

A Winning Hand or Time to Fold? State Taxation of Fuel Sales on Kansas Indian Reservations

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I. INTRODUCTION

Indian travel plaza fuel stops have been popping up on Indian reservations in Kansas as well as the rest of the country.¹ These businesses have been extremely successful, mainly because of their ability to avoid the imposition of state fuel taxes.² The financial windfall created for Indian tribes is immeasurable, yet it comes at a steep cost to the rest of society. The tribes' ability to escape taxation has led to an unfair competitive disadvantage for many nearby non-Indian retailers,³ frustrated the states' efforts to uniformly and effectively collect tax revenue,⁴ and resulted in great uncertainty for consumers, the states, and even Indian retailers.⁵

In an effort to alleviate these problems, the Kansas legislature and the Kansas Department of Revenue have aggressively tried to ensure that all fuels sold to non-Indians will be taxed, regardless of the location of the sale. To minimize constraints posed by federal law, stare decisis, and preemption, Kansas has for years used an innovative scheme of fuel taxation whereby its fuel taxes have been imposed on

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1. See generally Kay Humphrey, *Winnebago on a Roll to a Financial Empire*, INDIAN COUNTRY TODAY (Jan. 3, 2001), at <http://www.indiancountry.com/?2137>.

2. The relatively small mark up for fuel and steep tax provide for a substantial increase in profitability for Indian fuel retailers who can avoid state fuel taxation. The historical profit margin on fuel is six to ten cents per gallon. *Prather v. Colo. Oil & Gas Corp.*, 542 P.2d 297, 300 (Kan. 1975); Telephone Interview with Ryan Sawyer, General Manager, Traffik Jam Convenience Stores (July 22, 2003). From July 1, 2002 until July 1, 2003, the tax on gasoline was twenty-three cents per gallon. KAN. STAT. ANN. § 79-34,141(a)(1) (1997 & Supp. 2002). Diesel fuel was taxed at twenty-five cents per gallon. *Id.* § 79-34,141(a)(2).

3. See *In re City of Wetmore*, 56 P.3d 248, 249 (Kan. 2002); Stacy L. Cook, Comment, *Indian Sovereignty: State Tax Collection on Indian Sales to Nontribal Members—States Have a Right Without a Remedy*, 31 WASHBURN L.J. 130, 138 n.72 (1991). The residents of Wetmore were forced to create a municipally-owned fuel station as a result of this competitive disadvantage. See *City of Wetmore*, 56 P.3d at 249. The city attempted to find a private enterprise to provide its residents with fuel, but failed because of the close proximity of the Indian fuel stops that could "sell fuel for less than most other commercial enterprises." *Id.*

4. Stephen P. McCleary, Comment, *A Proposed Solution to the Problem of State Jurisdiction to Tax on Indian Reservations*, 26 GONZ. L. REV. 627, 628 (1991). The Indian fuel tax controversy has exacerbated budgetary problems in two distinct ways. First, a state brings in less tax revenue because the fuel sold on the reservations may completely escape taxation. Second, state funds are further depleted by the cost of endless litigation on the issue.

5. In particular, this has led to some uneasy decisions for many third parties involved only collaterally in the fuel tax fight. For example, those in the trucking industry face becoming non-competitive on one hand, and having to defend themselves from possible state intervention on the other. Even though the State of Kansas has taken the position that the Kansas fuel tax is collected from the fuel distributor rather than the retail purchaser, there is still a risk that the State could try to retroactively collect tax revenues directly from the purchaser via the use tax.

the (non-Indian) distributors of fuel rather than the (Indian) retailers of fuel. Under this system, the tax is imposed before the fuel reaches the Indian reservation, making taxation *on the reservation* a non-issue. The State has been very successful with this approach, which has been upheld on more than one occasion by the courts.⁶

Not to be outdone by the Kansas legislature and Department of Revenue, the Indian tribes in Kansas have moved one step up the supply chain by purchasing fuel from other Indian tribes.⁷ Since the “distributor” of the fuel is another Indian entity, the preemptive federal and Indian law constraints are once again implicated.⁸ This has left the once certain statutory scheme in a state of utter uncertainty.⁹ The purpose of this note is to attempt to clear up some of this uncertainty, and in the event it is needed,¹⁰ to examine possible ways for the State of Kansas to collect fuel taxes on fuel sold on Indian reservations to non-Indian consumers.¹¹

II. BACKGROUND: STATE TAXATION ON INDIAN RESERVATIONS

A. *Limits on Taxation: Preemption and Indian Sovereignty*

Generally, state taxation on Indian reservations has two major limitations.¹² First, federal law and the Indian Commerce Clause may preempt state jurisdiction.¹³ As a result of preemption, a state may not directly tax Indian tribes unless Congress has specifically authorized the state taxation.¹⁴ This rule was established to reflect the sensitive relationship between American Indians and the federal

6. See *Sac and Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 585-86 (10th Cir. 2000) [hereinafter *Sac and Fox II*]; *Prairie Band Potawatomi Nation v. Richards*, 241 F. Supp. 2d 1295, 1308-09 (D. Kan. 2003); *Kaul v. State Dep't of Revenue*, 970 P.2d 60, 69 (Kan. 1998).

7. See *Winnebago Tribe of Nebraska v. Stovall*, 216 F. Supp. 2d 1226, 1229 (D. Kan. 2002) [hereinafter *Winnebago Tribe I*].

8. *Id.* at 1237.

9. The *Winnebago Tribe* case, which is still pending, leaves in limbo not only the old scheme but also any possible future scheme. See *Winnebago Tribe of Nebraska v. Stovall*, 341 F.3d 1202 (10th Cir. 2003) [hereinafter *Winnebago Tribe II*] (upholding the district court's preliminary injunction issued in 216 F. Supp. 2d 1226 (D. Kan. 2002)).

10. As of the date of this writing, the latest challenge to the Kansas fuel tax, *Winnebago Tribe of Nebraska v. Stovall*, had not been resolved. *Id.* It is thus unclear whether a new scheme will be required to collect the Kansas fuel tax.

11. This note does not advocate taxing fuel sales made to Indians, just sales made to non-Indians. Whether Indians should be able to escape taxation on personal consumption is another matter that has no bearing on whether non-Indians who buy fuel from Indian retailers should be taxed. Therefore, the arguments and policy behind taxation of Indians and Indian entities are beyond the scope of this note.

12. John McGown, Jr., *Tax Thoughts*, *Advoc.* July 1994, at 18, 19.

13. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458-59 (1995).

14. *Id.*

government.¹⁵ However, a major exception to this limitation exists when a state imposes the tax on tribal activities with non-Indians.¹⁶

Second, a state may not infringe on a tribe's inherent right to self-government under the doctrine of Indian sovereignty.¹⁷ Yet, a tribe's right to self-governance does not go so far as to guarantee "an artificial competitive advantage."¹⁸ Usually, "when state taxes are imposed on the sale of non-Indian products to non-Indian consumers, the balance of the federal, state and tribal interests tilt in favor of the state."¹⁹ As a related right, even when a state has the right to tax transactions on Indian reservations, an Indian tribe may enjoy sovereign immunity from suit.²⁰ However, this protection has its limits too. To circumvent sovereign immunity, a state may file suit against individual agents or officers of a tribe rather than the tribe itself.²¹ Indian retailers on Indian reservations may thus be "required to collect all state taxes applicable to sales to non-Indians."²²

B. Fuel Taxation on Indian Reservations

The seminal case on state fuel taxation is *Oklahoma Tax Commission v. Chickasaw Nation*,²³ where the United States Supreme Court struck down an Oklahoma State fuel tax imposed on fuel sold by the Chickasaw Nation Tribe.²⁴ The *Chickasaw Nation* Court structured a two-part test to determine the validity of the Oklahoma fuel tax as applied to reservation sales to non-Indians.²⁵ First, if the legal incidence of a tax falls on an Indian tribe or its members, rather than non-Indians, the tax will be categorically barred absent clear congressional authorization.²⁶ Second, if the legal incidence of the tax falls on non-

15. See *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 247 (1985) ("The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.").

16. See McGown, *supra* note 12, at 19-20 (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987)).

17. *Id.* at 19-20 (citing *Williams v. Lee*, 358 U.S. 217 (1959)).

18. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980).

19. *Prairie Band Potawatomi Nation v. Richards*, 241 F. Supp. 2d 1295, 1308 (D. Kan. 2003).

20. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 510 (1991). This anomaly has led to what some have called a "right without a remedy" because a state has the right to impose a tax on certain sales to non-Indians, yet cannot directly bring suit against a sovereign tribe to enforce that right. Cook, *supra* note 3, at 130.

21. *Citizen Band*, 498 U.S. at 514. The doctrine of sovereign immunity "does not excuse a tribe from all obligations to assist in the collection of validly imposed state . . . taxes." *Id.* at 512.

22. *Id.*

23. 515 U.S. 450 (1995), *aff'g in part, rev'g in part* 31 F.3d 964 (10th Cir. 1994).

24. *Id.* at 453.

25. *Id.* at 458-59.

26. *Id.* The preemptive legal incidence test is meant as a bright-line test rather than a reflection of economic reality. *Id.* at 459-60. The legal incidence test does not reflect reality because the legal incidence of a tax does not always fall on the same person that the economic incidence of the tax falls. See *Sac and Fox II*, 213 F.3d 566, 578 (10th Cir. 2000) (citing *United States v. Tax Comm'n*, 421 U.S. 599, 607-10 (1975)). Likewise, the legal incidence does not always fall on the person "legally liable for payment of the tax." *Id.* Instead, "the legal inci-

Indians, the tax will be upheld if “the balance of federal, state, and tribal interest favors the State, and federal law is not to the contrary.”²⁷ If a tax is upheld under this framework, a state would then be able to place “minimal burdens” on a tribe or its members to collect the tax.²⁸

The *Chickasaw Nation* Court ultimately held that the Oklahoma fuel tax, “as currently designed,” could not be applied to fuel sold by the Tribe.²⁹ Because the Oklahoma fuel tax did not specifically state where the legal incidence fell, the Court was forced to give a “fair interpretation of the taxing statute as written and applied” to determine where the legal incidence fell.³⁰ In the Court’s opinion, the legal incidence of the tax fell on the Indian retailer.³¹ Since the tax failed the categorical bar prong of the two-part test, a balancing of interests was not required.

