

American Indian Taxation

PROF. MICHAEL J. MCINTYRE
WAYNE STATE UNIVERSITY

A Look at Indian Tax Cases Through the Prism of *Atkinson Trading*

Warren Trading Post (1965)

ARIZONA TAX ON TRADING WITH NAVAJO

- **Facts:** Arizona Imposes 2% tax on sales at trading post (within Navajo Reservation), including sales to Navajo.
- **Issue:** Is the State Tax Preempted by Federal Regulation under Indian commerce clause?
- **Result:** Yes, Tax would Interfere Federal Efforts at Supporting Indians, Given that State is Relieved of Support Obligations.

McClanahan v. Arizona State Tax Comm'n (1973)

ARIZONA INCOME TAX ON NAVAJO

- **Facts:** Arizona Imposes Personal Income Tax on Navajo Tribal Members Earning Income on Reservation.
- **Issue:** Does Arizona Have Power to Impose the Tax?
- **Result:** No, Tax would Interfere with matters Reserved by Treaty and Statutes to Indians and Federal Government.

Washington v. Confed. Tribes of the Colville Indian Reservation (1980)

WASHINGTON CIGARETTE TAX

- **Facts:** Washington Taxes Cigarettes sold on Reservation to Non-Indians and Seizes Cigarettes Off Reservation.
- **Issue:** Do the State Tax and Seizure Interfere with Indian Tax?
- **Result:** No, the Tribes are just Marketing a Tax Exemption, so Tax OK under balancing test.

Merrion v. Jicarilla Apache Tribe (1982)

CONSTITUTIONALITY OF OIL SEVERANCE TAX

- **Facts:** Apaches Impose Severance Tax on Oil Extracted from Tribal Land.
- **Issue:** Does Indian Commerce Clause Prohibit Tax When Tp has Lease Right to Enter Tribal Land and the Tax is Not Mentioned in Lease?
- **Result:** No, Taxing Power is distinct from Power to Exclude, and Tp received Tribal Benefits..

Kerr-McGee v. Navajo Tribe (1985)

NAVAJO BUSINESS ACTIVITY TAX (BAT), DRAFTED BY MJM

- **Facts:** Navajo Impose BAT and Severance Tax without Permission of Secretary of Interior.
- **Issue:** Is that Permission Required?
- **Result:** No, Tribe Has Sovereign Right to Tax Absence Federal Prohibition.

Oklahoma Tax Commission v. Chickasaw Nation (1995)

GAS SALES TAX AND INCOME TAX ON OFF-RESERVATION INDIANS

- **Facts:** Oklahoma taxes gas at pump in Indian Country and also taxes off-reservation Indians on Income Paid to them by Tribe.
- **Issue:** Are These Taxes Legal?
- **Result:** No for Gas Tax, Balancing Is Improper When Legal Incidence of Tax Is on the Tribe Itself, But Yes for Income Tax.

Atkinson Trading Company (2001)

RIGHT OF NAVAJO TRIBE TO IMPOSE HOTEL TAX ON OWNERS OF FEE LAND LOCATED WITHIN BOUNDARIES OF NAVAJO RESERVATION

- **Facts:** Navajo Want to Impose Tax on Hotel Operator of hotel located on non-triballand within the tribal land mass..
- **Issue:** Is Tp Exempt?
- **Result:** Yes, Tp has Right of Entry and Tribe Has no Power to Exclude..

Atkinson Trading Co.

TRIBE WON IN LOWER COURTS

- **Atkinson Trading Decided for Navajo in:**
 - ▶ Navajo Tax Commission
 - ▶ Navajo Supreme Court
 - ▶ U.S. District Court, New Mexico
 - ▶ 10th Circuit
- **Big Loss (9-0) in U.S. Supreme Court**

Facts of Case

ATKINSON TRADING CO.

- Atkinson Trading Company owns and operates the Cameron Trading Post — hotel, restaurant, cafeteria, gallery, curio shop, retail store, and recreational vehicle facility.
- The complex lies near Cameron, on the Navajo Indian Reservation within the borders of the State of Arizona, and it is used primarily by tourists on their way to or from the Grand Canyon
- Atkinson owns the land underlying the complex in fee simple.

