No. 03-3218

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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| PRAIRIE BAND POTAWATOMI NATION,<br><br>Plaintiff/Appellant,<br><br>v.<br><br>STEPHEN S. RICHARDS, Secretary of the Kansas Department of Revenue, State of Kansas, in his official capacity,<br><br>Defendant/Appellee. | |

On Appeal from the United States District Court
For the District of Kansas

The Honorable Julie A. Robinson
District Judge

Case No. 99-4071-JAR

# APPELLANT'S OPENING BRIEF

Respectfully submitted,
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## STATEMENT REGARDING ORAL ARGUMENT

Counsel requests oral argument.

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## TABLE OF CONTENTS

ATTACHMENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**

**Other Authorities**



## PRIOR OR RELATED APPEALS

There are no prior or related appeals.

## STATEMENT OF JURISDICTION

**A. District Court.** The district court had jurisdiction under 28 U.S.C. §§ 1362, 1331 and 1367(a). The Plaintiff/Appellant is the Prairie Band Potawatomi Nation (the "Nation"), a federally-recognized Indian Tribe exercising governmental authority on its reservation near Mayetta, Kansas. The Nation operates a casino and a convenience store (the "Nation Station") on its reservation U.S. trust land. (A(I) 35)[1] The Nation asserts claims under the United States Constitution's Indian Commerce Clause and other federal law. (A(I) 10-11)

**B. Tenth Circuit Court of Appeals.** On January 16, 2003, the district court's memorandum opinion and order granted summary judgment to the Kansas Secretary of Revenue (the "defendant"). (Ex. A; A(V) 45) Judgment against the Nation was entered on January 17, 2003. (A(V) 73) On January 27, 2003, the Nation timely moved for reconsideration. On July 2, 2003, the court denied the motion. (A(V) 74; Ex. B, A(V) 171) On July 28, 2003, under Fed. R. App. P. 4(a)(4), the Nation filed a timely notice of appeal from the court's final order, which disposed of all parties' claims. (A(V) 179) The Tenth Circuit Court of Appeals has jurisdiction under 28 U.S.C. § 1291.

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[1] References to the Appellant's Appendix are cited "A(Vol. #) __."

## STATEMENT OF THE ISSUES

I. Whether the district court erred in upholding application of the Kansas fuel tax to an Indian tribe's non-Indian fuel distributor in the following circumstances:

A. The state tax imposes burdens on a tribally owned and operated enterprise that embodies significant reservation value;

B. The state tax precludes the tribe from imposing its own tax to raise substantial revenues for essential governmental functions;

C. Federal interests reinforce the tribal interests against imposition of the state tax; and

D. There was no evidence properly before the court supporting the State's asserted interest in imposing its tax.

II. Whether the district court erred in holding that the Kansas fuel tax did not impermissibly infringe on the tribe's rights of self-government under the above circumstances.

## STATEMENT OF THE CASE

**A. Nature of the Case.** The Nation seeks declaratory and injunctive relief prohibiting collection of the Kansas motor fuel tax with respect to fuel supplied to it by the Nation's non-Indian fuel distributor. This case implicates the large body of federal law establishing the limits on state taxation of non-Indians with respect to their transactions with Indian tribes.

**B. Course of Proceedings.** On May 14, 1999, the Nation filed its complaint, requesting declaratory relief and a permanent injunction. Discovery was conducted during 1999. An amended complaint was filed on February 8, 2000. (A(I) 10)

The defendant moved for summary judgment on October 16, 2000. (A(I) 41) On October 24, 2000, the defendant mailed her witness and exhibit list to plaintiff's counsel. (A(V) 95) On October 30, 2000, the Nation objected to defendant's Exhibit List exhibits 1-16. (A(I) 147) On December 22, 2000, the Nation objected to the defendant's motion exhibits 2-6, which included Exhibit List exhibits 2-4, 14 and 15. (A(II) 8) On January 2, 2001, the Nation moved to exclude defendant's Exhibit List exhibits 1-16. (A(V) 1, 5) The defendant did not respond to the Nation's motion to exclude his exhibits.

On February 1, 2001, the defendant filed her reply for the summary judgment motion, which completed the briefing. (A(V) 11)

C. **Disposition by Court Below.** On January 15, 2003, the district court granted defendant's motion for summary judgment. (Ex. A; A(V) 45) On January 27, 2003, the Nation moved for reconsideration, including a request that its motion to exclude the defendant's exhibits be granted. (A(V) 76, 80-81) On July 2, 2003, the court denied the Nation's motion to reconsider and declined to rule on the motion to exclude, stating that "the court did not rely on defendant's supposed objectionable exhibits in ruling on defendant's summary judgment motion." (Ex B 4; A(V) 171, 174)

## STATEMENT OF THE FACTS

### The Prairie Band Potawatomi Nation and the Nation Station.

1. The Prairie Band Potawatomi Nation is a federally-recognized and sovereign Indian Tribe. (A(I) 35)

2. The Nation owns and operates a convenience store (the "Nation Station") on its Indian reservation. The Nation Station is located on U.S. trust land near the Nation's casino. (A(II) 71) Retail sales of motor fuel generate 71% of the Nation Station's revenue. (A(III) 3) The Nation obtains its motor fuel at wholesale from Davies Oil Company, a non-Indian distributor with a place of business in Kansas. Davies Oil delivers the fuel to the Nation on its reservation.

**The Nation's Tribal Enterprise Embodies Substantial Reservation Value.**

3. The Nation's tribal enterprise, of which the Nation Station forms an integral part, embodies substantial reservation value.

A. The Nation has generated significant on-reservation value by financing, constructing and owning its 35 million dollar casino on its reservation. The casino is located on reservation U.S. trust land and is operated under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* The Nation oversees the management of its casino and receives 100% of the net revenues. Many of the casino's employees are tribal members of the Nation or their family members.

By building and operating the casino, the Nation has generated the value of a substantial flow of motor vehicle traffic in an otherwise remote rural location. The Nation Station's retail fuel business exists because of the flow of vehicle traffic to and from the casino and because of other reservation-related vehicle traffic, not because the Nation Station is selling fuel at below market prices. (A(II) 70-71)

B. The Nation Station is tribally-owned and operated. The Nation financed and constructed the Nation Station and its facilities. (A(II) 71) The total construction cost of the Nation Station was $1.5 million. The cost of the Nation Station's motor fuel handling system was over $250,000. It includes

tank storage and fuel handling and monitoring systems that are used by the Nation Station to make fuel available to customers. (A(III) 22)

C. The Nation actively contributes to and manages the Nation Station. The Nation Station is managed by Jon Boursaw, the Nation's Executive Director, by Jim Moulden, the Nation Station's general manager, and by Randy Conroy of the Nation's finance department. They and all other Nation Station personnel are tribal government employees. The Nation provides all of the Nation Station's personnel, accounting, financing and management. (A(III) 25)

D. As of May 25, 2000, the Nation Station employed a total of 15 persons. Eleven of its employees are Indians, with seven being tribal members of the Nation. The Nation Station exercises Indian preference in its employment practices. (A(III) 2-3)

E. The Nation's expert witness concluded that the Nation Station's commerce is derived from value generated on Indian lands by activities in which the Nation has a significant interest. His report states:

> Casino patrons and employees of the casino and Nation make up 73% of the NS fuel customers. The trade area of the NS [the Nation Station] is typical of a C-store, a one to two mile radius.
>
> The NS also provides important services to residents of the reservation and reservation workers. It is the only

"fast food" outlet on the reservation or within 2 miles of the government center. It serves approximately eighty meals per day to members of the Nation and reservation workers and casino workers and patrons. In addition, it is the only station owned by the Nation serving the 475 PBP members living on its 121 square mile reservation. About 11% of its fuel customers are people who work or live on the reservation, other than at the casino, and the NS also supplies fuel to the Nation's government vehicles.

* * *

It is clear that the "value marketed" by Nation Station results from the business generated by the casino and from employees of the casino and PBP government and residents. But for the casino, there would not be enough traffic to support the C-store in its current location. The NS is a good example of what appraisers call a "location dependant business." Furthermore, the location of the C-store fits well with the economic development plans as presented in the Nation's land use plan for the reservation which forecasts the development of other commercial operations and expanded residential facilities in the eastern sections of the reservation. (Emphasis added.) (A(II) 86)

* * *

Some Indian Nations have set up stores to sell cartons of cigarettes to non-residents. The tribes that operate these shops advertise heavily along major highways through and near their reservations often marketing their state tax exemptions with signage that displays "No State Cigarette Tax" in the advertising message. Since the stores are out-of-the-way, they would enjoy little traffic but for the substantial savings due to lack of state taxes that customers enjoy. My personal observation is that customers to these smoke shops tend to buy several weeks or more supply of cigarettes.

> There is little "value added" by these operations. They do not have a merchandise mix which meets the need of travelers or other cognizable group of consumers (other than smokers). They are generally passive conduits between the wholesaler and ultimate consumers and do not add significant value to the products that they sell through management, marketing or merchandising acumen or location.
>
> The Nation Station is a very different value proposition. The Nation recognized that casino customers and employees travel distances, sometimes substantial distances, to get to the reservation. These travelers should be attracted to a convenient place to buy gas, snacks, drinks and cigarettes before getting on the highway. Therefore, the Nation built a modern, full-service convenience store and strategically placed it so that it was easily accessible to travelers going to and from the casino. The store is a model operation, entirely state-of-the-art in C-store layout and design. To argue that this business does not add value is to entirely dismiss the contribution of retailing to the product value proposition. (Emphasis added. ) (A(II) 87)
> * * *
> The results of my study of the operation of the NS yield unequivocal answers to these questions. Clearly, the value of the NS is generated by the casino and the reservation community and the Nation has a significant interest in both. (Emphasis added.) (A(II) 89)

**The Nation Station Is Not Marketing a Tax Exemption.**

4. A. The Nation Station's retail motor fuel business exists because of the flow of vehicle traffic to and from the Nation's casino, not because the Nation Station is selling fuel at less than fair market prices. The Nation Station sells its fuel at fair market prices. (A(III) 161; A(III) 29-30)

B. The Nation's expert witness concluded that the Nation Station is not marketing an exemption from state taxes.

> The Nation Station is part of the economic infrastructure of the reservation and its customer base is comprised of visitors to the Nation's gaming operations, non-resident reservation workers and residents of the reservation. By virtue of its location and lack of nearby highway advertising, NS does not seek to nor does it compete for fuel purchases from those who would not otherwise be on the reservation.
>
> Because the Nation sets its fuel tax [discussed below] at approximately the same level as that of the State of Kansas, it is not establishing a competitive advantage for Nation Station by virtue of not collecting the State of Kansas tax.
>
> Furthermore, the Nation is not 'marketing a tax exemption' because the price of fuel at the Nation Station is set above cost, including the Nation's tax, and within 2¢ per gallon of the price prevailing in the local market. (A(II) 84)
>
> * * *
>
> [A] survey done by the PBP tribal government at our request, shows that only 11% of NS customers stopped at the store for the specific purpose of buying gas. Thirty percent of customers bought no gas. Casino patrons and employees of the casino and Nation make up 73% of the NS fuel customers. The trade area of the NS is typical of a C-store, a one to two mile radius. (A(II) 86)
>
> * * *
>
> Since the NS sells fuel at the market price, it cannot be charged with "marketing a tax exemption." Both logic and the results of our survey confirm these conclusions. (A(II) 89)

## The Nation's Fuel Tax.

5. The Nation has enacted a tax code to raise tribal government revenues, as follows:

> It is necessary and essential to the preservation of the Nation as a sovereign government to strengthen tribal government by...providing financing for the maintenance and expansion of the Nation's tribal government operations and services in order for the Prairie Band Potawatomi Nation to...exercise its confirmed governmental responsibilities within the Indian Country subject to its jurisdiction. (A(IV) 184)

6. The Nation has imposed a tribal tax on retailers of motor fuel at the rate of 16 cents/gal. for gasoline and 18 cents/gal. for diesel fuel. (A(IV) 207) On January 1, 2003, the rate was increased to 20 cents/gal. for gasoline and 18 cents/gal. for diesel fuel. (A(V) 169) As required by tribal law, all tribal fuel tax collections are used by the Nation's government to maintain and improve roads and bridges on and near the reservation. (A(III) 3; A(IV) 208) The Nation Station, as a retailer of motor fuel, is subject to the Nation's fuel tax. (A(IV) 207)

7. The defendant concedes that the Nation has the governmental right to impose its fuel tax on the Nation Station. (A(I) 75-76)

8. The Nation Station pays tribal fuel taxes of approximately $300,000 per year to the Nation. Transfers of this tax are periodically made to the Prairie Band Potawatomi Road and Bridge Department. (A(III) 3)

9. The tribal fuel taxes from the Nation Station enable the Nation to provide essential governmental services to its reservation. The generation of tribal taxes from the Nation Station to fund tribal government services is an integral part of the self-governance and self-sufficiency of the Nation. (A(II) 71)

**The Indirect Burden of the State Tax Falls on the Nation.**

10. A. The indirect burden of the state fuel tax falls on the Nation's retail fuel business and interferes with its self-government. The defendant's attempted enforcement of the state fuel tax has a direct and substantial adverse impact on the Nation Station and the Nation. The Nation Station's cost of fuel with the state tax imposed would destroy its business and would make it impossible for the Nation to collect fuel taxes from it. The higher retail prices that the Nation Station would be forced to charge if the state tax were imposed would put it out of business. The Nation's governmental system of motor fuel taxation will be rendered completely ineffective if the defendant's enforcement of the state fuel tax is permitted to continue. (A(II) 72-73; A(III) 29-30)

B. The Nation's expert witness explained in economic terms the destructive burden of the state tax upon the Nation.

> The demand for gasoline is highly elastic in the relevant market and that the Nation does not have the market power to impose its tax in addition to the Kansas tax. Were it to try and do so, the Nation Station would sell virtually no gasoline or diesel fuel. Hence, if the State is successful, the Tribe will not be able to collect its tax on motor fuel sales on the reservation. (A(II) 84)
>
> * * *
>
> Basic economic theory teaches that the NS cannot charge prices high enough to allow collection of both the Kansas and PBP fuel taxes. Motor fuel is a commodity and cannot be differentiated enough to permit disparate pricing in the same geographic market. Therefore, the Tribal and State taxes are mutually exclusive and only one can be collected without reducing the NS fuel business to virtually zero. (A(II) 89)

**The Nation Provides Most of the Government Services on the Reservation.**

11. The Nation's tribal government provides the majority of government services to the Nation Station, its Indian and non-Indian customers and the reservation as a whole. In 2000 the Nation provided roughly $10.5 million of regular tribal government services on and near the reservation. These tribal services included road and bridge construction and maintenance, law enforcement, fire protection and emergency medical, child care, education, zoning, environmental protection, tribal court and many other government

services. These tribal government services are also provided to the company that distributes motor fuel to the Nation Station. (A(III) 25-29; A(II) 72) These figures do not include tribal government capital expenditures for special projects. (A(III) 28)

12. The Nation has taken responsibility for the majority of the roads and bridges on the reservation. It also has improved and maintained many off-reservation roads near the Nation Station. The Nation improved and continues to maintain the two miles of casino access road on 150th Road from P Road to the 150th Road and U.S. 75 Highway intersection. The Nation spent $1.2 million in 1997 and 1998 to improve this access road to the casino. (A(III) 22-23, 135)

13. A. The Nation's Road and Bridge Department provides most of the reservation road and bridge construction and maintenance for the Nation's 121 square mile reservation. These reservation roads provide (a) customer and employee access to commercial and government establishments, (b) access to the residences of tribal members and non-members living on the reservation and (c) access to crop lands and agricultural facilities. The Nation maintains these roads and bridges with no financial assistance from the County or the State. The Nation also provides funds and materials to the County to help it maintain and improve other roads on the reservation. (A(III) 134-135)

B. From 1997 through 2005, the Nation's Road and Bridge Department has expended and will expend roughly $29,000,000 for constructing and maintaining roads and bridges on and near the reservation. This is an average of over $3.0 million per year. (A(III) 135)

C. The Nation's Road and Bridge Department employs 32 persons, 31 of whom are members of the Nation. The department owns, operates and maintains a fleet of twenty-two pieces of road equipment including graders, scrapers, dump trucks and back hoes and a number of small trucks worth approximately $4 million. (A(III) 136)

D. In performing tribal government services, the Nation's Road and Bridge Department had regular expenditures of over $1.6 million in 1999 and over $1.8 million in 2000. (A(III) 136)

E. As part of its ongoing, special road reconstruction projects, the Nation anticipates that during the period of 2000 through 2005, its Road and Bridge Department will redesign, improve and pave 30 of miles of reservation road. The total expected cost to the Nation for these special road reconstruction projects is $8,250,000. (A(III) 137)

F. In addition to the above special projects, the Nation has agreed to finance $450,000 of the costs to improve the off-reservation intersection at 150th Road and U.S. 75 Highway. The Nation will pay the

engineering, right of way and utility relocation costs for this project. (A(III) 137)

14. A. The Nation's police force provides significant law enforcement services for the Nation Station, its customers and all other persons on the reservation. It expended $1.1 million in tribal funds to pay for these services in 2000, employing 10 full-time tribal police officers. All have been deputized to enforce tribal and federal criminal laws and to enforce tribal civil laws, which benefits both Indians and non-Indians on the reservation. (A(III) 158)

B. Tribal police routinely patrol and provide assistance to all persons and land on and near the reservation, providing law enforcement, medical emergency and vehicle accident services. (A(III) 158)

C. The Nation constructed a $300,000 law enforcement center, which provides law enforcement services on and near the reservation. It is located within 2 miles of the Nation Station and the casino. (A(III) 158)

D. The Nation's police provide assistance to other law enforcement agencies on and near the reservation. (A(III) 159)

15. The Nation's Fire and Emergency Medical Services Department provides fire protection, EMS first response and ambulance services for the Nation Station, its customers and all other persons on and near the reservation.

