

THE RISE OF TRIBES AND THE FALL OF FEDERAL INDIAN LAW

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INTRODUCTION

I teach a one-week law school class on tribal economic law and policy. I start each class with the following written on the board: “I hate federal Indian law, but I love tribal law.” I explain to my students that I hate federal Indian law because it is a set of highly restrictive rules that often serve as rationalizations to take away or limit tribal rights. I love tribal law because by enacting tribal laws, the tribe expands and flexes its sovereignty. It really is quite simple. Federal Indian law is restrictive and tribal law is expansive.

Indian law, in general, has two realities. The first is a set of rules established over the last two hundred years by the federal court system and the United States Congress (the “Congress”), which have combined to place tribes in a tight box of restrictions and limitations. This reality is at least partially grounded in racist principles, paternalism, and economic exploitation. Unfortunately, this reality is a large part of what law schools teach. Native law students typically go to law school to make a difference in their tribal communities, but often leave after three years knowing exactly what they cannot do to help their communities. In effect, law school can be a form of indoctrination.

The second reality is far more satisfying. The economic awakening of tribes has created an emerging system where tribes can use their various advantages to simply bypass the economic and legal restrictions of established federal Indian law to create a new tribal law based sovereignty that largely ignores or simply gives a slight nod to federal Indian Law. I believe law schools need to understand that federal Indian law is fading and do a better job of teaching how to bypass, ignore, and run right over the anachronism that federal Indian law has become over the years.

This Article will question some of the fundamental principles of federal Indian law—because it is still grounded in the biases of the past—and explain how the growing economic power of tribes is empowering the rapid growth

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of tribal law. I have stopped and started this Article and others like it several times. I have struggled to approach it like an academic article or as a good story. I decided to try to blend the styles. I will lay out the basic legal framework in a more traditional way and then switch to simply trying to tell the story of what tribes are doing to bypass the restrictions of federal Indian law. I hope that by telling the story, it will help the reader understand the natural progression of the thought process and lay the groundwork for further expansion.

I. MY SUSPECT FORMAL TRIBAL LEGAL EDUCATION

I took a two week class on federal Indian law during my third year in law school, which was the only tribal-oriented class offered at my school at that time. I left that class each day perplexed and frustrated because everything I was being taught was an expanding set of restrictions that seemed to only be limited by the rationalization process of the court system. My professor explained in detail how ridiculous some of the rationalizations were, but it did not change the outcome and it did not change the fact that the next case was built upon this increasingly suspect legal foundation.

Here is what is ironic to me. I have taught or lectured on tribal law at several universities. I manage the largest exclusively tribal law firm in the country¹ and I manage a successful tribal economic development corporation.² I do all these things with having devoted a meager two weeks of my formal legal education to federal Indian law, and therefore, very little of what I have accomplished in the tribal arena is grounded in my deep knowledge and respect for federal Indian law. In fact, it is quite the opposite.

My original disdain of federal Indian law, and lack of expertise in the field is partially responsible for my success. At each encounter with a legal roadblock, I did not let my exhaustive knowledge of federal Indian law stop me from pushing forward. On the contrary, my base assumption that it was a flawed system combined with a desperate desire to grow the company and help my tribe allowed me to slowly develop a tribal law oriented approach to circumvent the restrictions of federal Indian law.

I have witnessed so many tribal growth ideas stopped by a tribal law lawyer who explains to a tribal leader why what they want to do is not

¹ *Colorado Lawyer Thomas Fredericks to Receive ABA 2017 Spirit of Excellence Award*, AM. BAR ASS'N, (Nov. 4, 2016, 9:04 AM), http://www.americanbar.org/news/abanews/aba-news-archives/2016/11/colorado_lawyer_thom.html (noting that Fredericks Peebles & Morgan LLP is “the nation’s largest Indian Law firm”); FREDERICKS PEEBLES & MORGAN LLP, www.ndnlaw.com (last visited Mar. 12, 2017).

² HO-CHUNK, INC., <http://www.hochunkinc.com/home.php> (last visited Mar. 12, 2017).

possible. I have said many times to the younger lawyers I work with that they get an A+ on their legal memo, but they still failed because all they did was explain in perfect legal detail why something is not possible. I challenge them to add a few more pages to the memo, figuring out how to accomplish what the tribe wants to do anyway.

