1987).
71. *Id.* at 711.
72. 25 U.S.C. § 2206 (1994).
73. *Youpee*, 67 F.3d at 200.

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in the amended Act as a two per cent (or less) interest in a parcel that is "incapable of earning $100 in any one of the *five* years from the date of the decedent's death."[74] The Act further allowed the devise of an otherwise escheatable interest to any other owner of an undivided fractional interest.[75]

The amended Indian Land Consolidation Act also provided for tribal adoption of their own codes to govern the disposition of interests subject to escheat. However, the Act stated that "the Secretary shall not approve any code or law that fails to accomplish the purpose of preventing further descent or fractionation of any such interests."[76]

In *Youpee*, the Ninth Circuit applied the three-part takings test set out in *Hodel*.[77] The test considers "(1) the economic impact of the statute; (2) its interference with reasonable investment-backed expectations; and (3) the character of the governmental action."[78] First, the fair market value of Mr. Youpee's fractional interests was $1,239. Therefore, the court found that the parties had a significant economic interest in the ownership of a parcel, with which the ILCA still interfered.[79]

Second, although the court found that the parties' investment-backed expectations were not infringed by the Act, the circuit court still invalidated the escheat provision by following the Supreme Court's reasoning in *Hodel*. Although the land generated little, if any, income for the parties — "weigh[ing] in favor of the statute's constitutionality"[80] — the factors of the test must be considered together. Thus, while the parties investment-backed expectations were not implicated, the economic impact of the statute was still unconstitutional because the fair market value of the land was significant and the parties had a valuable interest in the land itself.[81]

In considering the character of the governmental action, the Ninth Circuit focused on the provision allowing the devise "to any other owner of an undivided fractional interest in such parcel . . . ."[82] The court stated that "[i]nstead of allowing the decedent to choose one devisee from the population, the amended statute restricts the population to a very limited group, which is unlikely to contain any lineal descendants, and requires the decedent to choose a devisee from this group."[83]

74. 25 U.S.C. § 2206(a) (1994) (emphasis added).

75. *Id.* § 2206(b).

76. *Id.* § 2206(c).

77. *Youpee*, 67 F.3d at 199 (citing Penn. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

78. *Id.*

79. *Id.*

80. *Id.*

81. "While the income generated by a parcel may be de minimis, the value of the land itself may not be." *Id.* (citing *Hodel*, 481 U.S. at 714).

82. *Id*,

83. *Id.*

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Regarding the still-narrow class of potential devisees created by the amended statute, the court noted that it would be a rare case for a lineal heir to own an interest in the trust land to be devised by the decedent. In practice a decedent would not be allowed to devise land to his children, rather the decedent would be forced to either find a collateral heir who owned such an interest, give the land to a stranger, or let it escheat to the tribe. Reasoning that the ability to transfer land to one's heirs is in itself a valuable interest, the Ninth Circuit found the amendments unacceptable.[84]

The court concluded by mentioning other options which Congress might pursue such as purchasing the land, condemning the land and providing just compensation, or finding an acceptable limitation on descent or devise. However, the Ninth Circuit found that the amended version of the Indian Land Consolidation Act continued to completely abolish both descent and devise and was, therefore, an unconstitutional taking without just compensation in violation of the Fifth Amendment.[85]

84. *Id.* at 199-200.
85. *Id.* at 200.

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