IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 03-3218

PRAIRIE BAND POTAWATOMI NATION
plaintiff/appellant

vs.

STEPHEN S. RICHARDS, SECRETARY, KANSAS DEPARTMENT OF REVENUE
defendant/appellee

BRIEF FOR THE APPELLEE SECRETARY OF REVENUE, STATE OF KANSAS

ORAL ARGUMENT DESIRED

ON APPEAL FROM THE UNITED STATES COURT
FOR THE DISTRICT OF KANSAS
Honorable Julie A. Robinson

BRIEF FOR THE APPELLEE SECRETARY OF REVENUE, STATE OF KANSAS

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PRIOR OR RELATED APPEALS

There are no prior or related appeals.

STATEMENT OF JURISDICTION

A. District Court

The Plaintiff/Appellant ("tribe") invoked the jurisdiction of the district court pursuant to 28 U.S.C. § § 1331, 1362 and 1367(a). Complaint, at 1, Aplt. App. Vol. I at 10-11.

B. Tenth Circuit Court of Appeals

The tribe invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1291. Aplt. App. Vol V at 179. The district court's order granting summary judgment in favor of the Defendant/Appellee (the "secretary") was entered on January 17, 2003. Memorandum and Order, Aplt. App. Vol. V at 73. The district court issued a final order on July 2, 2003, denying the tribe's request for reconsideration, Memorandum and Order, Aplt. App. Vol. V at 171. The tribe timely filed a Notice of Appeal from the district court's final order on July 28, 2003, Aplt. App. Vol. V at 179.

STATEMENT OF ISSUES

The over-arching issue in this case is whether the District Court erred in holding that the State fuel tax imposed off-reservation against non-tribal members is permissible. The tribe raises five issues on appeal:

1) Whether the District Court erred in holding that the State's significant and compelling sovereign interest in its system of taxation off-reservation against non-tribal members is not preempted by federal law.

2) Whether the District Court erred in holding that the State tax imposed off reservation against non-tribal members does not impermissibly infringe on the tribe's right to self government.

3) Whether the District Court erred in holding that the tribe's imposition of a tribal tax does not oust a State tax imposed off reservation against non-tribal members.

4) Whether the District Court erred in holding that the tribe's purchases of finished fuel off reservation and re-selling it at retail to non-tribal members in the vicinity of the tribe's casino does not create value added on the reservation sufficient to preempt a State tax imposed off reservation against non-tribal members.

5) Whether the District Court allegedly erred in considering evidence not properly before the Court.

STATEMENT OF THE CASE

A. Nature of the Case

This is an action filed by the tribe seeking declaratory and injunctive relief prohibiting the secretary from collecting Kansas motor fuel tax off reservation from non-tribal members.

B. Course of the Proceedings

On May 14, 1999, the tribe filed a declaratory action in the United States District Court for the District of Kansas seeking a preliminary and permanent injunction to halt state collection of

the Kansas motor fuel tax from distributors delivering to the tribe. Aplt. App. Vol I at 2.

The secretary moved for summary judgment on October 16, 2000. Aplt. App. Vol I 41. On December 22, 2000, the tribe filed its response to the secretary's motion for summary judgment. Aplt. App. Vol II at 1. On February 1, 2001, the secretary filed his reply. Aplt. App. Vol V at 11.

C. Determination by the Court Below

On January 16, 2003, the District Court granted the secretary's motion for summary judgment. Aplt. App. Vol. V at 45 On July 2, 2003, the District Court denied the tribe's motion for reconsideration. Aplt. App. Vol. V at 171.

STATEMENT OF RELEVANT FACTS

1. The tribe is a federally-recognized Indian tribe whose reservation is in Jackson County, Kansas. Aptl. App. Vol. V at 45.

2. The tribe operates a gas station on its reservation and imposes a tax of $.16 per gallon of gasoline and $.18 per gallon of diesel fuel. Aptl. App. Vol. V at 46.

3. The tribe does not sell the majority of its fuel to tribal members on its reservation. Instead, the tribe sells 73% of its fuel to casino patrons and employees. Aptl. App. Vol. V at 46.

4. The finished fuel is delivered to the tribe from outside the reservation in a finished, saleable condition. The tribe merely offers the fuel for sale at retail. Aptl. App. Vol. V at 46.

5. The cost of the State tax imposed off-reservation on non-reservation value against non-tribal members, if said cost is passed through to the tribe, will have an effect on the tribe's profit margin. Aptl. App. Vol. V at 46-47.

SUMMARY OF ARGUMENT

When viewed as a whole, the tribe largely argues some form of federal preemption or preclusion to State taxation off-reservation

against non-tribal members. The District Court examined all of the tribe's evidence in a light most favorable to the tribe, and determined that the tribe did not add value to the finished fuel sufficient to merit ousting the State tax imposed off reservation against non-tribal members. Instead, the District Court determined that, based on the tribe's evidence, the tribe is merely bringing a finished product on its reservation and selling it at retail.

After reviewing the tribe's evidence in a light most favorable to the tribe, the District Court correctly determined that simply because the tribe's gas station sits in the vicinity of the tribe's casino and because the tribe safely stores and sells the fuel at retail, does not make this fuel an "Indian" product. Thus, the District Court was correct in granting the secretary's motion for summary judgment as to this issue.

By following controlling Supreme Court precedent and precedent from this Circuit, the District Court did not err in determining that a State tax imposed off reservation against non-tribal

members is not impermissible double taxation. The District Court correctly cited controlling authority in holding that even if the tribe's profits were reduced (or even eliminated), the State tax imposed off-reservation against non-tribal members was not impermissible. Thus, it was not error for the District Court to grant the secretary's motion for summary judgment as to this issue.

To date, the tribe has failed to cite any federal law that preempts the State tax imposed off reservation against non-tribal members. Indeed, this Circuit has determined that there is no federal law that so occupies the field of motor fuel sales that State taxes are preempted.

The tribe attempts to cobble together a string of non-germane federal statutes and the Act for Admission of Kansas into the Union in an effort to show that the State tax is preempted. These federal statutes are either wholly inapplicable, or grossly misinterpreted by the tribe. A general interest by the federal government in the welfare of tribes, without significantly more, is

insufficient to preempt a lawful State tax imposed on non-tribal members off-reservation.

The tribe asserts that the State tax is preempted because a balance of interests between the parties tips in favor of the tribe. First, the balance of interests test has outlived its useful life, and this Court should abandon the balance of interests test, and adopt a straight forward federal preemption test.