In 2000 the Nation expended over $2.0 million for these services. In 1999, the Nation built a new $1.2 million fire station on the reservation. The Nation provides fire control services to all persons on and near the reservation under mutual aid agreements with several local fire districts. (A(III) 26)

16. The Nation's government is expending over $1.0 million annually on education. The Nation's Child Care and Head Start program provides child care and early childhood development services for both Indians and non-Indians. (A(III) 26-27)

17. The Nation's Department of Planning and Environmental Protection generally provides environmental protection, zoning and land use planning regulation services for the Nation Station, its customers and all other persons on and near the reservation. In 2000 the tribal expenditures for these services were roughly $400,000. (A(III) 27)

**Other State and Tribal Interests.**

18. In 1999 state motor fuel tax collections were $331,151,050 and total state receipts from all sources were $5,194,746,208. (A(III) 4) The $300,000 of tribal fuel taxes paid by the Nation Station during the year from 1999-2000 were 100% of all tribal fuel tax collections. (A(III) 3)

19. The State has an historical policy of not imposing state taxes with respect to fuel delivered to Indian reservations. In the early 1990's, Kansas

Governor Finney agreed that the State should relinquish state tax authority over the Indian reservations if a Tribe imposes its own tribal taxes. The State also has a policy that motor fuel should not be subject to double taxation. (K.S.A. §§ 79-3424, 79-3408(d)(1); A(II) 73-74)

**The District Court's Decision**

In addressing defendant's motion for summary judgment, the district court first rejected defendant's contentions that the Eleventh Amendment barred the Nation's claim, that the Nation lacked standing, and that the Hayden Cartwright Act, 4 U.S.C. § 104, provides explicit congressional authorization for states to impose fuel tax on fuel delivered to Indian reservations. (Ex. A 5-18; A(V) 49-62) It then addressed whether the Kansas tax is barred under the separate but related doctrines of federal preemption and infringement of tribal self-government. (Ex. A 19-28; A(V) 63-72)

The court acknowledged that resolution of these remaining questions requires a balancing of interests analysis in which federal and tribal interests against state taxation are weighed against state interests in favor of state taxation. The court further acknowledged the Supreme Court's decision in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), establishing that state taxes generally may not be imposed on non-Indians where the revenues burdened by the tax are derived from value

"generated on reservations by activities in which [Indians] have a significant interest." *Id.* at 156-57.

The Nation submitted uncontroverted evidence of significant tribal and federal interests that disfavor the state tax, including extensive evidence of tribally generated values and of the state tax's destructive effects on the Nation Station's business and interference with the Nation's right to impose its own tax. (A(II) 45-49) The defendant sought to introduce evidence of state interests that favor the tax, to which the Nation objected.[2] (A(II) 8 and A(I) 147) Although the court did not rule on the Nation's objection, it stated in its ruling denying the Nation's motion for reconsideration that it did not consider any of the defendant's allegations of state services in its decision. (Ex. B 4; A(V) 174)

Notwithstanding the uncontroverted evidence in the record of significant federal and tribal interests and the absence of any evidence of state interests, the district court decided that the evidence favoring Kansas's interest was "so one-sided that the defendant was entitled to prevail as a matter of law." (Ex. B 5; A(V) 175) The court based its conclusion on its view that "if the tribe earns its

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[2] The attachments to defendant's summary judgment motion exhibits 2-6 are identical to defendant's Exhibit List exhibits 2-4, 14, and 15. (A(V) 76-77) The Nation objected and moved to exclude defendant's Exhibit List exhibits 2-4, 14 and 15. (A(I) 147; A(V) 1) The defendant did not oppose the Nation's motion notwithstanding written notice to him five times over a six month period. (A(I) 147; A(II) 8; A(V) 1, 5; A(V) 167, 168)

profits simply by importing non-Indian products onto the reservation for resale to non-Indians free from state taxation, the profits are not derived from value generated on Indian lands." (Ex. A 23; A(V) 67) The court also premised its holding on its finding that "the Tribe has failed to show that the state motor fuel tax substantially affects its ability to offer governmental services or in any way affects the Tribe's right to self-government." (Ex. A 25-26; A(V) 69-70)

## SUMMARY OF THE ARGUMENT

This case turns on whether the defendant can impose a fuel tax on fuel acquired by an Indian tribe where the state's interest in imposing the tax is decisively outweighed by substantial tribal and federal interests against imposing the tax. The Nation's fuel marketing activity forms an integral and essential part of its general on-reservation economic enterprise, and embodies substantial reservation-generated value resulting from the Nation's creation of a market for fuel among its casino patrons, employees, tribal members and other residents of the reservation. Having created a significant motor traffic and fuel market on its reservation, the Nation has a compelling interest in levying its own tribal fuel tax upon the resulting fuel sales in order to carry out its responsibilities to build, repair and maintain its on-reservation roads and bridges. These tribal responsibilities are strongly supported by the federal

government's interest in promoting tribal self-sufficiency, self-government and economic development. In comparison to these substantial tribal and federal interests against the tax, the state's interest in imposing the tax is unarticulated, insignificant and has not been properly presented before the district court. Accordingly, this Court should hold that the Kansas fuel tax is preempted with respect to the Nation's fuel.

Imposition of the Kansas fuel tax upon the Nation's fuel would also infringe the Nation's right to self-governance by destroying its tribal business and precluding it from exercising its sovereign right to impose its own fuel tax to finance essential governmental functions. Moreover, imposition of the Kansas fuel tax would impair the Nation's rights in violation of the Kansas Act for Admission. For these reasons, also, this Court should hold that the Kansas fuel tax is preempted with respect to the Nation's fuel.

The district court's order upholding the application of the Kansas fuel tax to the Nation's fuel rested on numerous errors of law that prevented it from correctly weighing the relevant issues in this case. The district court misconstrued the meaning and significance of reservation-generated value and overlooked its substantial presence in the Nation's fuel marketing activity and its general on-reservation economic enterprise. The district court inexplicably dismissed the Nation's strong interest in imposing its own fuel tax and

completely overlooked the federal interests supporting the Nation's interest. Finally, the district court misdefined and grossly exaggerated the state's interest in imposing its tax, relying on evidence not properly before the court in defining this interest. For these reasons, this Court should reverse the district court's entry of summary judgment in favor of the defendant.

## STANDARD OF REVIEW

The standard of review is *de novo* for all issues in this appeal. This court reviews a district court's grant of summary judgment de novo to determine whether there is a genuine issue as to any material fact, and whether the moving party is entitled to judgment as a matter of law. *Gossett v. Board of Regents for Langston University*, 245 F.3d 1172, 1175 (10th Cir. 2001); *Sac & Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 583 (10th Cir. 2000), *cert. denied*, 531 U.S. 1144 (2001). The court must view the record and draw all reasonable inferences in the light most favorable to the non-moving party. *Thomas v. International Business Machines*, 48 F.3d 478, 484 (10th Cir. 1995). Relief by way of summary judgment is drastic, and should be applied with caution to the end that litigants will have trial on bona fide factual disputes. *Jones v. Nelson*, 484 F.2d 1165, 1168 (10th Cir. 1973).

## ARGUMENT

### I. THE KANSAS FUEL TAX AT ISSUE IS INVALID AS APPLIED TO THE NATION'S FUEL BECAUSE THE FEDERAL AND TRIBAL INTERESTS AGAINST STATE TAXATION OUTWEIGH THE STATE INTERESTS IN FAVOR OF STATE TAXATION.

In *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995), the Supreme Court held that a state tax is categorically preempted by federal law, absent explicit congressional permission to the contrary, if the legal incidence of the tax falls "directly on an Indian tribe or its members inside Indian country, rather than on non-Indians." 515 U.S. at 458. In situations in which the legal incidence of a state tax falls on a non-Indian, but in which Indians or Indian tribes are adversely affected by the tax, the tax is not categorically preempted but nevertheless may be preempted based on an analysis balancing federal, tribal, and state interests. If the balance of interests tilts against the state's interest in imposing its tax, and federal law is not to the contrary, the state may not impose its tax. *E.g., id.*, 515 U.S. at 459; *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1253 (10th Cir. 2001); *Indian Country, U.S.A. v. Oklahoma Tax Comm'n*, 829 F.2d 967, 981-82 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988).

The Supreme Court has explained that the resolution of balancing of interests cases does not depend on "rigid rule[s]" or on "mechanical or absolute conceptions of state or tribal sovereignty," but instead requires a "particularized inquiry" to determine on a case by case basis whether a state tax is invalid as a matter of federal law:

> In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for *a particularized inquiry into the nature of the state, federal, and tribal interests at stake*, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

*White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-5 (1980) (emphasis added).

"State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983). In conducting this balancing of federal, tribal and state interests, "[t]he traditional notions of Indian sovereignty provide a crucial 'backdrop' against which any assertion of state authority must be assessed." 462 U.S. at 334-35.

This "backdrop" requires that treaties and federal statues be interpreted "generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *Bracker*, 448 U.S. at 144-5.

The constitutional source of these federal preemption principles is the Indian Commerce Clause, Art. I, § 8, cl. 3, which provides: "The Congress shall have the power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The Supreme Court recently described the Indian Commerce Clause's broad proscription of state authority over Indian tribes as follows:

> If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that *the States* still exercise some authority over interstate trade but *have been divested of virtually all authority over Indian commerce and Indian tribes*.

*Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 62 (1996) (emphasis added).

In the instant case, the district court failed to conduct the particularized inquiry required by federal law. It erroneously weighed the evidence and failed to view the record in the light most favorable to the Nation. The district court also erroneously decided several legal issues and misapplied the law to the facts of this case. To the extent the material facts are not disputed, they require

summary judgment for the Nation. Accordingly, the district court erred in granting summary judgment.

### A. In Applying the Balancing Test, the District Court Failed to Properly Consider and Weigh the Competing Federal, Tribal, and State Interests.

#### 1. Contrary to the District Court's Conclusion, the Kansas Tax Burdens a Tribal Enterprise that Embodies Significant Reservation Value.

The district court erroneously held that the Nation Station enterprise involved nothing more than the sale of a "non-Indian product" without reservation value. (Ex. A 21; A(V) 65) The court rejected any suggestion that "the fuel sold at the Nation Station is an Indian product because the Tribe operates a casino in the vicinity or that fuel is an Indian product because the Tribe financed and constructed the Nation Station to include proper facilities for unloading, storage and dispensing of gasoline," citing *Chemehuevi Indian Tribe v. California Bd. of Equalization*, 800 F.2d 1446 (9th Cir. 1986). The court's myopic focus on the physical fuel, to the exclusion of the Nation's general reservation-based economic enterprise and its significant investment in and control over that enterprise, seriously deviates from the established federal test for determining the presence of reservation value.

The federal courts have made clear that state taxes generally may *not* be imposed on non-Indians where the revenues burdened by the tax are derived

from value "generated on the reservations by *activities* in which [Indians] have a significant interest." *Colville*, 447 U.S. at 156-57 (emphasis added); *accord Sac & Fox*, 213 F.3d at 585; *Indian Country, U.S.A.*, 829 F.2d at 986.

In defining reservation-generated value, the federal courts do not focus merely on the bare physical product offered for sale on the reservation, but rather examine the tribal marketing enterprise as a whole. Thus the Supreme Court in *Colville* indicated that the "efforts of the Tribes in importing and marketing" cigarettes and the "location" of Indian reservations where the cigarettes sales occur are relevant to determining the reservation value embodied in cigarette marketing enterprises. 447 U.S. at 158.[3] Similarly, in *Indian Country, U.S.A.*, this Court examined the reservation value embodied in a "tribal bingo *enterprise*" without distinguishing between the component parts of the enterprise, which included not only the holding of bingo games, but also the sale of food, bingo supplies and bingo accessories – which items presumably were imported from outside the reservation. 829 F.2d at 972, 983-

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[3] The Court refused to address these factors because the record lacked the necessary evidence. *Colville*, 447 U.S. at 158. The Court made its observations in discussing the State of Washington's failure to give any credit for *tribal* taxes paid on cigarettes. The Court recognized that if such a credit were given, thereby removing any difference in the tax burden between reservation and non-reservation sales, the remaining reservation cigarette sales would be attributable to reservation value resulting from the tribe's marketing location and techniques. *Id.*

84 (emphasis added). The Ninth Circuit took a similar approach in *Gila River Indian Community v. Waddell*, 967 F.2d 1404 (9th Cir. 1992), where it examined the reservation value in the tribe's comprehensive entertainment enterprise – including a marina, an auto racetrack, an amphitheater, and associated concession buildings – without narrowly focusing on the different types of services and products marketed as part of the enterprise. The Ninth Circuit took this broad approach even though the activities on which Arizona sought to impose its tax included the sale of concessionary items which presumably were manufactured outside the reservation. 967 F.2d at 1406.

Secondly, in evaluating the reservation value embodied in a tribal enterprise, the federal courts focus on the tribe's investment in and control over the enterprise, not simply the geographical origin of the products sold or used in the enterprise. Thus, the Supreme Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), in assessing the reservation value in a tribal casino enterprise, did not examine the off-reservation origin of the gaming supplies and accessories used in the enterprise. Rather, the Court emphasized that the Tribes:

> have built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services

> the Tribes provide. The Tribes have a strong incentive to provide comfortable, clean, and attractive facilities and well-run games in order to increase attendance at games.

