COURTS SIDE WITH TRIBES IN THE FIRST TAX DISPUTES TESTING THE OBAMA ADMINISTRATION LAND LEASING REGULATIONS

F. Michael Willis

The Eleventh Circuit began its opinion in the Seminole Tribe's recent tax dispute with the state of Florida by emphasizing the confounding legal complexity that undermines American Indian tribal governments' efforts to secure the revenues needed to serve their tribal citizens. The circuit panel wrote, "Ben Franklin said, '[I]n this world nothing can be said to be certain, except death and taxes.' He was almost right. As this case illustrates, even taxes are not certain when it comes to matters affecting Indian tribes." *Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324 (2015).

The Eleventh Circuit's ruling in the Seminole case and the recent district court decision in *Agua Caliente Band of Cahuilla Indians v. Riverside County, et al.*, No. CV 14-0007 (C.D. Cal. Feb. 8, 2016) (*Agua Caliente*), mark a new generation of cases in a long line of disputes in which the federal courts have been called upon to decide whether a particular state or local tax may be levied on commercial activity taking place within the boundaries of an Indian reservation. In these two recent cases, the courts' examinations were bolstered by a new set of federal regulations clarifying that strong federal and tribal interests in commercial activity undertaken pursuant to leases on Indian lands leave no room for taxation by state and local governments. The Indian land leasing regulations (25 C.F.R. pt. 162) were promulgated in December 2012 to improve tribal governments' ability to generate revenue and stimulate economic development through more streamlined and flexible leasing procedures. 77 Fed. Reg. 72,440 (Dec. 5, 2012). Importantly, the regulations contain provisions intended to shield tribal revenue generation activities from taxation by state and local governments as decades of particularized fact-specific rulings have exposed commerce in tribal territories to multiple layers of taxation that chill investment and stifle economic development.

Supreme Court Precedents

Since the 1970s the federal courts have been called upon to resolve numerous disputes over the authority to tax economic activity on Indian lands. The Supreme Court has been clear that states and their governmental subdivisions are categorically barred from taxing tribes and tribal members within Indian country. *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993). When non-Indians engage in commerce on tribal lands, however, the Court has applied a "flexible preemption analysis." *Cotton Petroleum v. New Mexico*, 490 U.S. 163, 176 (1989).

The leading case involved Arizona's attempt to tax a non-Indian company doing business with the White Mountain Apache Tribe's timber enterprise. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). In *Bracker*, the Court explained that when a state regulatory action is directed toward non-Indians within Indian country, there are two "independent but interrelated" barriers to state regulatory authority: (1) state authority may be preempted by federal law; and (2) state law may unlawfully infringe on the "right of reservation Indians to make their own laws and be ruled by them." *Id*. at 142. Where non-Indians are involved, the Court has said it is "often confront[ing] the difficult problem of reconciling the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations." *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 836–37 (1982).

In its application, *Bracker* has required the federal courts to employ a balancing test that considers numerous factors, weighing the federal and tribal interests in preemption of the tax against the state's interest in the tax. Administering this flexible preemption doctrine adds a layer of legal uncertainty to an already challenging environment for economic development. Whether state and

local governments can tax an on-reservation activity depends on such factors as the extent of the involvement of non-Indians, the status of the land, the characterization of the state tax, the nature of the activity, and the degree to which the state provides services associated with the activity. Through this approach, state and local governments have been allowed to tax on-reservation economic activity when the court perceives that the specific type of on-reservation commerce with non-Indians justifies the outside jurisdiction's tax. The result has been the loss of tribally generated revenues to those outside jurisdictions, legal uncertainty that stifles economic development in tribal communities, and frequent resort to litigation.

It is well established that tribal governments face tremendous obstacles generating sufficient revenues to deliver services to their citizens. Real property taxes are out of the question: Indian lands are held in trust by the federal government in restricted status. Income taxes on tribal members are not viable: per capita incomes in Indian country are less than half the national average. Although some services are federally funded, such as the programs that were historically provided by the Bureau of Indian Affairs (BIA) and the Indian Health Service, the funding levels are not commensurate with the need.

