The "Who and Where" Means the State Takes All: State Taxation Crosses Into Indian Country

Kelly Gaines Stoner, Oklahoma City University School of Law
Casey Ross-Petherick

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THE "WHO AND WHERE" MEANS THE STATE TAKES ALL: STATE TAXATION CROSSES INTO INDIAN COUNTRY

Kelly Gaines Stoner* & Casey Ross-Petherick**

The ability to tax is a core attribute of tribal sovereignty. Taxation in Indian Country is one of the most complex areas of Indian Law. Not only must tribes work within the framework established by federal statutes and the United States Supreme Court, but tribes must also brace for direct attacks on tribal sovereignty by state legislatures. State taxation is a complex issue for any tribe, but becomes especially complex when states legislate on taxation issues that have some direct impact in Indian country. The waters become even murkier when tribal-state compacts and tribal-state contracts are included in the analysis.

In many areas, tribal-state relations are strained by historical events and current practices. This article will address the historical factors regarding state taxation in Indian country, follow with a discussion of the most recent case in this area, Wagnon v. Prairie Band of Potawatomi Nation, and conclude with

* Kelly Stoner is the Director of the Native American Legal Resource Center at the Oklahoma City University School of Law. Professor Stoner publishes and teaches in the areas of American Indian Law, Domestic Violence Law and Family Law. Professor Stoner and Dr. Ross-Petherick want thank Dr. Ted Fleming, Amanda O’Quinn, and Bita Ashtari for their research assistance for this article.

** Casey Ross-Petherick, J.D., M.B.A., is the Assistant Director of the Native American Legal Resource Center at the Oklahoma City University School of Law. She is a member of the Cherokee Nation, and specializes in Federal and State legislative policy affecting Tribal Governments.

1. Indian country is defined in the United States code as the following:
The term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.


2. "[T]he people of the States where [Indians] are found are often their deadliest enemies."

suggestions for tribal nations regarding how to overcome this latest Supreme Court decision.

State taxation in Indian country has long been a flashpoint for conflicts between states and tribes. How can tribes form their course of action when so many variables and federal, state, and tribal sovereigns are involved? As with any Indian Law analysis, a brief review of the confusing web of historical principles is warranted, so tribes can begin the process of building strategy and business development models that will protect the tax benefits that remain in effect.\(^4\)

As recently as 1962, the U.S. Supreme Court had little precedent on state-tribal tax relations.\(^5\) The Court discusses the occasions it has had to take up the difficult issue, and sums up the precedent existing at the time, saying, “These decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law.”\(^6\) Therefore, to determine state taxing authority as of 1962, the Court would first determine whether the state law interfered with self-governance or conflicted with federal law.

In 1973, the Court moved away from the interference test toward a new understanding of state taxation authority in Indian country, strictly requiring Congress’ grant of authority to states for taxation of tribes to be valid.\(^7\) In 1992, the Court reiterated this sentiment, clarifying that unless Congress cedes jurisdiction over Indian affairs, a state cannot tax Indians\(^8\) in Indian country.\(^9\)

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4. A word of caution is necessary, however, because in addition to the United States Supreme Court precedent, tribes must also understand the growingly complex relationship such precedent has to state legislation and tribal-state compacts and contracts.

5. In Organized Village of Kake v. Egan, 369 U.S. 60 (1962), the Court noted, “Decisions of this Court are few as to the power of the States when not granted Congressional authority to regulate matters affecting Indians.” Id. at 74.

6. Id. at 75.

7. In McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973), the U.S. Supreme set forth the principle that State Laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress.

Id. at 170-71 (citing U.S. DEP’T OF THE INTERIOR, FEDERAL INDIAN LAW 845 (1958)).

8. There is no federal definition of who is an Indian for purposes of criminal or civil jurisdiction. It is widely accepted that a member of a federally recognized tribe is an Indian for jurisdictional purposes. See William C. Canby, Jr., AMERICAN INDIAN LAW IN A NUTSHELL 10 (4th ed. 2004)

9. “Absent cession of jurisdiction or other federal statutes permitting it”, we have held, a State is without power to tax reservation lands and reservation Indians.” County of Yakima
However, the dynamics radically change when the Court looks at Indians outside of Indian country.