Second, if this Court declines to adopt a straight forward preemption analysis, then the balance of interests test is inapplicable where a State, as here, seeks to impose a tax off-reservation against non-tribal members. A balancing test is only appropriate if a State seeks to tax on-reservation activity.

Third, assuming this Court declines the invitation to affirm the District Court on one of the two grounds above, then the District Court should be affirmed because it clearly balanced the respective interests in a light most favorable to the tribe, and determined that the State's significant, special sovereign

interests in taxing non-tribal member fuel off-reservation was a stronger interest than the tribe's interest in its profits. Memorandum and Order, Aptl. App. Vol. V at 70.

With regard to the tribe's assertion of impermissible infringement concerning its right to self-government, the tribe failed to meet this Court's test on improper infringement. Improper infringement can occur under the circumstances of this case only if the tribe can show that a substantial amount of the tribe's fuel sales were to tribal members. Because the tribe failed to even plead, let alone provide supporting facts, that it met this test, the District Court did not err in determining that the tribe's pecuniary interest in profits on sales to non-tribal members does not oust the State tax imposed off-reservation against non-tribal members.

Further, the District Court determined that this matter involves issues that implicate special sovereign interests of Kansas' system of taxation. Because the tribe's interest is solely economic, the District Court determined under the facts viewed

in a light most favorable to the tribe that Kansas' interests in its system of taxation does not impermissibly infringe on the tribe's right to self-government. Memorandum and Order, Aplt. App. Vol. V 69-70.

Finally, as to the tribe's contention that the District Court improperly relied on facts not before the Court, the tribe is wrong. The tribe's assertion is wholly without merit because not once, but twice, the District Court unequivocally stated that it did not consider evidence proffered by the secretary in reaching its decision. The District Court was emphatic that it considered only the tribe's evidence (and in a light most favorable to the tribe) in granting the secretary's motion for summary judgment.

ARGUMENT

I. Issue

Whether the District Court erred in holding that the State's significant and compelling sovereign interest in its system of taxation off-reservation against non-tribal members is not preempted by federal law.

A. Standard of Review

This issue involves a mixture of interpretation and application of law, and a balancing of equities. To the extent that this issue involves an interpretation and application of law, this Court's review is *de novo*. *Hiller Cranberry Products, Inc. v. Koplovsky*, 165 F.3d 1, 4 (1st Cir. 1999). Because, however, resolution of the issue also involves questions of balancing equities between the respective parties, this Court's scope of review is narrowed to using the abuse of discretion standard. *Woerner v. U.S. Small Business Administration*, 934 F.2d 1277, 1278, 290 U.S. App. D.C. 105, 106 (1991).

B. Disposition of the Issue Below

The District Court determined that there is no federal law that preempts the State tax imposed off-reservation against non-tribal members. *Prairie Band Potawatomi Nation v. Richards*, 2003 WL 136197 10-13 (D. Kan. 2003).

C. Discussion

The tribe essentially breaks this issue into two separate categories: 1) That various federal enactments serve as a categorical bar to the State tax being imposed off-reservation against non-tribal members; and, 2) a balance of competing federal, state and tribal interests serve as a federal preemption of the State tax being imposed off-reservation against non-tribal members. The secretary will address them in turn.

1) Federal Enactments Do Not Preempt the State Tax

a. Preemption Generally

There is no federal law that abrogates State authority to enforce its tax laws off-reservation. A claim of preemption generally, "arises when state law conflicts with (1) an enactment of Congress pursuant to the Indian Commerce Clause or (2) a treaty entered into by the United States and a tribe." *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1253 (10th Cir. 2001). Neither of these circumstances exist in this case.

The tribe does not assert that the federal government has so occupied the field of motor fuel sales that the State is preempted from imposing an otherwise lawful State tax on motor fuel distributors. In fact, this Court has determined that there is no comprehensive federal regulatory scheme governing the wholesale distribution of motor fuel to Indian tribes. *Sac and Fox v. Pierce*, 213 F.3d 566, 582 (10th Cir. 2000), *cert. denied*, 531 U.S. 1144 (2001).

b. Indian Commerce Clause

The tribe apparently claims that the State tax violates the U. S. Constitution's Indian Commerce Clause. The tribe's claim for relief is based almost entirely upon the Indian Commerce Clause of the United States Constitution. The tribe's various federal Indian issues, in one fashion or another, pivot from this single fulcrum. As such, the tribe argues, federal law preempts the State tax.

In fact, the Indian Commerce Clause offers nothing other than justification for federal legislation affecting Indians. *E.g., Cotton*

Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) ("the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs .....").

Assuming that the Court may find more breadth to the Indian Commerce Clause, the secretary submits that there is no authority that supports the tribe's position. Without citation to controlling authority, it appears that the tribe is saying simply that because they are Indians, they have a federally-protected right to usurp state authority outside of their reservation in order to obtain and maintain profits. Nothing could be further from the truth and law.

State imposition of its fuel tax off-reservation does not violate the Indian Commerce Clause. Judicial review of state taxation is, "intended to ensure that States do not disrupt or burden interstate commerce when Congress' power remains unexercised: it protects the free flow of commerce, and thereby safeguards Congress' latent power from encroachment by the several

States." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982). In the absence of federal legislation, a state may rightfully prescribe uniform regulations with respect to its highways for all vehicles including those engaged in interstate commerce. *Hendrick v. Maryland*, 235 U.S. 610, 622 (1915).

Moreover, the State is not automatically barred from applying non-discriminatory tax laws even if they may significantly touch the political and economic interests of the tribes. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 157 (1980) (discussing Indian Commerce Clause). Only *undue* discrimination is forbidden. *Id.*

The indirect economic burden placed on the tribe here is not applied in a discriminatory manner; it is applied to all distributors and importers of fuel into Kansas; and, it is applied off-reservation. It can only be concluded that Kansas' fuel tax, as applied, does not violate the Indian Commerce Clause.

c. Indian Trader Statutes

The tribe asserts that the Indian Trader Statutes, 25 U.S.C. §§

261-64 act as a categorical bar to the State tax. (Aplt. Brief at 40). First, this issue was not raised sufficiently before the District Court, and should not be allowed for the first time on appeal. Second, this Court has held that the Indian Trader Statutes do not support the tribe's argument. *Sac & Fox v. Pierce*, 213 F.3d 566, 583 (10th Cir. 2000) ("we conclude that the Indian Trader Statutes do not so pervade the field that they preempt the Kansas motor fuel tax....").