II. RACIALLY BIASED LEGAL PRECEDENTS ARE STILL VALID FOR TRIBES

The law is often a reflection of the morals of the time the case was decided. The United States Supreme Court (the “Supreme Court”) has ruled on several cases that, when viewed through a twenty-first century lens, seem hard to believe. In 1856, in *Dred Scott v. Sandford*,³ the Supreme Court held that a black slave was property and not a citizen. In 1883, in *Pace v. Alabama*,⁴ the Supreme Court upheld a law preventing a black person from marrying a white person because it applied to both races equally, and therefore, the law was race neutral. In 1896, in *Plessy v. Ferguson*,⁵ the Supreme Court ruled that it was legal to have separate but equal public facilities for members of different races. In 1944, in *Korematsu v. United States*,⁶ the Supreme Court upheld the internment of thousands of U.S. citizens who had Japanese ancestry.⁷

The above racially biased Supreme Court cases are products of the moral systems of their time. Fortunately, our value system has changed and these cases are no longer the law and carry no weight as legal precedent.⁸ In fact, they often are taught as cautionary tales about how not to treat minority groups.

The time frame of the above cases is from 1857 to 1944. During that exact time frame, many of the principles of federal Indian law were being established. In 1886, in *United States v. Kagama*,⁹ the Supreme Court ruled that the Commerce Clause of the United States Constitution, in effect, gave Congress plenary power over Indian tribes.¹⁰ Congress now had the ability to do whatever it wanted to tribal interests. The ruling in *Kagama* validated Congress’s power to make tribal people subject to federal criminal law

3. *Dred Scott v. Sandford*, 60 U.S. 393, 481 (1856).

4. *Pace v. Alabama*, 106 U.S. 583, 585 (1883).

5. *Plessy v. Ferguson*, 163 U.S. 537, 550–51 (1896).

6. *Korematsu v. United States*, 323 U.S. 214 (1944).

7. *Id.* at 219–20.

8. See generally Yolanda C. Rondon, *Is Korematsu Really Dead?*, 41 HUM. RTS. 23 (2015); Adam Liptak, *A Discredited Supreme Court Ruling That Still, Technically, Stands*, N.Y. TIMES, Jan. 28, 2014, at A15.

9. *United States v. Kagama*, 118 U.S. 375 (1886).

10. *Id.* at 378–79, 384–85.

through the Major Crimes Act of 1885,¹¹ even though tribal people were not U.S. citizens. This all-encompassing plenary power was also used to pass the Indian General Allotment Act (the “Dawes Act”)¹² which resulted in the loss of millions of acres of tribal land and led to the establishment of the trust land system, which has greatly complicated tribal jurisdiction issues and indirectly sentenced generations of tribal members to poverty.¹³ In 1903, in *Lone Wolf v. Hitchcock*,¹⁴ the Supreme Court ruled that Congress’s plenary power also gave it the authority to unilaterally abrogate treaty obligations between the United States and tribes. In 1924, Native Americans became U.S. citizens,¹⁵ but the Court had already established that Congress still retained plenary power over tribes when tribal people became citizens.¹⁶ In 1953, Congress took plenary power to an extreme and announced its official policy of terminating tribes and began granting tribal jurisdiction to the states.¹⁷

The foundation of federal Indian case law and federal statutory law was being established at the exact same time as the now notorious civil rights cases related to other racial groups. Given the obviously racially biased legal system from this era, it is naïve to think that tribal interests were not subject to the same racially biased moral system and that it would be reflected in the case law and federal statutes of that era.

The civil rights cases referenced for non-tribal interests are no longer valid law. Unfortunately, when it comes to federal Indian law, these cases and federal statutes are still valid precedents and still serve as the foundation for modern federal Indian law. We still live under an absolute plenary power of Congress. We are still suffering from the side effects of the Dawes Act and the terrible jurisdictional and economic problems the trust land system created. We are still subject to federal criminal law. We still could be terminated as tribal entities at any time. The Supreme Court and Congress righted most of the wrongs created by the civil rights cases cited above for Black and Japanese Americans, but never did the same for Native Americans and tribes.

When you face an injustice and a system rigged against you, you must then find another way and create a new reality. Federal Indian law is

11. Major Crimes Act, 18 U.S.C. § 1153 (2013).

12. Indian General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887) (amended 1934).

13. *Oversight Hearing on Economic Development in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 109th Cong. 115–17 (2006) (statement of Lance Morgan, President/CEO, Ho-Chunk Inc.).

14. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

15. Indian Citizenship Act of 1924, 43 Stat. 253 (1924).

16. *United States v. Nice*, 241 U.S. 591, 598 (1916).