In *Mescalero Apache Tribe v. Jones*, the Court distinguishes between activities occurring inside the reservation from those occurring outside the reservation, saying Indians going outside of the reservation are subject to state law. The 1991 Supreme Court case of *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe* completes the circle, deciding that unless a state has jurisdiction under Public Law 280, the state cannot tax Indians on Indian land, but may tax nonmembers on Indian land. Precedent also establishes that a state can tax Indians outside of Indian country.

However, there is a caveat to the Congressional cession principle. In *White Mountain Apache Tribe v. Bracker*, the Supreme Court squarely and flatly rejects the requirement of an explicit grant of Congressional authority in order

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11. The *Mescalero* court noted the following with respect to activities conducted on and off reservations:
   
   But tribal activities conducted outside the reservation present different considerations. "State authority over Indians is yet more extensive over activities ... not on any reservation." [(citing Organized Village of Kake v. Egan, 369 U.S. 60, 75 (1962))] Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.

*Mescalero*, 411 U.S. at 148-49.


13. Notice that the Court uses the word "nonmembers" rather than "non-Indians". This is the beginning of a very complex weave of precedent that is, as of yet, unsettled regarding civil jurisdiction of nonmember Indians in Indian country. *See Strate v. A-I Contractors*, 117 S.Ct. 1404, 1409 (1997):

   Subject to controlling provisions in treaties and statutes, and the two exceptions identified in Montana, the civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally "do[es] not extend to the activities of nonmembers of the tribe.

14. *Id.* at 507.

15. *See Strate v. A-I Contractors*, 117 S.Ct. 1404, 1409 (1997). Notice that the Court makes a distinction between Indian country and non-Indian fee lands within Indian country for the purpose of defining tribal civil jurisdiction over nonmembers (which presumably includes non-Indians and nonmember Indians). Non-Indian fee land could be land within a reservation or former existing reservation boundary that is not held in trust by the Federal government for the benefit of an Indian or tribal government, and is not held in restricted status by an individual Indian. *See William B. Canby, Jr., American Indian Law in a Nutshell* 114-17 (3d ed. 1998).

for a state to be able to tax in Indian Country.\textsuperscript{17} Instead, the Court looks to a balancing of interests among the sovereigns to determine if a state may exercise regulatory authority over a tribe.\textsuperscript{18}

The Court specifically set forth two independent but related barriers to the assertion of state regulatory authority over tribes and tribal members: the authority may either be pre-empted by federal law,\textsuperscript{19} or the state regulation may be an unlawful infringement on the right of reservation Indians to make their own laws and be governed by them.\textsuperscript{20} The Court noted that either barrier was sufficient to find that state law was inapplicable to the reservation or tribal members.\textsuperscript{21} The Court indicated that the analysis must include whether the state regulation was pre-empted by federal law, scrutinizing whether the congressional enactments demonstrated a firm federal policy of promoting tribal self-sufficiency and economic development.\textsuperscript{22} The Court went on to state that any ambiguities in federal law were to be construed generously in order to comport with traditional notions of sovereignty and with the federal policy of encouraging tribal independence.\textsuperscript{23} Finally, the Court noted that if the reservation conduct involved only Indians, the state’s interest would likely be minimal and the tribe’s self-government interest would be the strongest.\textsuperscript{24}

However, the U.S. Supreme Court has limited the use of the \textit{Bracker} balancing principle to cases involving state regulation of non-Indians in Indian country\textsuperscript{25}. In fact, the Court seems to disassociate the \textit{Bracker} balancing from

\begin{footnotesize}
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\item In rejecting the requirement the Court specifically stated:
\begin{quote}
We have thus rejected the proposition that in order to find a particular state law to have been pre-empted by operation of federal law, an express congressional statement to that effect is required. At the same time, any applicable regulatory interest of the State must be given weight, and “automatic exemptions ‘as a matter of constitutional law’” are unusual.
\end{quote}
\textit{Id.} at 144.
\item The balancing is framed as follows:
\begin{quote}
This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.
\end{quote}
\textit{Id.} at 145.
\item \textit{Id.} at 142.
\item \textit{Id.} at 142 (citing Williams v Lee, 358 U.S. 217, 220 (1959)).
\item \textit{Id.} at 143.
\item \textit{Id.}
\item \textit{Id.} at 144.
\end{enumerate}
\end{footnotesize}
the context of taxation on tribes in Indian country altogether when the tax levy is against a tribe or a tribal member in Indian country.26