*Id.* at 219. Similarly, in *Indian Country, U.S.A.*, this Court held that a tribal bingo enterprise embodied sufficient reservation value to preclude the imposition of a state tax on non-Indians because (1) the enterprise was located on Creek Nation lands, (2) the Creek Nation owned and controlled the enterprise, and (3) Creek Nation members predominated as employees of the enterprise. 829 F.2d at 982-83, 986. This Court did not even mention the off-reservation origin of the concessions or the gambling supplies used and sold as part of the enterprise. In *Gila River*, moreover, the Ninth Circuit found sufficient allegations of reservation value in a tribal entertainment enterprise to reverse the district court's dismissal, holding that the tribe's alleged control and regulation of the entertainment events indicated "an active role in generating activities of value on its reservation" and gave it "a strong interest in maintaining those activities free from state interference." 967 F.2d at 1410.[4] The Ninth Circuit drew no attention to the off-reservation origin of the

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[4] In a later decision in the same case, the Ninth Circuit upheld the district court's grant of summary judgment against the Tribe, primarily on the ground that the Tribe's claim of active involvement in the entertainment activities was "unsupported by the record." *Gila River Indian Community v. Waddell*, 91 F.3d 1232, 1238 (9th Cir. 1996).

concessions sold at the entertainment events. The Ninth Circuit's broad approach to assessing reservation value in *Gila River* has superseded the narrower, product-oriented approach it used in *Chemehuevi*, upon which the district court erroneously chose to rely.

If an enterprise of an Indian tribe or tribal members lacks reservation value, the federal courts sometimes express this fact by observing that such activities involve the "marketing of a tax exemption." *See, e.g., Colville*, 447 U.S. at 155; Sac *& Fox*, 213 F.3d at 585;[5] *Salt River Pima-Maricopa Indian Community v. Arizona*, 50 F.3d 734 (9th Cir. 1995). In *Colville*, for instance, the Supreme Court concluded that "the value marketed by [certain reservation-based] smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest." 447 U.S. at 155. As a result, continued the Court, "[w]hat the smokeshops offer these customers, and what is not available elsewhere, is solely an exemption

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[5] In *Sac & Fox*, the tribes argued that imposition of the Kansas fuel tax diminished their tribal revenues and thereby infringed their sovereign right of self-government. 213 F.3d at 583. Because the tribes apparently presented no evidence with respect to the reservation value embodied in their tribal economic enterprises, this Court had no occasion in that case to consider whether the tribes' fuel sales incorporated reservation value and thus simply assumed that such value was absent. Thus, this case presents this Court with the first opportunity since *Indian Country, U.S.A.* to address the reservation value issue.

from state taxation." *Id.* Because the tribes offered no independent evidence of reservation-added value, 447 U.S. at 158, the *Colville* court concluded that the tribes marketed nothing more than "an exemption from state taxation to persons *who would normally do their business elsewhere.*" 447 U.S. at 155 (emphasis added). The determination that a tribe is marketing an exemption, therefore, is simply a *conclusion* that a tribe's activity lacks reservation value, and is not an independent test or inquiry. *Id.*

The district court flatly disregarded the established federal test for evaluating the reservation value of a tribal enterprise. First, the court erroneously focused on the extent of reservation value in the mere physical product sold by the Nation Station. (Ex. A 20; A(V) 64) In so proceeding, the court ignored the elements of location and tribal marketing effort that the Supreme Court in *Colville* treated as relevant to the reservation value inquiry. In sharp contrast to *Indian Country, U.S.A.*, the court expressly refused to evaluate the reservation value inhering in the Nation's general economic *enterprise*, of which the Nation Station is an integral part. As the Nation demonstrated in its papers before the district court, the Nation Station was purposefully located on trust land close to the Nation's casino enterprise and was built to serve the patrons and employees of the casino enterprise. The Nation's expert witness found that 73% of the Nation Station's fuel customers

consist of patrons and employees of the casino and the Nation, and that "[b]ut for the casino, there would not be enough traffic to support the [Nation Station] in its current location." (Fact 3(E)) (Citations to "Facts" are to the numbered facts in the Statement of the Facts.) It is doubtful, in fact, whether the sales at the Nation Station would take place *anywhere within Kansas* absent the magnet effect of the Nation's casino enterprise, which increases fuel consumption among those who travel to the enterprise and attracts visitors from adjoining states. The Nation Station serves approximately 80 meals per day to members of the Nation, reservation and casino workers, and casino patrons, and is integrated with the economic development plans in the Nation's land use plan for the reservation. (Fact 3(E)) The Nation Station's fuel sale activity, in short, is not a discrete and isolated enterprise of the Nation. The district court clearly erred in not considering the reservation value embodied in the Nation's general economic enterprise, of which the Nation Station, along with the casino, is an integral part.

Secondly, in sharp contrast to *Cabazon*, *Indian Country, U.S.A.* and *Gila River*, the district court erroneously failed to consider the Nation's substantial investment in and direct management and control over the casino enterprise and the Nation Station. The district court, in fact, made *no attempt whatsoever* to assess the Nation's substantial participation in its enterprise. Among other

things, the court ignored the following uncontroverted elements that establish the existence of strong reservation value:

- The Nation financed and constructed on its reservation a $35 million casino, of which the Nation oversees the management and receives 100% of the revenues and of which many of the Nation's members are employees. By building and operating its casino, the Nation has generated the value of a substantial flow of motor vehicle traffic in an otherwise remote rural location. (Fact 3(A))

- The Nation recognized that casino customers and employees travel distances, sometimes substantial distances, to get to the reservation. These travelers should be attracted to a convenient place to buy gas, snacks, drinks and cigarettes before getting on the highway. Therefore, the Nation financed and constructed the Nation Station at a cost of $1.5 million and a motor fuel handling system at a cost of $250,000. The Nation Station is a modern, full-service convenience store strategically placed so that it is easily accessible to travelers going to and from the casino. (Fact 3(B)&(E))

- The Nation owns and directly manages the Nation Station, and most of the Nation Station's employees are Indians and Nation members. (Fact 3(C)&(D))

- The Nation Station sells its fuel at fair market prices, which includes the Nation's tax imposed at approximately the same level as that of the State of Kansas. (Fact 4)

The reservation value that exists in the present case is substantially the same as the reservation value that this Court found conclusive in *Indian Country, U.S.A.* and the Supreme Court found conclusive in *Cabazon*. As in *Indian Country, U.S.A.*, the Nation has made substantial monetary investments in the on-reservation enterprise, maintains an ownership interest in the facilities

and profits of the enterprise, exercises direct control and management over the enterprise, and employs significant numbers of its own members in the enterprise. 829 F.2d at 982-83, 986. Like the Tribes in *Cabazon*, the Nation "is not merely importing a product onto the reservations for immediate resale to non-Indians. [It has] built modern facilities which provide recreational opportunities and ancillary services to [its] patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide." 480 U.S. 202, 219 (1987).

The district court's reliance on *Chemehuevi*, *Colville*, and *Salt River* is completely misplaced. With regard to *Chemehuevi*, as noted above, *supra* 26-27, the Ninth Circuit now generally evaluates reservation value with reference to a tribe's investment in and control over the tribe's economic enterprise as a whole. *Gila River*, 967 U.S. at 1410; *see also Salt River*, 50 F.3d at 738. Moreover, *Indian Country, U.S.A.* establishes that the reservation value inquiry within the Tenth Circuit requires examination of tribal participation in the general tribal enterprise, and these parameters prevail over any contrary directive in the *Chemehuevi* case. 829 F.2d at 972, 983-84, 986.

The facts of the present case bear no resemblance to the facts in *Colville*, where the Court held, based on the record before it, that the tribes cigarette sales were made to customers who "would normally do their business

elsewhere." 447 U.S. at 155. Here, the business of the Nation Station's customers would not even exist, much less occur elsewhere, absent the Nation's substantial ongoing investment in its reservation-based economic enterprise, which creates the market which the Nation serves.

The *Salt River* case, likewise, involved markedly different facts than those in the present case. In sharp contrast to the Nation's enterprise, all of the reservation businesses subject to the state tax in *Salt River* were "owned and managed by non-Indian entities, none of which were residents of the reservation."[6] 50 F.3d at 735. Moreover, utterly unlike the present case, the on-reservation businesses in *Salt River* had leased property from a non-Indian developer, who in turn leased land from tribal members for *55 years*; the developer financed construction of the shopping mall in question without the tribe's participation; the tribe had *no* interest in the profits or rents of the businesses; and the tribe had *no* role in making business decisions with respect to the businesses. 50 F.3d at 735, 738. Finally, the court in *Salt River* noted that the tribal 1% sales tax could be imposed concurrently with the state 5.5% tax, whereas in the present case, the tribal and state fuel taxes are mutually

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[6] The businesses in question included Circuit City, Cost Plus Imports, Denny's, J.C. Penney, McDonalds, Taco Bell, Kentucky Fried Chicken, and Home Depot – names not usually associated with Indian country. *Salt River*, 50 F.3d at 735.

exclusive. Importantly, the *Salt River* court indicated that "there may be a limit on state taxation where it effectively prevents appropriate taxation by an Indian tribe" – the precise situation in the present case. 50 F.3d at 738.

In summary, the district court ignored the proper federal test for assessing reservation value, dismissed the Nation's abundant evidence that satisfied this federal test, and relied on a superseded and factually distinguishable cases on reservation value in making its determination. For these reasons, this Court should reverse the district court's order for summary judgment.

### 2. The District Court Failed to Accord Proper Weight to the Nation's Compelling Interest in Raising Revenues to Construct and Maintain Reservation Roads, Bridges, and Related Infrastructure.

After erroneously concluding that the Kansas fuel tax does not burden commerce derived from significant reservation value, the district court made two additional and significant errors in considering the impact of the Kansas tax on the Nation's ability to impose its own fuel tax on the Nation Station. First, the court ignored uncontroverted evidence in the record that the Nation's tax raises substantial revenues for reservation roads, bridges, and related infrastructure on the reservation, and that the Nation would be *unable* to impose its tax if the Kansas tax also were imposed, evidence that establishes a compelling tribal interest against state taxation in the circumstances of this case.

(Facts 10-17) Second, the court accorded no weight at all to this compelling interest of the Nation, much less the weight that is warranted, in balancing the competing tribal, federal, and state interests.

The Supreme Court has recognized that "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty . . . ." *Colville*, 447 U.S. at 152. In many balancing of interests cases in which the courts have considered a tribe's interest in imposing a tax, however, the courts have concluded based on the evidence that the state tax would not adversely affect the tribe's ability to impose its tax. *See, e.g., Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 173, 191 (1989) (finding no evidence in record that dual state and tribal taxes had any adverse impact on tribe); *Gila River II*, 91 F.3d at 1239 (9th Cir. 1996) (rejecting as speculative tribe's assertion that dual taxation would harm tribe); *Salt River*, 50 F.3d at 738 (concluding that state's 5% tax has not prevented tribe from imposing its 1% tax).

In *Colville*, by contrast, the Supreme Court recognized that the state tax at issue *would* adversely affect the tribes' ability to impose their own taxes and, indeed, would eliminate the bulk of the business at the tribal smokeshops. The Court in *Colville* explained the process for weighing a tribe's interest against state taxation under these circumstances:

> While the Tribes do have an interest in raising revenues for essential governmental programs, *that interest is strongest* when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services.

447 U.S. at 156-57. There was no evidence before the Court in *Colville* that the state tax at issue would burden commerce that would exist on the reservations if the state tax were imposed with a credit for tribal taxes paid. Indeed, the evidence before the Court showed quite the contrary:

> [E]ven if credit were given, the bulk of the smokeshops' present business would still be eliminated, since nonresidents of the reservation could purchase cigarettes at the same price and with greater convenience nearer their homes and would have no incentive to travel to the smokeshops for bargain purchases as they do now.

*Id.* at 158. Based on the record before it, the Court concluded that the tribes' interest in imposing their own taxes should not be accorded significant weight in the balancing of interests. *Id.* at 157-58; *see also Sac & Fox*, 213 F.3d at 585 (relying heavily on *Colville*'s analysis of economic realities to reverse summary judgment granted to tribes challenging Kansas fuel tax and remand to district court for examination of "what the precise economic realities of the situation are both in the presence and absence of the motor fuel tax" and "whether and to what extent the motor fuel tax would burden commerce derived from value generated on Indian lands").

In the present case, unlike *Colville*, the Kansas tax clearly burdens commerce derived from reservation value. As a result, the tribal and federal interests against state taxation would be sufficient to invalidate the Kansas tax *even if the Nation imposed no tax at all*. That the Nation *does* impose a tax that raises substantial revenues and uses those revenues to provide essential governmental services on its reservation further strengthens the Nation's already strong interests against state taxation in this case.

The uncontroverted evidence before the district court established the following:

- The Nation's fuel tax generates approximately $300,000 per year for the Nation, which makes periodic transfers of the tax to the Nation's Road and Bridge Department. The Nation's fuel tax thus enables the Nation to provide essential governmental services to its reservation, its customers and its members, and to safeguard the self-sufficiency and self-governance of the Nation. (Facts 8&9)

- The tax imposed on the Nation Station is the Nation's only source of fuel tax revenues. (Fact 8)

- The Nation would be *unable* to impose its tax on the Nation Station to raise revenues for these essential services if the Kansas tax also were imposed. (Fact 10)

In the face of this evidence, the district court reached the astonishing and erroneous conclusion that "the Tribe has failed to show that the state motor fuel tax substantially affects its ability to offer governmental services or in any way

affects the Tribe's right of self-government." (Ex. A 25-26; A(V) 69-70) Perhaps to justify this false conclusion, the district court repeatedly asserted that the Nation's *customers* and not the Nation would bear the *direct* economic burden of the Kansas tax. (Ex. A 22, 24; A(V) 66, 68) The court failed to recognize, however, that the Nation would bear a significant *indirect* economic burden of the Kansas tax, because the Nation could not impose its own tax if the Kansas tax also were imposed.[7]

In a further attempt to minimize the significance of the Nation's interest in imposing its taxes, the district court suggested that the Nation's customers do not receive significant governmental services from the Nation. (Ex. A 25 n.101; A(V) 69 n.101) However, the uncontroverted evidence summarized above establishes that the Nation indisputably provides services to these constituents. Thus, this additional attempt by the district court to discount the Nation's compelling interest in imposing its fuel tax also must fail.

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[7] In emphasizing that the Nation's customers would bear the direct economic burden of the Kansas tax, the district court relied on this Court's statements in *Sac & Fox* regarding this burden. *See* 213 F.3d at 584. The *Sac & Fox* Court appreciated that *Colville* was decided based on economic realities, however, and was mindful that the Kansas tax may impose *indirect* economic burdens on a tribe or tribal members that may be relevant to the particularized inquiry that is required in the balancing of interests. Indeed, this Court remanded the case in *Sac & Fox* for, *inter alia*, a determination under the balancing test of "the precise economic realities of the situation . . . both in the presence and absence of the motor fuel tax." *Id.* at 585.

Although the district court purported to recognize in general that the Nation has an interest in imposing taxes to raise revenues, the court accorded no weight at all to this interest under the circumstances of this case in concluding that the evidence favoring Kansas's interest was "so one-sided that the defendant was entitled to prevail as a matter of law." (Ex. B 5; A(V) 175) Because the Nation's tax is imposed on a reservation activity in which the Nation plays the central role, and because the tax revenues enable the Nation to construct and maintain reservation roads and related infrastructure that are burdened by the activity, the Nation's interest in imposing the tax is especially compelling and the district court's failure to accord it any weight in the balancing of interests is especially egregious. For this reason, this Court should reverse the district court's order for summary judgment.

