Oneida Nation

Certification of Referendum Question

TO: General Tribal Council
FROM: Lisa Summers, Tribal Secretary
DATE: May 25, 2016
RE: Tribal Sales Tax

At the caucus held on May 9, 2015, the following question was received by the Tribal Secretary:

> As a Sovereign, the Oneida Nation has the right to tax. Should the Oneida Nation supplant the existing 5.5% WI State tax exempt trust lands including Walmart and Sam's Club on Mason Street and the Home Depot on Taylor Street with all such funds collected and dedicated to a trust fund for PerCapita distribution?

The referendum question was placed on the ballot for the election held on July 11, 2015, with the following results:

Yes: 359 No: 133

As provided by in the Election Law, the issue is being presented for action/decision at General Tribal Council:

> Election Law Section C. 2.12-9.(a) Referendum elections in which a majority of the qualified voters who cast votes shall be binding on the Business Committee to present the issue for action/decision at General Tribal Council.

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CONFIDENTIAL MEMORANDUM

TO: Jo Anne House, Chief Counsel

FROM: James R. Bittorf, Deputy Chief Counsel

DATE: November 13, 2015

SUBJECT: Referendum Question — Tribal Sales Tax

Background

The United States holds title to land within the Oneida Reservation in trust for the benefit of the Tribe ("trust land"). The Tribe leases some of this trust land to developers, who in turn sublease the land to non-Indian companies that operate retail businesses on the land. The Tribe also leases trust land directly to non-Indian companies that operate retail businesses on the land. The Secretary of the United States Department of the Interior approves the leases pursuant to applicable federal laws and regulations. The State of Wisconsin imposes a 5% sales tax on all on-reservation sales made by non-Indian companies to customers who are not members of the Tribe, including sales made by non-Indian companies to nonmembers on trust land.

A majority of tribal members who participated in a recent election voted in favor of the following referendum question:

> As a sovereign the Oneida Nation has the right to tax. Should the Oneida Nation supplant the existing 5.5% Wisconsin State and Brown County sales taxes on businesses located on tax exempt trust lands including Walmart and Sam's on West Mason Street and the Home Depot on Taylor Street with all such funds collected and dedicated to a trust fund for per capita distribution?

Questions Presented

This memorandum addresses the following questions: 1) Does the Tribe have the authority to impose a sales tax on the non-Indian companies that operate retail businesses on the Tribe's trust lands? 2) Would a tribal sales tax on these non-Indian companies supplant or replace the state sales tax?

Short Answers

1) The Tribe has the authority to impose a sales tax on the non-Indian companies that operate retail businesses on the Tribe's trust lands, because the companies have entered the Tribe's lands for the purpose of conducting business, and because the companies have entered into consensual relationships with the Tribe, and the sales tax has a connection with those consensual relationships.

2) If enacted, a tribal sales tax would not supplant or replace the state sales tax. The non-Indian companies operating retail businesses on the Tribe's trust lands would be subject to both tribal and state sales taxes, and would be placed at a competitive disadvantage to companies whose businesses are not located on tribal trust lands. The non-Indian companies operating retail businesses on the Tribe's trust lands would therefore have an incentive to challenge the validity of the Tribe's sales tax, and may seek to terminate their leases/subleases.

Discussion

I. Tribal Authority to Impose Sales Taxes on Non-Indian Lessees of Trust Land.

Indian tribes have the authority to tax the activities of nonmembers who enter upon tribal lands to conduct business. A tribe's interest in raising revenue by taxing the activities of nonmembers on tribal lands is at its strongest when the tribe has a significant interest in the subject matter and the nonmembers receive governmental services from the tribe. A tribe also

has the authority to tax the activities of nonmembers if the nonmembers have entered into consensual relationships with the Tribe and the tax has a connection with those consensual relationships, or if the nonmembers' activities threaten the political integrity or health and welfare of the tribe.