The seminal case on state motor fuels taxation as it relates to tribes is Oklahoma Tax Commission v. Chickasaw Nation.27 In Chickasaw Nation, the state of Oklahoma attempted to levy a tax on tribal retailers located on trust land.28 The Supreme Court focuses on where the “legal incidence” of the tax falls to determine the permissible scope of taxation in Indian country.29 The Court refuses to adopt “economic reality” as the dispositive factor,30 and reiterates that the legal incidence test is more predictable.31 The Court then suggests how states can levy taxes in Indian country by passing legislation to shift the incidence of the tax.32 After Chickasaw Nation33, Kansas passed such

26. The Court disassociates the Bracker balancing when it states the following:
    We have balanced federal, state, and tribal interests in diverse contexts, notably,
in assessing state regulation that does not involve taxation. But when a State
attempts to levy a tax directly on an Indian tribe or its members inside Indian
country, rather than on non-Indians, we have employed, instead of a balancing
inquiry, “a more categorical approach . . . .”
Id. at 458 (citations omitted).
28. Id. at 452-53.
29. In focusing on where the legal incidence of the tax falls, the Court stated:
    The initial and frequently dispositive question in Indian tax cases, therefore, is
who bears the legal incidence of a tax. If the legal incidence of an excise tax rests
on a tribe, or on tribal members for sales made in inside Indian country, the tax
cannot be enforced absent clear congressional authorization . . . . But if the legal
incidence of the tax rests on non-Indians, no categorical bar prevents enforcement
of the tax; if the balance of federal, state and tribal interests favors the State, and
federal law is not to the contrary, the State may impose its levy . . . .
Id. at 458.
30. “If we were to make ‘economic reality’ our guide, we might be obliged to consider, for
example, how completely retailers can pass along tax increases without sacrificing sales volume
—a complicated matter dependent on the characteristics of the market for the relevant product.”
Id. at 460.
31. “By contrast, a ‘legal incidence’ test, as 11 States with large Indian populations have
informed us ‘provide[s] a reasonably bright-line standard which, from a tax administration
perspective, responds to the need for substantial certainty as to the permissible state taxation
authority’” Id. (citing Brief of Amici Curiae South Dakota et al. at 2).
32. “And if a State is unable to enforce a tax because the legal incidence of the impost is
on Indians or Indian tribes, the State generally is free to amend its law to shift the tax’s legal
incidence.” Id.
33. 515 U.S. 450 (1995)
a statute. In the recent case of *Wagnon v. Prairie Band Potawatomi Nation*, the United States Supreme Court addressed the "who" and "where" of a Kansas motor fuel tax.

The Prairie Band Potawatomi Nation (Nation) is a federally recognized Indian tribe located on the Nation’s reservation. The Nation owns and operates a casino on the Nation’s reservation. In order to accommodate casino patrons and other reservation-related traffic, the Nation built, owns, and operates a gas station on the reservation next to the casino. Seventy-three percent of the Nation station’s fuel sales are casino patrons with another eleven percent of the sales being made to persons who live or work on the reservation.

In 1992, prior to the U.S. Supreme Court decision in *Chickasaw Nation*, Kansas entered into a five year agreement with the Nation concerning a range of excise taxes including fuel taxes. The State and Nation agreed that it was beneficial to both sovereigns to cooperate in matters relating to taxation. The agreement broadly exempted all tribal sales from state excise taxes regarding on reservation sales to non-Indian purchases as long as the tribe imposed a tax of its own no less than 60% of the sales tax. The agreement had a five year term and was renewable by mutual consent. In 1995, after the *Chickasaw Nation* decision Kansas amended its statute to remove the tribal exemption from the motor fuel tax. In 1997, Kansas refused to renew the tribal-state agreement, over the tribe’s objection.