The tribe in its Brief at page 41 asks for reconsideration *en banc* on this issue. The secretary is unaware of any federal rule that supports the tribe's request, and it should be rejected by the Court.

d. Other Federal Statutes

Next, the tribe strings together a series of irrelevant and non-germane federal enactments (Aplt. Brief at 42-44) that the tribe asserts serve to preempt the State tax imposed off-reservation against non-tribal members.

The statutes cited by the tribe, however, provide it no relief. First, none of the cited statutes concerns state taxation of non-tribal members off-reservation. Second, it appears that the tribe cites these statutes solely for the broad proposition that because the federal government has a general interest in Indian self-sufficiency, that general interest, standing alone, is sufficient to preempt State action directed off-reservation. The tribe's logic is in error, and case law does not support such an overly broad, shotgun approach to federal preemption.

Courts have rejected the notion that a federal interest in tribal economic development is an overriding force preempting an otherwise valid state tax on non-Indian activity. *Gila River Indian Community v. Waddell*, 91 F.3d 1232, 1235 (9th Cir. 1996) (citing *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980)). Thus, a federal interest "in assisting tribes in their efforts to achieve economic self-sufficiency ... does not, without more, defeat a state tax on non-Indians." *Salt River Pima-Maricopa Indian Community v. Arizona*, 50 F.3d 734, 739 (9th Cir.), *cert. denied*, 516 U.S. 868 (1995). This rationale is

altogether more cogent and persuasive when the State's interest is, as is the case here, directed at off-reservation activity.

e. Kansas Act for Admission

The tribe also claims that the "Act for Admission of Kansas Into the Union" preempts State taxation of non-tribal members off-reservation. As this Court stated in *Sac and Fox v. Pierce*, 213 F.3d 566 (10th Cir. 2000), *cert. denied*, 531 U.S. 1144 (2001), however, "the Act for the Admission of Kansas into the Union ... [does not] lend[] any support to the Tribes' challenge to the Kansas motor fuel tax law." *Id.* at 577.

Accepting, however, that the tribe relies on different language from the provision thereto than considered in *Sac and Fox*, its claim distorts the plain language of the Act for Admission[1] beyond any sense of reasonable construction.

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[1] The pertinent language reads as follows: "That the state of Kansas shall be, and is hereby declared to be, one of the United States of America, and admitted into the union on an equal footing with the original states in all respects whatever. And the said state shall consist of all the territory included within the following boundaries... Provided, That nothing contained in the said constitution *respecting the boundary* of said state shall be construed to impair the rights of person or property *now pertaining* to the

There is absolutely nothing in the Admission Act to demonstrate that the authors and adopters thereof intended to create a tax-free haven. Yet, that is the practical effect if the tribe's view is adopted. The language used in the Act should not be construed in a manner that would allow non-tribal members to avoid their State tax obligation on transactions occurring off-reservation. *Colville*, 447 U.S. at 155.

The plain language of this section of the Act means that the construction of the metes and bounds of Kansas could not lessen the geographic dimensions of Indian reservations then existing. In other words, Kansas "disclaimed" any ownership of reservation lands.

Hence, the terms "boundary" and "now pertaining" recognize that when Kansas attained Statehood, treaties were in existence that secured some land within state boundaries for Indian tribes. In other words, the *dimensions* of the State set forth in the Act

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Indians of said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians...." (emphasis

would not be construed in a manner that Kansas could make a "land grab" and wrest reservation land from the Indians as set forth in the then-existing treaties. *See U.S. v. Ward*, 1 Woolw. 17, 1 Kan. Dass. Ed. 601, 604-05 C.C.D. Kan. (1863).

This analysis is borne out in other cases. Enabling Acts themselves forced states to disclaim only their proprietary interest in Indian land, not the states' governmental or regulatory authority over that land. *Organized Village of Kake v. Egan*, 369 U.S. 60, 67-69 (1962); *Jicarilla Apache Tribe v. U.S.* 601 F.2d 1116, 1135 (10th Cir.), *cert. denied*, 444 U.S. 995 (1979).

The Act for Admission does not support the tribe's claim of entitlement to exclude non-tribal members from the operation of State law off-reservation. The secretary is not construing the geographic boundaries of the State or acting in any manner that denies or impairs any right of the tribe.

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supplied).

The tribe attempts to argue that because it cannot avail itself of the export exclusion under the fuel tax act, K.S.A. 79-3408(d)(1)[2] (Aptl. Brief at 57), that is a *per se* violation of the Indians' "rights" under the Act for Admission. The tribe's tortured logic is at odds with this Court's construction of the Act for Admission in *Sac & Fox v. Pierce*, 213 F. 3d 566 at 577, and would mean that the Act itself is inconsistent from one sentence to the next. This is a gross misinterpretation by the tribe and should be rejected by the Court.

2) Balance of Interests Does Not Preempt State Tax

a. Balance of Interests Test Should Be Abandoned

It is abundantly clear that the balance of interests test laid down

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[2] The pertinent language reads as follows: 79-3408. Tax imposed on use, sale or delivery of motor-vehicle fuels or special fuels; pumps labeled to show alcohol content; incidence of tax imposed on distributor; allowance for certain losses; exempt transactions; reports required. (a) A tax per gallon or fraction thereof, at the rate computed as prescribed in K.S.A. 79-34,141, and amendments thereto, is hereby imposed on the use, sale or delivery of all motor vehicle fuels or special fuels which are used, sold or delivered in this state for any purpose whatsoever... (d) No tax is hereby imposed upon or with respect to the following transactions: (1) The sale or delivery of motor-vehicle fuel or special fuel for export from the state of Kansas to any other state or territory or to any foreign country.

approximately three decades ago is simply un-workable. Justice (now Chief Justice) Rehnquist's dissent in *Colville* was chillingly prescient. The judiciary has become log-jammed with protracted litigation in which neither side can nor will acknowledge that the balance of interests favors the other. This results in one or both parties running to the courthouse doors to seek a judicial determination over matters that only Congress can truly address.

