No. _____

In The

Supreme Court of the United States

IDAHO STATE TAX COMMISSION,

Petitioner,

v.

GOODMAN OIL COMPANY OF LEWISTON, an Idaho Corporation; and GOODMAN OIL COMPANY, an Idaho Corporation,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Idaho

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does section 10 of the Hayden-Cartwright Act, 4 U.S.C. § 104, provide Congressional authorization for States to impose their motor fuel taxes on Indian tribes or their members within an Indian reservation?

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of the State of Idaho, on behalf of the Idaho State Tax Commission, petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Idaho in this case.

OPINIONS BELOW

The opinion of the Idaho Supreme Court (App. at 1) is reported at 28 P.3d 996. The opinion of the state district court (App. at 21) is unreported. The administrative decision of the Idaho State Tax Commission (App. at 42) is unreported.

JURISDICTION

The Idaho Supreme Court entered its denial of the Idaho State Tax Commission's petition for rehearing on July 27, 2001. (App. at 60) The jurisdiction of the Court is invoked under 28 U.S.C. § 1257.

STATUTORY PROVISION INVOLVED

Section 10 of the Hayden-Cartwright Act, 4 U.S.C. § 104, provides 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.

STATEMENT OF THE CASE

This case presents a recurring conflict in State/Tribal sovereignty that has not been, but should be, resolved by this Court. Specifically, it concerns whether Congress gave consent for states to impose non-discriminatory taxes upon reservation sales of motor vehicle fuels to Indian tribes and tribal members. The case will affect sale of motor vehicle fuels on Indian reservations throughout the Nation.

I. Federal Statutory Background

The first quarter of the twentieth century saw explosive growth in the numbers of cars using the nation's relatively undeveloped highways. The initial dependence on property tax revenues to fund highway construction and maintenance proved inadequate. AMERICA'S HIGHWAYS 1776-1976: A HISTORY OF THE FEDERAL AID PROGRAM 41-67 (U.S. Government Printing Office 1976). In 1919, Oregon led the nation in developing a new source of revenue to

serve the rapidly growing need. The new source was the motor fuel tax. It quickly gained acceptance across the country. By 1929, fuel taxes garnered state revenues of $430.2 million, or 56% of all revenues from road users. AMERICA'S HIGHWAYS 114. When the Hayden-Cartwright Act was enacted in 1936, Congress was presented with a fairly uniform system of state motor fuel taxes specifically devoted to highway construction and maintenance.

The motor fuel tax functions as a surrogate user fee. This is the policy foundation of the tax. Instead of tollbooths set up on every highway in America, a tax is imposed at the pump and the revenues devoted to the highways. Regardless which element in the distribution chain bears the legal incidence of the tax, the economic burden of the tax is borne by the consumer using the roads in proportion to his use. The Idaho Supreme Court made this point in language that might have come from almost any state court in the country.

> The provisions of the act leave no doubt in our minds that the clear policy of the law is simply to require, so far as the legislature can, that all using motor vehicles on the highways of this state shall contribute to their maintenance in the proportion of that use. This enforced contribution is measured by the amount of gasoline consumed in that use.

Union Pacific R.R. Co. v. Riggs, 66 Idaho 677 at 685, 166 P.2d 926 at 929 (1946). (quoting *Independent School Dist. v. Pfost*, 51 Idaho 240, 4 P.2d 893.)

Two years prior to passage of the Hayden-Cartwright Act, this Court decided *Standard Oil Co. v. California*, 291

U.S. 242 (1934). In *Standard Oil*, the Court pointed to the lack of federal legislation permitting collection of state fuel tax on federal reservations and held that motor fuel sold on the Presidio of San Francisco, a federal military reservation, was not subject to California fuel tax. Motorists could purchase fuel on the Presidio and consume it on state maintained public highways. This demonstrated a weakness in the policy foundation of the motor fuel tax. A universal surrogate user fee breaks down when fuel can be purchased in a way that allows the consumer to avoid paying his fair share toward the construction and upkeep of the roads he uses. An economist might call this an example of the "free rider" problem.

The policy weakness inherent in the free rider problem is not confined to fuel sold on one kind of federal reservation and not another. Any consumer who obtains fuel without contributing to the upkeep of the highways he uses is a free rider. Other consumers pay his share. This applies to fuel sold on Indian reservations just as well as fuel sold on military reservations.