A. Inherent tribal authority.

The United States Supreme Court has described Indian tribes as "'domestic dependent nations,' which exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Comm'n v. Citizen Band Potowatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (citing *Cherokee Nation v. Georgia,* 5 Pet. 1, 17, 8 L.Ed. 25 (1831)). On two occasions, the Supreme Court has ruled that the inherent authority of tribes includes the power to tax nonmembers' activities on tribal trust land. In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) ("*Colville*"), the Court stated "[t]he power to tax transactions occurring on trust lands and significantly involving the tribe or its members is a fundamental attribute of sovereignty which tribes retain unless divested of it by federal law or necessary implication of their dependent status." *Id.* at 152. Similarly, in *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1981), the Court determined that Indian tribes possess the authority to tax nonmembers' activities on trust land, and stated:

> The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services. The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction.

Id. at 137.

Colville involved both tribal taxes on cigarette sales made by tribal retailers to non-Indians on trust lands, and state cigarette and sales taxes on those same transactions. In defending its tax, the State of Washington claimed the Tribes lacked authority to impose taxes on non-Indian purchasers. The Court rejected this claim, noting the view of the federal government that Indian tribes possess authority to tax the activities of non-Indians on reservation lands in which the tribes have a significant interest:

> The widely held understanding within the Federal Government has always been that federal law to date has not worked a divestiture of Indian taxing power. Executive branch officials have consistently recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest, including jurisdiction to tax.

Colville, 447 U.S. at 152-53 (citations omitted). The Court also suggested that the authority to tax non-Indians on tribal lands was confirmed by the Indian Reorganization Act, which secures for tribes organized under the Act all powers vested in the tribes by "existing law," in addition to the rights and powers enumerated in the Act. The Court stated:

> [A]uthority to tax the activities or property of non-Indians taking place or situated on Indian lands, in cases where the tribe has a significant interest in the subject matter, was very probably one of the tribal powers under "existing law" confirmed by the Indian Reorganization Act of 1934, 48 Stat. 987, 25 U.S.C. § 476.

Id. at 153. Finally, the Court noted the Tribes' interest in taxing nonmembers to raise "revenues for essential governmental programs...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." *Id.* at 156-57.

In *Merrion*, the Jicarilla Apache Tribe entered into long-term leases under which non-Indian companies extracted oil and gas from tribal trust land in exchange for royalty payments. The Tribe later imposed oil and gas severance taxes on the companies, and the companies

challenged the Tribes authority to levy the taxes. *Merrion,* 455 U.S at 135-36. The Court upheld the tax, and ruled the power to tax is not only an "essential attribute of Indian sovereignty," but also is supported by a tribe's power to exclude non-Indians from tribal lands. *Id.* at 137. In reaching this holding, the Court noted the companies benefitted from conducting business on the Tribe's lands, and the companies received services from the Tribe.

> The [companies] avail themselves of the substantial privilege of carrying on business on the reservation. They benefit from the provision of police protection and other governmental services, as well as the advantages of a civilized society that are assured by the existence of tribal government.

Id. at 137-38 (citations and internal quotation marks omitted). The Court also considered "the views of the three branches of the federal government, as well as general taxation principles, [which] confirm that Indian tribes enjoy authority to finance their governmental services through taxation of non-Indians who benefit from those services." *Id.* at 140.

Three justices dissented in *Merrion.* They would have ruled that a tribe's power to tax nonmembers arises solely from the tribe's power to exclude them from tribal lands, and that the Jicarilla Apache Tribe gave up the power to exclude the companies from its lands when it entered into leases with them. *Id.* at 185-86. While the majority rejected this position, they agreed there are limits on a tribe's authority to tax nonmembers. "We do not question that there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe." The majority also ruled that "[n]onmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct, such as a tax on business activities on the reservation."