17. H.R. Con. Res. 108, 83rd Cong. (1953) (enacted).

complicated. We now have thousands of native lawyers and professors all wrapped into the minutia of it. We know it is fundamentally flawed. We know it is grounded in racist principles. We know it is almost impossible to fix. So why do we give federal Indian law such deference in practice?

Sometimes in the legal profession we forget to put into context legal precedent and simply accept the ruling as an edict from some wise benevolent legal god from the past. Federal Indian law isn't the Ten Commandments. It is something much different. It is a web of restrictions grounded in racism, paternalism, and exploitation. The system of restrictions is so deep and so pervasive that it really cannot be fixed. If you want to get something done, federal Indian law simply has to be ignored on occasion. We need to stop complaining and writing scathing articles that the federal Indian law system largely ignores. We need to stop playing their game because we cannot win it. If we have any hope of progress, we need to play a new game.

III. EMPOWERING TRIBAL LAW

Certain aspects of federal Indian law are largely a set of economic restrictions. Federal Indian law has repeatedly given the states the power to take from tribes and to limit our ability to provide for ourselves. When you combine these economic restrictions with the inherent economic and tribal tax restrictions of federal trust land¹⁸ you then have a perfect storm creating generations of poverty and all the social ills of such a system.

How do you fight a set of legal, economic, and political restrictions? You sure don't do it by taking cases to the Supreme Court, the most feared entity in our profession. This is America! Legal, economic, and political issues are almost always fought with money. The goal is not to get the Supreme Court or Congress to see the light and overturn the last two hundred years of precedent. The goal is to change the system by coopting it. At some point, tribes will be too big to steal from, too powerful to push around and too smart to play the losing game of mindlessly obeying federal Indian law.

After I took my two-week class on Federal Indian Law in 1992, I shook my head, acknowledged the injustice and put it out of my mind. My goal at the time was to be a corporate lawyer, not a tribal law lawyer. I associated Indian law with the Bureau of Indian Affairs, water law, and government regulations. I wanted to work on building things, not complaining and fighting for what I considered important, but largely lost causes. However,

18. *Oversight Hearing on Economic Development in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 109th Cong. 115–17 (2006) (statement of Lance Morgan, President/CEO, Ho-Chunk Inc.).

while I was in law school, tribal gaming exploded and all of a sudden I could combine my economics degree and corporate law degree and enter the emerging field of tribal economic law.

In 1995, I left the law firm I worked for after two years and started Ho-Chunk, Inc., a successful tribal company.¹⁹ As I was trying to build the company, I kept hitting legal road blocks. I realized then that I could stop or I could find a way around them.

As simple as this sounds, it is important to understand that the Supreme Court does not check up on tribes to see if they are limiting themselves properly in accordance with 100-year-old biased precedent. They are dependent upon tribes policing themselves or being brought back into line generally by outside interests, primarily arms of the state or federal government.

My initial techniques for pushing forward were simplistic and ranged from finding a legal loophole or even a small rationale for ignoring the restriction, or in some cases just ignoring the precedent entirely and hoping no one noticed. Over time, I realized that I needed to get more sophisticated and that tribal law could provide a rationale for bypassing the restrictions of federal Indian law. At my request, my tribe started passing tribal laws to create a legal standing for our initiatives, even if it directly conflicted with federal Indian law principles.

I was not exactly inventing the wheel. Tribes ignore precedent and do what they want all the time and often no one cares or even notices. Tribes take action and someone cares, but we have sovereign immunity so it is never actually challenged in court and hence has never showed up in the federal Indian law textbook. Tribes cut a deal and enter into a compact to bypass the restrictions to establish a new economic and legal equilibrium, but those are ad-hoc agreements and not easy to integrate into federal Indian law either. All of these things are done routinely now and have resulted in an explosion of tribal law, which is making federal Indian law increasingly outdated.

IV. ECONOMIC RISE EMPOWERS TRIBAL LAW

Under federal Indian law, tribes retained small rights, exemptions, and sovereign immunity, but largely had very limited economic and taxation rights. There is an inherent paternalism in many of these Supreme Court cases. They typically assume the tribe will not be actively engaged in its own

19. *Management: Lance Morgan, HO-CHUNK, INC.*, http://www.hochunkinc.com/management_LM.php (last visited Mar. 23, 2017).

economic activity, and therefore, tribes will be relatively easy to control indirectly because the state regulatory system controls the tribe's access to the stream of economic commerce. As the examples will illustrate later in this Article, a state's typical approach is to indirectly assert its power over tribes by moving the legal incidence of the tax²⁰ or threatening those who deal with the tribe.