In the instant case, the Nation station purchased fuel for sale to Nation station customers from an off-reservation non-Indian distributor. That distributor pays a state fuel tax on the initial receipt of the motor fuel pursuant

36. *Id.* at 682.
37. *Id.* at 680. The Nation invested more than $35 million to construct this casino complex according to the Respondents' Brief at 4, *Wagnon* (No. 04-631).
42. *Id.*
to the Kansas statute.\textsuperscript{47} The cost of that tax is then passed on to the customers including the customers of the Nation station.\textsuperscript{48} The Nation station sells its fuel within two cents per gallon of the prevailing market price despite the distributor’s decision to pass along the state fuel tax to the Nation station and notwithstanding the Nation’s own fuel tax.\textsuperscript{49} The Nation’s fuel tax generates approximately $300,000 annually and the funds are used exclusively for constructing and maintaining roads, bridges and rights-of-way located on or near the Reservation.\textsuperscript{50}

The Nation brought an action in Federal district court for declaratory judgment and injunctive relief from the State’s collection of motor fuel tax from distributors who deliver motor fuel to the Nation station.\textsuperscript{51} The District Court granted summary judgment in favor of the State holding that the \textit{Bracker} test tilted in favor of state interests since the legal incidence of the tax fell on the off-reservation fuel distributors and because the ultimate purchasers receive the bulk of their governmental services from the State.\textsuperscript{52} The Court of Appeals for the Tenth Circuit reversed finding that the \textit{Bracker} test tilted in favor of the Nation because the fuel revenues were derived from value generated primarily on the reservation and the Nation’s interests in raising revenue outweighed the State’s interests.\textsuperscript{53} The United States Supreme Court granted cert to determine whether Kansas may tax a non-Indian distributor’s off-reservation receipt of fuel when said fuel is ultimately delivered to the Nation station and said tax is ultimately passed on to the Nation station.\textsuperscript{54}

The Nation argued that the legal incidence of the tax fell on the Nation, therefore, the Nation was entitled to a categorical bar against state taxation set forth in \textit{Chickasaw Nation}.\textsuperscript{55} The Nation argued that the tax liability arose at the point of the on-reservation sale and delivery of the motor-fuel as opposed to the off-reservation receipt of the fuel.\textsuperscript{56}

\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id. at 681.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id. at 681.}
\item Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995) (holding that when a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, a more categorical approach is needed: "Absent cession of jurisdiction or other federal statutes permitting it', we have held, a State is without power to tax reservation lands and reservation Indians."); \textit{Wagnon}, 126 S. Ct. at 682.
\item \textit{Id. at 681.}
\end{enumerate}
The Nation pointed out that the statutory language of the Kansas statute\textsuperscript{57} stated that a tax was imposed on the use, sale, or delivery of all motor vehicle fuels which were used, sold, or delivered in the state for any purpose.\textsuperscript{58} In support of this position, the Nation argued that the statute provided many exemptions from taxation including delivery of the motor fuels to exempt entities.\textsuperscript{59} Further, the Nation argued that the distributor could not calculate the tax liability until the delivery was made or some other act creating an exemption to the tax had occurred.\textsuperscript{60} The Nation argued that the State had cleverly re-characterized the tax as a tax on the distributor of first receipt in order to escape the pre-emption test, however, in reality the tax had been passed on to the Nation station.\textsuperscript{61} Therefore, the legal incidence of the tax fell on the Prairie Band Potawatomi Nation in Indian country and thus, the State was categorically barred from taxing the Nation station.

Alternatively, the Nation argued that even if the legal incidence of the tax fell on the non-Indian distributor, the tax arose out of the distributor’s on-reservation transaction, the sale and delivery of the fuel, to the Nation station.\textsuperscript{62} Therefore, the Nation asserted that the Bracker test was appropriate in this case.\textsuperscript{63}

The Nation also argued that the Bracker test was necessary to accommodate all interests involved given the Indian Commerce Clause in the United State Constitution\textsuperscript{64} which gives the federal government the power to regulate commerce with Indian tribes and prohibits state intrusion into this area.\textsuperscript{65} Further, the Nation argued that the tax statute was discriminatory in nature in that the statute allowed exemptions for state and federal governments.\textsuperscript{66}