Merrion only involved nonmember activities on tribal trust land, as all lands within the Jicarilla Apache Reservation are held in trust. *Id.* at 133. In *Atkinson Trading Post v. Shirley,* 532 U.S. 645 (2001), the Court considered whether a tribe may tax nonmember activities on non-Indian fee lands, and ruled that such assertions of tribal taxing authority must fall within an exception to the general rule announced in *Montana v. United States*, 450 U.S. 544 (1981), which holds that Indian tribes generally do not possess jurisdiction over the activities of nonmembers on non-Indian fee land. In so ruling, the Court specifically limited the applicability of *Merrion* to "transactions occurring on *trust* lands and significantly involving a tribe or its members." *Atkinson*, 532 U.S. at 653 (citations and internal quotation marks omitted, emphasis in original). The Court explained:

> There are undoubtedly parts of the *Merrion* opinion that suggest a broader scope for tribal taxing authority than the quoted language above. But *Merrion* involved a tax that only applied to activity occurring on the reservation, and its holding is therefore easily reconcilable with the *Montana-Strate* line of authority, which we deem to be controlling. See *Merrion, supra* at 142 ("[A] tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe"). An Indian tribe's sovereign power to tax — whatever its derivation — reaches no further than tribal land.

Id. (footnotes omitted).

The Supreme Court recently granted review of the decision of the United States Court of Appeals for the Fifth Circuit in *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians,* 746 F.3d 167 (2014). The petitioners in that case are non-Indian companies that operate a retail business on leased tribal trust land. They are challenging the tribal court's exercise of jurisdiction over them in a civil lawsuit arising out of an alleged sexual assault by one of their employees against a minor tribal member. They are arguing, in part, that an Indian tribe may only exercise civil jurisdiction over a nonmember if the nonmember expressly consents to the tribe's jurisdiction. The Supreme Court is expected to rule on the case next year, and the Court's

decision could limit the authority of Indian tribes over nonmembers who enter tribal land, and over nonmembers who enter consensual relationships with tribes. An adverse decision of the Court could therefore call into question an Indian tribe's ability to tax nonmembers who have entered tribal land, or entered into consensual relationships with a tribe.

B. Inherent tribal authority to tax activities of nonmembers who enter into consensual relationships with the Tribe.

In *Montana*, the Court announced the general rule that Indian tribes lack jurisdiction over the activities of nonmembers on non-Indian fee land. The Court determined that tribes have been divested of this authority "through their original incorporation into the United States as well as through specific treaties and statutes." *Montana,* 450 U.S. at 563 (citation omitted). "'These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom *to determine their external relations.*'" *Id.* at 564 (quoting *United States v. Wheeler,* 435 U.S. 313, 326 (1978)) (italics in original).

The Court identified two exceptions to this general rule. First, the Court stated:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.

Id. at 565 (citations omitted). Second, the Court stated:

> A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, of the health or welfare of the tribe.

Id, at 566 (citations omitted).

In subsequent cases, the Court has emphasized the narrow scope of these exceptions, and has stated that they are "limited ones and cannot be construed in a manner that would swallow the rule or severely shrink it." *Plains Commerce Bank v. Long Family Land & Cattle Co.,* 554

U.S. 316, 330 (2008) (citations and quotation marks omitted). With respect to the first *Montana* exception relating to consensual relationships, the Court has ruled that the tribal regulation must have a connection with the consensual relationship between the nonmember and the Tribe or tribal member. "*Montana's* consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself.... A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another – it is not 'in for a penny, in for a Pound.'" *Atkinson*, 532 U.S. at 656 (quoting E. Ravenscroft, The Canterbury Guests; Or a Bargain Broke, act v, sc. 1). With respect to the second *Montana* exception, the Court has held the nonmember's conduct must threaten the subsistence of the tribal community.

> The second exception authorizes the tribe to exercise civil jurisdiction when non-Indians' conduct menaces the political integrity, the economic security, or the health and welfare of the tribe. The conduct must to more than injure the tribe, it must imperil the subsistence of the tribal community. One commentator has noted that "th[e] elevated threshold for application of the second *Montana* exception suggest that tribal power must be necessary to avert catastrophic consequences." Cohen § 4.02[3][c], at 232, n. 220.

Plains Commerce, 554 U.S. at 341 (2008) (citation and quotation marks omitted). At the same time, the Court has stated a tribe's "traditional and undisputed power to exclude persons from tribal land, ... gives it the power to set conditions on entry to that land...," and has remarked, "[m]uch taxation can be justified on a similar basis." *Id.* at 335 (citations and quotation marks omitted).