The economic rise of all tribes in the last twenty-five years, largely due to the long term impact of self-determination, gaming, natural resource development, and the ancillary rise of tribal corporations, has changed the basic economic and legal equation.²¹ This change allows tribes to bypass the normal restrictions the states use to limit tribes. This economic growth transforms federal Indian law restrictions into nuances, not hard barriers anymore.

As a young tribal lawyer and business leader, I was learning to bypass the restrictions of the federal Indian law system to help grow the company. What I did not realize is that as I grew the company, it had the side effect of greatly expanding our ability to create tribal law solutions and expand tribal law and tribal sovereignty. The bigger we got as a company, the more options we had to implement tribal law in place of federal Indian law restrictions. A symbiotic relationship has emerged. The growth of tribal law feeds on the growth of the tribal economy and vice versa.

A. *Preemption is Better than Exemption*

In the tribal economic area, the core dispute is often with the powers federal Indian law has granted to the states. The states use this power to directly and indirectly control tribes. During our attempts to develop our tribal laws on the Winnebago reservation, I coined a phrase that I still use as a reminder: "Preemption is better than exemption!" Often federal Indian law results in a tribe or tribal member being exempt from a state law. Rather than rely on a state law exemption, I believe it is stronger legally and a lot easier to pass a tribal law that preempts a state law. Even if it was unclear under the principles of federal Indian law that a tribal law would preempt a state law, we did it anyway. Enacting a tribal law also draws on the tribe's inherent

20. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 100–15 (2005) (“[T]he Kansas motor fuel tax is a nondiscriminatory tax imposed on an off-reservation transaction between non-Indians. . . . [that] poses no affront to the Nation's sovereignty.”).

21. See generally Jeff R. Keohane, *The Rise of Tribal Self-Determination and Economic Development*, 33 HUM. RTS. 9, 9–12 (2006) (stating that tribes that assert their sovereignty are more economically successful).

sovereign rights, not the state's sovereignty, and allows the tribe to craft its own economic and legal framework.

When I first started Ho-Chunk, Inc., I had a conversation with a tribal tax lawyer and she stated that the preemption argument is the loser argument that you just throw in at the end of the legal brief. I replied that it was only the loser argument if the tribe did not do anything to actually preempt the state law and that the preemption argument would be the primary argument if the tribe passed their own laws and actually added value on its reservation.²²

As a side note, it is important to also understand that tribal sovereign immunity plays a large role in the economic expansion of tribal law. Often the state will be aware of the tribe's efforts, but has no direct way to force the tribe to do anything because they cannot sue the tribe directly.²³ When you combine the empowering effect of tribal economic growth with the paralyzing effect of the sovereign immunity of tribes on the states responses, then you have the beginnings of a recipe for bypassing the restrictive system of federal Indian law and growing the tribes' economic interests.

The rest of this Article will discuss the legal framework tribes must function in and give examples of how tribes are using their economic growth and tribal laws to bypass federal Indian law restrictions.

V. HOW STATES ENFORCE A RACE-BASED TAXATION SYSTEM

The states are allowed to reach into tribal land and impose various types of taxes on non-Indians.²⁴ Tribal members are largely exempt from these taxes.²⁵ In effect, federal Indian law through several Supreme Court decisions has established a race-based taxation system.²⁶ These cases totally ignore the

22. State of Neb. Office of the Attorney Gen., Opinion Letter on Imposition of Nebraska Cigarette Tax on Cigarettes Manufactured by the Omaha Tribe of Nebraska and Sold by the Tribe on Its Reservation in Nebraska (Jan. 15, 1998), <https://ago.nebraska.gov/sites/ago.nebraska.gov/files/docs/opinions/AG%20Opinion%201998-005.pdf>.

23. See generally Keohane, *supra* note 21, at 9.

24. See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe Okla., 498 U.S. 505, 512–14 (1991).

25. See Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 453 (1995) (“[W]hen Congress does not instruct otherwise, a State's excise tax is unenforceable if its legal incidence falls on a Tribe or its members for sales made within Indian country.”); Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 128 (1993) (holding that, absent explicit congressional direction to the contrary, there is a presumption against states having jurisdiction to tax within Indian country); *Potawatomi Indian Tribe*, 498 U.S. at 510.