Nevertheless, the United States Supreme Court also suggested that the tax could be imposed under a slightly different statutory scheme. The Court specifically pointed out that “Oklahoma could accomplish what it here seeks by declaring the tax to fall on the consumer and directing the Tribe to collect and remit the levy.”³² Similarly, the Court recognized that a state is generally “free to amend its law to shift the tax’s legal incidence.”³³ Therefore, as the Court suggested, a state can bypass the preemptive categorical bar under the two-part test by statutorily placing the fuel tax on a non-Indian entity. This can be done even if the economic burden of the tax remains on an Indian entity.³⁴

III. KANSAS FUEL TAX LAW

A. *The Statutory Scheme*

Taking note of the United States Supreme Court’s equivocal language in *Chickasaw Nation*, the Kansas legislature quickly acted to amend the Kansas fuel tax statutes. The Kansas fuel tax has been imposed as broadly as possible on the “use, sale or delivery of all motor vehicle fuels or special fuels which are used, sold or delivered in

dence of a tax falls upon the entity or individual necessarily responsible for paying the tax.” *Id.* The *Chickasaw Nation* Court looked to the legal incidence rather than the economic incidence of the tax simply because it “accommodates the reality that tax administration requires predictability.” *Chickasaw Nation*, 515 U.S. at 459-60.

27. *Chickasaw Nation*, 515 U.S. at 459.

28. *Id.*

29. *Id.* at 453 (emphasis added).

30. *Id.* at 461 (internal quotes omitted).

31. *Id.* at 462.

32. *Id.* at 460 (internal quotes omitted).

33. *Id.*

34. *See id.* at 459-60; *Sac and Fox II*, 213 F.3d 566, 578 (10th Cir. 2000).

this state for any purpose whatsoever.”³⁵ The linchpin of the new statutory scheme was the statutory placement of the legal incidence of the fuel tax on the “distributor of the first receipt.”³⁶ This provision, as suggested by the *Chickasaw Nation* Court, makes issues of preemption and Indian sovereignty inapplicable to the Kansas fuel tax.³⁷ The Kansas statutes also place the burden of collecting the tax on fuel distributors.³⁸ Distributors are, however, given the right to pass the tax on to retailers as part of their selling price.³⁹

To provide an additional layer of protection from possible future enforcement problems, the fuel tax was applied to fuel “used, sold or delivered in this state.”⁴⁰ The “use tax” is specifically applied to interstate motor fuel users in order to carry out this broad application.⁴¹ Realistically speaking, the use tax is meant as a safety net to be used only if the fuel tax cannot be collected on the initial sale of the fuel.⁴² The use tax is theoretically applied to every gallon of fuel at a rate equivalent to the fuel tax,⁴³ but a credit is allowed for motor fuel taxes already paid.⁴⁴ Thus, the use tax is rarely used as a collection device because the fuel tax is usually collected from the distributor.⁴⁵ In fact, a typical fuel user most likely has no idea that the use tax even exists as a collection device.

The statutory scheme also incorporates a notice provision, presumably for fairness reasons.⁴⁶ Notice is essential to the fairness of the use tax because an everyday purchaser of fuel would generally have no idea whether the distributor paid the tax. This is especially true for purchases made on Indian reservations. Since an Indian retailer does not remit nor bear the legal incidence of the fuel tax, a distributor’s payment of the fuel tax would not automatically be apparent. Without a notice provision, a purchaser would need to trace

35. KAN. STAT. ANN. § 79-3408(a) (1997 & Supp. 2002). The term “motor vehicle fuels” is defined as various types of gasoline, including “gasohol, gasoline-oxygenate blend and any other spark-ignition motor fuel.” *Id.* § 79-3401(l) (1997). The term “special fuels” is defined as “all combustible liquids suitable for the generation of power for the propulsion of motor vehicles including, but not limited to, diesel fuel, alcohol and such fuels not defined under the motor-vehicle fuels definition.” *Id.* § 79-3401(s).

36. *Id.* § 79-3408(c) (1997 & Supp. 2002). This provision is by far the most important of the new scheme, as under *Chickasaw Nation* a tax on fuel sold on an Indian reservation is categorically barred if its legal incidence falls on an Indian tribe or its members. *Chickasaw Nation*, 515 U.S. at 458-59.

37. *See Chickasaw Nation*, 515 U.S. at 459-60.

38. KAN. STAT. ANN. § 79-3409 (1997 & Supp. 2002).

39. *Id.* Even though distributors have the right to pass on the tax, they are not required to do so. *Id.*

40. *Id.* § 79-3408(a).

41. *See id.* § 79-34,109(a) (1997).

42. *See id.* § 79-34,112.

43. *Id.* § 79-34,109(a).

44. *Id.* § 79-34,112.

45. *See id.* § 79-3409 (1997 & Supp. 2002). The primary purpose for the use tax is the interstate apportionment of fuel tax revenues. *See id.* § 79-34,112 (1997).

46. *See id.* § 79-3409 (1997 & Supp. 2002).

the fuel through the retailer back to the distributor to know if the tax had been already paid.⁴⁷ The transactional cost of such tracing renders the method clearly impractical and necessitates an easily recognizable notice mechanism.

The statutory scheme has a specific provision meant to provide this needed notice mechanism.⁴⁸ When the retail price of fuel does not include state and federal tax, the “total of the taxes must be shown [on the price sign] in numbers the same size as the price of the motor fuel.”⁴⁹ Under this provision, a retailer who was selling fuel not previously taxed would be forced to indicate that fact on its signs. In the process, the end user would be given notice that the use tax applied and could use that information in determining where to purchase his or her fuel.⁵⁰ Considering the Kansas Indian tribes’ most recent attempt to avoid taxation through Indian distribution of fuel, strict enforcement of the statutory notice provision is of utmost importance when considering the inherent fairness of the use tax.⁵¹

B. *Official Interpretations, Opinions, and Notices*

In Attorney General’s Opinion No. 95-80, the Kansas Attorney General carried out the intent of the legislature when she opined that the legal incidence of the fuel tax was placed on the fuel distributor of first receipt under Kansas law.⁵² As such, in her opinion, Indian fuel retailers were not exempt from fuel taxation.⁵³ The Attorney General distinguished *Chickasaw Nation* by noting that under Kansas law the legal incidence of the fuel tax falls on non-Indian distributors, whereas under *Chickasaw Nation* the incidence fell on Indian retailers.⁵⁴ The Attorney General also pointed out that “products which have been imported for sale are subject to the ‘collect and remit’ requirements of the State’s retailers’ sales tax and cigarette tax acts when the legal incidence of the tax falls on non-Indian purchasers.”⁵⁵

47. An interstate motor fuel user must have evidence of prior tax payment that is “satisfactory to the director” in order to receive credit toward the use tax. *Id.* § 79-34,112 (1997). In the event of a dispute, the burden of showing prior payment is on the fuel user. *Id.*

48. *Id.* § 79-3409 (1997 & Supp. 2002).

49. *Id.*

50. Although not part of the statutory scheme, the Kansas Department of Revenue and the Kansas Attorney General would presumably issue public notices if the tax were not being collected. The presumption is based on prior notices issued by these authorities relating to Indian fuel tax issues. *See infra* notes 52-57 and accompanying text.

51. At the date of this writing, the price sign requirement embodied in section 79-3409 of the Kansas Statutes Annotated is not being enforced, as evidenced by signs located on Indian travel plazas in Kansas.

52. XXIX Kan. Op. Att’y Gen. 33, Kan. Att’y Gen. Op. 95-80, 1995 WL 813445 at *3 (1995).

53. *Id.*

54. *Id.* at *2.

55. *Id.* at *1.

In Notice No. 95-11, the Secretary of the Kansas Department of Revenue announced the future “enforcement of a 1995 law requiring the department to collect motor fuel taxes from distributors when fuel is subsequently sold on Native American reservations in Kansas.”⁵⁶ A refund provision whereby Indians or Indian entities could request a refund of any tax paid was also explained.⁵⁷

C. Kansas Case Law

After *Chickasaw Nation*, the Kansas legislature acted swiftly to create a viable method for ensuring equal taxation on all fuels sold to non-Indians. However, the Indian tribes in Kansas did not welcome the new statutory scheme. The new fuel tax law was viewed by the tribes as an infringement on their sovereign rights and as a threat to economic security. A fierce legal battle ensued.

As a sign of the significance of the issue, the first challenge to the new statutory scheme was litigated all the way to the Kansas Supreme Court.⁵⁸ In *Kaul v. State Department of Revenue*,⁵⁹ two members of the Citizen Band Potawatomi Tribe of Oklahoma who owned retail convenience stores filed suit to enjoin collection of the fuel tax.⁶⁰ The retailers were not assessed the tax directly by the State, but were indirectly billed by their distributors for payment of the fuel tax.⁶¹ The plaintiffs leveled several arguments against the tax. The Indian retailers first claimed a statutory exemption from the tax, asserting that the Indian reservation qualified as an “other state or territory” for the purposes of section 79-3408(d)(1) of the Kansas Statutes Annotated.⁶² The retailers also argued that the fuel tax law was categorically barred under *Chickasaw Nation* because the incidence of the tax fell on Indian entities.⁶³

After examining the Organic Act, the Act for Admission, and the legislative history of the Kansas fuel tax, the Kansas Supreme Court held that the statutory exemption did not apply.⁶⁴ The court based this determination on its finding that an Indian reservation located inside Kansas should not be classified as a “territory” outside Kansas.⁶⁵ Next, the court addressed the *Chickasaw Nation* argument.⁶⁶

56. Kan. Dep’t of Rev., Notice 95-11 (Sept. 6, 1995).

57. *Id.*

58. *Kaul v. State Dep’t of Revenue*, 970 P.2d 60 (Kan. 1998).

59. *Id.* at 61.

60. *Id.* at 62.

61. *Id.*

62. *Id.* at 63.

63. *Id.* The retailers also claimed a violation of equal protection and that a tax compact precluded fuel taxation on fuels delivered to the reservation. *Id.*

64. *Id.* at 67.

65. *Id.*

66. *Id.* at 68-69.