Congress recognized this. That is why section 10 of the Hayden-Cartwright Act does not restrict itself to eliminating the free rider problem only for fuel sold on military reservations. It applies to fuel sold on "military and other reservations." To indicate non-military reservations it also intended to reach, Congress provided an extensive list of fuel outlets and classes of sellers one might find on "military and other reservations." The Act, for example, applies to naval reservations because it specifically mentions fuel sold from "ship stores" and "ship service stores." The list of sellers also includes "licensed traders." In the words of the Solicitor of the Department

of the Interior, writing four years after the passage of the Act, the phrase "licensed trader" is "particularly suggestive of Indian reservations." 57 Interior Dec. 129 at 139 (1940). The Solicitor opined States may require Tribes and their members to pay motor fuel taxes on Indian reservations. After the Solicitor's opinion issued, Congress twice reenacted the Hayden-Cartwright Act. In 1947, the Act was reenacted without change. 68 Stat. 641, 644. In 1956, the Act was amended only to include Guam. 70 Stat. 799.

II. Factual And Procedural Background

At all times relevant to this case, both respondent corporations were licensed distributors of motor vehicle fuel under Idaho law. Goodman Oil of Lewiston purchased gasoline from an Exxon terminal in Spokane, Washington. A sister company, Sun Transportation, transported the fuel through the state of Washington to an outlet located in Idaho on the Coeur d'Alene Indian Reservation (Reservation). A federally recognized Indian Tribe, the Coeur d'Alene Tribe (Tribe), owned the retail outlet. Situated wholly within Idaho, the Reservation borders Washington on the west. Sun Transportation entered the Reservation directly from Washington. Title to the gasoline transferred from Goodman Oil of Lewiston to the Tribe at the border.

Idaho statutes impose an excise tax on motor fuel. Idaho Code § 63-2405 (Michie 2000). The tax revenue does not go to the state's general fund. Idaho's Constitution and statutes dedicate the fuel tax revenues chiefly for the construction and maintenance of roads and highways in

the state. For this purpose, the revenues are distributed to both the Idaho Transportation Department and local road and highway districts. Idaho Const. Art. VII, § 17. Idaho Code § 63-2412 (Michie 2000). Idaho Code § 40-701 (Michie 2001). Both state and local levels use some of these revenues to construct and maintain highways on the various Indian reservations in Idaho. The record in this case, for example, discloses actual or planned expenditures on road construction for the period 1993-2003 on the Coeur d'Alene Reservation to be $13,814,000. This total does not include local or federal funds. State road maintenance expenditures on the same reservation for the period 1993 through part of 1999 total $6,165,348. The Reservation covers approximately 345,000 acres. The Tribe has about 1,750 enrolled members. Official Coeur d'Alene Tribe Website at *http://www.cdatribe.com/overview.html.*

The case began with the issuance of a tax deficiency notice to Goodman Oil Lewiston. The distributor protested the deficiency notice to the Tax Commission. The Commission, referring to the Hayden-Cartwright Act, issued a decision assessing the tax. The distributor then appealed to state district court. The district court, after reviewing the Hayden-Cartwright Act issue, struck down the tax assessment. By the time the case reached the Idaho Supreme Court, the issues had been reduced to two. The first was a matter of state law. Which element in the distribution chain bore the legal incidence of the tax? The tax commission argued it was the licensed distributor, the licensed distributor argued it was the consumer, the Idaho Supreme Court held it falls on the retailer with the duty to collect and remit the tax falling on the licensed distributor. The second issue was the federal

question. Does the Hayden-Cartwright Act provide states with the necessary Congressional consent to impose motor fuel taxes on sales made to tribes and tribal members on an Indian reservation? If the Act does provide Congressional consent, then it makes no difference who bears the legal incidence of the tax. The Idaho Supreme Court held the Act does not provide Congressional consent for the imposition of motor fuels taxes on sales made on the reservation. Although the case was presented as an appeal from a Motion for Partial Summary Judgment, by deciding the two issues before it as it did the Court fully disposed of the case. This petition results.

REASONS FOR GRANTING THE WRIT

I. The Authority Of A State To Tax Reservation Motor Fuel Sales In The Same Manner As It Taxes Such Sales Elsewhere Is An Important And Recurring Issue That Should Be Resolved Now, Particularly As Two State Supreme Courts Are Split On The Issue.

The question presented is not new, but it grows in importance. It has divided lower courts that have been forced to decide it. It recurs.

The issue recurs because it is important to the states for both policy and practical reasons. The motor fuel tax is a surrogate user fee. To the extent that some users escape paying their fair share, the policy underlying the motor fuel tax is undercut. Furthermore, the very purpose of motor fuel is to permit mobility. Fuel purchased ex-tax on the reservation will be used to travel the highways off the reservation. In *Department of Taxation and*

Finance of New York v. Milhelm Attea & Bros., Inc., 512 U.S. 61 (1994), the Court tied state lack of authority to tax to on-reservation consumption. "Because New York lacks authority to tax cigarettes sold to tribal members for their own consumption, cigarettes to be consumed on the reservation by enrolled members are tax exempt and need not be stamped." *Milhelm Attea*, 512 U.S. at 64 (citations omitted.)