As discussed above, the *Dolgencorp* case is currently pending before the Supreme Court, and the Court's decision in that case could further limit tribal jurisdiction over nonmembers, and may call into question a tribe's authority to impose taxes on nonmembers who have entered upon tribal land or who have entered into consensual relationships with the tribe.

C. The proposed tribal sales tax on non-Indian lessees of tribal trust land.

The Tribe leases trust land to non-Indian developers who sublease the land to non-Indian companies who operate retail businesses on the land. The Tribe also leases trust land directly to non-Indian companies who operate retail businesses on the land. These non-Indian companies have entered the tribe's land for business purposes, have directly or indirectly entered into relationships with the Tribe, and may receive some tribal services. Under *Merrion*, *Montana,* and *Atkinson,* the Tribe has the authority to impose a sales tax on the companies.

II. A Tribal Sales Tax Would Not Supplant Or Replace the State Sales Tax.

A. Preemption analysis.

When a state imposes a tax on a non-Indian on an Indian reservation, the tax may be preempted if the federal and tribal interests at stake outweigh the state interest in imposing the tax. *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142 (1980). This weighing of interests has become known as the *Bracker* interest-balancing test, and calls for "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, and inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 144-45. State taxes may also be preempted if they interfere with tribal self-governance. *Id.* at 142.

Applying the *Bracker* interest-balancing test, courts have invalidated state taxes on non-Indians when federal regulation of the activity in question is "comprehensive" and "pervasive." *Id.* at 145-48; *Ramah Navajo Sch. Bd. v. Bureau of Revenue,* 458 U.S. 832, 839-42 (1982). In *Bracker,* for instance, the Court invalidated state motor carrier license and fuel taxes imposed on a non-Indian logging company operating on tribal land because the taxes "would obstruct federal policies" regarding the harvesting of Indian timber. *Bracker*, 448 U.S. at 148. Similarly, in

Ramah, the Court struck down state gross receipts taxes imposed on a non-Indian contractor in relation to the construction of a reservation school, because the taxes would interfere with federal policies regarding the education of Indian children. *Ramah*, 458 U.S. at 841-43. A federal appellate court has also invalidated state taxes on non-Indians when the tax impacted value generated by an Indian tribe on its reservation, and the tribe was "not merely serving as a conduit for the products of others." *Cabazon Band of Mission Indians v. Wilson,* 37 F.3d 430, 435 (9th Cir. 1994) (Cabazon Band's interest in generating activities of value on reservation, coupled with federal interest in tribal economic development and self-sufficiency, outweighed state interest in imposing simulcast wagering tax).

B. Tribal taxes do not preempt state taxes.

In *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation,* 425 U.S. 463 (1976), the Supreme Court determined Montana could impose taxes on non-Indians who purchased cigarettes from tribal retailers on the Flathead Reservation, and could require tribal retailers to collect the taxes and remit them to the state. "Without the simple expedient of having the retailer collect the sales tax from non-Indian purchasers, it is clear that wholesale violations of the law by the latter class will go virtually unchecked." *Id.* at 482. The Court described the state's requirement that tribal retailers collect and remit the tax as "a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax." *Id.* at 483. The Court saw "nothing in this burden which frustrates tribal self-government, or runs afoul of any congressional enactment dealing with the affairs of reservation Indians." *Id.* (citations omitted).

Four years after *Moe* was decided, the Supreme Court ruled in *Colville, supra,* that a tribe's imposition of a tax does not preclude a state from imposing a tax on the same transaction.

As noted above, *Colville* involved tribal and state taxes on non-Indians who purchased cigarettes from tribal retailers on the Tribes' reservations. The Tribes levied their taxes pursuant to ordinances approved by the Secretary of the Interior, and were significantly involved in the businesses as retailers or wholesalers.