The court determined that the legal incidence of the fuel tax fell on fuel distributors rather than the Indian retailers.⁶⁷ The tax was thus not categorically barred.⁶⁸ This finding was essential, as it allowed the court to distinguish the case from the result reached in *Chickasaw Nation*. Finally, because the legal incidence of the fuel tax fell on non-Indians, the court found that the retailers had no protected interest under the balancing test.⁶⁹ The tax was thus upheld, and Kansas achieved its first major victory under the new statutory scheme.⁷⁰

In the *Sac and Fox Nation of Missouri*⁷¹ line of cases, three Kansas Indian Tribes challenged the Kansas fuel tax.⁷² The Tribes argued that the fuel tax was barred by (1) tax compacts between the State and the Tribes; (2) statutory exemption of fuels delivered to other “territories”; (3) preemption resulting from the legal incidence of the tax falling on the Indian Tribes; and (4) the balancing of federal, tribal, and state interests that, in their opinion, weighed in favor of non-taxation.⁷³

The District Court of Kansas first opined that the tax was not barred by tax compacts with the State of Kansas.⁷⁴ The court found that the alleged tax compacts were not valid because they were never approved by the Kansas legislature, and in any event, the compacts would have expired by their own terms in 1996.⁷⁵ Next, the court addressed the issue of whether the Tribes fell within a statutory exemption for transactions with other territories.⁷⁶ The relevant provision was section 79-3408(d)(1) of the Kansas Statutes Annotated, which states that no tax shall be imposed on the sale or delivery of fuel “for export from the state of Kansas to any other state or territory.”⁷⁷ The Tribes contended that an Indian reservation was “another state or ter-

67. *Id.* at 69.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Sac and Fox Nation of Missouri v. LaFaver*, 979 F. Supp. 1350 (D. Kan. 1997) (motion to dismiss denied), *Sac and Fox Nation of Missouri v. LaFaver*, 31 F. Supp. 2d 1298 (D. Kan. 1998) [hereinafter *Sac and Fox I*] (holding that the legal incidence of the tax fell on non-Indians, but the balancing test weighed in favor of non-taxation), *rev'd and remanded by Sac and Fox II*, 213 F.3d 566 (10th Cir. 2000) (upholding the fuel tax because of insufficient evidence to conduct a balancing test), *Sac and Fox Nation of Missouri v. Richards*, 158 F. Supp. 2d 1274 (D. Kan. 2001) [hereinafter *Sac and Fox III*] (dissolving permanent injunction).

72. *Sac and Fox I*, 31 F. Supp. 2d at 1301. The three Tribes included the Sac and Fox Nation of Missouri, the Iowa Tribe of Kansas and Nebraska, and the Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas. *Id.* at 1300.

73. *Id.* at 1302-07.

74. *Id.* at 1303.

75. *Id.* at 1302-03. For information on the spurious circumstances that these compacts were unilaterally entered into by then Kansas Governor Joan Finney, see Cook, *supra* note 3, at 138 n.72.

76. *Id.* at 1303-04.

77. *Id.* at 1304.

ritory” for the purposes of the statutory exemption.⁷⁸ The court agreed and issued a permanent injunction.⁷⁹

As an alternative basis for its decision, the court held that the state-federal-tribal balancing test would have invalidated the tax anyway.⁸⁰ In balancing the federal and tribal interest with the State’s interest in enforcement, the court noted several arguments set forth by the parties.⁸¹ First, the court recognized that Kansas had never taxed fuel sales on Indian reservations and that invalidating the tax “would not take money out of the state coffers that had been relied upon in the past.”⁸² Next, the court pointed out that the number of transactions on Indian reservations was relatively small and that the fuel tax as a whole would not be undermined from non-enforcement.⁸³ Finally, it concluded that the State would not suffer “a great deal of harm” from allowing the fuel to go untaxed.⁸⁴

On the other hand, the court determined that the harm to Indian retailers would be great because the Tribes “rely heavily on the sale of motor-vehicle fuel on their reservations for income.”⁸⁵ The court reasoned that the Indian retailers would be forced to either absorb the tax or increase prices to include the tax.⁸⁶ Forcing Indian retailers to compete on an even playing field would, in the court’s eyes, have had a “real and direct impact” on the Tribe’s income and could lead to a situation where “tribal autonomy would clearly be compromised.”⁸⁷ As such, the District Court of Kansas held that the Kansas fuel tax could not withstand scrutiny under the balancing test.⁸⁸

On appeal, the Tenth Circuit Court of Appeals reversed and remanded.⁸⁹ The court held that the Tribes did not fall within the statutory exemption to the tax since an Indian reservation is not considered “another state or territory” under Kansas law.⁹⁰ The court found that the District Court of Kansas misconstrued the Kansas Act for Admission and had completely overlooked the Kansas Supreme Court case

78. *Id.*

79. *Id.*

80. *See id.* at 1308. The court did, however, recognize that “the statutes are extremely clear” in placing the legal incidence of the tax on entities other than Indian retailers. *Id.* at 1307.

81. *Id.* at 1307.

82. *Id.* Prior to enacting the new statutory scheme, the State of Kansas had never tried to collect fuel taxes on Indian reservations. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* Based on the high elasticity of demand for fuel on a microeconomic level, it is much more likely that the retailers would continue to sell the fuel at the market-established rate and absorb the increase in cost. This is because an increase in price over that of nearby competitors would have a more than proportionate decrease in sales.

87. *Id.* at 1307-08.

88. *Id.* at 1308.

89. *Sac and Fox II*, 213 F.3d 566, 586 (10th Cir. 2000). The case was remanded for further findings as to the balancing of Indian, federal, and state interests. *Id.* at 585-86.

90. *Id.* at 576.

of *Kaul*.⁹¹ The *Kaul* court held that “the exemption from taxation provided by K.S.A. § 79-3408(d)(1) did not apply to the retailers because Indian reservations within the boundaries of the State are not included as territories outside the boundaries of Kansas.”⁹² The State also argued that preemption was not an issue, contending that the Hayden-Cartwright Act⁹³ specifically authorized state taxation of fuel sold on Indian reservations.⁹⁴ The Tenth Circuit, however, declined to address this issue because it had not been raised before the district court.⁹⁵

The court then addressed the district court’s alternative basis for striking down the fuel tax: the balancing of state, federal, and tribal interest.⁹⁶ The court again disapproved of the lower court’s treatment of the issue, holding that it did not have enough information to properly conduct the balancing test.⁹⁷ The case was thus remanded.⁹⁸ To be able to rule for the Tribe, the court directed that it would need some “verifiable projections based upon historic statistics indicating what portion of the Tribes’ retail fuel sales is made to tribal members as compared to the general public.”⁹⁹

In *Prairie Band Potawatomi Nation v. Richards*,¹⁰⁰ the District Court of Kansas again addressed the fuel tax issue, this time to determine whether the State could collect the fuel tax from fuel distributors on deliveries made to Indian retailers.¹⁰¹ The Prairie Band Potawatomi Nation Tribe imported fuel for resale at its convenience store gas station.¹⁰² Approximately seventy-three percent of the Tribe’s fuel sales were to patrons and employees of the Tribe’s nearby casino.¹⁰³ The Tribe collected its own fuel tax on these sales, which it used for the construction and maintenance of the reservation’s roads.¹⁰⁴ The Tribe claimed that the Indian Commerce Clause and Indian sovereignty preempted the Kansas fuel tax.¹⁰⁵ The State countered that the

91. *Id.* at 576-77.

92. *Kaul v. State Dep’t of Revenue*, 970 P.2d. 60, 66-67 (Kan. 1998).

93. 4 U.S.C. § 104 (2000).

94. *Sac and Fox II*, 213 F.3d at 575.

95. *Id.*

96. *Id.* at 577.

97. *Id.* at 583-85.

98. *Id.* at 586.

99. *Id.* at 585. After remand, the State of Kansas moved for an order dissolving the injunction against collection of the fuel tax from distributors. *Sac and Fox III*, 158 F. Supp. 2d 1274 (D. Kan. 2001). The court granted the order dissolving the injunction in light of the Tenth Circuit’s ruling that in order to successfully challenge the tax, the Tribes would have to show a “substantial portion” of its fuel was sold to Indians. *Id.* at 1277-78.

100. 241 F. Supp. 2d 1295 (D. Kan. 2003).

101. *Id.* at 1299.

102. *Id.* at 1297.

103. *Id.* at 1297-98.

104. *Id.* at 1298. The Tribe collected a sixteen-cent per gallon tax on gasoline and an eighteen-cent per gallon tax on diesel. *Id.* In total, the Tribal fuel tax amounted to about \$300,000 per year. *Id.*

105. *Id.* at 1299.

Hayden-Cartwright Act specifically authorized the Kansas fuel tax, and that preemption and Indian sovereignty were non-issues under the Kansas statutory scheme.¹⁰⁶

As a preliminary matter, the court examined the Hayden-Cartwright Act to see if there was specific congressional authorization from federal law to tax the fuel.¹⁰⁷ In pertinent part, the Act states that

[a]ll tax levied by any State . . . with respect to . . . motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations.¹⁰⁸

Kansas argued that by its plain meaning the phrase “or other reservations” was meant to include Indian reservations and that circumstances surrounding the passage of the Act supported such a reading.¹⁰⁹ Specifically, Kansas argued that under the Hayden-Cartwright Act, “Congress intended to correct the general unfairness in the sale of fuel exempt from state taxation on federal reservations.”¹¹⁰ The court, however, found that the phrase “United States military or other reservations” was too ambiguous to conclusively include Indian reservations in its meaning.¹¹¹ In the court’s opinion, the term “reservation” was broad enough that it could or could not include Indian reservations.¹¹² The court then commented that if Congress had meant to include Indian reservations, it should have done it with more particularity.¹¹³ Thus, the court held that “the Hayden-Cartwright Act does not amount to congressional authorization for states to impose fuel tax on fuel delivered to Indian reservations.”¹¹⁴

The court then, however, ruled for the State on the bigger issues of preemption and tribal sovereignty.¹¹⁵ Since the legal incidence of

106. *Id.*

107. *Id.* at 1303-04. The court noted that the only other courts to specifically address the issue were the Idaho Supreme Court and the District Court of Idaho. *Id.* at 1304.

108. *Id.* at 1303 (quoting 4 U.S.C. § 104(a) (2000)).

109. *Id.* at 1304-05. In commenting on the Act four months after its passage, the United States Attorney General opined that it applied to a “military reservation, or an Indian reservation.” *Id.* at 1306 (citing 38 Op. Att’y Gen. 522, 524 (1936)). The Solicitor of the Department of the Interior concurred when he was asked to decide on the issue. *Id.* (citing *In re Menominee Indian Mills*, 57 Interior Dec. 129, 138-40 (1940)).