Rather than paraphrase the Chief Justice, direct citation to his dissent in *Colville* is more appropriate:

> Since early in the last century, this Court has been struggling to develop a coherent doctrine by which to measure with some predictability the scope of Indian immunity from state taxation. In recent years, it appeared such a doctrine was well on its way to being established. I write separately to underscore what I think the contours of that doctrine are because I am convinced that a well-defined body of principles is essential in order to end the need for case-by-case litigation which has plagued this area of the law for a number of years. That doctrine, I had thought, was at bottom a pre-emption analysis based on the principle that Indian immunities are dependent upon congressional intent, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Bryan v. Itasca County*, 426 U.S. 373 (1976), at least absent discriminatory state action prohibited by the Indian Commerce Clause. I see no need for this Court to

balance the state and tribal interests in enacting particular forms of taxation in order to determine their validity. *Ante, at* 156-157. Absent discrimination, the question is only one of congressional intent. Either Congress intended to pre-empt the state taxing authority or it did not. Balancing of interests is not the appropriate gauge for determining validity since it is that very balancing which we have reserved to Congress

* * *

McClanahan confirmed the trend which had been developing in recent decades towards a reliance on a federal pre-emption analysis. Congress has for many years legislated extensively in the field of Indian affairs. *McClanahan* therefore recognized that the answer to most claims of Indian immunity from state power could be resolved by looking "to the applicable treaties and statutes which define the limits of state power." 411 U.S., at 172 .

Despite the expanse of congressional statutes regulating Indian affairs over the years, *McClanahan* foresaw that congressional intent would not always be readily apparent. As a guide to ascertaining that intent in such cases, the Court invoked the tradition of Indian sovereignty as reflected by the earlier decisions of this Court: "The Indian sovereignty doctrine is relevant, . . . not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read." *Ibid.*

McClanahan readily illustrates application of the analysis. The question presented in that case was whether the State of Arizona had jurisdiction to impose a tax on a reservation Indian's income derived solely from reservation sources. The Court first reviewed the "tradition of sovereignty" relevant to this "narrow

question." *Id.*, at 168. Historically this Court had found Indians to be exempt from taxes on Indian ownership and activity confined to the reservation and not involving non-Indians. *The Kansas Indians*, 5 Wall. 737 (1867). With this tradition placing reservation-ownership beyond the jurisdiction of the States, the Court undertook a review of the relevant treaties and statutes to determine whether this tradition of immunity had been altered by Congress.

* * *

The Court therefore declined to infer a congressional departure from the prior tradition of Indian immunity absent an express provision otherwise. Thus, as this Court's opinion in *Bryan v. Itasca County*, *supra*, later characterized it, *McClanahan* established a rule against finding that "ambiguous statutes abolish by implication Indian tax immunities." 426 U.S., at 392 .

The companion case to *McClanahan*, *Mescalero Apache Tribe v. Jones*, *supra*, established the corollary principle: When tradition did not recognize a sovereign immunity in favor of the Indians, this Court would recognize one only if Congress expressly conferred one.

* * *

The Court in *Mescalero* applied precisely the analysis *McClanahan* adopted. First, the Court reviewed the tradition of sovereignty and found that no immunity for off-reservation activities had traditionally been recognized. *See Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575 (1928); *Ward v. Race Horse*, 163 U.S. 504 (1896). With that tradition as its backdrop, the Court reviewed the particular statutes relevant to the question of whether or not Congress intended to immunize the Indian enterprise from the state gross receipts tax. The principal Act relevant to the inquiry was the Indian

> Reorganization Act, since it was the Act under which the tribal enterprise was being conducted. Section 5 of that Act, 25 U.S.C. 465, provides that the lands acquired under authority of the Act are exempt from state and local taxation. The Court nevertheless refused to read 5 as broadly conferring an immunity from income as well as property taxes. The Court invoked the well-established rule that "`tax exemptions are not granted by implication,'" that such exemptions may not rest on "`dubious inferences,'" but that they must be provided in "`plain words.'" 411 U.S., at 156 , quoting *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 606 -607 (1943). Despite the clear federal purpose of promoting this tribal economic enterprise, the Court found that no judicial immunities could appropriately be implied.

Colville, 447 U.S. 176-80. Justice Rehnquist's well-reasoned analysis in his dissent in *Colville* needs to be applied here. The balancing of interests test was a noble, but ill-fated attempt to reconcile differences between states and tribes. It has failed, and the judiciary is littered with the debris of litigation to prove it. Balancing is best left to Congress, where local and national interests can be better reconciled in an open forum with public debate. The secretary therefore requests that the Court abandon the balancing of interests test and apply the federal preemption analysis as set forth by Justice Rehnquist in his dissent in *Colville.*

Applying the federal preemption test as illustrated in *Mescalero*, the tradition of Indian sovereignty provides no immunity for off-reservation activities; none have traditionally been recognized. *See Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575 (1928); *Ward v. Race Horse*, 163 U.S. 504 (1896). Thus, the answer here becomes much more focused. The Kansas fuel tax is imposed off-reservation on non-tribal members directed at non-reservation value. Neither the cases cited above nor any treaty with this tribe nor federal statute provide "traditional immunity" under these circumstances.

b. Balance of Interests Test Inappropriate for Off-Reservation Activity

In *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), the Court's conclusion stands for the proposition that preemption analysis is not applicable to off-reservation activity. *White Mountain* involved only the on-reservation activity of a non-Indian company. In fact, the Court expressly recognized the dichotomy between a state's authority to enforce otherwise nondiscriminatory state law off and on-reservation, stating that

"[i]n the case of Indians going beyond reservation boundaries... a nondiscriminatory state law is generally applicable in the absence of express federal law to the contrary." *White Mountain*, 448 U.S. at 144 n.11.

Moreover, the tribe cannot cite any case applying the "tribal self-government" doctrine to *off-reservation activity*. In fact, this concept's origin was in *Williams v. Lee*, 358 U.S. 217 (1959), where the Court held that state courts had no jurisdiction over a civil claim by a non-Indian against an Indian for a transaction *arising on* the reservation. *Williams v. Lee* 358 U.S. at 223, (emphasis added).

The *White Mountain* Court was only addressing the "difficult question" of applying state law to the on-reservation activity of non-Indians when it announced its preemption analysis.[3] In light

[3] "When *on-reservation* conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. More difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging in activity *on the reservation. In such cases* we have... [conducted] a particularized inquiry into the nature of the state, federal, and tribal interests at stake...." *White Mountain*, 448 U.S. at 144-45. (internal cites omitted; emphasis added).

of this passage and the *White Mountain* Court's recognition of the dichotomy between a state's authority to enforce otherwise nondiscriminatory state law off and on-reservation, there is simply no basis for concluding that *White Mountain's* preemption analysis can apply to off-reservation activity.