> [The Colville, Lummi and Makah] Tribes use federally restricted tribal funds to purchase cigarettes from out-of-state dealers. The Tribes distribute the cigarettes to the tobacco outlets and collect from the operators of those outlets both the wholesale distribution price and a tax of 40 to 50 cents per carton. The cigarettes remain the property of the Tribe until sale. The taxing ordinances specify that the tax is to be passed on to the ultimate consumer...
>
> ...[T]he Yakima Tribe acts as a wholesaler. It purchases cigarettes from out-of-state dealers and then sells them to its licensed retailers. The Tribe receives a markup over the wholesale price from those retailers as well as a tax of 22.5 cents per carton. There is no requirement that the tax be added to the selling price.

Colville, 447 U.S. at 144-45 (footnotes omitted).

The Court identified the issue whether the Tribes' taxes preempted the state tax as "perhaps the most significant" question presented by the case:

> Although a variety of questions are presented, perhaps the most significant is 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 transaction or by otherwise earning revenues from the tribal business.

Id. at 138. While the Court upheld the Tribes' authority to impose taxes on non-Indian purchasers, the Court rejected the Tribes' challenge to the state tax, and ruled the state tax was not preempted by virtue of the tribal taxes. The Court found both the Tribes and the State had a legitimate interest in raising revenue through taxation:

> While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is at its 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 governmental services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

Id. at 156-157. The Court ruled that both the Tribes and the State could impose taxes on the same transactions. "There is no direct conflict between the state and tribal schemes, since each government is free to impose its taxes without ousting the other." *Id.* at 158.

The Court acknowledged that its ruling placed tribal retailers at a competitive disadvantage. "The tribal retailers will actually be placed at a competitive disadvantage, as compared to retailers elsewhere, due to the overlapping impact of tribal and state taxation." *Id.* at 157. However, the Court determined this result was necessary to prevent the Tribes from inappropriately marketing a tax exemption.

> If [the Tribes'] 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 and drawing custom from surrounding areas. We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-governance, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.

Id. at 155.

In Wa*gnon v. Prairie Band Potowatomi Nation,* 546 U.S. 95 (2005), the Supreme Court addressed a similar situation involving motor fuel taxes, and reached the same result. Both the Prairie Band Potowatomi Nation and the State of Kansas imposed motor fuel taxes on gasoline sold at the Nation's gas station located on its reservation. The Nation and the State disputed whether the legal incidence of the state tax fell on the Nation as the retailer, or on the non-Indian distributor who then passed it on to the Nation. The Court determined that the legal incidence of the state tax fell on the non-Indian distributor off the reservation, and that there was no need to apply the *Bracker* interest-balancing test. "If a State may apply a nondiscriminatory tax to Indians who have gone beyond the boundaries of the reservation, then it follows that it may apply a nondiscriminatory tax where, as here, the tax is imposed on non-Indians as a result of an

off-reservation transaction. In these circumstances, the interest-balancing test set forth in *Bracker* is inapplicable." *Id.* at 113.

The Court also held that *Bracker* interest-balancing was not required based upon the fact the state tax interfered with the tribal tax. "Nor is the Nation entitled to interest balancing by virtue of its claim that the Kansas motor fuel tax interferes with its own motor fuel tax." *Id.* at 114. In so holding, the Court specifically affirmed the validity of dual taxation, stating:

> When two sovereigns have legitimate authority to tax the same transaction, exercise of that authority by one sovereign does not oust the jurisdiction of the other. If it were otherwise we would not be obligated to pay federal as well as state taxes on our income or gasoline purchases. Economic burdens on the competing sovereign . . . do not alter the concurrent nature of the taxing authority.

Id. at 114-15 (quoting *Colville*, 447 U.S. at 184 n. 9 (Rehnquist, J., concurring in part, concurring in result in part, and dissenting in part)) (ellipsis in original). The Court drew no distinction between the Tribe's business revenue and its tax revenue, stating: "The Nation merely seeks to increase [its] revenues by purchasing untaxed fuel. But the Nation cannot invalidate the Kansas tax by complaining about a decrease in revenues." *Id.* at 114.