110. *Id.* at 1306.

111. *Id.* at 1304-05. Statutes that affect Indian rights are “construed broadly, with any ambiguous provision to be interpreted to their benefit.” *Id.* at 1304.

112. *Id.* at 1305.

113. *Id.* The court also found the term “licensed traders” to be too ambiguous to include Indian retailers. *Id.*

114. *Id.* at 1304.

115. *Id.* at 1308, 1311. The State also argued in *Prairie Band* that a “state tax will be allowed where the tribe is attempting to sell non-Indian products to non-Indians and where the state tax precludes the tribe from creating the type of tax haven the *Colville* court sought to prevent.” *Id.* at 1308. This argument is dubbed the “magnet effect” and is described further at Part V.B.

the tax did not fall on Indians, the court reasoned there was no pre-emption that would necessitate further congressional approval under Hayden-Cartwright.¹¹⁶ Therefore, whether or not the Hayden-Cartwright Act applied was irrelevant. The court went on to rule in the State's favor under the balancing test, stating that "[o]rdinarily, when state taxes are imposed on the sale of non-Indian products to non-Indian consumers, the balance of the federal, state and tribal interests tilt in favor of the state."¹¹⁷ Thus, the net effect of the decision was that the State lost on one of its major justifications for the tax, but prevailed on the ultimate issue.

Notwithstanding these adverse court decisions, Kansas Indian Tribes have not conceded defeat on the fuel tax issue.¹¹⁸ Instead, the Kansas Tribes have found an apparent loophole in the Kansas statutory scheme. The loophole is simple: buy fuel from an Indian distributor.¹¹⁹ Buying fuel from an Indian fuel distributor shifts the legal incidence of the tax from a non-Indian entity to an Indian entity, and the federal and constitutional protections of Indian interests are once again invoked.¹²⁰ This scenario has set up *Winnebago Tribe of Nebraska v. Stovall*¹²¹ as the next great fuel tax case.¹²² In *Winnebago Tribe*, several Kansas Tribes¹²³ entered into fuel purchase contracts with Ho-Chunk Inc., a corporation wholly owned by the Nebraska-based Winnebago Tribe.¹²⁴ Ho-Chunk Inc. purchases fuel from off-reservation pipelines in Nebraska and Iowa and blends alcohol or soy additives into the fuel.¹²⁵ The Tribe asserts that this process renders the fuel "manufactured" by an Indian Tribe for the purposes of the

116. *See id.*

117. *Id.*

118. *See Winnebago Tribe I*, 216 F. Supp. 2d 1226, 1229 (D. Kan. 2002).

119. *Id.* The Kansas statutory scheme is premised on the assumption that the distributor of fuel will be a non-Indian. By undercutting this assumption, it is quite possible that the entire scheme has been defeated.

120. *See Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458-59 (1995). Since the distributor is an Indian entity, the legal incidence of the tax falls on an Indian and cannot be upheld without specific congressional authorization. *Id.*

121. 216 F. Supp. 2d 1226 (2002) (granting a preliminary injunction enjoining the collection of the Kansas fuel tax).

122. At the time of this writing, the *Winnebago Tribe* case was pending before the District Court of Kansas. *See Winnebago Tribe II*, 341 F.3d 1202, 1203 (10th Cir. 2003).

123. The Kansas Tribes include the Sac and Fox Nation of Missouri, the Iowa Tribe of Kansas and Nebraska, and the Kickapoo Tribe of Indians of the Kickapoo Reservation. *Winnebago Tribe I*, 216 F. Supp. 2d at 1229.

124. *Id.* The Winnebago Tribe has had great financial success in various businesses. *See Humphrey, supra* note 1. The Tribe is involved in fuel distribution, convenience stores, internet companies, motels, a publicly traded home manufacturer, and the financing industry. *Id.* More recently, the Tribe successfully completed a leveraged buyout of a Minnesota manufacturing company and is set to make "one of the first buyouts of a publicly traded company by an Indian tribe." *Id.* The breadth of this success indicates a high level of business sophistication and should displace any negative stereotypes that could arguably justify non-enforcement of the fuel tax.

125. *Winnebago Tribe I*, 216 F. Supp. 2d at 1229.

balancing test.¹²⁶ The Kansas Tribes, with the help of the Winnebago Tribe and its perceptive business leaders, hope to be able to defeat the Kansas fuel tax with this arrangement.

The Kansas Department of Revenue responded to this development by informing Ho-Chuck Inc. that as a licensed Kansas fuel importer it was required to collect fuel taxes on deliveries to Kansas retailers.¹²⁷ Ho-Chuck Inc. countered by stating that as an Indian entity wholly owned by the Winnebago Tribe it was immune from Kansas taxing authority.¹²⁸ After nearly seven months of non-payment, the Kansas Department of Revenue attempted to enforce the Kansas fuel tax by seizing two of Ho-Chuck Inc.'s delivery trucks and tankers.¹²⁹ Ho-Chuck Inc., through the Winnebago Tribe, then filed suit for an injunction against the enforcement of the Kansas fuel tax.¹³⁰ The Tribe also moved for a temporary restraining order against enforcement.¹³¹ The District Court of Kansas granted the Tribe a preliminary injunction pending further adjudication of the case.¹³² The Tenth Circuit subsequently upheld the preliminary injunction.¹³³

If the Kansas Tribes ultimately prevail on the merits of the *Winnebago Tribe* case, then the State's victories on the fuel tax issue are all for naught. The State could be left scrambling for a way to close the fuel tax loophole, while at the same time trying to justify the litigation expenses of past cases.

IV. WHY FUEL SOLD TO NON-INDIANS SHOULD BE TAXED

Both the states and Indian tribes have compelling reasons for why fuel sold on a reservation to non-Indians should or should not be taxed. Most of these arguments revolve around equity and fairness considerations. Courts pay close attention to these rationales, and in some cases the ultimate outcome hinges on which side has the better argument. More specifically, these arguments form the federal-state-tribal balancing test that determines whether a tax will be upheld when not categorically barred by federal preemption.

126. *Id.* A tribe's interest under the balancing test is "at its weakest when goods are imported from off-reservation for sale to non-Indians." *Prairie Band*, 241 F. Supp. 2d at 1309.

127. *Winnebago Tribe I*, 216 F. Supp. 2d at 1229.

128. *Id.*

129. *Id.* at 1229-30.

130. *Id.*

131. *Id.*

132. *Id.* at 1240.

133. *See Winnebago Tribe II*, 341 F.3d 1202, 1203 (10th Cir. 2003).

A. Tribes' Perspective

Indian tribes rely on their federally granted sovereign rights to justify their tax-free status.¹³⁴ This tax-free position exists because of the sensitive trust relationship between the federal government and the Indian tribes.¹³⁵ The tribes assert that this unique tax position should be extended to non-Indian transactions as well.¹³⁶ In their opinion, the tax revenues are “not for the states to lose, as they never belonged to the states.”¹³⁷ Instead, the Indian tribes claim tax revenues “rightfully belong within the jurisdiction of native sovereignties, for the tribes or nations to pay for services on their own lands and to support their home communities.”¹³⁸

The tribes also rely on need-based economic arguments when rebuffing state fuel taxation.¹³⁹ Without the competitive advantage gained from non-taxation, the tribes assert that they would not have enough revenue to support “essential tribal services.”¹⁴⁰ In the words of the Chairperson of the Sac and Fox Nation, “[w]ithout the draw of the low-cost fuel, customers would no longer bring their business to the [fuel station], and the additional revenue would be lost to the Nation.”¹⁴¹ The tribes have further argued that the benefit of collection to the State is so small that it does not justify the harm inflicted on the tribes.¹⁴² Specifically, it has been estimated that Kansas loses only .33% of its total possible fuel tax proceeds from non-collection of the tax on Indian reservations.¹⁴³ However, that relatively small amount would “have real and direct impact on the tribes’ incomes.”¹⁴⁴

The downfall of these arguments is that the fuel tax will not defeat Indian sovereignty or economic stability.¹⁴⁵ It just puts the Indian businesses on an equal playing field with non-Indian businesses. Even

134. See Brian Stockes, *Tribes Ask ‘What is the New Issue?’*, INDIAN COUNTRY TODAY (July 26, 2000), at <http://www.indiancountry.com/?735>. As stated by Harry Benedict, sub-chief of the St. Regis Mohawk Tribe, “We don’t believe the federal government or the state . . . has the right to impose these laws on our nation.” *Id.* “The right to tax and/or not be taxed is fundamental to understanding Indian sovereignty.” *Idaho Case Reaffirms ‘Indians Not Taxed’ Reality*, INDIAN COUNTRY TODAY (Sept. 3, 2002), at <http://www.indiancountry.com/?1031080025>.

135. *Oneida County v. Oneida Indian Nation of New York*, 470 U.S. 226, 247 (1985).

136. See *Idaho Case Reaffirms ‘Indians Not Taxed’ Reality*, *supra* note 134.

137. *Id.*

138. See *id.*

139. *Sac and Fox II*, 213 F.3d 566, 583 (10th Cir. 2000).

140. *Id.*

141. *Id.* at 584 n.14.

142. *Sac and Fox I*, 31 F. Supp. 2d 1298, 1307 (1998). Since Kansas has never before collected the fuel tax on reservation sales, the court acknowledged that the State would not be losing money previously collected. *Id.*

143. *Winnebago Tribe I*, 216 F. Supp. 2d 1226, 1233 (2002).

144. *Sac and Fox II*, 213 F.3d at 583.

145. The tribes have no vested right in sales to non-Indians. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 151 n.27 (1980) (holding that the “State may sometimes impose a non-discriminatory tax on non-Indian customers of Indian retailers doing business on the reservation . . . even if it seriously disadvantages or eliminates the Indian retailer’s business with non-Indians”).

without the benefit of the tax exemption, Indian fuel stops have the potential to be very successful. The only difference is that the success would be based on unaltered market forces and good business practices rather than on a government subsidy in the form of a tax exemption.