Tribal governments must be able to generate revenues from their own enterprises and through economic development on their reservations. The Supreme Court has affirmed tribal power to tax non-Indians on Indian reservations. In *Merrion v. Jicarilla Apache Tribe*, the Court recognized the power to tax to be an inherent power of tribal governments that "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 those acting within the territory to contribute]. 455 U.S. 130, 137 (1982).

Not long after *Merrion*, however, the Court in effect divested tribal tax jurisdiction of its effectiveness to the detriment of tribal citizens. In *Cotton Petroleum v. New Mexico*, 490 U.S. 163 (1989), the Court held that although a state cannot tax tribes directly or tax the reservation lands held in trust by the United States for tribes, the state may tax private parties with whom an Indian tribe does business—even though the ultimate financial burden of those taxes may fall on the tribe. Because of the threat that the outside jurisdiction's tax will apply on the reservation, tribes are deprived of the ability to offer tax incentives to companies to entice them to locate in Indian country. Indeed, tribes often must wholly forego their own taxes simply to offer businesses a tax rate that is equivalent to the off-reservation rate. With the outside jurisdiction collecting the tax from the on-reservation activities of non-Indian businesses, tribes and their members have little say as to whether those revenues are invested in their communities or appropriated for programs in another part of the state with little to no benefit to the tribe or its members.

The Revised Regulations

Tribal nations and tribal organizations for many years have called upon Congress and the executive branch to establish clarity over tax jurisdiction so that revenues generated by economic development activity in Indian country stay in Indian country. Congress has not taken action, but the tribes found a willing partner in the Obama administration. Most notably, in revised regulations governing the leasing of Indian lands, the administration has affirmed and clarified that the strong federal and tribal interests associated with activities on those lands leave no room for state and local government taxation. The regulatory terms appeared to set forth the type of bright line rules that tribal leaders have been seeking with respect to state and location taxation.

In the preamble of the final rule on Indian land leasing, the BIA provided explanatory commentary, saying:

> Assessment of State and local taxes would obstruct Federal policies supporting tribal economic development, self-determination,

> and strong tribal governments. State and local taxation also threatens substantial tribal interests in effective tribal government, economic self-sufficiency, and territorial autonomy. The leasing of trust or restricted land is an instrumental tool in fulfilling "the traditional notions of sovereignty and [] the federal policy of encouraging tribal independence."

77 Fed Reg. 72,440, 72,447 (Dec. 12, 2012) (quoting *White Mountain Apache v. Bracker*, 448 U.S. 136, 145 (1980)).

Recent Court Decisions

The federal courts that have reviewed state and local government taxes on non-Indian activity within tribal territory since promulgation of the new regulations have largely found the outside jurisdiction's tax to have been preempted, but have not viewed the regulations as establishing a bright line rule. The first review of these regulations arose in *Seminole Tribe of Florida v. Florida*, 49 F. Supp. 3d 1095 (S.D. Fla. 2014). After concluding that federal statute (25 U.S.C. § 465) prevented Florida from imposing its rental tax on non-Indian businesses who lease Indian trust land on the Seminole Tribe's reservation, the court offered an alternative basis for preempting the tax. It held that if the statute did not expressly prohibit the rental tax, the tax impermissibly interfered with tribal sovereignty and was preempted by federal law. 49 F. Supp. 3d at 1098–102. In reaching this holding, the district court gave a high level of deference to the taxation terms of the Indian land leasing regulations. *See id*. at 1099–100.

On appeal, the Eleventh Circuit agreed with the district court's conclusion that federal law preempts the state's rental tax. The circuit, however, found the district court's alternative argument based on the new regulations to be in error. *Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324 (2015). The circuit emphasized that in Bracker the Supreme Court required a "*particularized* balancing of the specific federal, tribal, and state interests involved." *Id*. at 1338 (emphasis in original). Given that the regulations did not examine Florida's interests with regard to the particular tax at issue, the circuit concluded that the terms in the regulations balancing the respective governmental interests "cannot substitute for the particularized inquiry required by *Bracker*." *Id*. The Eleventh Circuit noted, however, that the regulations may be accorded some weight, especially given their clear analysis of the strong federal and tribal interests at stake. The circuit then proceeded to conduct its own *Bracker* balancing test to reach its conclusion that the particularized federal and tribal interests outweigh the interests of the state. (Additionally, the circuit reversed the district court's determination that another tax at issue in the case, Florida's utility tax, was preempted because the legal incidence of the tax was imposed directly on the tribe. Under the circuit's analysis, the incidence of the utility tax fell upon the power company. The Seminole Tribe's petition for Supreme Court review of the circuit's ruling on the utility tax has since been denied.)