Two justices dissented in *Wagnon*. They recognized that, although the state tax was imposed on the non-Indian distributor, it was passed on to the Tribe and "burden[ed] *on-reservation* tribal activity." *Id.* at 123 (Ginsburg, J., dissenting) (italics in original). They also recognized the tribal and state taxes could not coexist:

> As a practical matter, however, the two tolls cannot coexist. If the Nation imposes its tax on top of Kansas' tax, then unless the Nation operates the Nation Station at a substantial loss, scarcely anyone will fill up at its pumps. Effectively double-taxed, the Nation Station must operate as an unprofitable venture, or not at all.

Id. at 116 (citation omitted).

At least one federal appellate court has also affirmed dual taxation by tribes and states. In *Salt River Pima-Maricopa Indian Community v. Arizona,* 50 F.3d 734 (9th Cir. 1995), the United States Court of Appeals for the Ninth Circuit addressed tribal and state sales taxes, and ruled that both sovereigns could impose taxes on the same transactions. *Salt River* involved trust allotments on the Community's reservation which were leased to a non-Indian developer who constructed a shopping mall on the property and then subleased space within the mall to non-Indian retailers, including Circuit City, Clothestime, J.C. Penney, and Home Depot. Nearly all of the goods sold were produced off the reservation, and all of the retailers were owned and managed by non-Indian entities with headquarters off the reservation. The Community imposed a 1 percent sales tax on the retailers, as contemplated in the leases with the developer. The state also imposed sales and rental taxes on the retailers. The developer, the Community, and the State all provided services to the mall. *Id.* at 735.

The Community challenged the state taxes: "The Community sued in federal court, arguing that the state taxes interfere with its right to impose taxes. In effect, the Community argued that because it acts like a state in providing various governmental services to the mall's businesses, Arizona's 5.5 percent tax should be preempted." *Id.* at 736. The court framed the issue presented by the case as follows: "We must decide whether state taxes on the sale of non-Indian goods to a non-Indian by a non-Indian business on a reservation are preempted when the tribe concurrently taxes and provides some governmental services used by the non-Indian businesses." *Id.*

The court rejected the Community's challenge, and upheld the state taxes. The court noted that the Supreme Court upheld state taxes on non-Indians who purchased cigarettes from tribal retailers in *Moe,* and that the Supreme Court found "no conflict between concurrent taxes

on non-Indians by the state and the tribe" in *Colville*. *Id.* at 737. Based upon the considerations outlined in *Moe* and *Colville*, the court determined the *Bracker* interest-balancing test favored the state:

> Applying these principles to the facts here, it is clear that the balance tips in favor of Arizona's taxation. Most importantly, the goods and services sold are non-Indian, and the legal incidence of Arizona's tax falls on non-Indians. Furthermore, Arizona and its agents provide the majority of the governmental services used by these taxpayers. Consequently, the State's interest is at its strongest, not its weakest.

Id. (citations omitted). The court also emphasized the non-Indian character of the products and businesses:

> The mall earns its profits simply by importing non-Indian products onto the reservation for resale to non-Indians. The Community contributes relatively little to the value of the products and services at the mall; the businesses are managed and owned by non-Indians, and the Community does not participate in the business decisions and does not share in the profits.

Id. at 738. Finally, the court noted the state's interest in enforcing its tax laws:

> Arizona's ability to tax these sales precludes the Community from creating a tax haven at the mall. If we were to disallow the state tax, there is nothing to prevent the Community from opening chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts and drawing custom from surrounding areas.

Id. Given these circumstances, the court found "[t]he preemption balance unmistakably tips in favor of the State." *Id.* at 739.

C. Effect of the proposed tribal sales tax on the state's ability to impose its sales tax.

The Tribe leases trust land to non-Indian developers who sublease the land to non-Indian companies who operate retail businesses on the land. The Tribe also leases trust land directly to non-Indian companies who operate retail businesses on the land. In both scenarios, the Tribe has little to no involvement in the businesses, and the businesses sell primarily non-Indian products.

Under *Colville, Wagnon,* and *Salt River,* the Tribe's imposition of a sales tax would not prevent the state from imposing its sales tax.