B. State's Perspective

The State of Kansas persuasively contends that equity requires fuel sold on Indian reservations to non-Indians should be taxed just the same as fuel sold to non-Indians outside the reservation.¹⁴⁶ The fuel tax benefits everyone, including Indian retailers who are located near highways paid for and maintained with revenues from the tax.¹⁴⁷ The sole purpose of the fuel tax is to defray the enormous cost of construction and maintenance of roads.¹⁴⁸ The United States Congress reinforced its support of this purpose in the Hayden-Cartwright Act, which arguably authorizes the cost of the road system to be spread over as wide of a fuel tax base as possible.¹⁴⁹

Since fuel sold on Indian reservations is used “almost exclusively on state roads,” it seems fair that the tax on that fuel help support those roads.¹⁵⁰ While the construction and maintenance of these roads imposes a substantial cost on states, it imposes no burden at all on Indian retailers.¹⁵¹ When looked at in this light, it is clearly unfair to allow a product to escape taxation while at the same time allowing the consumer of that product to enjoy the benefits of what the escaped tax was meant to pay for.¹⁵²

Furthermore, the State of Kansas is only trying to collect from non-Indian purchasers of fuel; no Indian purchasers are being taxed.¹⁵³ The whole purpose behind protecting Indian tribes from taxation is to prevent the government from imposing paralyzing tax burdens on Indians that would threaten the sovereign status of the

146. See *Sac and Fox II*, 213 F.3d at 585 (“Congress has made it clear in no uncertain terms that a state has a special and fundamental interest in its tax collection system.”).

147. *Sac and Fox II*, 213 F.3d at 585 n.15. The fuel tax benefits everyone who uses Kansas highways, including “wholesalers who deliver the fuel over state highways, retailers whose businesses are located on or near state highways, and consumers who drive on state highways.” *Id.*

148. See KAN. STAT. ANN. § 79-3402 (1997). “The tax imposed by this act is levied for the purpose of producing revenue to be used by the state of Kansas to defray in whole, or in part, the cost of constructing, widening, purchasing of right-of-way, reconstructing, maintaining, surfacing, resurfacing and repairing public highways . . . and for no other purpose whatever.” *Id.*

149. See *infra* Part V.A.

150. See *Chickasaw Nation v. Oklahoma Tax Comm’n*, 515 U.S. 450, 457 (1995).

151. *Id.*

152. In other words, a consumer should not be able to avoid sharing in the costs of the road system (by avoiding the fuel tax) and then be able to enjoy the very road system he or she did not help pay for.

153. The Kansas fuel tax is a non-discriminatory tax imposed on all fuel distributed within Kansas. *Sac and Fox II*, 213 F.3d at 582.

tribes.¹⁵⁴ Exempting Indian consumer purchases from the tax follows the logic of the federal protections, so if the State was trying to collect the tax from Indian purchasers, the tribes would have a valid argument. Yet, when it is a non-Indian consumer that is paying the tax, the logic falls apart because the ultimate economic burden of the fuel tax falls on the non-Indian consumers of the fuel rather than the Indian retailers.¹⁵⁵

Additionally, it is apparent that the value marketed at Indian fuel stops is truly an exemption from state taxation rather than value based on quality or convenience.¹⁵⁶ The United States Supreme Court has stated that Indian tribes have no authorization to “market an exemption from state taxation to persons who would normally do their business elsewhere.”¹⁵⁷ Sophisticated businesspersons within Indian tribes are well aware of the possible tax advantages available to Indian businesses and have tried to make these benefits available to their non-Indian customers.¹⁵⁸ The tribes should not, however, be able to extend their tax-free position to all commercial goods and especially not to traditionally non-Indian products sold to non-Indians.

Finally, the State is not trying to impose the tax on a traditional Indian product that would possibly warrant the extension of the special tax protection to non-Indians.¹⁵⁹ Fuel is not a traditional “Indian” product, and a product should not become “Indian” simply because it is sold on a reservation. Allowing a tribe and subsequent purchasers to escape taxation on products simply by using an Indian middleman would lead to great problems, and the ultimate collapse of the tax system.¹⁶⁰ If this tax treatment were allowed, Indian reservations would be filled with large commercial retailers, car dealerships, and other wholesalers that would be able to pass goods to consumers tax-free.¹⁶¹ Fairness dictates that a non-Indian should not be able to escape taxation simply by making his or her purchase on an Indian reservation.

154. See *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 510 (1991).

155. *Id.* at 584. The full amount of the fuel tax is usually passed on from distributors to retailers and finally to consumers. *Id.*

156. See *id.* at 585.

157. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980).

158. See generally *Humphrey*, *supra* note 1. The Winnebago Tribe's business success is a great example of the business and financial opportunities afforded an Indian tribe with great leadership. *Id.*

159. See *Chickasaw Nation v. Oklahoma Tax Comm'n*, 515 U.S. 450, 458 (1995) (“[T]he levy does not reach any value generated by the Tribe on Indian Land . . . *i.e.*, the fuel is not produced or refined in Indian country, and is often sold to outsiders.”).

160. *Colville*, 447 U.S. at 155.

161. *Id.* (“If this 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.”).

C. *Third-Parties' Perspective*

One of the major problems with the State and Indian perspectives is that neither side takes into account the effects of collection or non-collection on innocent third parties. Even though courts theoretically do not consider the impact of the fuel tax on third parties, these persons are clear stakeholders in the issue. The amount spent on litigation by the Indian tribes and the State was paid for, at least in part, by third parties. In addition, innocent third parties caught in the crossfire of the fuel tax fight have assumed a great deal of risk. Some have even been forced to spend a significant amount of money to defend themselves and their livelihoods.

A representative case is that of *State v. Davies Oil Co.*,¹⁶² where the Davies Oil Company was drawn into the fuel tax fight because of its status as a fuel distributor.¹⁶³ Defendant Davies Oil Company served as a fuel distributor for the Prairie Band of Potawatomie Indians.¹⁶⁴ The company did not collect the fuel tax on deliveries to the Tribe, as it had the good faith understanding that the State of Kansas lacked jurisdiction to tax such deliveries.¹⁶⁵ The company thus, at least in part because of the uncertainty surrounding the Kansas fuel tax, made fuel deliveries without collecting the fuel tax.¹⁶⁶ The State forcefully challenged Davies Oil Company because of its actions. The company's equipment was seized and five actions, including a criminal action, were filed.¹⁶⁷

Others in the highly competitive trucking industry are also facing great uncertainty and risk as a result of the chaotic state of the fuel tax and the ongoing legal battle between the State and the Indian tribes. Uncertainty created by the fuel tax fight forces trucking companies into a lose-lose situation. If a trucking company decides to avoid risk and "play it safe" by declining to buy fuel at an Indian reservation, it will be at a competitive disadvantage to those trucking companies that do buy at the Indian reservations. The higher cost would lead to loss of profits, loss of competitiveness, and possibly the loss of the business as a going concern. On the other hand, if the trucking company buys fuel on an Indian reservation, in reliance on the State's current position of trying to collect from the fuel distributor, uncertainty is injected into the business because it is unclear where the State will make

162. 2002 WL 32136262 (D. Kan. Aug. 27, 2002).

163. *Id.* at *1.

164. *Id.*

165. *Id.*

166. *See id.* As argued above, there is much uncertainty surrounding the Kansas fuel tax as applied to Indian reservation fuel sales.

167. *Id.* at *1-3. Interestingly, the Prairie Band provided an escrow of nearly \$700,000 so that the Davies Oil Company equipment seized by the State would be released. *Id.* at *3.

up for the lost revenue if it ultimately loses the fuel tax fight.¹⁶⁸ The Kansas statutory scheme exacerbates this concern by possibly providing a double layer of protection in the form of the use tax.

Finally, the tax-free sale of fuel on Indian reservations causes a severe hardship on nearby non-Indian businesses.¹⁶⁹ Tribal retailers are able to create a steep competitive advantage by selling fuel cheaper than nearby competitors, while at the same time still making a larger profit.¹⁷⁰ Such an “unfair advantage . . . could prove disastrous to private business as well as to the state.”¹⁷¹ This inequity will not only drive current businesses out of the market, but also prevent many areas from having private fuel stations altogether.¹⁷² For example, the small northeast Kansas town of Wetmore was unable to get a commercial fuel station to locate in its town, at least in part because of its proximity to an Indian reservation.¹⁷³ As pointed out by the Tenth Circuit, “the Supreme Court has never ‘gone so far as to grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses.’”¹⁷⁴ Yet, that is exactly what the Kansas Tribes are asking for, even though “[t]he Tribes have no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all.”¹⁷⁵

In the end, the tribes’ rationale for challenging the tax is questionable. Non-Indians bear the economic burden of the tax, and the State is not trying to collect on consumer Indian purchases. The tribes’ true motive for challenging the tax is merely economic: a tax would decrease the profitability of their fuel station businesses. While Indians justifiably have special protections and privileges in the area of tax, the protection of profits created solely from the exploitation of a tax exemption is not one of them. The justification for allowing a tax exemption for personal Indian consumption, simply does not ap-

168. The Kansas Statutes have a provision that, if enforced, would clear up this situation by giving the fuel purchasers notice of whether the tax was actually collected by the fuel distributor. See KAN. STAT. ANN. § 79-3409 (1997 & Supp. 2002). Unfortunately, however, this provision has not been enforced.

169. See *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980) (rephrasing the tribal argument as “[i]f the State is permitted to impose its taxes, the Tribes will no longer enjoy any competitive advantage vis-à-vis businesses in surrounding areas”). For empirical proof of the disadvantage felt by nearby businesses, see *In re City of Wetmore*, 56 P.3d 248, 249 (Kan. 2002).

170. See Manny Gamallo, *Tribal Tobacco, Fuel Mixture Ignites*, TULSA WORLD, Oct. 1, 1995 at A3. Indian retailers are thus benefiting from higher demand and higher profitability.

171. Brian Ford, *Tribe’s Exemption from Gas Tax Under Fire*, TULSA WORLD, June 25, 1995.

172. See *City of Wetmore*, 56 P.3d at 249.

173. *Id.* As a result, the town had to establish its own city-run station in order to provide local fuel service. *Id.*

174. *Sac and Fox II*, 213 F.3d 566, 584-85 (10th Cir. 2000) (quoting *Colville*, 447 U.S. at 155).

175. *Id.* at 585 (quoting *Colville*, 447 U.S. at 151).

ply to commercial Indian activities with non-Indian customers, and especially not on traditionally non-Indian products such as fuel.¹⁷⁶

By the same token, the State should make sure it treats third parties fairly. The frustration undoubtedly felt by State officials from possibly not being able to collect fuel taxes on the Indian reservations is understandable; however, it is unconscionable for the State to take this anger out on seemingly innocent third parties. A cornerstone principle in any system of law is predictability, and one of the major problems with alternative enforcement mechanisms has to do with reliance on the current statutory scheme.¹⁷⁷ Any solution should thus be focused on future rather than retroactive solutions.