Off-reservation use is taxable, but no state will be able to monitor individual on-reservation as opposed to off-reservation fuel consumption. No general formula is a fair alternative to individual monitoring because individual consumption patterns are so diverse. States will collect the motor fuel taxes to which they are entitled only if they can collect motor fuel taxes on all sales made on the reservation.

In *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995), the Court suggested if a state is unable to enforce a tax because the legal incidence falls on Indians or Indian tribes, the state is generally free to shift the tax's legal incidence. This is only a partial solution. If the legal incidence is shifted to the consumer, Indians and tribal vehicles will still be able to travel roads, both on and off the reservation, built and maintained with state motor fuel tax revenues to which they have not contributed. If the incidence of the tax is shifted to the distributor, Tribes will simply become distributors. When, as in this case, the reservation abuts another state, the tribal distributor is free to move the fuel directly from a state beyond the jurisdiction of the taxing state to a reservation that, but for the Hayden-Cartwright Act, is likewise

beyond the state's authority to tax. Even when reservation boundaries and state lines are not co-extensive, normal collection procedures are curtailed regardless where the legal incidence of the tax falls. *Oklahoma Tax Commission v. Citizen Band of Potawatomi Tribe of Oklahoma,* 498 U.S. 505 (1991), teaches tribal sovereign immunity will bar suits filed by States to collect taxes owed for sales to non-Indians. States may be forced to seize goods in transit to reservations, a far more confrontational collection technique used by the state of Washington in *Washington v. Confederated Tribes of Colville Reservation,* 447 U.S. 134 (1980). There will be disputes as to whether the state has the authority to audit on the reservation. If the state does have audit authority, there will be disputes over how much authority the state has.

The issue is also important to tribes. If tribes and individual Indians do not contribute to the construction and maintenance of the roads they use, some states and local governments may simply choose to devote more resources to off-reservation roads than they do now. Tribes may even find that local highway districts amend their boundaries to exclude those portions of the districts now falling inside reservations. Either scenario would mean a diminution in the funds available for roads on the reservation.

The Hayden-Cartwright Act issue is important not only to states and tribes, but to non-Indian retailers facing competition from Indian retailers. If Indians can market a fuel tax exemption, non-Indian retailers are at their mercy. The profit margin on each gallon of fuel sold is small; the state tax burden on each gallon is comparatively high. Non-Indian retailers not driven out of business will see

sources of funding evaporate as lenders become wary of loaning money to businesses confronting such competitive disadvantage. Given that there are more than 275 Indian land areas in the United States administered as Indian reservations, this is no small problem. Bureau of Indian Affairs Answers to Frequently Asked Questions at *http://www.doi.gov/bia/aitoday/q and a.html.*

Examples of the recurring nature of the question include cases decided by this Court. In *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), the Court decided the case without having to discuss "whether the Hayden-Cartwright Act applies to Indian reservations at all." *White Mountain Apache*, 448 U.S. at 151, n.16. In *Chickasaw Nation*, 515 U.S. 450, the Court declined to address the issue because it was not presented to the courts below and not fairly included in the question tendered for the Court's review. This case presents the Hayden-Cartwright Act question to the Court for a third time.

In state courts, too, the issue recurs. The Hayden-Cartwright Act issue was presented to the Court of Appeals of New York in *Herzog Brothers Trucking, Inc. v. State Tax Commission*, 533 N.E.2d 255 (Ct. Ap. N.Y. 1988), *on remand from State Tax Commission v. Herzog Bros. Trucking, Inc.*, 487 U.S. 1212 (1988). The issue was raised untimely and not decided by the Court. In addition to this Idaho case, the Supreme Court of South Dakota addressed the issue in *Matter of the State Motor Fuel Tax Liability of A.G.E. Corporation*, 273 N.W.2d 737 (1978). The South Dakota Court's decision is squarely inconsistent with that of the Idaho Supreme Court.

A.G.E. arose when a non-tribal contractor constructed roads within two South Dakota Indian reservations under federal contracts and the State sought to impose a use tax for diesel fuel used in the construction. The contractor disputed the tax, contending for several reasons that the State lacked jurisdiction to tax fuel used on Indian reservations. In analyzing the contractor's arguments, the Court determined that the Hayden-Cartwright Act pertained both to sale and use of motor vehicle fuel and then held the Act granted to the states the right to tax use or sale of motor vehicle fuel sold to tribes and individual Indians on Indian reservations.