\textsuperscript{57} KAN. STAT. ANN. § 79-3408(a) (Supp. 2003).
\textsuperscript{58} Wagnon, 126 S. Ct. at 684.
\textsuperscript{59} Id. at 685.
\textsuperscript{60} Id.
\textsuperscript{61} Respondents’ Brief at 15, Wagnon (No. 04-631).
\textsuperscript{62} Wagnon, 126 S. Ct. at 682.
\textsuperscript{63} Id. The Nation argued that Tribal interests included the power of a tribal sovereignty and the power of a tribe to tax in order to raise revenue for upkeep of tribal roads and bridges that have a direct nexus with on-reservation generated revenue. The Nation also argued that this power to tax was necessary in order to make available tribal services. Further, the state interest in raising revenue with this type of transaction is small in that the State of Kansas collected $6.1 billion through taxes in 2004. The tax at issue here is $300,000, or roughly .1% of the total state fuel tax revenues. Respondents’ Brief at 12, Wagnon (No. 04-631).
\textsuperscript{64} U.S. CONST. art. 1, § 8, cl. 3.
\textsuperscript{65} Respondents’ Brief at 12, Wagnon (No. 04-631).
\textsuperscript{66} Wagnon, 126 S. Ct. at 689.
Nation argued that this language treated similar sovereigns differently in that tribal sovereigns were not allowed an exemption from the statutory scheme.67

Kansas argued that the clear language of the statute should control. The statute directly reflects that the incidence of the tax falls on the distributor of first receipt.68 In the instant case, that would be the non-Indian distributor. The state further set forth that the act that gave rise to the tax liability was the receipt of the fuel by the distributor, which occurred off-reservation.69 Therefore, since the legal incidence of the tax is on the distributor of first receipt, and the transaction that gave rise to the tax liability was the off-reservation receipt of the fuel by the distributor, the State argued that the Bracker test did not apply in this case.70 Alternatively, Kansas argued that if the Bracker test did apply, the State's interests in taxing were weightier than any tribal interests involved.71

The U.S. Supreme Court found that the Kansas statute was clear that the distributor rather than the retailer was liable for the tax.72 The Court held that such dispositive language is determinative of who bears the legal incidence of a tax but even if the statutory language was not dispositive the fair interpretation of the statute as written and applied would have resulted in the same finding.73 The Court pointed to the statutory language and found that the distributor of first receipt was responsible for computing and paying the motor fuel tax despite the fact that the statute allowed the distributor to pass the cost of the tax to downstream customers.74 The Court noted that according to the statute, the distributor's tax liability was determined by calculating the amount of fuel received by the distributor.75 The amount of the taxes was to be calculated using the state form76 and the taxes were due to the director the month following the delivery of the fuel to the distributor.77

The Court held that the Nation's argument indicating that the tax liability arose upon the sale and delivery of the motor fuel was incorrect because the

67. Respondents' Brief at 19, Wagnon (No. 04-631).
68. Wagnon, 126 S. Ct. at 682.
69. Id. at 684.
70. Id. at 686.
71. Id. at 684. The State argued that state interests included state sovereignty and the power of a state to tax.
72. Id. at 682.
73. Id.
74. Id.
75. Id. at 684.
77. Wagnon, 126 S. Ct. at 684.
distributor must pay the tax even if the fuel was never sold or delivered to a retailer.\textsuperscript{78} The Court indicated that this tax liability was much like that of the federal income taxpayer. The Court opined that the receipt of the income by the taxpayer was the taxable event even though the taxpayer could reduce the tax liability by paying home mortgage interest.\textsuperscript{79} Therefore, the Court held that the \textit{Bracker} test was not applicable in the instant case because the legal incidence of the tax fell on a non-Indian distributor and the act that gave rise to the tax liability arose off the reservation.\textsuperscript{80}

The Court noted that the Nation was not entitled to the \textit{Bracker} test just because the Nation complained that the Kansas motor fuel tax interfered with the Nation's tax.\textsuperscript{81} The Court noted that the Nation was selling gas at prevailing market rates notwithstanding the Kansas tax and it should not matter whether the tribal revenues were labeled profits or tax proceeds.\textsuperscript{82} The Court found that the Nation was merely seeking to increase those revenues by purchasing untaxed fuel\textsuperscript{83} and noted that economic burdens on competing sovereigns do not alter the concurrent nature of the taxing authority.\textsuperscript{84}

The Court found that the Kansas statute was not discriminatory even though the statute provided tax exemptions for other state and federal sovereigns.\textsuperscript{85} The Court noted that the Nation was different from other states and federal governments in that Kansas used the proceeds from the fuel tax to pay for a significant portion of maintaining roads and bridges on the Nation's reservation and Kansas offered no such services for other states or federal governments.\textsuperscript{86} The Court went on to note that, to the extent the Kansas retailers bear the cost of the fuel tax, the burden fell on all retailers within the State irrespective of whether the retailer was located on an Indian reservation or not.\textsuperscript{87}