Moreover, Supreme Court authority interpreting *White Mountain* makes clear that *White Mountain's* preemption analysis--along with its concern for sovereignty factors--does not apply when the issue is whether state law applies off-reservation. In *New Mexico v. Mescalero Apache Tribe (Mescalero II)*, 462 U.S. 324 (1983), the state's application of its hunting and fishing laws to nonmembers of the tribe on the reservation was preempted by operation of federal law. *Mescalero II*, 462 U.S. at 343-44.[4]

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[4] "In [*White Mountain Apache Tribe v.*] *Bracker*, we reviewed our prior decisions concerning tribal and State authority over Indian reservations and extracted certain principles governing the determination whether federal law preempts the assertion of State authority over nonmembers *on a reservation.* We stated that that determination does not depend "on mechanical or absolute conceptions of state or tribal sovereignty, but calls for a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Mescalero II*, 462 U.S. at 333. (emphasis added).

At the same time, the *Mescalero II* Court noted that "[o]ur cases have recognized that tribal sovereignty contains a 'significant geographical component,' " *id.* at 335 n. 18, and, as a result, "the off-reservation activities of Indians are generally subject to the prescriptions of a 'nondiscriminatory state law' in the absence of 'express federal law to the contrary.' " *id.* (quoting *Mescalero I*, 411 U.S. at 148-49).

This statement, appearing after the Court rejected the requirement for an "express congressional statement" when applying *White Mountain's* preemption analysis, confirms that *White Mountain's* preemption analysis requiring balancing of interests does not apply when the issue is whether state law applies off-reservation.

c. Balance of Interests Test Favors the State

Assuming the Court determines that a balancing of interests between the parties is appropriate, it was not error for the District Court to have found that said balance favored the State.

As this Court determined, "Congress has made it clear in no uncertain terms that a state has a special and fundamental interest in its tax collection system." *Colville*, 447 U.S. at 157. *see also ANR Pipeline Co. v. LaFaver*, 150 F.3d 1178, 1193 (10th Cir. 1998). A State's interest is "strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." *Colville*, 447 U.S. at 157, *see also Prairie Band Potawatomi Nation v. Richards*, 2003 WL 136197 10 (D. Kan. 2003). This, the District Court determined is the primary State interest, and, under the circumstances of this case, it trumps the tribe's interest in more profits.

As the District Court surmised, all that the tribe has really alleged as its "interest" is that if the State tax is allowed to stand, the tribe may not have as many sales as it currently enjoys, or as much profit as it would like. As the District Court correctly determined, this has never been sufficient to oust a State tax imposed off-reservation on non-tribal members.

The Supreme Court has never "gone so far as to grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses." *Colville*, 447 U.S. at 155. In fact, a tax on non- Indians "may be valid even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians." *Id.* at 151. "[T]he Tribes have no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all." *Id.* at 151 n.27.

The tribe's reliance on *California v. Cabazon Band of Mission Indians*, 480 U.S. 292 (1987), *Gila River Indian Community v. Waddell*, 967 F.2d 1404 (9th Cir. 1992) and *Indian Country, U.S.A. v. Oklahoma Tax Comm'n*, 829 F.2d 967 (10th Cir. 1987), cert. denied 487 U.S. 1218 (1988), is misplaced. Those cases turned largely on the fact that in those cases the State was attempting to impose tax or regulate on reservation activities. That is not the case here. The State tax at issue here is imposed off-reservation against non-tribal members.

The District Court correctly determined that the tribe's interest in this case, which is primarily economic, was insufficient to trump the State's sovereign interests in its tax system; especially where the State's interest is directed off-reservation against non-tribal members. The District Court simply followed controlling precedent. This was not error, and the District Court should be affirmed.

II. Issue

Whether the District Court erred in holding that the State tax imposed off-reservation against non-tribal members does not impermissibly infringe on the tribe's right to self government.

A. Standard of Review

Resolution of this issue involves almost exclusively a balancing of equities between the respective parties. Thus, this Court's scope of review is narrowed to using the abuse of discretion standard. *Woerner v. U. S. Small Business Administration*, 934 F. 2d 1277, 1278, 290 U.S. App. D.C. 105, 106 (1991).

B. Disposition of the Issue Below

The District Court held that a State tax imposed off-reservation against non-tribal members does not impermissibly infringe on the tribe's right to self-government, even if the tribe's profits are reduced. *Prairie Band Potawatomi Nation v. Richards*, 2003 WL 136197 10-11 (D. Kan. 2003)

C. Discussion

This Court has set forth a threshold test for whether a State's tax unconstitutionally infringes upon a tribe's internal affairs: if a substantial portion of the tribe's retail fuel sales are to tribal members as opposed to consumers traveling from outside Indian land, the tribe's argument that the indirect burden of the fuel tax improperly interferes with their internal affairs may have force. *Sac & Fox Nation of Missouri v. Pierce*, 213 F.3d at 584.

The Court's logic is clear: if the State tax is imposed off-reservation on non-tribal members directed at non-reservation value, and if the majority of sales are to non-tribal members, the

tribe cannot show impermissible interference with internal tribal affairs.

As shown above, the State tax at question here is imposed on non-tribal member distributors off-reservation on non-reservation value (*Sac & Fox Nation of Missouri v. Pierce*, 213 F. 3d at 580); in this circumstance this Court has clearly established a direct link between the volume of sales to tribal members and an allegation of unconstitutional interference from the State tax.

If the majority of sales are to non-tribal members, then the State's imposition of a tax off-reservation directed at non-reservation value does not unconstitutionally infringe upon a tribe's internal affairs.

Moreover, this Court has placed the burden of proof on this threshold factual test squarely on the tribe asserting "infringement." *Sac & Fox v. Pierce*, 213 F. 3d at 584 (Tribes must provide courts with verifiable projections based upon historic

statistics indicating what portion of the tribe's retail fuel sales is made to tribal members as compared to the general public, *See also Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 128 (1993) (remanding for a determination of "whether the tribal members on whom Oklahoma attempts to impose its income and motor vehicle fuel taxes live in Indian country")).

Here, the tribe has not even alleged that a substantial portion of its fuel sales are to tribal members. The tribe's failure to even allege that a substantial portion of its sales are to tribal members is fatal, because it fails this Court's threshold test for infringement.

All that the tribe has alleged is that if the State tax imposed on non-tribal members off-reservation on non-reservation value is allowed to stand, the tribe may not have as many sales as it currently enjoys, or as much profit as it would like. This has never been the standard in analyzing whether a State tax imposed on non-tribal members off-reservation on non-

reservation value unconstitutionally infringes on a tribe's internal affairs.

A tax imposed by Kansas off-reservation in no way prohibits or impairs the tribe's ability to enact its own laws and be ruled by them. It is free to do so, and the secretary has never taken a contrary position under these circumstances.