V. POSSIBLE STRATEGIES TO COLLECT THE FUEL TAX AND LEVEL THE PLAYING FIELD

Fairness and equity require that, to the extent that traditionally non-Indian products are being sold on Indian reservations to non-Indians, the applicable tax be imposed. Exempting fuel sales to Indians is one thing, but exempting sales to non-Indians merely because the place of sale is an Indian reservation is quite another. Simply put, Indians should not be able to divert money from the Kansas highway program by marketing and extending their tax exemption to non-Indians.

While the State of Kansas should be able to collect fuel taxes from the sale of fuel to non-Indians on Indian reservations, the State should not be able to change its position halfway through the game. Many innocent third parties who have relied on the old system have been involuntarily dragged into the fuel tax fight.¹⁷⁸ Rather than taking a contemptuous approach with these third parties through alternative enforcement, the State should focus on correcting the loophole in the tax scheme in an honorable way.¹⁷⁹ The State should consider the following five alternatives.

176. The unique relationship between the federal government and the Indian tribes somewhat justifies the non-taxation of fuel used for personal Indian activities. However, it seems only appropriate that a different rule be applied to commercial Indian activities with non-Indian consumers.

177. It would be fundamentally unfair to try to collect any unpaid taxes from the end user if no notice was given to the end user that the distributor had refused to collect the tax.

178. *See supra* notes 161-173 and accompanying text. As argued, many third-party stakeholders have suffered as a result of the chaos surrounding the current fuel tax scheme.

179. The State should focus its attention on the future of the fuel tax rather than trying to collect past amounts in an undignified manner. Thus, turning to the use tax while at the same time not enforcing the price sign notice provisions of section 79-3409 of the Kansas Statutes Annotated is neither a proper nor fair solution. *See* KAN. STAT. ANN. § 79-3409 (1997 & Supp. 2002).

A. *Argue Congressional Authorization in the Hayden-Cartwright Act*

Many have argued that the Hayden-Cartwright Act was meant to give specific authorization to the states to be able to tax fuel sold on Indian reservations, while others have argued that the Act could not have given such authorization.¹⁸⁰ The courts have preferred to not address the issue, and the few that have addressed the issue have held that the Act is too ambiguous to decide that taxation is appropriate. The United States Supreme Court has specifically declined to rule on this issue on two occasions, thus leaving its status unclear.¹⁸¹

Proponents of imposing the fuel tax on Indian retailers argue that Congress has authorized such taxation on fuels via the Hayden-Cartwright Act. The Hayden-Cartwright Act was introduced as a Federal Aid Highway Appropriations Bill and was amended to allow state collection of fuel taxes within federal areas of the states.¹⁸² The net result of the Act was to level the playing field for those states that had federal public lands devoted to military reservations, national parks, and even Indian reservations.¹⁸³

The plain language of the Hayden-Cartwright Act, as well as its legislative history and agency interpretation, show that the intent of the Act was to “correct the general unfairness in the sale of fuel exempt from state taxation on federal reservations.”¹⁸⁴ The relevant provision states that

[a]ll tax levied by any State . . . with respect to . . . motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military *or other reservations*, when such fuels are not for the exclusive use of the United States.¹⁸⁵

180. For more information and arguments on the Hayden-Cartwright Act's apparent authorization of state taxation of fuel sales on Indian reservations, see Charles K. Bloeser, Comment, *Hayden-Cartwright: A Ready Remedy for Oklahoma's Indian Fuel Tax Woes*, 32 TULSA L.J. 139 (1996) (arguing that the Hayden-Cartwright Act authorizes state fuel taxation) and Karen L. Spinola, Casenote, *The Road Less Traveled—Implications of the Goodman Oil Decision*, 38 IDAHO L. REV. 637 (2002) (arguing that the Hayden-Cartwright Act does not authorize state taxation).

181. See *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 456-57 (1995); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 n.16 (1980). In *Chickasaw Nation*, the Court did not address the issue because it was raised for the first time on appeal. *Chickasaw Nation*, 515 U.S. at 456. The *Bracker* Court did not address the issue because the fuel tax issue was not before the Court. *Bracker*, 448 U.S. at 151 n.16.

182. The Amendment was meant to help states with military reservations, national parks, and Indian reservations collect their share of fuel taxes from all federal areas within its borders. See Bloeser, *supra* note 180, at 143-44. Otherwise, persons purchasing fuel on those reservations would be able to purchase the fuel tax-free and then consume it “while adding wear and tear to state-maintained roads.” *Id.* at 144.

183. *Id.* at 143.

184. *Prairie Band Potawatomi Nation v. Richards*, 241 F. Supp. 2d 1295, 1306 (D. Kan. 2003).

185. Hayden-Cartwright Act, 4 U.S.C. § 104(a) (2002) (emphasis added).

The inclusion of the phrase “or other reservations,” by its plain meaning and lack of qualifying language, includes all reservations regardless of specific classification. The phrase is used as a catchall rather than a limiting statement.

The phrase “or other reservations” is also used in a catchall fashion in other parts of the Act. Section 3 of the Act states that “there is hereby authorized to be appropriated for the survey, construction, reconstruction, and maintenance of main roads through unappropriated or unreserved public lands, nontaxable Indian lands, or other Federal reservations other than the forest reservation.”¹⁸⁶ Section 5 of the Act again uses the same structure in providing funding for roads through “public lands, national forests, or other Federal reservations.”¹⁸⁷ These provisions undoubtedly use the phrase “other reservations” as a catchall. If a specific inclusion or exclusion was desired, such as the exclusion of forest reservations in section 3, it was done specifically. This broad terminology, and more importantly the specific exclusion used for forest reservations, shows that Congress was well aware of the far-reaching effect of its use of the phrase “or other reservations.”¹⁸⁸ The specific exclusion of forest reservations further shows that Congress specifically excluded sub-types of reservations when it thought fit.

At the time of the Act’s passage, the meaning of “or other reservations” was read very broadly as an almost all-inclusive term.¹⁸⁹ The United States Supreme Court defined the word as “any body of land, large or small, which Congress has reserved from sale for any purpose. It may be a military reservation, or an Indian reservation, or, indeed, one for any purpose for which Congress has authority to provide.”¹⁹⁰ The Court’s established definition of the term was known or should have been known to Congress and should carry the day on the argument. The joint conference committee report for the Hayden-Cartwright Act also reveals an intent for the word to be inclusive rather

186. Hayden-Cartwright Act, Pub. L. No. 686, § 3, 49 Stat. 1519, 1520 (1936).

187. *Id.* § 5.

188. The resolution, as read to the Senate general assembly, reveals the broad intent of the Act.

Whereas this conference views with alarm the continued sale of motor vehicle fuels on Government military and other reservations, upon which no State tax has been collected, such tax-free fuel being used on the public highways; and

Whereas the various States have no remedy under existing laws:

Now, therefore, be it

Resolved, That this conference pledge its support to a bill now before Congress . . . which, if enacted, will confer upon the several States authority to collect motor fuel taxes on all sales made on such reservations other than to the United States Government or its agencies.

80 CONG. REC. 6913 (1936).

189. Unfortunately, however, the term is not specifically defined in the Act. *See generally* Hayden-Cartwright Act 4 U.S.C. § 104.

190. *United States v. Celestine*, 215 U.S. 278, 285 (1909).

than exclusive by stating that “[t]he conferees believe that all local taxes should be collected except when the gasoline or motor vehicle fuels are for the exclusive use of the United States.”¹⁹¹ Prior statements by the co-sponsor of the Act further reveal a specific desire to minimize special treatment and/or subsidies to Indian entities.¹⁹²

Two government agencies also concluded that the term “other reservations” included Indian reservations. Shortly after the Act was passed in 1936, the Attorney General stated that “the Act applied to a ‘military reservation, or an Indian reservation.’”¹⁹³ Furthermore, in 1940 the head of the federal agency in charge of applying the Act, the Solicitor of the Interior, opined that the Act allowed fuel taxation on Indian reservations.¹⁹⁴ The well-settled practice of giving deference to agency interpretations further strengthens the argument for taxation.¹⁹⁵ “Chevron deference” requires that “unless refuted by the clear language of the statute, a court must defer to the agency interpretation” of a statute when trying to determine legislative intent.¹⁹⁶ Therefore, after combining the plain meaning rule with the deference given under *Chevron*, the term “or other reservations” necessarily includes Indian reservations.¹⁹⁷

In the case *In re A.G.E. Corp.*,¹⁹⁸ South Dakota became the first jurisdiction to rule on whether the Hayden-Cartwright Act authorized state fuel taxation on Indian reservations.¹⁹⁹ In *A.G.E. Corp.*, a non-Indian corporation appealed the assessment of the fuel tax on fuels used for highway construction on an Indian reservation.²⁰⁰ In upholding the tax, the court found that the Hayden-Cartwright Act was meant by Congress to authorize state fuel taxation on Indian reservations.²⁰¹ The court specifically held “that the United States has granted to the states the right to exercise limited jurisdiction in taxing the use or sale of gasoline or other motor vehicle fuel within federal

191. *Prairie Band Potawatomi Nation v. Richards*, 241 F. Supp. 2d 1295, 1306 n.70 (D. Kan. 2003) (citing 80 CONG. REC. 8, 8701 (1936)).

192. Congressman Hayden stated, “So long as I remain a Member of the House I shall exercise every effort to prevent any Indian in Arizona from receiving anything in the way of a direct gratuity from the Government of the United States.” Spinola, *supra* note 180, at 651 (citing 62 CONG. REC. 1076 (1922)).

193. *Prairie Band*, 241 F. Supp. 2d at 1306 (citing 38 Op. Att’y Gen. 522, 524 (1936)).

194. *Id.* (citing *In re Menominee Indian Mills*, 57 Interior Dec. 129, 140 (1940)).

195. See *Chevron U.S.A., Inc. v. Nat’l Res. Def. Council*, 467 U.S. 837, 843-44 (1984).

196. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 618 (1992).

197. The fact that Congress reenacted Hayden-Cartwright without change after these interpretations were issued also suggests that these interpretations were correct. See Lorillard v. Pons, 434 U.S. 575, 580 (1978).