> We are of the opinion that the United States has granted to the states the right to exercise limited jurisdiction in taxing the use or sale of gasoline or other motor vehicle fuel within federal areas in exactly the same manner as if those areas did not exist, except in cases where the gasoline is to be used exclusively by the United States. Jurisdiction was extended to the states by Section 10 of the Hayden-Cartwright Act . . . and in Section 1 of the Buck Act.

Matter of State Motor Fuel Tax Liability of A.G.E. Corp., 273 N.W.2d 737 at 739. (citations omitted.)

Once the Court determined South Dakota had jurisdiction to tax the on-reservation sale of motor vehicle fuel to Indians, it faced the second question. Did the federal preemption doctrine apply despite the Hayden-Cartwright Act? The Court determined that it did not. The Court's federal preemption discussion is superfluous without the initial determination that the Act permits

states to tax the on-reservation sale and use of motor vehicle fuel to and by Indians.

II. The Idaho Supreme Court Erred In Concluding That The State Does Not Have Authority To Impose Its Motor Fuel Tax Upon The Reservation Sale Of Motor Fuel To Tribes And Enrolled Members Of Tribes.

The State Tax Commission presented two arguments for the proposition that states have Congressional consent to impose their motor fuel taxes on sales made on an Indian reservation to tribes or members of tribes. The first argument is based on the language of the statute. The Commission analyzed the phrase "licensed trader" and concluded the Solicitor of the Department of the Interior understated the case when he concluded "licensed trader" is only "particularly suggestive of Indian reservations." The phrase is an exceptionally strong indication Congress intended States to have the power to collect motor fuel taxes from Indians on Indian reservations. In federal statutes, federal case law and the Code of Federal Regulations, the phrase "licensed trader" is almost always used to mean one licensed to trade with Indians. In the few instances in which "licensed trader" is used in a non-Indian context, it does not refer to anyone engaged in the sale of motor fuel. When "licensed trader" is used in a statute dealing with the sale of motor fuel, the phrase can refer only to a licensed Indian trader. Despite this, the Idaho Supreme Court held against the State. It reasoned that, although Congress may have meant to reach Indian traders, it did not make its intent "unmistakably clear." (App at 9.)

The Commission also relied on a rule of statutory construction. Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. *Lorillard v. Pons*, 434 U.S. 575 (1978). The Commission pointed principally to the opinion of the Solicitor of the Department of the Interior when it argued that there existed an administrative interpretation supporting the Commission's view of the Hayden-Cartwright Act. The re-enactment of the statute after issuance of the Solicitor's opinion therefore indicated with unmistakable clarity Congress's agreement with the view expressed in the opinion that sales of motor fuels to Indians on a reservation were subject to state motor fuel tax.

The Solicitor's opinion arose out of the following situation. The Menominee Indian Mills were sawmills located on the Menominee Indian Reservation in Wisconsin. They were operated by the United States. Expenses were borne by the Tribe and all proceeds of the mill operations were for the benefit of the Tribe. Gasoline was sold through the commissary. The Solicitor determined that for both state and federal gasoline tax purposes, the mills should be treated as a government agency.

Wisconsin levied an excise tax on gasoline sold, used and distributed in the state, with the exception of gasoline sold to the United States or its agencies. The tax was enforced through a system of licenses on wholesalers who were responsible for the payment of the tax to the state. As to whether the Wisconsin gasoline tax could be enforced against sales of fuel made to Tribal members, the Solicitor determined that the Hayden-Cartwright Act

was dispositive. The Solicitor noted that in the absence of the Act, the state tax would not apply. Given the Act, however, purchases of fuel by Indians were subject to state fuel tax. The Solicitor was clear.

> While I am of the opinion, therefore, that the act of June 16, 1936, [the Hayden-Cartwright Act] subjects to the State gasoline tax sales made through the commissary to private persons, there remains the question whether the statute also removes the immunity from such taxes of Indians making purchases on Indian reservations. . . . Although the immunity of purchases from an Indian commissary might be removed by the Federal statute, purchases made by the Indians on the reservation might nevertheless be exempt. However, I think this would not be the proper conclusion . . . .

57 Interior Dec. 129 at 140

Reasoning that the Solicitor's decision was ambiguous, the Idaho Supreme Court never considered the powerful argument flowing from the rule reiterated in *Lorillard*. The Commission respectfully urges that the Solicitor's decision is not ambiguous; application of *Lorillard* alone is enough to reverse the decision of the Idaho Supreme Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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