### 3. The District Court Totally Overlooked the Federal Interests Against State Taxation.

#### a. The Federal Indian Trader Statutes By Themselves Preempt the State Tax.

The Supreme Court held in *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965), and *Central Machinery Co. v. Arizona Tax Commission*, 448 U.S. 160 (1980), that the federal Indian Trader Statutes, 25 U.S.C. §§ 261-264, categorically bar the imposition of state taxes on non-Indians with respect to their sales made to Indians and Indian tribes on their

reservations. The Indian Trader Statutes provide, in pertinent part, that the Commissioner of Indian Affairs "shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." 25 U.S.C. § 261. The Commissioner has issued detailed regulations that govern all aspects of trading with reservation Indians. 25 C.F.R. §§ 140.1-140.26. As the Court reasoned in *Warren Trading*, "Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders," *id.* at 690, and the Court's holdings in *Warren Trading* and *Central Machinery* are fully applicable to the Kansas tax at issue here.

We recognize that this Court held in *Sac & Fox* that the Indian Trader Statutes did not prevent enforcement of the Kansas fuel tax with respect to transactions between non-Indian distributors and various Kansas tribes. 213 F.3d at 583. To the extent that *Sac & Fox* can be read to hold categorically, without limitation to the facts of that case, that the Indian Trader Statutes permit the imposition of the Kansas fuel tax upon any supplier with respect to fuel sales to Indians on their reservation, the decision would clearly violate binding Supreme Court precedents and should be reconsidered by the *en banc* Court.

### b. Other Strong Federal Interests Weigh Against State Taxation.

In addition to the categorical bar imposed by the Indian Trader Statutes, strong federal interests reinforce the strong tribal interests weighing against state taxation. The district court totally overlooked these federal interests against state taxation in balancing the interests.

Just as in *Indian Country, U.S.A.*, where the federal government's heavy involvement in promoting and assisting in the development of tribal bingo enterprises carried great weight with this Court in striking down a state tax on non-Indians, the federal government's heavy involvement in promoting and assisting in general tribal economic enterprise development provides a strong federal interest against imposition of the Kansas fuel tax. There is perhaps no stronger federal policy goal in the area of Indian affairs than tribal economic development and self-sufficiency. This goal is stated explicitly in numerous Acts of Congress, including, among others, the Indian Reorganization Act, 25 U.S.C. §§ 461 to 479 (the "IRA"), the Indian Self-Determination Act, 25 U.S.C. § 450f *et seq.*, the Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.*, and, of course, the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*, §2701(4) ("IGRA"). As discussed above, the Nation Station is an immediate outgrowth and result of the Nation's IGRA casino. (Fact 3(A))

Numerous Executive Branch policies likewise state the federal policy goal of tribal economic development and self-sufficiency, which encompasses the goal of economic diversification beyond gaming and promoting inter-tribal commerce to develop tribal markets. *E.g.*, Presidential Proclamation 7500 of November 12, 2001, 66 Fed. Reg. 57641 (Nov. 15, 2001) ("My Administration will continue to work with tribal governments on a sovereign to sovereign basis to provide Native Americans with new economic and educational opportunities. . . . We will protect and honor tribal sovereignty and help to stimulate economic development in reservation communities."); Presidential Executive Order 13175, 65 Fed. Reg. 67249, Consultation and Coordination With Indian Tribal Governments, Sec. 2(a), (Nov. 6, 2000) ("the United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination") The federal government programs and initiatives to promote tribal economic development are too numerous to catalogue here. Just one example is Native eDGE (economic Development Guidance and Empowerment), "an interagency initiative of the Federal Government to facilitate sustainable economic development within American Indian and Alaska Native communities." (http://nativeedge.hud.gov/reference/whatisedge.asp.)

Another of the federal government's most consistently expressed Indian policy goals since Congress's enactment of the IRA in 1934 has been promoting tribal self-government. This goal, like the goal of tribal economic development and self-sufficiency, is stated explicitly in numerous Acts of Congress, including the IRA, IGRA, and the Indian Civil Rights Act of 1968, 25 U.S.C.§1301 et seq. Congress enacted the IRS "to provide a mechanism for the tribe as a governmental unit to interact with and adapt to a modern society... " F. Cohen, *Handbook of Federal Indian Law* 147 (1982 ed.). The "intent and purpose of the Reorganization Act was to 'rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973), quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934). The district court would categorically restrict the scope of tribal self-government interests to "Indian products," such as baskets, jewelry and other products made by Indians. This is unreasonable in a business sense, and it is contrary to Congress's intent that Indian tribes should be empowered to operate in the modern world. This federal interest in modernizing Indian governments is served by protecting the Nation's self-government interest in its bona fide, modern-day retail activities.

When Congress passed the Indian Tribal Government Tax Status Act of 1982, P.L. 97-473, § 201 et seq., it explicitly recognized the importance of tribal taxation:

> Many Indian tribal governments exercise sovereign powers; often this fact has been recognized by the United States by treaty. With the power to tax, the power of eminent domain, and police powers, many Indian tribal governments have responsibilities and needs quite similar to those of state and local governments. Increasingly, Indian tribal governments have sought funds with which they could assist their people by stimulating their tribal economies and by providing governmental services. The committee has concluded that, in order to facilitate these efforts of the Indian tribal governments that exercise such sovereign powers, it is appropriate to provide these governments with a status under the Internal Revenue Code similar to what is now provided for the governments of the states of the United States.

S. Rep. No. 97-646, 1982 U.S.C.C.A.N. 4580, 4589. This Act requires that tribal taxes receive treatment equal to state taxes for purposes of deductibility.

> The bill provides that Indian tribal governments are to be treated as states for purposes of the deduction for taxes under section 164. As a result, if a tax imposed by an Indian tribal government falls into any of the categories of taxes that may be deducted under section 164 if imposed by a state, then the Indian tribal government tax is also deductible for federal income tax purposes.

S. Rep. No. 97-646, 1982 U.S.C.C.A.N. 4580, 4593; see also 26 U.S.C. § 7871(a)(3). The Indian Tribal Government Tax Status Act demonstrates the

specific federal interest in encouraging tribal taxation to support self-sufficient tribal government.

The district court's failure to consider and weigh these federal interests in tribal economic development, tribal self-sufficiency, and strong tribal governments, which reinforce the strong tribal interests discussed above, provides an additional basis for reversal of the district court's order for summary judgment.

### 4. The District Court Misconstrued and Exaggerated the State Interest By Erroneously Focusing on Unspecified Off-Reservation State Services Provided to the Nation's Customers.

The district court's holding rested heavily on its conclusion that the state possessed a strong interest in imposing its tax on the Nation's fuel. (Ex. A 26; A(V) 70) In defining and evaluating the state interest in this case, however, the district court seriously deviated from governing federal precedents and grossly exaggerated the strength of the state interest in this case.

In assessing the state interest in imposing a tax under the balancing test, federal courts examine two main issues. First, the courts evaluate the nature and extent of state services provided to the party that bears the *legal incidence* of the tax. In *Bracker*, 448 U.S. at 150, for instance, the Supreme Court examined the state's regulatory interest and services provided to the non-Indian

logging company which bore the legal incidence of the motor vehicle licensing and fuel use taxes that Arizona imposed on the company's on-reservation activities. Similarly, in *Indian Country, U.S.A.,* 829 F.2d at 987, this Court assessed Oklahoma's interest in imposing its sales tax with respect to an Indian tribe's bingo activities by evaluating the State's interest in and services to the bingo patrons, who bore the legal incidence of the state sales tax. Numerous other cases confirm that the state services considered under the balancing test are those provided to the "taxpayer" – the party who bears the legal incidence, not the economic burden, of the tax. *See, e.g., Colville*, 447 U.S. at 157 (evaluating state services provided to the customer, who bore the legal incidence of the Washington cigarette tax); *Cotton Petroleum*, 490 U.S. at 185 (evaluating state services and regulations with respect to on-reservation petroleum company that bore the legal incidence of five New Mexico oil and gas production taxes); *Salt River*, 50 F.3d at 336 (assessing the state services provided to non-Indian lessees selling upon an Indian reservation who bore the legal incidence of Arizona's gross receipts tax).

Second, the federal courts assess the state's services with respect to the *on-reservation activities affected by the state tax.* As the Supreme Court stated in *Mescalero Apache Tribe*, 462 U.S. at 336, "[t]he exercise of State authority which imposes additional burdens on a tribal enterprise must ordinarily be

justified by functions or services performed by the State *in connection with the on-reservation activity*" (emphasis added). Thus, in preempting the Arizona motor vehicle licensing and use fuel taxes, the court in *Bracker* emphasized that Arizona could not identify "any regulatory function or service performed by the State that would justify the assessment of taxes for activities on Bureau and tribal roads within the reservation." 448 U.S. at 148-49. Similarly, the Court in *Ramah Navajo School Board, Inc. v Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982), attached little importance to the *off-reservation* state services provided to the non-Indian contractor (Lembke) whom New Mexico sought to tax for constructing a reservation school, noting that "[p]resumably, the state tax revenues derived from Lembke's off-reservation business activities are adequate to reimburse the State for the services it provides to Lembke." 458 U.S. at 844 n.9. The *Ramah Navajo* decision rather focused on existence of state services to Indian education within the reservation, which it found almost entirely lacking. *Id.* at 843-44. In *Indian Country, U.S.A.*, this Court stressed that the State lacked any regulatory interest over the tribe's on-reservation bingo activity and that "the State has pointed to no services that it provides on Creek Nation lands that would justify the tax." 829 F.2d at 987. The *Indian Country, U.S.A.* Court added that the state interest in its residents "is substantially diminished when the residents engage in activities largely beyond

the state's jurisdiction and control . . . ." *Id.* Only where the State provides substantial on-reservation services benefiting the activities burdened by the state tax have federal courts found a significant state interest for purposes of the balancing test. *See, e.g.*, *Cotton Petroleum*, 490 U.S. at 185-86 (substantial regulatory services directly relating to oil and gas production); *Chemehuevi*, 800 F.2d at 1449 ("substantial services on the reservation" relating to highways, education, transportation and law enforcement).

The district court decision simply ignored these federal principles in evaluating the state interest in this case. First, the district court erroneously evaluated the state services provided to the Nation's *customers*, who do not bear the legal incidence of the tax, *Sac & Fox*, 213 F.3d at 580, but only the economic burden of the tax. (Ex. A 26; A(V) 70) The district court appears to have misunderstood the *Salt River* decision which, contrary to the court's assertion, did *not* consider the governmental services provided to consumers who bore "the ultimate economic burden of the state tax," but rather the governmental services provided to the non-Indian merchants, who were the "taxpayers" bearing the legal incidence of the Arizona gross receipts tax. In the present case, the state services relevant to the balancing inquiry are those provided to Davies Oil, which alone bears the legal incidence of the Kansas fuel tax. Needless to say, the state services provided to Davies Oil are significantly

less than those provided to the thousands of customers of the Nation, and should be offset by the fuel tax and other fees paid by Davies Oil in driving its tanker trucks to the Nation Station.

Second, the district court erroneously considered state services provided off the Nation's reservation and failed to show any relation between such services and the on-reservation activity burdened by the fuel tax. The court's memorandum and order granting defendant's motion for summary judgment emphasized that the consumers "who bear the ultimate economic burden of the fuel tax . . . are provided governmental services by the state," and that "[i]t cannot be disputed that Kansas provides governmental services off the reservation to the non-Indian purchasers of fuel." (Ex. A 22; A(V) 60) The court's memorandum and order denying plaintiff's motion to reconsider and alter judgment confirmed that its summary judgment holding rested solely on the state's provision of "governmental services . . . off the reservation" and did not depend on the presence of "state services on and near the reservation." (Ex. B 5; A(V) 175) In fact, the Nation timely moved to exclude the state's exhibits purporting to show its on-reservation services, upon which motion the court had not acted and could not properly rely for purposes of considering defendant's summary judgment motion. The court's exclusive consideration of off-

reservation services sharply departs from federal Indian law principles applicable to the balancing test.

The district court not only erred by focusing on off-reservation state services, it compounded this error by (1) failing to specify the type and nature of these state services, (2) failing to assess the relation between such services and the on-reservation activity burdened by the fuel tax, and (3) failing to assess the quantum of services provided. With respect to (3), for instance, the district court wholly failed to consider that many customers at the Nation Station are non-Kansas residents and receive very few services from the State of Kansas. The reason for the court's failure to address these issues is obvious: neither the Nation nor the state had introduced *any* evidence before the court on the nature, amount and relevance of the state's *off-reservation* services. Far from conducting the "particularized inquiry into the nature of the state . . . interests at stake," as required by *Bracker* and its progeny, the district court simply *posited*, without any record evidence, the presence of an unelaborated but sufficiently large off-reservation "state interest" to overcome the significant, documented federal and tribal interests in this case.

In analyzing the state interest, therefore, the district court focused on the wrong recipient of state services and the wrong location of state services, and it did so without inquiring into the particular nature or quantum of the services,

without considering whether or how such services relate to the on-reservation activity burdened by the tax, and without relying on a scrap of evidence properly before the court. In so proceeding, the district court greatly exaggerated the strength of the state interest in this case. For these reasons, this Court should reverse the district court's order for summary judgment.

### B. When the District Court's Errors Are Eliminated, the Balance of Federal, Tribal, and State Interests Tips Decisively Against State Taxation.

As demonstrated above, the district court disregarded the substantial reservation value embodied in the Nation's fuel sales, unfairly dismissed the Nation's substantial interest in imposing its own fuel tax, overlooked the strong federal interest against imposition of the state tax, and grossly exaggerated the state's interest in imposing the tax. After eliminating the district court's errors, the balance of interests stands as follows:

- The Nation has demonstrated a substantial tribal interest against imposition of the Kansas fuel tax upon the Nation's fuel because imposition of the state tax would (a) fall upon reservation value generated by the Nation's own economic enterprise and not attributable to state aid or services, and (b) preclude the Nation from imposing its own fuel tax and thereby frustrate its desire and responsibility to carry out maintenance and repair activities upon reservation roads and other essential governmental functions.
- The Nation has demonstrated a substantial federal interest against imposition of the Kansas fuel tax upon the Nation's fuel because imposition of the tax would flatly contravene the Indian Trader Statutes, as interpreted and enforced by the United States Supreme

Court, and would violate the federal policies of fostering tribal self-sufficiency, tribal self-government and economic development within Indian country.

- There are no facts of record demonstrating the existence of a state interest relevant to the balancing test.

Based on the foregoing, the balance of tribal, federal and state interests tips decisively against imposing the tax. Accordingly, this Court should not only reverse the district court's order of summary judgment for defendant, but enter an order for summary judgment in favor the Nation.

## II. THE KANSAS MOTOR FUEL TAX AT ISSUE IS INVALID AS A MATTER OF FEDERAL LAW BECAUSE IT IMPERMISSIBLY INFRINGES ON THE NATION'S RIGHTS OF TRIBAL SELF-GOVERNMENT.

Based upon its erroneous finding of no on-reservation tribal value, the district court held that *Colville* broadly permits the destruction of the Nation's business and its governmental system of tribal fuel taxation. The court stated that its opinion is not altered by the infringement test or the Kansas Act for Admission. (Ex. A 22-28, A(V) 66-72)

### A. The State Tax Fails the Infringement Test.

Under a separate federal doctrine that overlaps with balancing of interests analysis, a state tax must be struck down as a matter of federal law if it infringes on inherent rights of tribal self-government. *Bracker*, 448 U.S. at 142; *see also*

*Williams v. Lee*, 358 U.S. 217, 220 (1959) (state court jurisdiction improper because it "infringe[s] on the right of reservation Indians to make their own laws and be ruled by them"). The unlawful infringement test requires courts to "[seek] an accommodation between the interests of the Tribe and the Federal Government, on the one hand, and those of the State, on the other." *Colville*, 447 U.S. at 156.