198. 273 N.W.2d 737 (S.D. 1978).

199. See *id.* at 739.

200. *Id.* at 738. The highways constructed “were not a part of the South Dakota primary or secondary road system.” *Id.*

201. *Id.* at 739.

areas in exactly the same manner as if those areas did not exist.”²⁰² It was thus established that an Indian reservation was indeed a federal area included in the phrase “or other reservation” for the purposes of the Hayden-Cartwright Act.²⁰³

Opponents of the direct fuel taxation on Indian reservations argue that the Hayden-Cartwright Act is not specific enough to allow taxation of fuel sold on Indian reservations. Canons of construction relating to taxation and Indian issues are the backbone of this argument.²⁰⁴ Taxation statutes are to be “strictly construed against the taxing authority and in favor of the taxpayer with any ambiguities to be resolved in favor of the taxpayer.”²⁰⁵ Indians benefit from a “unique trust relationship” with the United States that grants favorable rules of construction on Indian-related issues.²⁰⁶ A state may impose a tax directly on Indians “only when Congress has manifested clearly its consent.”²⁰⁷ Any statute dealing with Indian interests must also be “construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.”²⁰⁸

The Idaho Supreme Court, in *Goodman Oil Co. of Lewiston v. Idaho State Tax Commission*,²⁰⁹ was the first to specifically reject the argument that Hayden-Cartwright authorized state taxation of fuel sold on an Indian reservation to non-Indian consumers.²¹⁰ The court held that the broad scope of the phrase “or other reservations” was per se too ambiguous to allow taxation because the word could possibly include *all* reservations.²¹¹ The court opined that an Indian reservation was not necessarily a “federal reservation” because it was “distinct from every other type of reservation, i.e., national parks, wilderness areas, military reservations, and even further, Indian reservations are a distinct entity within the law.”²¹² The court reasoned that the statutory language “or other reservations” was thus too ambigu-

202. *Id.* During the court’s analysis of the Act it became clear that “[j]urisdiction was extended to the states by Section 10 of the Hayden-Cartwright Act.” *Id.* (citing 4 U.S.C. § 104 (1936)). The court’s analysis was based in part on *Minnesota v. Keely*, 126 F.2d 863, 864-65 (8th Cir. 1942), where the context of the Hayden-Cartwright Act was also discussed. *Id.*

203. See *Goodman Oil Co. of Lewiston v. Idaho State Tax Comm’n*, 28 P.3d 996, 999 (Idaho 2001).

204. See *id.* at 998.

205. *Id.* (citing *Reinecke v. Gardner*, 227 U.S. 239, 244 (1928)).

206. *Id.* (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)).

207. *Id.* (quoting *Blackfeet Tribe*, 471 U.S. at 766).

208. *Id.* (quoting *Blackfeet Tribe*, 471 U.S. at 766).

209. 28 P.3d 996 (Idaho 2001).

210. *Id.* at 1002 (“It is not unmistakably clear that Congress intended to eliminate the exemption of the Tribes from the taxes the state attempts to impose.”).

211. *Id.* at 1000. Ambiguous language is to be construed in the light most favorable to Indian interests. *Id.* at 1001 (citing *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989)).

212. *Id.* at 1000. The court further tried to bolster its holding by assuming that Congress would have been more deliberate with its choice of the phrase “or other reservation” if it had meant to include Indian reservations within the meaning of the Act. *Id.* The court made this assumption based on its finding that the Act “use[d] the term ‘reservation’ in conjunction with the term ‘Indian.’” *Id.*

ous to include Indian reservations.²¹³ The Idaho Supreme Court also characterized as “ambiguous” the interpretations set forth by the Attorney General and Solicitor of the Interior that plainly included Indian reservations within the phrase “or other reservations.”²¹⁴

The *Goodman Oil* court’s strained logic and repeated findings of ambiguity are not persuasive. The court reached to find ambiguity where none existed, and in the process ignored clear rules of construction.²¹⁵ It is of no consequence that an Indian reservation is a distinct sub-type of reservation, as the broad language of the Hayden-Cartwright Act was meant to include all sub-types of federal reservations. The Idaho legislature apparently agreed, as the statutory backlash in Idaho to the *Goodman Oil* decision was extraordinary.²¹⁶ A bill was passed almost immediately that was “designed to change the holding of the Idaho Supreme Court in the case of *Goodman Oil*.”²¹⁷ The bill accomplished this goal by statutorily shifting the legal incidence of the Idaho fuel tax to the fuel distributor on a retroactive basis.²¹⁸

The District Court of Kansas has also found ambiguity in the Hayden-Cartwright Act.²¹⁹ The Kansas court, in *Prairie Band Potawatomi Nation*, based its finding of ambiguity on the *Goodman Oil* decision.²²⁰ By deferring to the flawed logic of South Dakota’s *Goodman Oil* decision, the Kansas court created its own flawed decision. Like the *Goodman Oil* court, the *Prairie Band* court found ambiguity because “the term ‘reservation’ has broad meaning and may or may not include Indian reservations.”²²¹ Even though the court conceded that the purpose of the Act was “to correct the general unfairness in the sale of fuel exempt from state taxation on federal reservations,” it went on to hold that the Hayden-Cartwright Act was too ambiguous to authorize fuel taxation on Indian reservations.²²² The court tried to justify its position by remarking that if Congress had the intent for

213. *Id.* at 1002. This argument is unpersuasive considering that Congress, in using the broadest possible term, meant to include all sub-types of reservations within the reach of the Hayden-Cartwright Act.

214. *Id.* at 1000-01. The court also noted that the “states waited approximately forty years to mention the Act in cases before the United States Supreme Court.” *Id.* at 1001.

215. Specifically, the court ignored the plain meaning rule, *Chevron* deference, and the presumption that language will not be read as mere surplusage if at all possible.

216. *See* Spinola, *supra* note 180, at 655-58.

217. *Id.* at 656 (citing Statement of Purpose, H.B. 732, 56th Gen. Assem., 2nd Reg. Sess. (Idaho 2002)).

218. *Id.* at 656. It is possible that the retroactive application may be deemed unconstitutional. *Id.* at 657-58.

219. *See* *Prairie Band Potawatomi Nation v. Richards*, 241 F. Supp. 2d 1295, 1307 (D. Kan. 2003); *supra* notes 100-14 and accompanying text.

220. *See* *Prairie Band*, 241 F. Supp. 2d at 1304.

221. *Id.* at 1305.

222. *Id.* at 1306-07.

“the entire Act . . . to apply to Indian reservations or Indian lands,” it would have specifically stated so.²²³

It is also possible that the court’s determination of ambiguity was affected by its knowledge that the tax would be ultimately upheld on another basis. The District Court of Kansas knew that in the end it was going to uphold the fuel tax because the incidence of the tax fell on the fuel distributor, so its analysis of the Hayden-Cartwright Act was seemingly less significant at the time. Considering the present budget problems facing the State, the court may have ruled differently on the Hayden-Cartwright issue had it known that the distributor taxation scheme was about to be undone by resourceful Indian planning.

B. *Argue that the Tribes Create an Impermissible “Magnet Effect”*

In *Washington v. Confederated Tribes of the Colville Indian Reservation*,²²⁴ the United States Supreme Court authorized state taxation of tribal businesses set up in attempt to create a tax haven for non-Indian consumers.²²⁵ The business generated at these tax havens as a result of non-taxation has been termed the “magnet effect.”²²⁶ When tribes take advantage of the magnet effect, state taxation is allowed regardless of whether preemption should apply.²²⁷ In addressing the issue, the *Colville* Court stated that “[w]e do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.”²²⁸ Since it is clear that what Indian fuel stops offer their customers, “and what is not available elsewhere, is solely an exemption from state taxation,” an impermissible magnet effect has been created by the tribes’ tax-free sale of fuel to non-Indians.²²⁹

In *Colville*, several Indian Tribes challenged the State of Washington’s collection of sales and cigarette taxes on sales made to non-

223. *Id.* at 1305. This argument lacks considerable amount of force because at the time of the Act’s passage the United States Supreme Court’s interpretation of the phrase “federal reservation” included Indian reservations. *United States v. Celestine*, 215 U.S. 278, 285 (1909). It is also presumed that Congress was aware of that interpretation. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Nonetheless, the court apparently gave a mandate that requires legislation to be overly specific and cumbersome to the point that each term is given a particular meaning within the legislation, regardless of the common meaning of the term. The slippery-slope nature of this holding is obvious. Legislators should also take notice that the use of politically correct language may negate the true intent of any past, present, or future legislative act under the court’s holding.

224. 447 U.S. 134 (1980).

225. *Id.* at 155.

226. *See Prairie Band*, 241 F. Supp. 2d at 1308.

227. *Colville*, 447 U.S. at 155.

228. *Id.*

229. *See id.*

Indians.²³⁰ The Indian cigarette retailers made a large majority of their total sales to non-Indians who were residents of nearby communities.²³¹ Many residents made their purchases at the reservation in order to “take advantage of the claimed tribal exemption from the state cigarette and sales taxes.”²³² The Tribes argued against the taxes, fearing that they would lose their “competitive advantage vis-à-vis businesses in surrounding areas.”²³³ Nevertheless, the Court thought it was “painfully apparent that the value marketed by the [Indians] to persons coming from outside is not generated on the reservations.”²³⁴ The Court specifically found that “[w]hat the [Indians] offer these customers, and what is not available elsewhere, is solely an exemption from state taxation.”²³⁵ As a result, the taxes were upheld irrespective of possible preemption and Indian sovereignty issues.²³⁶

Just as in *Colville*, the primary selling point for fuel sold on many Indian reservations is the de facto tax exemption enjoyed by non-Indian consumers. Although the *Colville* Court addressed only cigarette and sales taxes, the principles set out by the Court should apply equally to the fuel tax.²³⁷ Under the *Colville* analysis, Indian fuel stops are intended to create a magnet effect by drawing customers to the reservations by offering lower taxation.²³⁸ It is highly unlikely that most consumers would continue to patronize Indian fuel stops at the current level if it were not for the tax incentive.²³⁹ The tax exemption helps Indian tribes manipulate the profitability of fuel sales to the detriment of nearby competitors, and under *Colville* such result should not be tolerated. Indian retailers should have to compete on a level playing field with other non-Indian retailers.