Map of Navajo Reservation



Map of Surrounding States

ARIZONA, NEW MEXICO, COLORADO, UTAH



One More Map



Nature of Tax

RETAIL TAX ON USE OF HOTELS ON NAVAJO RESERVATION

- In 1992, the Navajo Nation Council enacted a hotel occupancy tax. 24 Navajo Tribal Code § 102
- The rate is eight percent of the price paid.
- Hotel operators must assess and collect the tax on Navajo and Non-Navajo. NTC § 104
- The tax is “imposed for the purposes of promoting tourism and tourism development”

Some Cases

CASES ADDRESSED IN ATKINSON TRADING

- *Montana* (Key case, decided against the Indian Tribes)
- *Merrion* (Key case supporting tribal sovereignty)
- *Atkinson Trading* in 10th Circuit (for Navajo)
- *Buster v. Wright* (Sovereignty is more than right to exclude)
- *Strate v. A-1 Contractors* (Tribal loss, Narrow application of *Montana* tests)
- *Brendale v. Confederated Tribes* (Power to regulate non-tribal land when necessary for Tribal sovereignty)

Montana v. United States

450 U.S. 544 (1981)

- Court held that a Tribe did not have inherent sovereign authority to regulate hunting and fishing by nonmembers on nonmember fee land.
- The Court recognized, however, two exceptions to that general principle.

Quotations from *Montana*

EXCEPTIONS TO LIMITS ON INDIAN AUTHORITY OVER NON-MEMBERS

- First, 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.”
- Second, a Tribe retains “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, or the health or welfare of the tribe.”

Quotations from *Merrion*

OIL SEVERANCE TAX CASE

- “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.”
- A Tribe’s power to tax non-Indians on its reservation “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.”

10th Circuit Opinion

ATKINSON TRADING, CONTINUED

- Majority: "*Montana* and *Strate* mandate that we permit the Navajo Nation to tax Appellant's guests if the tax falls within the consensual relationship exception."
- BRISCOE, Circuit Judge, dissenting: "The second Montana exception also implicates Indian nation police power.... As is apparent from the above-quoted language, the Navajo Supreme Court's analysis is nonsensical."
- Question: Is the 10th Circuit minority showing appropriate respect for the Tribal Court?

Buster v. Wright

135 F. 947 (8TH CIR. 1905)

- In *Buster*, deeds to individual lots in Indian territory had been granted to non-Indian residents, and Congress had expressly prohibited the Tribe from removing these non-Indian residents. The court held that the Tribe retained its power to tax because a sovereign state does not lose the power to govern the people within its borders by "the ownership . . . of the land within its territorial jurisdiction by citizens or foreigners."
- Merrion: "The decision in *Buster v. Wright* actually undermines the theory that the tribes' taxing authority derives solely from the power to exclude non-Indians from tribal lands."

Strate v. A-1 Contractors

520 U.S. 438 (1997)

- A Tribe had no inherent jurisdiction to adjudicate a civil claim brought by one nonmember against another nonmember arising out of an accident that occurred on a state highway right-of-way (treated as nonmember fee land)
- Court concluded that neither of the *Montana* exceptions applied to the situation at issue in *Strate*.

Brendale v. Confederated Tribes(1989)

GOOD CASE FOR TRIBES

- The Court held that the Tribe had authority to zone private fee lands located within the Yakima Indian Reservation. (Justice Stevens delivered opinion)
- The fact that a very small proportion of the closed area was owned in fee did not deprive the Tribe of the right to ensure that this area maintained its unadulterated character.
- Question: Can the Navajo impose a hotel tax on Tribal land if hotels located on non-tribal "islands" are exempt? Is this *Atkinson Trading*?

Atkinson Trading (2001)

9-0 LOSS IN U.S. SUPREME COURT
532 U.S. 645 (CHIEF JUSTICE REHNQUIST)

- "In *Montana* * * *, we held that, with limited exceptions, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian fee land within a reservation. The question with which we are presented is whether this general rule applies to tribal attempts to tax nonmember activity occurring on non-Indian fee land. We hold that it does and that neither of *Montana*'s exceptions obtains here."
- "Only full territorial sovereigns enjoy the 'power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens,' and Indian tribes 'can no longer be described as sovereigns in this sense.'"

More from Atkinson Trading

QUOTATIONS FROM COURT'S OPINION

- "We therefore do not read *Merrion* to exempt taxation from *Montana*'s general rule that Indian tribes lack civil authority over nonmembers on non-Indian fee land."
- "[W]e fail to see how petitioner's operation of a hotel on non-Indian fee land 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'"
 - ▶ Query: What happens if someone builds a hotel on tribal land next to *Atkinson Trading*? Can the Tribe effectively tax that hotel if the nearby hotel is tax free?