When the underbrush is cleared away, what the tribe is really arguing is that it believes it has a right to unlimited sales of fuel to the ultimate consumers of said fuel, and a right to unlimited profits on said sales. Absolutely *no* support for the tribe's position exists.

The tribe has failed to demonstrate that a State tax imposed off-reservation against non-tribal members impermissibly infringes upon any federal right: constitutional, statutory, judicial, or treaty. Second, case law has laid to rest any question that states can exercise jurisdiction on and off Indian reservations.[5]

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[5] *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463 (1976); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980);

Even though the State tax may have an indirect economic effect on the tribe, this does not negate the tribe's ability to impose a tribal tax, even if tribal profits are lessened as a result of the State tax. "A nondiscriminatory tax imposed on non-exempt private entities that do business with Indian tribes and that pass the cost of those taxes on to the tribes does not violate tribal sovereign immunity." *Chickasaw Nation v. Oklahoma Tax Comm'n*, 31 F.3d 964, 970 (10th Cir. 1994), *aff'd in part, rev'd in part on other grounds*, 515 U.S. 450 (1995).[6]

The tribe asserts that the State fuel tax jeopardizes their fuel sales that allegedly support essential tribal services. According to

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California State Board of Equalization v. Chemehuevi Indian Tribe, 474 U.S. 9 (1985); and *Mescalero Apache Tribe v. O'Cheskey*, 625 F.2d 967 (10th Cir. 1980).

[6] It should be noted that non-tribal members are considered by the Courts as non-Indians: "Nor would the imposition of Washington's tax on these purchasers contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe. *For most practical purposes those Indians stand on the same footing as non-Indians* resident on the reservation. There is no evidence that nonmembers have a say in tribal affairs or significantly share in tribal disbursements. We find, therefore, that the State's interest in taxing these purchasers outweighs any tribal interest that may exist in preventing the State from imposing its taxes." *Colville*, 447 U.S. 160-61 (emphasis supplied).

the tribe, if the State tax stands, their profits will decrease, impermissibly interfering with their self-government.

The Supreme Court addressed this very issue and language similar to the language in the Kansas Act for Admission in the Oklahoma Organic Act over a century ago in *Thomas v. Gay*, 169 U.S. 264 (1898). There, it was argued that the Organic Act of Oklahoma precluded territorial taxation of cattle grazing on Indian reservation land as impairing "any right now pertaining to any Indians." It was argued that Indians were directly and vitally interested in the property sought to be taxed, that the Indian's rights and rights of property would be seriously impaired by the territorial tax, that the money received by the tribe from the grazing leases were to be used by the tribe for tribal uses and tribal government services, that the federal government's interest in tribal issues precluded territorial taxation and that if the territorial taxes were allowed to be imposed it would devalue the reservation lands, the tribe would not get as much profit, and its leases and revenue flow would fluctuate or be completely destroyed. *Thomas v. Gay*, 169 U.S. 265, 271-73 (1898). These

are the same precise arguments put forth by the tribe in this case.

The Supreme Court swept aside all of the above arguments against the territorial tax. Holding that a tax upon the cattle of the lessees was too remote and indirect to be deemed a tax upon the lands or privileges of the Indians. *Thomas v. Gay*, 169 U.S. 264, 273 (1898) The Supreme Court likewise held that the character of the territorial tax in no way impeded Congress' plenary power over the Indians. *Id.* at 274-75. Slightly less than a decade later the analysis and conclusion in *Thomas* was sustained in *Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1906).

Here, the same conclusion is even more manifest. In *Thomas*, the cattle sought to be taxed by the territory were actually on the reservation. Here, the gasoline is taxed off of the reservation. In *Thomas*, no reservation values (i.e. the land or the rents paid to the tribe) were sought to be taxed. Here, the secretary is not attempting to tax the tribe's sales on the reservation or the

profits therefrom. In *Thomas*, the Indians had no property interest in the commodity sought to be taxed by the territory. Similarly here, the tribe has not even alleged (let alone proven) that it has a property interest in the fuel when the tax is imposed on the distributor off reservation. Finally, in *Thomas* the fact that the tribe might lose revenues completely was simply irrelevant to the Court, because the territorial tax was too remote to infringe on the tribe's rights and its rights in property. The same is true in this case today.

Nearly a century later the rationale of *Thomas* was confirmed, and similar arguments raised by a tribe were rejected by the Supreme Court in *Colville*, 447 U.S. at 154-59, where the State of Washington sought to impose a cigarette sales tax on on-reservation purchases by nonmembers of the Tribes. In *Colville*, the Court phrased the issue as "whether an Indian tribe ousts a State from any power to tax on-reservation purchases by nonmembers of the tribe by imposing its own tax on the transactions or by otherwise earning revenues from the tribal business."

The Supreme Court has never, however, "gone so far as to grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses." *Colville*, 447 U.S. at 155. In fact, a tax on non-Indians "may be valid even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians." *Id.* at 151. (emphasis added). "[T]he Tribes have no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all." *Id.* at 151 n.27. (emphasis added). For over a century the Supreme Court has consistently adhered to this rule, and this court should not accept the tribe's invitation to ignore plain Supreme Court precedent.

The relevant inquiry is to what extent will non-tribal members avoid their obligation to remit fuel tax to Kansas by a claimed exclusion from Kansas tax. *That* is the question, and if the State tax at issue here is stricken, then non-tribal member distributors and importers will avoid their obligation to remit fuel tax to the State.

The Supreme Court has denounced the notion of striking a state tax based merely on the extent to which a non-Indian "is willing to flout his legal obligation to pay the tax." *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 482 (1976).

The tribe, apparently, argues that the issue is whether a tribe is "marketing an exemption" by advertising its prices are lower because of no State tax. The courts, however, have not looked solely at "marketing an exemption" as the determinative touchstone, but instead have focused on whether *non-tribal members* would be avoiding *their* state tax remittance obligations if the State tax was stricken.[7]

Moreover, limiting the inquiry to whether the tribe is "marketing an exemption" is a slippery slope that no court has ventured to traverse. The Ninth Circuit declined a tribe's similar invitation to

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[7] *See Colville*, 447 U.S. at 155 ("The Tribes assert the power to create such exemptions by imposing their own taxes or otherwise earning revenues by participating in the reservation enterprises. If this assertion were accepted, the Tribes could impose a nominal tax and open chains of discount stores at reservations borders, selling goods of all descriptions at deep discounts and drawing customers from surrounding areas.").

do that which the tribe here appears to urge this Court: read *Colville* narrowly.[8]

The Ninth Circuit wisely avoided reading *Colville* too narrowly. The Court recognized that limiting the results of *Colville* to only those situations of "marketing an exemption" would open a pandora's box in which prices could be manipulated up or down and narrow, hair-splitting (and often irrelevant) facts could be asserted to "prove" unconstitutional State infringement. The Ninth Circuit avoided that trap, and this Court should likewise decline any invitation by the tribe here to a never-ending cycle of litigation.