In conclusion, the Supreme Court in \textit{Chickasaw Nation}\textsuperscript{88} gave the states direction on how to craft particular statutory language, which would effectively

\textsuperscript{78} \textit{Id.} at 685.
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} \textit{Id.} at 688.
\textsuperscript{81} \textit{Id.}
\textsuperscript{82} \textit{Id.}
\textsuperscript{83} \textit{Id.}
\textsuperscript{84} \textit{Id.} at 689 (citing Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 184 n.9 (1980) (Rehnquist, J., concurring in part, concurring in result in part, and dissenting in part)).
\textsuperscript{85} \textit{Id.}
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{Id.}
\textsuperscript{88} 515 U.S. 450 (1995).
tax tribal retailers in direct contravention of precedent.\textsuperscript{89} Kansas took heed and drafted the statute at issue. In its application, the statute allows Kansas to do what has never been allowed prior to this case; Kansas has effectively taxed a tribal retailer in Indian country. The Court approves the application of this levy indicating that all of the retailers in the state may bear the burden of the cost of the tax and because the Kansas statute specifically sets forth in clear language that the legal incidence of the tax falls on the distributor of first receipt, the statute taxes a non-Indian in an off-reservation transaction. This holding effectively immunizes state taxation from the pre-emption analysis, will enable states to increase state taxation of tribal economic development activities, and will restrict the ability of tribes to tax revenues generated on the reservation by shifting the tax upstream to the distributor.

In order to provide suggestions for Tribal Nations regarding possible ways to circumvent this latest state intrusion on tribal sovereignty, the analysis must focus where the act that gave rise to the tax liability occurred since states may not be open to modifying statutory language regarding who the legal incidence of the tax falls on.\textsuperscript{90} The Kansas statute focuses on where the distributor of first receipt actually receives the motor-fuel. Nations might consider the economic feasibility of establishing tribal distributors in Indian country. However, the analysis will depend on exactly where the act giving rise to the tax liability occurs — is it upon delivery to the distributor at the distributor’s place of business or upon the distributor’s pick up of the motor fuel at the refinery site? If the act is delivery of the motor fuel by the refinery to the tribal distributor’s place of business (assuming the place of business is Indian country), then the legal incidence of the tax will fall squarely on the tribe in Indian country and should be entitled to a categorical bar set out in \textit{Chickasaw Nation}. If, however, the act is the delivery of the motor fuel by the refinery at the refinery site, then the act will be on an Indian distributor outside of Indian country, (assuming the refinery is outside of Indian country) and the results will most likely be the same as \textit{Prairie Band}.

Tribal Nations may consider whether exporting motor fuel from neighboring states that do not have comparable statutes might be more productive than paying the type of tax Kansas has levied in \textit{Prairie Band}. Tribal Nations must now contemplate whether states will even be interested in entering into tribal-

\textsuperscript{89} \textit{Id.} at 460.

\textsuperscript{90} Tribes might argue that the off-reservation distributor in \textit{Prairie Band} was a non-Indian and that taxing an off-reservation tribal distributor is equivalent to taxing a tribe. However, this argument will not likely succeed, since the Supreme Court has held that tribe’s doing business off reservations are subject to state taxation.
state compacts, cooperative agreements or contracts with tribes regarding state taxation issues since states are now free to effectively tax tribal retailers in Indian country by shifting the tax upstream to the distributor.

With each petition for certiorari, the Supreme Court is given the opportunity to uphold and strengthen the principles of tribal sovereignty, but the Court continues to tip the scales in favor of state sovereignty. No matter what protections the tribes attempt to put in place to comply with the United States Supreme Court precedent, state legislation and tribal-state compacts or contracts, it seems the policy of determining who bears the legal incidence of the tax, and where such incidence lies will accommodate the states’ attempts to tax tribes. Disputes between states and tribal nations are best resolved sovereign-to-sovereign, in a manner that recognizes the governmental interests on both sides, rather than a one-sided “State takes all” rule.91

91. Respondents’ Brief at 27, Wagnon (No. 04-631).