The Nation has the self-government right to impose tribal fuel taxes on Indian and non-Indian commerce to fund its government:

> Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except were Congress has provided otherwise, the power may be exercised over members of the tribe and over non-members, so far as such non-members may accept privileges of trade, residence, etc. to which taxes may be attached as conditions.

Powers of Indian Tribes, 55 I.D. 14 (1934), Opinions of the Solicitor, Vol. I, p. 465, A(V) 232, cited with approval in *Cotton Petroleum*, 490 U.S. at 202. Tribal taxation powers encompass non-Indian activity when non-Indians have a consensual relationship with a tribe. *Atkinson Trading Co. v. Shirley,* 532 U.S. 645, 651 (2001), citing *Montana v. United States,* 450 U.S. 544, 559 (1981). Under this principle, the Nation has the clearly-established right to impose tribal taxes on its commerce with both Indians and non-Indians who consensually purchase the Nation Station's fuel. The defendant conceded that

the Nation has the governmental right to impose its tribal fuel taxes and the district court agreed. (Fact No. 7: Ex. B 6, A(V) 176)

In the current case, the indirect economic burden of the state tax falls on the Nation by destroying its tribal business and rendering useless its governmental right to impose tribal fuel taxes. (Fact Nos. 9-10) The Nation has imposed tribal fuel taxes on a tribal retail business to fund its own tribal government operations. All of these activities are central to the tribal affairs and self-government of the Nation as an Indian Tribe. Therefore, the state tax here is particularly invasive in its infringement upon the Nation's self-government rights. The burden of the state tax in this case cuts to the heart of the exercise of tribal sovereignty.

The tax is particularly burdensome on the Nation's self-government because the Nation Station is the Nation's *only* source of fuel tax revenue. (Fact 18) Federal law limits the circumstances in which Indian tribes may tax non-Indian businesses on their reservations. *Atkinson Trading Co,* 532 U.S. at 645. As a result, the Nation has concluded that it is unable to impose its fuel tax upon the two reservation fuel stations that are owned by non-members of the Nation, even though the Nation provides substantial governmental services to those stations and their customers who consume the fuel purchased there on tribally-maintained reservation roads. (A(II) 86) The State of Kansas is already

collecting fuel taxes with respect to these non-member fuel stations on the reservation. *See Kaul v. State Dept of Revenue*, 266 Kan. 464, 970 P.2d 60 (1998), *cert. denied* 528 U.S. 812 (1999).

The tribal fuel taxes from the Nation Station are very important because the Nation maintains the majority of reservation roads with fuel taxes from only one-third of the reservation fuel stations. (Fact No. 12) If the Nation can't even tax its own tribal business, it will have no fuel tax revenue at all. Clearly, the complete loss of this last source of tribal fuel tax revenue from its only tribal fuel station would burden and infringe upon the Nation's self-government right of tribal taxation. (Fact Nos. 8-10) Therefore, the state tax in this case fails the infringement test, providing an additional ground for reversal.

### B. The State Tax Violates the Kansas Act for Admission by Impairing the Nation's Rights.

Section 1 of the Kansas Act for Admission provides:

> That nothing contained in said [Kansas] constitution respecting the boundary of said state shall be construed to impair the rights of person or property now pertaining to the Indians of said territory, so long as such rights remain unextinguished by treaty between the United States and such Indians...

12 Stat. 127, ch. 20, §1; Jan. 29, 1861. (A(III) 165) The United States and Kansas Supreme Courts have both construed Section 1 to prohibit the impairment of Indian rights:

> "...Kansas accepted her admission into the family of States on condition that the Indian rights should remain unimpaired..." *The Kansas Indians*, 72 U.S. 737, 756 (1866).
>
> "Under 1861 Act for Admission of Kansas into the Union, no personal or property rights that Indians possessed before State of Kansas was admitted into the Union, or before Territory of Kansas was organized, can be impaired unless such rights are extinguished by treaty between the United States and the Indians..." *In the Application for Tax Exemption of Nina Kaul*, 261 Kan. 755, 770, Syl. ¶8, 933 P.2d 711 (1997).

In a general sense, the state tax in the current case is violating Section 1 by impairing the Nation's right of tribal taxation. (Fact 10)

In a more specific sense, contrary to Section 1, the boundary of the state is being construed in a way that impairs the Nation's rights. If not for the inclusion of the Nation's jurisdiction within the state's boundaries, the Nation would be allowed the state exemption for deliveries to out-of-state jurisdictions under K.S.A. 79-3408(d)(1). The loss of this state exemption due to the inclusion of the Nation's jurisdiction within the state boundaries is impairing its right of tribal taxation, contrary to a reasonable reading of Section 1.

This interpretation of Section 1 to preserve the Nation's taxation rights unimpaired by the creation of the state boundaries is also supported by U.S. Supreme Court decisions of that time.

> "In July, 1859, a constitution was formed for the State of Kansas, in which it was provided that all rights of individuals should continue as if no State had been formed, or change in government made.
>
> In January, 1861, an act for the admission of the State was passed by Congress. [FN6] In this it was provided 'that nothing contained in this said constitution respecting the boundaries of said State shall be construed to impair *the rights of person or property now pertaining to the Indians of said territory*, so long as such rights shall remain unextinguished by treaty with such Indians.'" *The Kansas Indians*, 72 U.S. at 740-741.
>
> "In the cases of the Kansas Indians, 5 Wall. 737, we held that a state, when admitted into the Union, was bound to respect an exemption from taxation which it had previously granted to tribes of Indians within its borders, because, as the court said, the state of Kansas 'accepted this status when she accepted the act admitting her into the Union. Conferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or voluntary abandonment of their tribal organization.'" *Ward v. Race Horse*, 163 U.S. 504, 519 (1896).

*Kansas Indians* held that when Kansas was created, Indian rights "should continue as if no State had been formed, or change in government made." 72 U.S. at 740. The preservation of these rights would be accomplished by the federal courts preempting the state fuel tax and/or determining that Section 1 requires that the K.S.A. 79-3408(d)(1) exemption to be allowed.

The Nation believes that Section 1 is by itself sufficient to invalidate the state fuel taxes because they are impairing the Nation's rights. "Congress

clearly saw state disclaimer clauses as independent obstacles to a state's assertion of [] jurisdiction." (A(V) 202, David E. Wilkins, *Tribal-State Affairs: American States as "Disclaiming" Sovereigns*, Chapt. 1, p. 19, from *The Tribes and the States: Geographies of Intergovernmental Interaction*, Brad A. Bays and Erin Hogan Fouberg (Rowman & Littlefield Publishers, Inc. 2002) At the very least, Section 1 adds further weight to the compelling tribal and federal interests in this case under the balancing test. "These express guarantees supplement and reinforce the usual preemption consideration that state laws not interfere with tribal interests and governance." *Indian County, U.S.A.*, 829 F.2d at 985.

Any ambiguities in Section 1 are required to be construed if favor of the Nation. "[S]tatutes passed for the benefit of dependent Indian tribes ... are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976). "[W]e construe all ambiguities in favor of Indian sovereignty." *Duke v. Absentee Shawnee Tribe of Oklahoma Housing Authority*, 199 F.3d 1123, 1125 (10th Cir. 1999), and *Merrion v. Jicarilla Apache Tribe*, 617 F.3d 537, 547 (10th Cir. 1980), *aff'd*, 455 U.S. 130, 152 (1982). A reasonable reading of Kansas Act for Admission Section 1 prohibits the state from impairing the Nation's right of tribal taxation of its commerce at the Nation Station.

## III. ALTERNATIVELY, THE COURT SHOULD REMAND THE CASE TO THE DISTRICT COURT TO UNDERTAKE THE PARTICULARIZED INQUIRY THAT IS REQUIRED IN DETERMINING THE VALIDITY OF THE TAX AND FOR TRIAL OF ANY DISPUTED FACT ISSUES.

In the alternative, instead of reversing the district court's order of summary judgment and ordering that summary judgment be entered in favor of the Nation, the Court should reverse and remand to the district court for the particularized inquiry required by federal law. The Court should provide the following instructions to the district court to guide its determination on remand:

1. In determining whether the Nation's enterprise embodies reservation value, the court should examine the general economic enterprise as a whole, including the elements of location and marketing efforts and the tribe's investment in, control over, and participation in the enterprise.

2. In further assessing the strength of the tribal interest, the court should consider the precise economic realities of the situation both in the presence and absence of the Kansas tax.

3. The court should further consider whether federal interests reinforce any tribal interests against state taxation.

4. In addressing the state interest, the court should focus on the nature and extent of state services provided to Davies Oil with respect to the on-reservation activities affected by the state tax.

Although we do not believe there are any issues of fact that would require a trial in the event of such a remand, further development of the factual record may be desirable to inform the Court's particularized inquiry. A trial could be necessary if issues do arise as to which there are factual disputes.

## CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, this Court should reverse the district court's decision granting summary judgment to the defendant and order that the district court enter judgment for the Nation. Alternatively, the Court should remand the case to the district court to conduct the required particularized inquiry regarding the nature and weight of the tribal, federal, and state interests at stake and whether imposition of the Kansas fuel tax impermissibly infringes on the Nation's right of self-government.

## STATEMENT REGARDING ORAL ARGUMENT

The issues raised in this appeal are significant and important to the proper exercise of federally-recognized sovereign rights of Indian tribes without state interference. The issues are of wide tribal interest to all Indian Tribes in the United States. Oral argument will also assist the court in better understanding

this case, the proceedings below and the nature and extent of the tribal, federal and state interests involved.

Respectfully submitted,

/S/

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## CERTIFICATE OF COMPLIANCE

The Nation's counsel hereby certifies that this brief complies with the type-volume limitations of Fed. R. App. P. Rule 32(a)(7)(B). According to the Nation's word-processing system, this brief contains 13,617 words, exclusive of the table of contents, table of citations, statement with respect to oral argument, and certificates of counsel.

/S/

David Prager, III

## CERTIFICATE OF SERVICE

I hereby certify that two copies of this Appellant's Brief and one set of copies of Appellant's Appendix Vols. I-V were hand-delivered on September 22, 2003, to:

John Michael Hale, Kansas Department of Revenue, 2nd Floor, 915 S.W. Harrison, Topeka, KS 66612-1588,

which is the last known address, by way of United States mail or courier.

I also certify that on September 22, 2003, an original and seven copies of the Appellant's Brief and two sets of copies of the Appellant's Appendix Vols. I-V was mailed to:

Patrick Fischer, Clerk, U.S. 10th Circuit Court of Appeals, Byron White U.S. Courthouse, 1823 Stout Street, Denver CO 80257

by way of U.S. First Class Mail or other class of U.S. mail that is at least as expeditious.

9-22-03
Date

/S/
David Prager, III

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<KeyCite Citations>

United States District Court,
D. Kansas.

PRAIRIE BAND POTAWATOMI NATION, Plaintiff,
v.
Stephen RICHARDS, Secretary of the Kansas Department of Revenue, State of Kansas, Defendant.

No. 99-4071-JAR.

Jan. 15, 2003.

Indian tribe brought action for declaratory and injunctive relief from state's collection of motor fuel tax from distributors delivering fuel to reservation. State moved for summary judgment. The District Court, Robinson, J., held that: (1) Court had jurisdiction to hear tribe's claim; (2) tribe had standing to bring action; (3) Hayden-Cartwright Act did not amount to Congressional authorization for states to impose fuel tax on fuel delivered to Indian reservations; (4) state was not barred by federal preemption from imposing tax; (5) tribe's interest in raising revenues did not outweigh state's interests; and (6) Kansas Act for Admission did not bar imposition of tax.

Motion granted.

West Headnotes

[1] Federal Courts k265
170Bk265

[1] Federal Courts k274
170Bk274

[1] Federal Courts k275
170Bk275

Eleventh Amendment grants states sovereign immunity from suits in federal court brought by the state's own citizens, citizens of another state, citizens of a foreign state, suits by other sovereigns and suits by an Indian tribe. U.S.C.A. Const.Amend. 11.

[2] Federal Courts k272
170Bk272

District Court had jurisdiction to hear Indian tribe's action for declaratory and injunctive relief against state's collection of motor fuel taxes from distributors delivering fuel to reservation; Eleventh Amendment did not bar claim inasmuch as *Ex Parte Young* exception was applicable. U.S.C.A. Const.Amend. 11; 28 U.S.C.A. § 1362.

[3] Federal Courts k12.1
170Bk12.1

Federal courts have jurisdiction to hear a matter only if an actual case or controversy exists. U.S.C.A. Const.Art. 3, § 2, cl. 1.

[4] Federal Civil Procedure k103.2
170Ak103.2

In determining whether a case or controversy exists, as required for its jurisdiction to hear a matter, District Court must evaluate whether plaintiff has standing to sue. U.S.C.A. Const.Art. 3, § 2, cl. 1.

[5] Federal Civil Procedure k103.2
170Ak103.2

[5] Federal Civil Procedure k103.3
170Ak103.3

To meet the standing requirement, a plaintiff must allege (1) a concrete and particularized actual or imminent injury, (2) which is fairly traceable to defendant's conduct, and (3) which a favorable court decision will redress.

[6] Federal Civil Procedure k103.4
170Ak103.4

To have standing to bring suit in federal court, a plaintiff must assert its own rights and not those of others.

[7] Federal Civil Procedure k103.4
170Ak103.4

A plaintiff will not meet the standing requirement if he or she asserts a generalized grievance shared by a large class of citizens.

[8] Federal Civil Procedure k103.2
170Ak103.2

For a plaintiff to have standing to being an action in federal court, the interest which he or she wants protected must be within the zone of interests to be protected by the statute or Constitutional guarantee at issue.

[9] Indians k27(1)
209k27(1)

[9] Taxation k1319
371k1319

Indian tribe had standing to bring action for declaratory and injunctive relief against state's collection of motor fuel tax from distributors delivering fuel to reservation; alleged injuries included interference with tribe's right of self government and economic injury, alleged injury was directly traceable to state's desire to impose a fuel tax, in that tax would be passed on directly to retailers, and decision for tribe would redress injury inasmuch as tax would not be passed through to tribe if distributors were not required to pay it.

[10] Taxation k1209
371k1209

A state may not levy taxes on Indian tribes or individual Indians inside Indian country without express approval of Congress.

[11] Indians k3(3)
209k3(3)

Because of the unique trust relationship between the United States and Indian Nations, statutes that affect Indians are to be construed broadly, with any ambiguous provision to be interpreted to their benefit.

[12] Taxation k1209
371k1209

Hayden-Cartwright Act did not amount to Congressional authorization for states to impose fuel tax on fuel delivered to Indian reservations; Act was ambiguous in that it did not expressly approve state taxation of motor fuel on Indian reservations, and thus, statute was construed in favor of tribe and interpreted so as to not grant such taxing authority. 4 U.S.C.A. § 104.

[13] Taxation k1209
371k1209

A state tax is unenforceable if the legal incidence of the tax falls on an Indian tribe or its members for sales made within Indian country.

[14] Taxation k1209
371k1209

If the legal incidence of a state tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if balance of federal, state, and tribal interests favors the state, and federal law is not to the contrary, state may impose its levy.

[15] States k18.75
360k18.75

[15] Taxation k1209
371k1209

State of Kansas was not barred by federal preemption from imposing fuel tax on motor fuels delivered to Indian-owned gas station on reservation; legal incidence of tax fell on non-Indians, tribe was importing a non-Indian product and reselling it mostly to non-Indians, and consumers who bore ultimate burden of tax were provided governmental services by state.

[16] Taxation k1209
371k1209

In balancing of state and tribal interests in raising revenue, for purpose of determining whether state fuel tax infringes on Indian tribe's right of self- government, tribe's interest is strongest when the revenues are derived from value generated on the reservation by activities involving the tribe and when the taxpayer is the recipient of tribal services; if the tribe earns its profits simply by importing non-Indian products onto reservation for resale to non-Indians free from state taxation, the profits are not derived from value generated on Indian lands.