The District Court held that the State tax imposed off-reservation against non-tribal members on non-reservation value did not impermissibly infringe upon the tribe's putative right to self-

[8] "Were we to accede to the tribe's arguments and distinguish *Colville* on the grounds that in Colville, non-Indian purchasers were attracted to the reservation solely to purchase tax-free cigarettes, we would raise the specter of drawing distinctions on a case by case basis, relying on such factors to allow or disallow state taxation as whether non-Indian customers resided on or off reservation, the existence of other tribal amenities attracting visitors to the reservation, the length of time visitors spent on the reservation, the level of state funding of reservation, and the amount of tribal effort devoted

government. There is no error in the District Court's logic, analysis, application of the law or holding, and this Court should affirm the District Court's holding.

III. Issue

Whether the District Court erred in holding that the tribe's imposition of a tribal tax does not oust a State tax imposed off-reservation against non-tribal members.

A. Standard of Review

This Court reviews *de novo* the district court's construction of a statute and its other conclusions of law. *Hiller Cranberry Products, Inc. v. Koplovsky*, 165 F.3d 1, 4 (1st Cir. 1999).

B. Disposition of the Issue Below

The District Court held that the fact that the tribe may impose a tribal fuel tax does not oust the State tax that is imposed off-

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to marketing the product." *Chemehuevi Indian Tribe v. California State Bd.*, 800 F. 2nd 1446, 1450 (9th Cir. 1986).

reservation against non-tribal members. *Prairie Band Potawatomi Nation v. Richards*, 2003 WL 136197 9, 11 (D. Kan. 2003)

C. Discussion

The tribe here complains about alleged problems of double taxation. Double taxation is not a bogeyman. It is simply a fact of life that we all live with every day. The federal government taxes fuel, tires, alcohol, cigarettes, and so do States, and the consumer pays for all of it. Except for the ultimate consumer, no one really "pays" taxes. The cost of taxes are built in to selling prices. This is the way the cost of the taxes are disbursed.

The Supreme Court has never struck a State tax under the circumstances and facts of this case on grounds of "double taxation," and the tribe does not cite the court to one case that stands for that proposition. Simply because the tribe and the State may tax the same commodity does not invalidate the State's tax. *Washington v. Confederated Tribes of the Colville* 447 U.S. 134, 158 (1980) (State tax not invalid where State and tribal taxes imposed on same transaction), and *Moe v. Salish and*

Kootenai, 425 U.S. 463, 469 n. 9 (1976) (holding minimal burden of tax collection insufficient to preempt State tax). *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (State tax not invalidated simply because tribe taxes the same commodity.).

It was not error for the District Court to follow controlling Supreme Court precedent and hold that the State tax imposed off-reservation against non-tribal members is not ousted simply because the tribe may also impose a tribal tax on the same commodity. *Prairie Band Potawatomi Nation v. Richards*, 2003 WL 136197 9 (D. Kan. 2003) This Court should affirm the District Court's holding on this issue.

IV. Issue

Whether the District Court erred in holding that the tribe's purchases of finished fuel off-reservation and re-selling it at retail to non-tribal members in the vicinity of the tribe's casino does not create value added on the reservation sufficient to preempt a State tax imposed off-reservation against non-tribal members.

A. Standard of Review

This Court reviews *de novo* the District Court's grant of a motion for summary judgment. *Atwater v. City of Lago Vista*, 165 F.3d 380, 383 (5th Cir. 1999).

B. Disposition of the Issue Below

The District Court held that finished fuel imported by the tribe for re-sale at retail in the vicinity of the tribe's casino was not an "Indian" product, and that the State tax at issue did not impermissibly burden any value added by the tribe on-reservation. *Prairie Band Potawatomi Nation v. Richards*, 2003 WL 136197 12-13 (D. Kan. 2003).

C. Discussion

All of the tribe's arguments that the State tax impermissibly burdens value added on the reservation to an "Indian product" are irrelevant, because the State is not attempting to tax anything that occurs on the tribe's reservation.

The tribe cites the correct standard from *Colville*, which was followed by the District Court: "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.' *Colville*, 447 U.S. 134, 156-57 (1980)." (Aplt. Brief at 18 emphasis added).

The State is not attempting to impose any tax on value generated on the tribe's reservation. The State is taxing the commodity on activities conducted off-reservation.

The tribe has not shown that it has a significant interest (or any role) in the distributor's activities off-reservation (which is where and upon whom the incidence of tax falls)[9]. That is what the State is taxing... the distributor's off-reservation activities. The fact that the tribe may add value later on down the line is

[9] K.S.A. 79-3408(c) "Unless otherwise specified in K.S.A. 79-3408c, and amendments thereto, the incidence of this tax is imposed on the distributor of the first receipt of the motor fuel and such taxes shall be paid but once. Such tax shall be computed on all motor-vehicle fuels or special fuels received by each distributor, manufacturer or importer in this state and paid in the manner provided for herein..."

irrelevant, because the State is simply not attempting to impose its tax on those retail "values" on-reservation.

The District Court, however, went further in correctly determining that gasoline and diesel fuel are not "Indian products." *Prairie Band Potawatomi Nation v. Richards*, 2003 WL 136197 at FN 91 (D. Kan. 2003). The tribe has not asserted that it is developing and marketing a tribal resource. All the tribe has asserted is that it is importing a finished product and selling it at retail in the vicinity of its casino.

Here, the District Court found that the fuel is finished and saleable when the tribe imports it. The tribe merely offers the fuel for sale at retail. That was insufficient for the Ninth Circuit to find preemption in *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107, 1112-13 (9th Cir. 1997) (No preemption as to food sales - even when tribe does contribute, and no preemption on sales of beverages that are finished when imported). It is insufficient here as well, and the balance of interests does not favor the tribe.

The tribe has desperately tried to argue that the simple fact that it is selling finished fuel at retail near its casino adds sufficient value to the product to oust the off-reservation tax imposed by the State against non-tribal members. The District Court correctly rejected the tribe's position.