Oneida Nation

Certification of Referendum Question

TO: General Tribal Council
FROM: Lisa Summers, Tribal Secretary
DATE: May 25, 2016
RE: Airport Seat Tax

At the caucus held on May 9, 2015, the following question was received by the Tribal Secretary:

> The Austin Straubal International Airport is located within the Oneida Nation Reservation, established by the 1838 treaty with the United States of America. Should the Oneida Nation apply a seat tax to all persons commuting through the ASIA on commercial flights and dedicate the funds allocated to a trust fund for PerCapita distribution?

The referendum question was placed on the ballot for the election held on July 11, 2015, with the following results:

Yes: 384 No: 109

As provided by in the Election Law, the issue is being presented for action/decision at General Tribal Council:

> Election Law Section C. 2.12-9.(a) Referendum elections in which a majority of the qualified voters who cast votes shall be binding on the Business Committee to present the issue for action/decision at General Tribal Council.

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ATTORNEY WORK PRODUCT

CONFIDENTIAL MEMORANDUM

TO: Jo Anne House, Chief Counsel

FROM: James R. Bittorf, Deputy Chief Counsel

DATE: November 13, 2015

SUBJECT: Referendum Question – Austin Staubel Seat Tax

Background

Brown County, Wisconsin, owns and operates the Austin Straubel International Airport (the "Airport"), which is located in the Village of Ashwaubenon and within the boundaries of the Oneida Reservation. Both tribal members and nonmembers travel on commercial flights which depart from or land at the Airport.

A majority of tribal members who participated in a recent election voted in favor of the following referendum question:

> The Austin Straubel International Airport is located within the Oneida Nation Reservation established by the 1838 Treaty with the United States of America. Should the Oneida Nation apply a seat tax to all persons commuting through the Austin Straubel International Airport on commercial flights and dedicate the funds collected to a trust fund for per capita distribution?

Question Presented

Does the Tribe have the authority to impose a seat tax on all persons commuting through the Airport on commercial flights.

Short Answer

The Tribe does not have the authority to impose a seat tax on all persons commuting through the Airport on commercial flights. The Tribe can impose seat taxes on tribal members who travel through the Airport. The Tribe cannot impose seat taxes on nonmembers who travel through the Airport.

The Austin Straubel International Airport is located on non-Indian fee land within the Oneida Reservation. Tribal authority over nonmembers is limited, and in order to impose a tax on nonmembers on non-Indian fee land, the Tribe must be able to establish one of the following: 1) the United States Congress has authorized the Tribe to impose the tax; 2) the nonmembers have entered into consensual relationships with the Tribe or tribal members, and the tax is related to those consensual relationships; or 3) the nonmembers' activities as airline passengers pose a threat to the Tribe's political integrity or health and welfare.

The Tribe cannot demonstrate that it has authority to impose seat taxes on nonmembers who travel through the Airport, because Congress has not authorized the Tribe to impose the tax, the nonmembers have not entered into consensual relationships with the Tribe or tribal members which would support the imposition of the tax, and the nonmembers' activities as airline passengers do not pose a threat to the Tribe's political integrity or health and welfare..

Discussion

I. Tribal Authority Over Nonmembers On Non-Indian Fee Land.

Tribal authority "centers on the land held by the tribe and on tribal members within the reservation," *Plains Commerce Bank v. Long Family Land and Cattle Co.,* 554 U.S. 316, 327 (2008) (citation omitted). As a general rule, absent congressional authorization through statutes or treaties, tribal authority does not extend to nonmembers. The United States Supreme Court

has noted that this general rule "restricts tribal authority over nonmember activities taking place on the reservation, and is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians – what we have called 'non-Indian fee land.'" *Id.* at 328 (citing *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997)).

There are two exceptions to the general rule, and a Tribe may exercise authority over nonmembers in two limited circumstances:

> We have recognized two exceptions to this principle, circumstances in which tribes may exercise civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. *First*, a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. *Second*, a tribe may exercise civil authority over the conduct of non-Indians on fee land within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, of the health or welfare of the tribe. These rules have become known as the Montana exceptions, after the case that elaborated them.

Id. at 329-30 (citing *Montana v. United States*, 450 U.S. 544, 565-66 (1981)) (quotation marks omitted) (italics supplied).