[17] Indians k32(9)
209k32(9)

Indian tribe's power to tax transactions occurring on trust lands is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law.

[18] Taxation k1209
371k1209

Indian tribe's interests in raising revenues did not outweigh state's legitimate interest in raising revenues, and so did not bar Kansas tax on motor fuels delivered to reservation, even if value of fuels sold on reservation was derived on reservation land; legal incidence of tax was directed off- reservation at fuel distributors, only a small part of sales were to recipients of tribal services, fact that double taxation might result did not require invalidation of state's tax, and tribe's right to self-government would not be affected.

[19] Indians k32(9)
209k32(9)

[19] Taxation k1209
371k1209

Kansas Act for Admission did not bar imposition by state of Kansas of tax on motor fuels delivered to reservation, even if Act could be read to preserve tribe's sovereign right to impose taxes and engage in commercial business on reservation; tribe's right to impose taxes did not oust state from imposing taxes on sales made to non-Indians, and such tax could be valid even if it disadvantaged Indian retailers' business with non-Indians. Act Jan. 29, 1861, § 1, 12 Stat. 126.
*1297 David Prager, III, Mayetta, KS, for Plaintiff.

John Michael Hale, Kansas Department of Revenue, Topeka, KS, for Defendant.

*MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT*

ROBINSON, District Judge.

This action is before the Court on defendant's Motion for Summary Judgment (Doc. 49). Plaintiff has filed a Response (Doc. 59) and defendant has filed a Reply (Doc. 68). The Court has reviewed the parties' filings and is now prepared to rule.

I. FACTS

The following facts are taken from the record and are either stipulated, uncontroverted or viewed in the light most favorable to plaintiff's case. The Court ignores factual assertions that are immaterial, or unsupported by affidavits and/or authenticated and admissible documents. The Court also disregards conclusory statements.

Plaintiff, the Prairie Band Potawatomi Nation ("Tribe"), is a federally recognized Indian tribe whose reservation is in Jackson County, Kansas. Pursuant to the Indian Gaming Regulatory Act, [FN1] the Tribe owns and operates a casino complex on its reservation land near Mayetta, Kansas. In addition to the casino, the Tribe owns and operates a convenience store and gas station, ("Nation Station"), located near the casino. Gasoline and diesel fuel are imported from outside the reservation for re-sale at the Nation Station. Once the fuel arrives on the reservation, the Nation Station unloads, stores, monitors and dispenses the fuel. Fuel sales made to casino *1298 patrons and employees account for approximately seventy-three percent of the total fuel sales. An additional eleven percent of fuel sales are made to people who work on the reservation but not for the casino, tribal government employees, and reservation residents. Seventy-one percent of the Nation Station's proceeds are generated by fuel sales.

FN1. 25 U.S.C. § 2701 *et seq.*

The Tribe imposes a tax of $.16 per gallon of gasoline and $.18 per gallon of diesel fuel. The Nation Station is subject to $300,000 in tribal fuel taxes per year. The Tribe spends revenue from the fuel tax to construct and maintain roads, including the road leading from U.S. Highway 75 to the Tribe's casino and other roads on and near the reservation. The Tribe also provides government services including law enforcement, fire protection, emergency services, education services, urban planning, court services and other miscellaneous services.

Prior to May of 1995, the Kansas Department of Revenue did not collect motor fuel tax on fuel distributed to Indian lands. Then, in 1995, the Kansas legislature amended the Kansas Motor Fuel Tax Act [FN2] and the Department of Revenue began to impose fuel tax on fuel distributed to Indian tribes on tribal land. The structure of the fuel tax statute places the legal incidence of the tax on the fuel distributors, but permits the distributors to pass the tax directly to the fuel retailers. [FN3]

FN2. *See* Kan. Stat. Ann. §§ 79-3401 *et seq.*

FN3. Kan. Stat. Ann. § 79-3409.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. [FN4] A factual dispute is "material" only if it "might affect the outcome of the suit under the governing law." [FN5] A "genuine" factual dispute requires more than a mere scintilla of evidence. [FN6]

FN4. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Vitkus v. Beatrice Co.*, 11 F.3d 1535, 1538-39 (10th Cir.1993).

FN5. *Anderson,* 477 U.S. at 248, 106 S.Ct. 2505.

FN6. *Id.* at 252, 106 S.Ct. 2505.

The moving party bears the initial burden of showing that there is an absence of any genuine issue of material fact. [FN7] Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial "as to those dispositive matters for which it carries the burden of proof." [FN8] The nonmoving party may not rest on its pleadings but must set forth specific facts. [FN9]

FN7. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Hicks v. City of Watonga,* 942 F.2d 737, 743 (10th Cir.1991).

FN8. *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir.1990); *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir.1991).

FN9. *Applied Genetics,* 912 F.2d at 1241.

"[The court] must view the record in a light most favorable to the parties opposing the motion for summary judgment." [FN10] Summary judgment may be granted if the non-moving party's evidence is merely colorable ***1299** or is not significantly probative. [FN11] Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." [FN12]

FN10. *Deepwater Invs., Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1110 (10th Cir.1991).

FN11. *Anderson,* 477 U.S. at 250-51, 106 S.Ct. 2505.

FN12. *Id.* at 251-52, 106 S.Ct. 2505.

III. DISCUSSION

The Tribe brought suit seeking injunctive and declaratory relief, asking the Court to issue an order prohibiting the State from collecting motor fuel tax from fuel distributors who deliver fuel to the Nation Station. The Tribe claims that the Indian Commerce Clause, [FN13] the Tribe's sovereign right to self-government and self-determination, the Act for Admission of Kansas [FN14] or other federal law prohibits imposition of the Kansas fuel tax laws on distributors distributing fuel to the Tribe. Defendant asserts that summary judgment should be granted because the State is entitled to Eleventh Amendment immunity, [FN15] the Tribe lacks standing, and the Hayden- Cartwright Act provides congressional consent for imposition of the State's fuel tax. [FN16] Defendant also asserts that there is no material issue of fact concerning whether the state fuel tax is preempted by federal law, whether the state fuel tax improperly infringes upon the Tribe's sovereign right to self-government, or whether the Kansas Act for Admissions bars imposition of the tax. The Court will take each of defendant's contentions in turn.

FN13. U.S. CONST. art. I, § 8 cl. 3.

FN14. *See* Act for Admission of Kansas into the Union, Ch. XX, § 1, 12 Stat. 126 (1861).

FN15. U.S. CONST. amend. XI.

FN16. 4 U.S.C. § 104.

A. Jurisdiction and the Eleventh Amendment

The Tribe asserts that this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1362, [FN17] which grants district courts original jurisdiction over civil actions brought by federally-recognized Indian tribes wherein the matter in controversy arises under the Constitution, laws or treaties of the United States. Defendant argues that despite the grant of jurisdiction in § 1362, the Eleventh Amendment bars the Tribe's claims. Defendant also asserts that *Ex parte Young,* [FN18] a legal fiction created to overcome the Eleventh Amendment's bar under certain circumstances, is inapplicable in this case. As discussed below, defendant's arguments are unfounded.

FN17. The Tribe also claims jurisdiction under federal question jurisdiction, 28 U.S.C. § 1331.

FN18. 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

[1] The Eleventh Amendment grants states sovereign immunity from suits in federal court brought by the state's own citizens, citizens of another state, citizens of a foreign state, suits by other sovereigns and suits by an Indian tribe. [FN19] In *Ex parte Young,* the Supreme Court created a legal fiction, circumventing Eleventh Amendment immunity for suits seeking injunctive and declaratory relief against state officers, sued in their official capacity, to enjoin an alleged ongoing violation of ***1300** federal law. [FN20] Defendant contends that the *Ex Parte Young* exception is inapplicable in this case because the relief being sought by the Tribe implicates special sovereignty interests.

FN19. *Blatchford v. Native Village of Noatak,* 501 U.S. 775, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991); *Principality of Monaco v. Mississippi,* 292 U.S. 313, 54 S.Ct. 745, 78 L.Ed. 1282 (1934); *Hans v. Louisiana,* 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890).

FN20. *Ex parte Young,* 209 U.S. at 155-56, 28 S.Ct. 441; *see also Alden v. Maine,* 527 U.S. 706, 747-48, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) (affirming the continuing validity of *Ex parte Young* ).

Defendant points to the Supreme Court case *Idaho v. Coeur d'Alene Tribe of Idaho,* [FN21] wherein the Court ruled that the *Ex parte Young* exception could not be entertained when the relief requested would be as much of an intrusion on state sovereignty as an award of money damages. In *Coeur d'Alene,* the tribe sought a declaratory judgment against the state establishing its right to quiet enjoyment to submerged lands located within the

boundaries of the Coeur d'Alene Reservation. [FN22] The tribe also sought injunctive relief against various state officials to prevent them from exercising regulatory jurisdiction over the submerged land. The Court determined that the tribe's claims were the functional equivalent to a quiet title action and if relief was granted, it would have divested the state of substantially all regulatory power over the land at issue. [FN23] Thus, the Court found that the requested relief would affect Idaho's sovereign interests "in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury," defeating plaintiff's *Ex parte Young* action. [FN24]

FN21. 521 U.S. 261, 287, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997).

FN22. *Id.* at 264-65, 117 S.Ct. 2028.

FN23. *Id.* at 265, 117 S.Ct. 2028.

FN24. *Id.* at 287, 117 S.Ct. 2028.

Soon after the Supreme Court's *Coeur d'Alene* decision, the Tenth Circuit decided *ANR Pipeline Co. v. Lafaver,* [FN25] where it held that the states' power to assess and levy personal property taxes on property located within its borders implicated special sovereignty interests, defeating an *Ex parte Young* action. In so holding, the Tenth Circuit interpreted *Coeur d'Alene* as requiring a new two-step analysis for determining whether *Ex parte Young* applies in any given case. According to *ANR Pipeline,* federal courts are to first "examine whether the relief being sought against a state official implicates special sovereignty interests." [FN26] If the answer to the first inquiry is affirmative, the court "must then determine whether that requested relief is the functional equivalent to a form of legal relief against the state that would otherwise be barred by the Eleventh Amendment." [FN27]

FN25. 150 F.3d 1178, 1193 (10th Cir.1998).

FN26. *Id.* at 1190 (citations and quotations omitted).

FN27. *Id.*

Relying on *Coeur d'Alene* and the *ANR Pipeline,* defendant asserts that an *Ex parte Young* action does not apply in this case because the relief sought by the Tribe implicates special sovereignty interests in the State's system of taxation and the requested relief would be the functional equivalent to money damages against the State. The Court finds defendant's reliance on these cases is misplaced. To rule otherwise would be to ignore the long line of cases decided in federal court relating to state taxation on tribal affairs. [FN28] As the ***1301** Ninth Circuit pointed out in *Agua Caliente Band of Cahuilla Indians v. Hardin,* [FN29] "in the context of state taxation of *tribes,* there are preemption considerations and *competing* sovereignty interest, the merits of which are governed by a long line of cases." The issues presented by state taxation of tribal interests were not present in either *ANR Pipeline* or *Coeur d'Alene,* both of which have been limited to their particular facts. [FN30] Thus, the Court finds that an *Ex parte Young* action is appropriate under the circumstances of this case.

FN28. *See e.g., Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995); *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980); *Moe v. Confederated Salish and Kootenai,* 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976).

FN29. 223 F.3d 1041, 1048 (2000).

FN30. *Robinson v. Kansas,* 117 F.Supp.2d 1124, 1136-37 (D.Kan.2000) (noting that Tenth Circuit has made it clear that finding a special sovereignty interest such as those found in *ANR Pipeline* and *Coeur d'Alene* is the exception not the rule) (citing *Buchwald v. Univ. of New Mexico Sch. of Medicine,* 159 F.3d 487 (10th Cir.1998); *Elephant Butte Irrigation Dist. v. Dept. of the Interior,* 160 F.3d 602 (10th

Cir.1998); *Branson Sch. Dist. RE-82 v. Romer,* 161 F.3d 619 (10th Cir.1998); *Ellis v. Univ. of Kansas Med. Ctr.,* 163 F.3d 1186, 1198 (10th Cir.1998); *J.B. ex rel. Hart v. Valdez,* 186 F.3d 1280, 1287 (10th Cir.1999).

In the alternative, the Tenth Circuit has ruled that Indian tribes, asserting jurisdiction under 28 U.S.C. § 1362, may seek injunctive relief from state taxation in federal court. [FN31] In *Sac and Fox,* the Tenth Circuit contemplated, under a set of facts very similar to those at hand, whether Indian tribes could maintain suits in federal court to enjoin collection of the State of Kansas's motor fuel tax. Relying on the Supreme Court's decision in *Moe v. Confederated Salish and Kootenai Tribes,* [FN32] the court determined that neither the Eleventh Amendment nor the Tax Injunction Act, 28 U.S.C. § 1341, barred the tribes' suit. [FN33] The court reached this conclusion notwithstanding the Supreme Court's decision in *Seminole Tribe of Florida v. Florida,* [FN34] finding that the *Seminole Tribe* Court had expressly recognized that in *Moe* it had reached a different conclusion due to the fact that the case involved an Indian tribe's access to federal court for the purpose of obtaining injunctive relief from state taxation. [FN35] Based on the *Moe* decision, the Tenth Circuit reasoned that federal courts have jurisdiction under 28 U.S.C. § 1362 to consider the merits of the Kansas fuel tax case. [FN36] Like the Tenth Circuit, this Court asserts jurisdiction under § 1362 and finds the Eleventh Amendment does not bar this suit.

FN31. *See Sac and Fox Nation of Missouri v. Pierce,* 213 F.3d 566, 571-73 (10th Cir.2000). *See also Sac and Fox Nation of Missouri,* 979 F.Supp. 1350, 1352-53 (D.Kan.1997).

FN32. 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976) (upholding an Indian tribe's right to seek injunctive relief from state taxation in federal court).

FN33. *Sac and Fox,* 213 F.3d at 572.

FN34. 517 U.S. 44, 72-73, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (holding that Article I of the United States Constitution, including the Indian Commerce Clause, does not provide sufficient authority for Congress to abrogate that State's Eleventh Amendment immunity).

FN35. *Sac and Fox,* 213 F.3d at 571 (citing *Blatchford,* 501 U.S. at 784, 111 S.Ct. 2578).

FN36. *Sac and Fox,* 213 F.3d at 572.

[2] As instructed by the Tenth Circuit in *Sac and Fox,* this Court has jurisdiction and the Eleventh Amendment does not bar the Tribe's claim brought pursuant to § 1362. Further, based on the legal fiction created in *Ex parte Young,* the Court finds that it has jurisdiction to hear this dispute. Therefore, summary judgment is not appropriate based on the State's Eleventh Amendment immunity.

***1302** B. Standing

[3][4] Under Article III, § 2 United States Constitution, Federal courts have jurisdiction to hear a matter only if an actual "case or controversy" exists. [FN37] In determining whether a case or controversy exists, the Court must evaluate whether the Tribe has standing to sue. [FN38]

FN37. U.S. CONST. art. III, § 2.

FN38. *Raines v. Byrd,* 521 U.S. 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997).

[5][6][7][8] As stated by the Tenth Circuit in *Sac and Fox,* the Constitutional standing question addresses "whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant its invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on its behalf." [FN39] To meet the standing requirement, the Tribe must allege "1) a concrete and particularized actual or

imminent injury, 2) which is fairly traceable to the defendant's conduct, and 3) which a favorable court decision will redress." [FN40] In addition to the above mentioned requirements, the Supreme Court has enunciated several other prudential standing requirements. First, a plaintiff must assert its own rights and not those of others. [FN41] Next, a plaintiff will not meet the standing requirement if he or she asserts a "generalized grievance shared by a large class of citizens." [FN42] Finally, the interest which a plaintiff wants protected must be within the "zone of interests to be protected by the statute or Constitutional guarantee." [FN43]

FN39. *Sac and Fox,* 213 F.3d at 573 (citations and quotations omitted).