Earlier this year, the U.S. District Court for the Central District of California concluded that Riverside County (County) could not impose a possessory interest tax (PIT) on non-Indian lessees of reservation land because it was preempted by Supreme Court precedent under the *Bracker* balancing test. *Agua Caliente, supra*. In reaching its decision, the district court undertook an extensive analysis of the *Bracker* balancing factors with attention given to case law and the federal government's interpretation of how California state law affects the federal land leasing regulatory scheme set forth in the new regulations. In its analysis, the court looked to the comprehensiveness of the federal regulatory scheme governing Indian leases, including the statutory authority (25 U.S.C. § 415, authorizing the leasing of Indian lands with secretarial approval, as well as 25 U.S.C. § 465, which prohibits the taxation of Indian lands held in trust by the federal government) along with the provisions in the new leasing regulations prohibiting the imposition of taxes and other fees on any leasehold or possessory interest absent

contrary federal law (25 C.F.R. § 162.017). The court concluded that federal regulation of leased Indian lands "is both detailed and pervasive, and there is no indication that Congress has delegated any authority over the leasing of Indian lands to the States." *Agua Caliente*, No. CV 14-0007, at *20.

In expressing the tribe's satisfaction with this result, Agua Caliente in-house counsel John Plata pointed out another inequity that plays out when outside governments tax activities on Indian lands: that revenues collected are not used to serve the community from which they are drawn. Mr. Plata stated, "We hope the ultimate resolution of this litigation will also alleviate another major concern for the Tribe—ensuring that these taxes paid by on-reservation lessees ultimately return to the reservation and local communities, rather than being collected here and distributed in areas of the county that are far removed from the reservation." Facing this phenomenon where tribal governments lack a procedural mechanism to call for taxes collected on their lands to serve tribal communities, intertribal organizations such as the United South and Eastern Tribes (USET) have urged policymaking based on the principle that economic activity in Indian country must generate revenues that serve Indian communities.

The application of the *Bracker* balancing test by the courts in Agua Caliente and Seminole in the context of the recently revised federal land leasing regulations offers important guidance that may help tribes further their economic development through the generation of leasing revenues in Indian country that are free from burdensome taxation by state or local governments. In *Agua Caliente*, as in the Eleventh Circuit ruling in *Seminole*, the BIA's land leasing regulations were evaluated and treated as entitled to deference with regard to the federal government's demonstration of strong federal and tribal interests with respect to the leasing of tribal trust lands. Because of *Bracker*'s requirement of a "particularized" inquiry, however, neither court could rule that the preemptive force of the regulations was in itself enough. Instead, the court analyzed the specific federal, tribal, and state interests associated with the tax under the balancing test that has been in place since 1980 and found the taxation provisions in the Indian land leasing regulations to express strong federal and tribal interests that, based on the facts of each case, outweighed the interests of the state and local governments. As a result of the new regulations, the weight on the scale has been markedly tipped to the federal and tribal side. The objective of certainty through a bright line rule, however, remains allusive.

F. Michael Willis *is a partner with Hobbs, Straus, Dean & Walker, LLP, in Washington, D.C. He may be reached at mwillis@hobbsstraus.com.*

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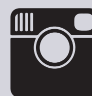

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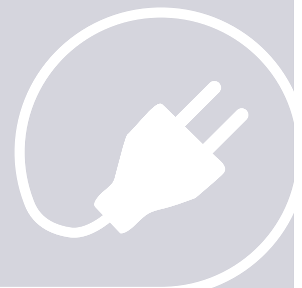

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