The District Court looked at all of the facts the tribe put forth. In a complete and comprehensive Order, the Court held that merely importing and selling finished fuel in the vicinity of the tribe's casino did not make the finished fuel an "Indian" value added product. Additionally, this type of argument has been un-persuasive with other courts. *See Chemehuevi Indian Tribe v. California State Bd.*, 800 F.2d 1446, 1449 (9th Cir. 1986). (The Chemehuevis are not developing and marketing a tribal resource; they are importing a finished product and reselling it to residents and visitors). *See also Salt River* 50 F.3d 734, 735 (9th Cir.) *cert. denied* 516 U.S. 868 (1995); *Yavapai-Prescott Indian Tribe v. Scott* 117 F.3d 1107, 1112-13 (9th Cir. 1997) (food

preparation and importing of finished beverages does not mean that the tribe contributes more to the value of what is sold).

When State taxes are imposed on the sale of non-Indian products to non-Indians, as is the case here, and in the so-called "smoke shop" cases, the preemption balance tips toward State interests. *Colville*, 447 U.S. at 156-57, *Salt River Pima-Maricopa Indian Community v. State of Arizona*, 50 F.3d 734, 737 (9th Cir.), *cert. denied* 516 U.S. 868 (1995), *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107, 1112-13 (9th Cir. 1997).

The facts put forth by the tribe failed to show that merely importing a finished fuel product and selling it at retail near its casino was sufficient to magically turn the fuel into an "Indian product." Moreover, the tribe failed to put forth any facts whatsoever that the State has attempted to impose a State tax on value generated on the tribe's reservation by activities in which the tribe has a significant interest.

For these reasons, the District Court's holding was not error, and this Court should affirm the District Court.

V. Issue

Whether the District Court allegedly erred in considering evidence not properly before the Court.

A. Standard of Review

Because this issue turns on facts reviewed and applied by the District Court and the competing equities between the parties, this Court's scope of review is narrowed to using the abuse of discretion standard. *Woerner v. U. S. Small Business Administration*, 934 F.2d 1277, 1278, 290 U.S. App. D.C. 105, 106 (1991).

B. Disposition of the Issue Below

The District Court held that in granting the secretary's motion for summary judgment, it only considered evidence proffered by the tribe, and viewed it in a light most favorable to the tribe. *Prairie Band Potawatomi Nation v. Richards*, 2003 WL 136197 1-2, 10-13 (D. Kan. 2003). *Prairie Band Potawatomi Nation v. Richards*, 2003 WL 21536881 3 (D. Kan. 2003).

C. Discussion

It is unclear what more the secretary can add to the District Court's own words. The District Court held, "The following facts are taken from the record and either stipulated, uncontroverted or viewed in a light most favorable to the plaintiff's case. The Court ignores factual assertions that are immaterial, or unsupported by affidavits and/or authenticated and admissible documents." *Prairie Band Potawatomi Nation v. Richards*, 2003 WL 136197 at 1. The Court then lists the Facts that it considered in reaching its decision. All of them came from the tribe.

The tribe raised in its motion for reconsideration the specter that the District Court considered facts not properly before it. The District Court stated in its Order on motion for reconsideration, "The Court declines plaintiff's assertions, the Court did not rely on defendant's supposed objectionable exhibits in ruling on defendant's summary judgment motion." *Prairie Band Potawatomi Nation v. Richards*, 2003 WL 21536881 at 3.

The secretary can add no more. The District Court clearly stated that it did not rely on anything from the secretary, only from the tribe, and in a light most favorable to the tribe. Unless the tribe is asserting that the District Court is being untruthful, it appears that the tribe simply does not like the District Court's decision. While that is understandable (no one likes to lose), without significantly more, the tribe's argument is hollow and should be given no merit by this Court.

The District Court's decision as to this issue should be affirmed by this Court.

CONCLUSION

Based upon the foregoing, the secretary respectfully requests that this Court affirm the holding of the District Court, that the tribe take naught, and for such other relief as the Court deems appropriate.

Respectfully submitted this twenty-second day of October, 2003.

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STATEMENT REGARDING ORAL ARGUMENT

The issues raised in this appeal are of significant import to the sovereignty of the State of Kansas and States generally. The issues are of wide public interest and importance as they concern fundamental rights of sovereignty and the way in which Indian tribes and States interact with one another. The issues addressed concern the proper scope, if any, of facts to be considered in balancing of tribal and State interests. This case also implicates special sovereignty issues and Kansas' fundamental right to taxation of commerce within its borders. Oral argument will assist the Court in understanding the record and proceedings below.

Respectfully submitted this twenty-second day of October, 2003.

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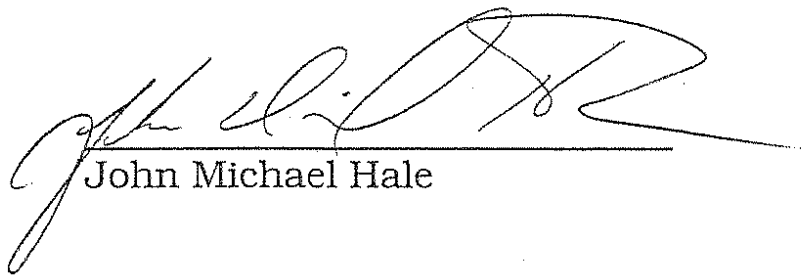
CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that a Microsoft Word count showed that this brief, exclusive of cover page, tables and attachments, contains 8979 words and 1234 lines, and therefore complies with the type-volume limitation of Rule 32(a)(7)(C) Fed. R. Of App. Pro.



John Michael Hale

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing APPELLEE'S OPENING BRIEF was duly served upon all attorneys below by depositing copies of the same in the United States Mail, postage prepaid and properly addressed, at Topeka, Kansas, on the twenty-second day of October, 2003, to:

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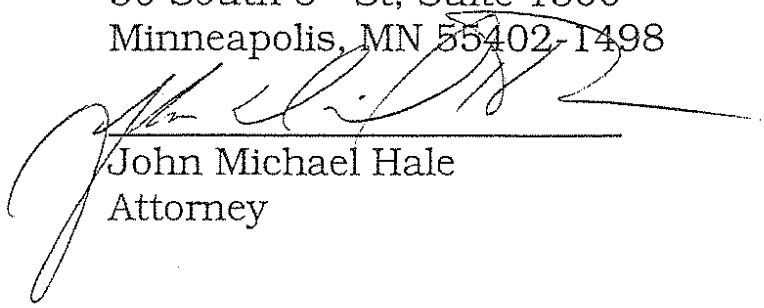

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