FN40. *Id.* (citing *Northeastern Fla. Chapter of the Associated Gen. Contractors of America v. City of Jacksonville,* 508 U.S. 656, 663-64, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993)).

FN41. *Id.* at 573 (citing *Warth v. Seldin,* 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)).

FN42. *Id.* (quoting *Warth,* 422 U.S. at 499, 95 S.Ct. 2197).

FN43. *Id.* (quoting *Association of Data Processing Serv. Orgs., Inc. v. Camp,* 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970)).

Defendant argues that the Tribe lacks standing to bring this case because the tax in question falls on the distributors, not the Tribe. [FN44] The Court finds that the Tenth Circuit's decision in *Sac and Fox* settles this issue.

FN44. *See Sac and Fox,* 213 F.3d at 580 (holding that the legal incidence of the Kansas fuel tax falls on the distributor, not the retailer).

Addressing the exact arguments made by defendant here, the *Sac and Fox* court held that a tribe has standing to sue a state in federal court where the tribe alleges particularized imminent economic injury due to the state's imposition of the fuel tax. [FN45] In *Sac and Fox,* the state alleged that the tribes did not have standing to bring suit challenging the Kansas motor fuel tax because the legal incidence of the tax falls on the distributors of the fuel rather than on the tribal retailers. The court rejected this argument stating that the court had "little difficulty concluding ***1303** that the Tribes [have] constitutional standing to maintain their suit against the State." [FN46]

FN45. *Id.* at 573-74. The Court acknowledges that the case cited by defendant, *Carter v. Montana Dept. of Transp.,* 274 Mont. 39, 905 P.2d 1102 (1995), where the court held a fuel retailer did not have standing to challenge the state fuel tax when the legal incidence of the tax falls on the distributor, is somewhat in contrast to the Tenth Circuit's decision in *Sac and Fox.* Despite the value of the case to defendant's position, the Court finds it is bound by Tenth Circuit precedent, not by Montana Supreme Court precedent. Further, the *Carter* case can be distinguished because the gas station in question was not tribally owned and the case was not brought by the tribe, it was brought by an individual Indian.

FN46. *Sac and Fox,* 213 F.3d at 573.

[9] Like the tribes in *Sac and Fox,* the Tribe here meets the standing criteria to challenge the State's fuel tax. [FN47] First, the Tribe provides affidavits claiming injury including interference with the right of self government and economic injury caused by the state fuel tax. Next, the alleged injury is directly traceable to the State's desire to impose a fuel tax, [FN48] in that the Act allows the tax to be passed on directly to the retailers. [FN49] Finally, deciding in favor of the Tribe will redress the alleged injury because if the distributors who distribute fuel to the Nation Station are not required to pay the tax, there will be no threat of passing the tax through to the Tribe. [FN50]

FN47. *See id.* at 573-74.

FN48. *Id.* at 574.

FN49. *See* Kan. Stat. Ann. § 79-3409.

FN50. *Sac and Fox,* 213 F.3d at 574 (citing Kan. Stat. Ann. § 79-3409).

Further, like in *Sac and Fox,* the prudential standing principles discussed above do not bar the Court's exercise of jurisdiction. [FN51] First, the Tribe asserts its own rights to be free from the cost of motor fuel tax. The fact that the consumers and fuel distributors will unquestionably benefit if the Tribe is successful in challenging the tax, does not alter the Court's analysis. [FN52] Next, because the Tribe has asserted its right to be free from the fuel tax, it is not asserting a "generalized grievance" prohibiting the Court from exercising jurisdiction. [FN53] Finally, the Tribe's alleged economic interest in being free from taxation is arguably within the "zone of interest" that federal law seeks to protect. [FN54] In grappling with the "zone of interest" prudential requirement for standing, the Tenth Circuit noted that federal law has long sought to "protect tribal self-government from state interference, including state taxation." [FN55]

FN51. *See id.*

FN52. *See id.*

FN53. *Id.*

FN54. *Id.*

FN55. *Id.* (citing *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 170-71, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973)).

Based on the above analysis, the Court finds that the Tribe has demonstrated that it has standing to bring this action in federal court. Therefore, summary judgment will not be granted on defendant's challenge to the Tribe's standing.

C. Hayden-Cartwright Act, 4 U.S.C. § 104

Defendant argues that pursuant to the Hayden-Cartwright Act, 4 U.S.C. § 104, Congress consented to the states' power to tax fuel distributions to Indian tribes, leaving the Tribe without recourse to challenge the tax. In pertinent part § 104(a) of the Act states:

> All tax 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 ***1304** use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State ... within whose borders the reservation may be located. [FN56]

FN56. (Emphasis added).

The State argues that the phrase "other reservations" includes Indian lands and that the term "licensed trader" specifically refers to tribal retailers. The Tribe counters that the Act is ambiguous and that ambiguity should be construed in favor of Indian sovereignty.

Unfortunately, the Court is left with little guidance from the Circuit Courts or the Supreme Court in determining whether Congress intended the phrase "other reservations" to include Indian reservations. [FN57] Only the Idaho Supreme Court and the United States District Court for the District of Idaho have struggled with this difficult

issue. [FN58] Although the Court is not bound by either of these decisions, the Court finds the decisions persuasive and holds that the Hayden-Cartwright Act does not amount to congressional authorization for states to impose fuel tax on fuel delivered to Indian reservations.

FN57. *Sac and Fox,* 213 at 576 ("Neither the Supreme Court nor any of the circuit courts of appeals, nor any court as far as we can discern, has addressed the difficult question of whether Congress intended 4 U.S.C. § 104(a) to encompass Indian lands.")

FN58. *Coeur D'Alene Tribe v. Hammond,* 224 F.Supp.2d 1264 (D.Idaho 2002); *Goodman Oil Co. of Lewiston v. Idaho State Tax Comm'n,* 136 Idaho 53, 28 P.3d 996 (2001), *cert denied,* 534 U.S. 1129, 122 S.Ct. 1068, 151 L.Ed.2d 971 (2002).

[10][11] The Court begins its analysis by noting that a state may not levy taxes on Indian tribes or individual Indians inside Indian country without express approval of Congress. [FN59] Because of the "unique trust relationship" between the United States and Indian Nations, statutes that affect Indians are to be "construed broadly, with any ambiguous provision to be interpreted to their benefit." [FN60] Unless Congress makes it abundantly clear that it intends to grant taxing authority to the states, the Court must construe the statute as not allowing the taxation of Indians. [FN61]

FN59. *See County of Yakima v. Confederated Tribes & Bands of Yakima Nation,* 502 U.S. 251, 258, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992) ( "['A]bsent cession of jurisdiction or other federal statutes permitting it,' we have held, a state is without power to tax reservation lands and reservations Indians.") (quoting *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973)). *See also Montana v. Blackfeet Tribe,* 471 U.S. 759, 764, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985) ("The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes ... and in recognition of the sovereignty retained by Indian tribes even after the formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their territory.")

FN60. *Hammond,* 224 F.Supp.2d at 1268 (citing *Oneida County v. Oneida Indian Nation,* 470 U.S. 226, 247, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985); *McClanahan,* 411 U.S. at 174, 93 S.Ct. 1257).

FN61. *Hammond,* 224 F.Supp.2d at 1268.

[12] Defendant argues that the language in the Hayden-Cartwright Act expressly approves state taxation of fuel delivered in Indian country. The Tribe argues that Congress did not expressly approve state taxation of motor fuel on Indian reservations and that the statute is, at best, ambiguous. Thus, the Tribe argues that the statute must be construed in favor of the Tribe and interpreted so as to not grant such taxing authority. Following the principles elucidated above, the Court agrees with the Tribe and finds that the Hayden-Cartwright ***1305** Act does not expressly provide for state taxation on fuels delivered in Indian country.

Defendant argues that the language in the Act, which allows for state taxation of motor fuels sold on "United States military or other reservations," [FN62] includes Indian reservations. The Court is not persuaded by defendant's argument. As noted by United States District Court for the District of Idaho in *Hammond,* the term "reservation" has broad meaning and may or may not include Indian reservations. [FN63] The *Hammond* court explained that the term reservation has been used in land law to describe any body of land which Congress has reserved from sale. [FN64] The term has also been used to describe "military bases, national parks and monuments, wildlife refuges, and federal property." [FN65]

FN62. 4 U.S.C. § 104(a).

FN63. *Hammond,* 224 F.Supp.2d at 1269.

FN64. *Id.* (quoting *United States v. Celestine,* 215 U.S. 278, 285, 30 S.Ct. 93, 54 L.Ed. 195 (1909)).

FN65. *Id.*

Additionally, as articulated by the Idaho Supreme Court in *Goodman Oil,* if Congress intended to include Indian lands in the pertinent part of the statute, § 104(a), it would have done so. The Act uses the phrase "Indian Lands or other federal reservations" in section three and the phrase "Indian reservation roads" in section six. [FN66] Congress's use of these distinct phrases convinces this Court that Congress could have specified that the entire Act was to apply to Indian reservations or Indian lands but did not. Therefore, by not using the word "Indian Reservation" in the applicable part of the Act, § 104(a), the language of the Act does not clearly show that Congress intended to allow state taxation of tribal fuel. [FN67]

FN66. *See Goodman Oil,* 28 P.3d at 1000.

FN67. *Id.*

Defendant also argues that the use of the term "licensed traders" equates to Indians or Indian traders, lending support for the position that Congress intended to allow states to tax in Indian country. The Court disagrees with defendant and finds that use of the term "licensed traders" is also ambiguous and therefore does not support defendant's position that the Act expressly grants states the authority to tax fuel on Indian reservations. As noted by the *Goodman Oil* court, at the time the Hayden-Cartwright Act was passed, the term licensed traders could have meant licensed sellers of malt beverages, licensed retailers on government reservations or licensed traders selling goods on all government reservations. [FN68] So, once again the term used by Congress is too broad to have the effect of conveying upon states the right to tax Indians. Congress could have used the term licensed Indian traders had it meant to grant states the authority to tax fuel on Indian reservations.

FN68. *Id.* (citing *Falls City Brewing Co. v. Reeves,* 40 F.Supp. 35 (D.Ky.1941)).

Defendant also urges the Court to resolve any ambiguities in the language of the Act by turning to the Act's legislative history and the executive interpretation of the Act. Defendant insists that the Court is required to defer to agency interpretation of a statute as required by the Supreme Court's decision in *Chevron U.S.A., Inc v. Natural Resources Defense Council.* [FN69] Defendant argues that the stated purpose of the statute, and two agencies' interpretations show, that the Act applies to Indian reservations. Again, the Court ***1306** disagrees. The Court will address defendant's arguments regarding the legislative history and agency interpretation in turn.

FN69. 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

First, defendant draws the Court's attention to legislative history explaining the intended purpose of the Act. The purpose of the Act, which was passed in 1936, was to fund the extension of highway construction and maintenance. Congress intended to correct the general unfairness in the sale of fuel exempt from state taxation on federal reservations. The legislative history discussing the purpose of the Act never specifically refers to Indian reservations. [FN70] Instead, the legislative history only discussed the inequities of selling gasoline free of state tax in "post exchange stores" and "government reservations." Once again, defendant contends that the use of the term government reservations was meant to include Indian reservations. As discussed above, the Court is not convinced that the use of the term "government reservations" includes Indian reservations. Further, as noted by the *Hammond* court, simply because Congress expressed its intent to give up the federal government's exemption from state motor fuel taxes, does not mean Congress was willing to sacrifice the Indians' exemption from the tax as well. [FN71]

FN70. *See* 80 CONG. REC. 8, 8701 (remarks of Congressman Whittington) ("In post exchange stores and on government reservations, gasoline and motor fuel is being sold free from local taxes. The conferees believe that all local taxes should be collected except when the gasoline or motor vehicle fuels are for the exclusive use of the United States ....").

FN71. *Hammond,* 224 F.Supp.2d at 1269.

Next, defendant calls the Court's attention to the opinions of the Attorney General and Solicitor of the Department of Interior, alleging that the opinions clarify any ambiguity contained in the language of the statute Four months after the Act was passed in 1936, the Attorney General stated that the Act applied to a "military reservation, or an Indian reservation ...." [FN72] Also, the Solicitor of the Department of the Interior concluded that the Act authorizes state taxation of sales of motor fuel purchased on a reservation for tribal enterprise for resale both to non-Indians and members of the tribe. [FN73]

FN72. 38 U.S. Op. Atty Gen. 522, 524 (1936).

FN73. Application of Federal and State Taxes to Activities of Menominee Indian Mills, 57 Interior Dec. 129, 138-40 (1940).

These statements suggest that the Attorney General and the Solicitor of the Department of Interior believed that the Act applied to Indian reservations, but as discussed in *Goodman Oil,* these statements are not sufficient to clarify the ambiguities contained in the Act. [FN74] The Attorney General Opinion of 1936 dealt with whether national parks fell within the Act and mentions "Indian Reservations" in passing. [FN75] The entire passage reads "some of the agencies which are expressly designated in Section 10 apparently are such as usually pertain to military, naval, or Indian reservations and that section does not expressly mention national parks." [FN76] The qualifier of "apparently" lends weight to this Court's conclusion that the Attorney General's interpretation is ambiguous.

FN74. *Goodman Oil,* 28 P.3d at 1000-01.

FN75. *See id.*

FN76. 38 U.S. Op. Atty Gen. 522, 524 (1936).

The opinion of the Solicitor of the Department of the Interior is equally ambiguous. Referencing the Act, the Solicitor said "[i]t is not clear, however, whether the Government agencies specified are intended to include such federal agency as the Menominee tribal enterprise and whether ***1307** the reference to reservations includes Indian reservations." [FN77] While the Solicitor eventually concluded that the taxes could be levied in the circumstances before him, his statement shows that he also found the Act ambiguous.

FN77. 57 Interior Dec. 129 at 138 (1940).

Further, as noted in *Goodman Oil* and *Hammond,* Congress has recently attempted to pass legislation to authorize the state taxation of fuel sales on Indian reservations. [FN78] Such an attempt was apparently a recognition by Congress that more precise language would be necessary to grant states the authority to tax fuel on Indian reservations. If Congress intended the Hayden-Cartwright Act to allow for state taxation of fuel on Indian reservations, it is unlikely that Congress would continue to propose bills to permit a tax it apparently already allowed.

FN78. *Hammond,* 224 F.Supp.2d at 1269 (citing H.R. No. 3966, 105th Cong.2d Sess. (1998); S. 550 106th Cong. (1999)); *Goodman,* 28 P.3d at 1001.

Interpreting ambiguities in the Act in favor of the Tribe, the Court finds that the language of the Act does not show that Congress consented to taxation of the Indian reservations. The Court is further not persuaded by defendant's arguments relating to the legislative history or subsequent agency interpretation of the Act. Because Congress must be explicit if it intends to grant states the power to tax within Indian country, and because the Court finds Hayden-Cartwright does not provide for an explicit grant of Congressional authority for state taxation of motor fuel delivered to Indian reservations, defendant's request for summary judgment on this issue is denied.

Because the Hayden-Cartwright Act is not a basis for summary judgment and because there is no jurisdictional bar preventing the Court from moving forward, the Court must now turn to the merits of the case.