C. *Tinker with the Kansas Statutory Scheme to Close the Loophole*

A third possibility would be to amend the Kansas fuel tax so that the legal incidence of the tax is placed on the ultimate fuel consumer

230. *Id.* at 138-39.

231. *Id.* at 145.

232. *Id.* By making the purchase tax-free, consumers were able to save about a dollar on each carton of cigarettes. *Id.*

233. *Id.* at 155.

234. *Id.*

235. *Id.*

236. *Id.*

237. The states' ability to collect other excise taxes sets strong precedent of equal taxation on non-Indian sales regardless of where the purchase is made.

238. The price per gallon of fuel on a reservation is usually somewhere between the fully taxable market price and twenty cents below the market price, i.e., some of the tax exemption is passed on to consumers and some of it is retained by the tribe. The consumer is thus “attracted” to at least a five-cent to ten-cent per gallon savings while the Indian retailer enjoys a boost in profit from the residue of the uncollected tax.

239. *See id.* at 157 (“It is evident that even if credit were given, the bulk of the [reservation’s] present business would still be eliminated, since nonresidents of the reservation could purchase [the product] at the same price and with greater convenience nearer their homes and would have no incentive to travel to the [reservation] for bargain purchases as they do now.”).

instead of the fuel distributor. The new scheme would be almost identical to the current law in all other respects. Under this scheme, an Indian retailer could be required to collect and remit the fuel tax imposed on non-Indian consumers.²⁴⁰ The collect and remit requirement would not be subject to the categorical bar under *Chickasaw Nation*, but would be subject to the balancing test.²⁴¹ Generally, however, the balancing test comes out in favor of a state's interest in taxation when the issue is one of taxing non-Indians.²⁴² A refund or non-taxation policy would need to be put in place for Indian consumer fuel purchasers.²⁴³

The United States Supreme Court, in *Chickasaw Nation*, laid out this simple framework for the states to follow.²⁴⁴ The *Chickasaw Nation* Court's sole reason for striking down the Oklahoma fuel tax "as currently designed" was its finding that the legal incidence of the tax fell on the Indian retailer.²⁴⁵ The Court then stated that "Oklahoma could accomplish what it here seeks by declaring the tax to fall on the consumer and directing the Tribe to collect and remit the levy."²⁴⁶ The Kansas legislature attempted to follow the framework set out by the Court, at least to a degree, but placed the legal incidence of the tax on the fuel distributor rather than the ultimate consumer.²⁴⁷ Under the proposed new scheme, the legal incidence of the fuel tax should be placed on the consumer, as originally suggested by the United States Supreme Court.²⁴⁸

240. *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 483 (1976). When a state's tax is valid, the state may "impose at least minimal burdens on Indian businesses to aid in collecting and enforcing that tax." *Colville*, 447 U.S. at 159. The State of Kansas could also force the Tribes to keep records for taxable and non-taxable sales. *Id.*

241. *Chickasaw Nation v. Oklahoma Tax Comm'n*, 515 U.S. 450, 458 (1995) ("We have balanced federal, state, and tribal interests in diverse contexts, notably, in assessing state regulation that does not involve taxation, and state attempts to compel Indians to collect and remit taxes actually imposed on non-Indians.") (internal quotes omitted).

242. *Moe*, 425 U.S. at 483 (holding that the collection "burden is not, strictly speaking, a tax at all").

243. This provision would ensure that neither the legal nor economic incidence of the fuel tax fell on private Indian fuel purchases. However, under United States Supreme Court precedent, the State could require tribal businesses to "record and retain for state inspection the names of all Indian purchasers, their tribal affiliations, the Indian reservations within which sales are made, and the dollar amount and dates of sales" for all non-taxable transactions. *Colville*, 447 U.S. at 159.

244. *Chickasaw Nation*, 515 U.S. at 460.

245. *Id.* at 453, 462.

246. *Id.* at 460 (internal quotes omitted). The *Chickasaw Nation* Court also suggested that a "pass through" provision may be needed, which would require distributors and retailers to pass the tax on to consumers. *Id.* at 461.

247. KAN. STAT. ANN. § 79-3408(c) (1997 & Supp. 2002).

248. It is quite possible that if the legislature would have followed the Court's original advice, the current problems would not have developed.

D. Lobby for United States Congressional (Re)Authorization

Even though the Hayden-Cartwright Act apparently authorizes state taxation of fuel sold on Indian reservations, the courts have been unwilling to recognize it as such.²⁴⁹ The issue of whether states should be able to collect the fuel tax on Indian reservations' fuel sales may therefore be ripe for legislative intervention at the federal level. Whether or not it is feasible to get the two majority parties to agree on anything, let alone a little known tax issue, is unknown. Regardless, the issue needs to be addressed. The states should thus band together and lobby the United States Congress to give (re)approval on the fuel tax issue, only this time in a more specific manner.

In fact, this action has already been attempted on a small scale by private entities. The Coalition Against Sales and Excise Tax Evasion attempted to introduce a bill of this type in 2001.²⁵⁰ Unfortunately, the attempt failed.²⁵¹ With a larger lobbying effort, however, success is possible. Considering the commercial success of many Indian-related entities,²⁵² there is a persuasive argument that a different rule should be applied to Indians acting in a commercial capacity rather than in a private capacity. A new rule could be formulated whereby Indians acting in a private capacity would continue to enjoy tax-free status, while Indian entities involved in commerce would be subject to taxation just like all other businesses.

Attempting a legislative solution at the federal level also has its risks. The option is a double-edged sword, as a failed attempt may further convince the courts that authorization was not initially given in the Hayden-Cartwright Act.²⁵³ The *Goodman Oil* court, in its strained attempt to find ambiguity in the Hayden-Cartwright Act, stated that “[a]nother point that suggests [ambiguity] . . . is that that there have been recent attempts to pass legislation to authorize the same tax.”²⁵⁴ Similarly, in *Prairie Band*, the District Court of Kansas hypothesized that a failed attempt to get reauthorization was “apparently a recognition by Congress that more precise language would be necessary to grant states the authority to tax fuel on Indian reservations.”²⁵⁵ The *Prairie Band* court went on to say that “[i]f Congress intended the Hayden-Cartwright Act to allow for state taxation of fuel

249. Most likely, this is because of the sensitive relationship between the federal government, state governments, and Indians.

250. Tribal-State Tax Fairness Act of 2001, H.R. 2726, 107th Cong. (2001).

251. See *Prairie Band Potawatomi Nation v. Richards*, 241 F. Supp. 2d 1295, 1307 (D. Kan. 2003).

252. See *supra* note 124 and accompanying text.

253. *Id.*

254. See *Goodman Oil Co. of Lewiston v. Idaho State Tax Comm'n*, 28 P.3d 996, 1001 (Idaho 2001).

255. *Prairie Band*, 241 F. Supp. 2d at 1307.

on Indian reservations, it is unlikely that Congress would continue to propose bills to permit a tax it apparently already allowed.”²⁵⁶ Congressional reauthorization may be the best way to settle the issue, as it would eliminate the lengthy and expensive litigation between the states and the Indian tribes.

E. *Enter into a Tax Treaty with the Kansas Indian Tribes*

Many states have resolved the fuel tax issue with negotiated state-Indian tax treaties.²⁵⁷ With a treaty, preemption and Indian sovereignty issues would not be a concern. But, in exchange, the tribes would require monetary compensation for giving up their claimed rights. Usually this consideration comes in the form of giving the Indian tribes part of the fuel tax proceeds. A treaty would require the Indian retailer to collect the fuel tax at the point of sale and then remit part of the proceeds to the State and the rest to the tribe. Some variations require that the money be used exclusively to improve reservation roads or support education.²⁵⁸ The main selling point of the amicable solution is the end to the seemingly endless litigation on the issue.

This solution has worked well for other states. For instance, after *Chickasaw Nation*, the State of Oklahoma offered the Oklahoma Indian Tribes the option to enter into a fuel tax compact. The State offered to share between 3% and 4.5% of its fuel tax revenues with the Tribes, provided that the revenue would be used for “tribal government programs limited to highway and bridge construction, health, education, corrections, and law enforcement.”²⁵⁹ Missouri has struck a similar agreement with the Tribes within its State that exempts from taxation the estimated probable tribal use of fuel.²⁶⁰ The fuel tax is collected on all other sales.²⁶¹

The cooperative nature of this proposed option would result in better State-Indian relations and would benefit all parties involved in the fuel tax fight. The biggest obstacle to this solution is the fiercely adversarial approach taken in past litigation. The State of Kansas probably has not been willing to take this approach in the past because it would result in a theoretical loss of tax. At the same time, the Kansas Indian Tribes are probably not willing to easily give up their hopes of attaining a completely non-taxable position. Yet, it is also

256. *Id.*

257. As of 1994, treaties had been agreed to in at least seven states. McGown, *supra* note 12, at 21.

258. OKLA. STAT. ANN. tit. 68, § 500.63 (West 2002).

259. *Id.*

260. MO. REV. STAT. § 142.821(1)(b) (2002).

261. *Id.*

possible that both sides will recognize that a cooperative agreement would be superior to wasted adversarial acts of the past.

VI. CONCLUSION

Indian tribes rightfully enjoy certain tax privileges granted to protect their sovereign status. However, the rationale justifying non-taxation of private Indian consumption does not apply to Indian entities acting in a commercial context. Commercial Indian entities should not be given the power to grant or extend tax exemption to the general public, especially not on a traditionally non-Indian product such as fuel. If the tribes prevail in *Winnebago Tribe*, however, they will have succeeded in doing just that.

While *Winnebago Tribe* may invalidate the well thought out Kansas statutory scheme, the State should not take its frustrations out on the innocent. Many third parties have been involuntarily dragged into the fuel tax fight, and many others have relied on the current scheme of collecting the fuel tax from fuel distributors. It would be desperate, inefficient, and unfair to now try to collect the Kansas fuel tax under an alternative mechanism without first enforcing the notice provisions in the Act.²⁶²

Instead, the State should look to the future of the fuel tax and carefully weigh its options. Until now there has been no need to examine alternative methods for assessing the fuel tax, but the time has come to reexamine the issue in depth. There are several alternatives for the State to consider, and hopefully one will be chosen that will put an end to the current fuel tax fiasco.

262. See KAN. STAT. ANN. § 79-3409. Thus, turning to the use tax while at the same time not enforcing the price sign notice provisions of section 79-3409 of the Kansas Statutes Annotated is neither a proper nor fair solution.