In *Atkinson Trading Company, Inc. v. Shirley*, 532 U.S. 645 (2001), the Supreme Court identified *Montana's* general rule and exceptions as the proper test for determining whether an Indian tribe may impose taxes on nonmembers' activities on non-Indian fee land. *Atkinson* involved the Navajo Nation's imposition of a hotel room occupancy tax on the nonmember customers of a hotel located on non-Indian fee land on the Navajo Reservation. The Court determined the Navajo Nation was required to demonstrate the existence of one of the *Montana* exceptions in order to support its authority to tax nonmembers. The Court stated:

> Tribal jurisdiction is limited: For powers not expressly conferred them by federal statute or treaty, Indian tribes must rely upon their retained or inherent sovereignty. In *Montana*, the most exhaustively reasoned of our modern cases addressing this later authority, we observed that Indian tribe power over nonmembers on non-Indian fee land is sharply circumscribed.

. . .

> Accordingly, ...we apply *Montana* straight up. Because Congress has not authorized the Navajo Nation's hotel occupancy tax through treaty or statute, and because the incidence of the tax falls on nonmembers on non-Indian fee land, it is incumbent upon the Navajo Nation to establish the existence of one of *Montana's* exceptions.

Id. at 649-50, 654.

The Navajo Nation argued the hotel owner and the hotel's nonmember customers consented to the tax because they benefitted from police, fire and emergency services provided by the Nation. The Court found these generalized services to be "patently insufficient to sustain the Tribe's civil authority over nonmembers on non-Indian fee land," under both the first and second *Montana* exceptions. *Id.* at 655.

With respect to the first *Montana* exception, the Court stated, "[t]he consensual relationship must stem from commercial dealing, contracts, leases, or other arrangements, and a nonmember's actual or potential receipt of tribal police, fire, and medical services does not create the requisite connection." *Id.* (citation and internal quotation marks omitted). The Court also determined the nonmember hotel owner did not consent to the tax by being licensed as an Indian trader under federal law. *Id.* at 655-56.

With respect to the second *Montana* exception, the Court determined the cost of providing services to the hotel's customers did not impact the Navajo Nation severely enough to justify the tax. The Court stated, "*Montana's* second exception grants Indian tribes nothing beyond what is necessary to protect tribal self-government or to control internal relations." *Id.* at 658 (citation and internal quotation marks omitted). The Court explained:

> The exception is only triggered by nonmember conduct that threatens the Indian tribe; it does not broadly permit the exercise of civil authority wherever it might be considered necessary to self-government. Thus, unless the drain of the nonmember's conduct upon tribal services and resources is so severe that it

> actually imperils the political integrity of the tribe, there can be no assertion of civil authority beyond tribal lands.

Id. at 657 n. 12 (citation, internal quotation marks and brackets omitted).

II. The Proposed Seat Tax

The United States Congress has not authorized the Tribe to impose a seat tax on nonmembers commuting through the Airport. Under *Atkinson,* the Tribe must therefore establish the existence of one of the *Montana* exceptions to justify the tax. In order to meet this burden, the Tribe must be able to show either that the nonmembers have entered into consensual relationships with the Tribe or tribal members and the tax is related to those consensual relationships, or that the nonmembers' activities imperil the political integrity of the Tribe.

While the Tribe may be able to establish that it has consensual relationships with some nonmembers who travel through the Airport, the Tribe cannot demonstrate that it has consensual relationships with all nonmembers who travel through the Airport. In addition, to the extent consensual relationships may exist, it is unlikely the Tribe could establish the tax has a connection to those relationships. The Tribe therefore cannot establish authority to impose the seat tax under the first *Montana* exception.

The Tribe also cannot establish authority to impose the tax under the second *Montana* exception, because the Tribe cannot demonstrate that the nonmembers' activities as airline passengers endanger the Tribe's political integrity or ability to control internal relations. This is especially the case because the Tribe has survived for many years without imposing a seat tax, and because the purpose of the proposed tax would be to generate funds for additional per capita payments, as opposed to offsetting costs occasioned by the nonmembers' use of the Airport.