D. Preemption and Tribal Self-Government

Two separate but distinct doctrines pose a barrier to the assertion of state taxation over transactions occurring on reservation land: federal preemption and tribal rights to self-government. [FN79] These doctrines manifest themselves from the broad authority given to Congress to regulate tribal affairs under the Indian Commerce Clause and from "the semi-independent" position of Indian tribes. [FN80] The Tribe asserts these doctrines bar the State from imposing its motor fuel tax on fuel delivered to the reservation. The Court is required to analyze the barriers posed by these doctrines independently because either doctrine, standing alone, can be a sufficient basis for holding that Kansas's motor fuel tax is invalid as it relates to fuel delivered to the Tribe's reservation. [FN81]

FN79. *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980).

FN80. *Id.*

FN81. *Id.*

1. Preemption

[13][14] It is settled law that a state tax is unenforceable if the legal incidence of the tax falls on an Indian tribe or its members for sales made within Indian country. [FN82] If, however, the legal incidence ***1308** of the tax rests on non-Indians, as it undisputably does here, "no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and the federal law is not to the contrary, the State may impose its levy." [FN83] Because the legal incidence of the Kansas motor fuel tax falls on non-Indians, the Court is required to determine if a material issue of fact exists as to whether the balance of the federal, state and tribal interests tilt in favor of the Tribe. The Court must grant defendant's motion for summary judgment if the Court finds the evidence favoring the State's interest in imposing the motor fuel tax is so one-sided that defendant is entitled to prevail as a matter of law. [FN84]

FN82. *Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 458, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995) ("[W]hen a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, we have employed, instead of a balancing inquiry, 'a more categorical approach: Absent cession of jurisdiction or other federal statutes permitting it, we have held a State is without power to tax reservation lands and reservation Indians.' ").

FN83. *Chickasaw Nation,* 515 U.S. at 459, 115 S.Ct. 2214.

FN84. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Ordinarily, when state taxes are imposed on the sale of non-Indian products to non-Indian consumers, the balance of the federal, state and tribal interests tilt in favor of the state. [FN85] In *Washington v. Confederated Tribes of the Colville Indian Reservation,* the Supreme Court held that while federal policy seeks to foster tribal self-government and economic development, it does not preclude state taxation of sales by Indians to nonmembers of the tribe. [FN86] In so holding, the Court announced that tribes cannot assert an exemption from state taxation by "imposing their own taxes or otherwise earning revenues by participating in the reservation enterprises." [FN87] The Court reasoned that "[i]f this assertion were accepted, the Tribes could impose a nominal tax and open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts ...." [FN88]

FN85. *Salt River Pima-Maricopa Indian Cmty. v. Arizona,* 50 F.3d 734, 737 (9th Cir.1995).

FN86. 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980).

FN87. *Id.*

FN88. *Id.*

[15] The Tribe asserts that the rules set forth in *Colville* are inapplicable in this case because unlike the customers who were drawn to the smokeshops to avoid state cigarette tax in *Colville,* gas purchasers are drawn to the Nation Station because of its close proximity to the casino, a tribally owned and operated endeavor. The Ninth Circuit was presented with a similar argument in *Salt River Pima-Maricopa Indian Community v. Arizona.* [FN89] In that case, the tribe argued that the rules set forth in *Colville* only apply in cases where a tribe attempts to create a "magnet" effect of drawing customers on to the reservation by offering a lower sales tax rate than the state. The court cast serious doubt on the tribe's attempt to read *Colville* so narrowly and held that even if *Colville* is narrowly read, the state tax will be allowed where the tribe is attempting to sell non- Indian products to non-Indians and where the state tax precludes the tribe from creating the type of tax haven the *Colville* court sought to prevent. According to the *Salt River* court, the most important factors in determining that the state tax was not preempted by federal law was that the goods and services sold were non-Indian, the legal incidence of the tax falls on non- Indians and the state provided most of the governmental ***1309** services to those who bear the ultimate economic burden of the state tax. [FN90] Likewise, in the case before the court, the legal incidence of the tax falls on non-Indians, the Tribe is importing a non-Indian product [FN91] and selling the product mostly to non-Indians and those who bear the ultimate economic burden of the fuel tax, the consumers, are provided governmental services by the state. [FN92]

FN89. 50 F.3d 734.

FN90. *Id.* at 737.

FN91. The court rejects the implication that fuel sold at the Nation Station is an Indian product because the Tribe operates a casino in the vicinity or that fuel is an Indian product because the Tribe financed and constructed the Nation Station to include the proper facilities for unloading, storage, and dispensing of gasoline. *See Chemehuevi Indian Tribe v. California St. Bd. of Equalization,* 800 F.2d 1446 (9th Cir.1986) (rejecting the tribe's assertion that *Colville* is inapposite where the tribe markets cigarettes as part of a legitimate business enterprise, where residents and visitors take advantage of other amenities offered by the tribe).

FN92. *See Sac and Fox,* 213 F.3d at 584 (stating that the ultimate economic burden of the Kansas motor fuel tax "most assuredly falls on the consumer"). As discussed below in section D.2., the court rejects the Tribe's argument that it bears the ultimate economic burden of the fuel tax.

While the Tribe certainly has an interest in raising revenues, that interest is at its weakest when goods are imported from off-reservation for sale to non-Indians. [FN93] The State's interest in raising revenues is strongest when, as here, non-Indians are taxed, and those taxes are used to provide the taxpayer with government services. [FN94] Based on the foregoing analysis, it is clear that the preemption balance unmistakably tips in favor of the State. Thus, summary judgment shall be granted as to the Tribe's claim arising under federal preemption.

FN93. *Salt River,* 50 F.3d at 739.

FN94. The Tribe has asserted that eleven percent of its fuel sales are derived from sales to reservation residents, tribal government employees and other persons who work on the reservation. The Tribe has not asserted that a majority or even a substantial portion of its fuel sales are made to reservation

residents, those who primarily reap the benefits of tribal government services. It cannot be disputed that Kansas provides governmental services off the reservation to the non-Indian purchasers of fuel. In addition, the State also provides services on and near the reservation including maintenance of U.S. Highway 75, the highway that leads to the reservation. In addition to road maintenance, the State provides fire and police protection on and near the reservation.

2. Tribal Self-Government

The Tribe also asserts that imposition of the state fuel tax infringes on the Tribe's sovereign right to impose tribal fuel taxes, infringes upon the Tribe's sovereign right to finance and provide essential government services, infringes upon the Tribe's sovereign right to self-government and self-determination, and infringes upon the Tribe's right to conduct business and to economically develop its reservation. "The doctrine of tribal self-government, while constituting an independent barrier to the assertion of state taxing authority over activities taking place on tribal reservations, bears some resemblance to that of federal preemption." [FN95] Application of this doctrine requires the Court to weigh both state and tribal interests in raising revenue to provide taxpayers with essential government services.

FN95. *Gila River Indian Cmty. v. Waddell,* 967 F.2d 1404, 1412 (9th Cir.1992) (citing *White Mountain Apache Tribe,* 448 U.S. at 142, 100 S.Ct. 2578).

[16] The Tribe's interest in raising revenues to support essential tribal services is strongest when "the revenues are derived ***1310** from *value generated on the reservation* by activities involving the Tribes *and* when the *taxpayer is the recipient of tribal services.*" [FN96] Revenues will not be considered derived from "value generated on the reservation" if the value of the product marketed by the tribe is merely an exemption from state tax. In other words, if the tribe earns its profits simply by importing non-Indian products onto the reservation for resale to non-Indians free from state taxation, the profits are not derived from value generated on Indian lands. [FN97]

FN96. *Colville,* 447 U.S. at 156-57, 100 S.Ct. 2069 (emphasis added).

FN97. *Salt River,* 50 F.3d at 738.

The Tribe asserts that the revenues derived from the fuel sold at the Nation Station are a result of value generated on Indian lands because the casino, operated in close proximity to the gas station, generates a flow of motor vehicle traffic. The Tribe contends that the gasoline market exists because of the nearby casino, not simply because patrons can purchase gas free from state motor fuel tax. Assuming the Tribe can show that they are marketing a product, the value of which is derived on reservation land, the Tribe cannot show that those who ultimately take on the economic burden of the tax, the consumers, are the recipients of tribal services as opposed to state services. [FN98]

FN98. *See Sac and Fox,* 213 F.3d at 584 (stating the ultimate economic burden of the Kansas motor fuel tax "most assuredly falls on the consumer").

The Tribe proposes that the ultimate economic burden of the tax does not fall on the consumers but rather it falls on the Tribe. The Tribe bases this assertion on the presumption that the tax will destroy the Nation Station's business by burdening the Nation Station with double taxation and interfering with the Tribe's right to impose tribal taxes and to finance its government. The Court cannot agree for several reasons.

First, in *Sac and Fox,* the Tenth Circuit held that even though the legal incidence of the Kansas motor fuel tax falls on the fuel distributors, the ultimate, albeit indirect, economic burden of the Kansas motor fuel tax falls on the consumer. [FN99] Thus, according to the Tenth Circuit, if the Tribe can show that the ultimate economic burden falls on tribal members as the consumers of the fuel, the tax improperly interferes with internal tribal affairs. [FN100] Such a showing would require the Tribe to produce evidence that a substantial portion of the

Tribe's retail fuel sales are to tribal members. The Tribe cannot make the required showing as their own evidence indicates that only a small percentage of the retail fuel sales are made to tribe members. The Tribe presents evidence indicating that seventy-three percent of the fuel sold at the Nation Station is sold to casino patrons and only eleven percent of the fuel sales are made to persons who live or work on the reservation. Although the Tribe certainly provides substantial services to those persons who live and work on the reservation, that group of persons constitutes only a small portion of the consumers who purchase fuel at the Nation Station. The majority of the fuel *1311 consumers are not members of the Tribe and are thus recipients of state services. [FN101]

FN99. *Sac and Fox,* 213 F.3d at 584. *See also United States v. Mississippi Tax Comm'n,* 421 U.S. 599, 607-10, 95 S.Ct. 1872, 44 L.Ed.2d 404 (1975) (holding that the legal incidence of the tax does not always fall upon the entity legally liable for payment of the tax); *Chickasaw Nation v. Oklahoma Tax Comm'n,* 31 F.3d 964, 972 (10th Cir.1994) (noting that the "question of who bears the ultimate economic burden of the tax is distinct from the question of on whom the tax has been imposed.").

FN100. *Id.*

FN101. The Court recognizes that the Tribe provides some governmental services to non-Indian purchasers by constructing and maintaining reservation roads and providing police protection. But, it cannot be disputed that the vast majority of governmental services used by the non- Indian purchasers are provided by the State, off the reservation.

[17] Second, the Tribe's contention that the state fuel tax and the tribe's fuel tax cannot coexist because the result will be double taxation and an increase in the product's cost must also be rejected. There is no question that the Tribe's power to tax transactions occurring on trust lands "is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law ...." [FN102] But, a tribe cannot oust a state from any power to tax on-reservation purchases by nonmembers of the tribe by simply imposing its own tax on the transactions or by otherwise earning its revenues from the tribal business. [FN103] Further, any negative economic impact on the Tribe by the imposition of the state fuel tax is not necessarily sufficient to invalidate the tax. [FN104] Indeed, the state may sometimes impose a "non-discriminatory tax on non-Indian consumers of Indian retailers doing business on the reservation ... even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians." [FN105]

FN102. *Colville,* 447 U.S. at 152, 100 S.Ct. 2069.

FN103. *Id.* at 154-158, 100 S.Ct. 2069. *See also Gila River Indian Cmty.,* 91 F.3d 1232, 1239 (9th Cir.1996) ("The State and Tribe have concurrent taxing jurisdiction ... [a]ccordingly, the Tribe's tax program is not undermined by the state tax.").

FN104. *Colville,* 447 U.S. at 152, 100 S.Ct. 2069; *Sac and Fox,* 213 F.3d at 583.

FN105. *Colville,* 447 U.S. at 151, 100 S.Ct. 2069.

Finally, the Tribe has failed to show that the state motor fuel tax substantially affects its ability to offer governmental services or in any way affects the Tribe's right to self-government. The Supreme Court has held that merely because the result of imposing the fuel tax will deprive the Tribes of the revenues which they are currently receiving, does not infringe on the right of reservation Indians to "make their own law and be ruled by them."

[18] The Tribe's interests in raising revenues simply cannot outweigh the State's legitimate interest in raising revenues through its system of taxation. [FN106] The State's interest in imposing such a tax is greatest when the "tax is directed at off-reservation value and when the taxpayer is the recipient of state services". [FN107] In this case, it is undisputed that the legal incidence of the tax is directed off-reservation at the fuel distributors. [FN108]

Further, it is also undisputed that only a small part of the fuel sales are made to persons who either live or work on the reservation who are the recipient of tribal services. The majority of the fuel consumers are recipients of state services. Even if the Court accepts the Tribe's proposition that the fuel sales are a result of value generated on reservation land, the Tribe cannot show that a substantial portion of the taxpayers are recipients of tribal services as opposed to state services. For the above reasons, defendant's motion for summary judgment shall be granted on the Tribe's claim regarding tribal rights to self-government.

FN106. *Id.* at 157, 100 S.Ct. 2069. *See also ANR Pipeline,* 150 F.3d at 1193 ("Congress has made it clear in no uncertain terms that a state has a special and fundamental interest in its tax collection system.").

FN107. *Colville,* 447 U.S. at 157, 100 S.Ct. 2069.

FN108. *Sac and Fox,* 213 F.3d at 580.

*1312 E. Kansas Act for Admission

In addition to claims based on preemption and tribal rights to self- government, the Tribe also asserts a claim under the Kansas Act for Admission § 1. The Kansas Act for Admission states that:

> [n]othing contained in said [Kansas] constitution respecting the boundary of said state shall be construed to impair the rights of person or property now pertaining to the Indians of said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with such Indian tribe, is not, without the consent of such tribe, to be included within the territorial limits or jurisdiction of any state or territory ....

Based on this language, the Tribe argues that the state is prohibited from taking action that impairs the Tribe's right to impose and collect its own tribal taxes, impairs the Tribes right to finance its government through tribal taxation and imposes on the Tribe's right to engage in sovereign functions of self-government. The Tribe asserts that unlike causes of action based on federal preemption, there is no need to balance the state, federal and tribal interests for claims arising from the Kansas Act for Admission.

[19] The Court finds that even if the Kansas Act for Admission can be read to preserve the Tribe's sovereign right to impose tribal taxes on reservation and to engage in commercial business on its reservation as proposed by the Tribe, the Court's foregoing analysis regarding tribal rights to self- government is still applicable. As mentioned above, while the Tribe has every right to impose tribal fuel taxes, by doing so it does not oust the State from imposing state tax on sales made to non-Indians. Further, even if the state tax imposes on the Tribe's ability to carry-on a commercial business by increasing the cost of the product, a state tax on non-Indians "may be valid even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians." [FN109] "[T]he tribes have no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all." [FN110] For these reasons defendant is entitled to judgment as a matter of law and summary judgment is granted on the Tribe's claim asserted under the Kansas Act for Admission.

FN109. *Colville,* 447 U.S. at 151, 100 S.Ct. 2069.

FN110. *Id.*

IV. CONCLUSION

In finding that the Court has jurisdiction over this matter, the Court rejects defendant's claim to immunity based on the Eleventh Amendment and rejects defendant's claim that the Tribe lacks standing to bring this suit. Additionally, the Court finds, contrary to defendant's arguments, that the Hayden-Cartwright Act does not provide for an explicit grant of Congressional authority for state taxation of motor fuel delivered to Indian reservations. Finally, because no material issue of fact remains regarding the Tribe's claims arising under federal preemption,

tribal right to self-government or Kansas Act for Admission and because defendant is entitled to judgment as a matter of law, defendant's motion for summary judgment is granted.

IT IS THEREFORE BY THE COURT ORDERED that State's Motion for Summary Judgment (Doc. 59) is GRANTED.

IT IS SO ORDERED.