26. See *Sac & Fox Nation*, 508 U.S. at 123 (“[W]e held that a State was without jurisdiction to subject a tribal member living on the reservation, and whose income derived from reservation sources, to a state income tax absent an express authorization from Congress.”); see also *Chickasaw Nation*, 515 U.S. at 459 (“If the legal incidence of an excise tax rests on a tribe or on

inherent right of any government, including a tribal government, to exercise taxation powers over its own jurisdiction. If you peel back the logic of these cases just a few layers, it is easy to see that the basic underlying assumption of these cases is that a tribe should have no power to tax a non-Indian.

Outside the context of federal Indian law, taxes are usually fundamentally based on territorial jurisdiction, not race.²⁷ However, tribal reservations are the only place in the United States where the federal and state governments' actual policy is enforcing a system that results in members of different races paying different prices at the exact same location for certain products like tobacco, gasoline, and alcohol.

Despite how strange a race based taxation system sounds to our modern ears, it is validated by a long string of Supreme Court cases.²⁸ The states have very little incentive to change. The states can usually impose their will indirectly on tribes, ignoring conflicting tribal taxation laws because the states control the tribe's access to the stream of commerce. The states simply threaten the manufacturers or distributors of tobacco, gasoline, and alcohol products. Given the fact that federal Indian case law typically backs the state's legal position, the companies that supply the tribes usually acquiesce to state demands and ignore any conflicting tribal laws.²⁹

VI. THE MOST RECENT GAS AND TOBACCO WARS

My first experience in bumping against federal Indian law restrictions was when the tribe assigned a money losing grocery store and gas station to the tribal corporation I managed in 1995. At the time, we had to fill out time-consuming state forms for every customer who was native and to apply for a refund from the state for the gas tax we discounted from the price for tribal members. The refunds were often denied because of a minor discrepancy, which was one of the reasons our business lost money. Also, a tribal member could buy tobacco products without the state tax, but we had to charge a non-Indian a different price because we had to include the state tax. This limited our ability to attract non-Indian customers. My frustration with this system

tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization.”).

27. *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 204 (1905).

28. *See Wagon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 95 (2005); *Chickasaw Nation*, 515 U.S. at 450; *Sac & Fox Nation*, 508 U.S. at 114; *Potawatomi Indian Tribe*, 498 U.S. at 505.

29. *See Internet Infrastructure in Native Communities: Equal Access to E-Commerce, Jobs and the Global Marketplace: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 38–41 (2011) (statement of Lance Morgan, President/CEO, Ho-Chunk, Inc.).

resulted in our store and gas stations becoming an experiment in pushing tribal sovereignty.

A. Tobacco Factories

In the late 1990s, the neighboring Omaha Tribe built a tobacco factory. The Nebraska Attorney General issued an opinion that stated that the state excise tax was preempted because the on-reservation manufacturing process was a “value generated” event.³⁰ The preemption of state tax was limited to the Omaha Tribe’s reservation.³¹ However, the Winnebago Tribe bought directly from the Omaha Tribe and began to sell the tribally made tobacco products on the Winnebago reservation with a tribal tax³² instead of a state tax.³³

The state objected to the Winnebago Tribe’s implementation of its own tobacco tax because the value added process was not on the Winnebago reservation. In this instance, the two tribes were the manufacturer, distributor, and retailer. Unlike previous tax disputes, the state did not have a non-Indian business to directly threaten because both tribes also had sovereign immunity.³⁴

The federal Indian case law and state statutory framework had not anticipated that tribes would be anything but retailers, and therefore, fairly easy to control indirectly. As far as the Omaha Tribe was concerned, it was a legal transaction. We simply went to their reservation and bought the product. When the state challenged the applicability of the Winnebago tobacco tax on tribally manufactured brands, we made relatively weak counter legal arguments that the state objected to vehemently.³⁵ However, in the end, we

30. State of Neb. Office of the Attorney Gen., *supra* note 22. Hereinafter, the Article refers to this as a “value added” event.

31. *Id.*

32. See Winnebago Tribal Tax Code, §§ 10-600 to 609 (2010) (revised January 2016).

33. The Winnebago tobacco tax only taxes Tribal Tobacco, which was defined as any tobacco product that does not already have another jurisdiction’s tax stamp on it. See *id.* We recognized that there were now two parallel tobacco distribution systems, one state controlled and one tribal. We did not want to limit our taxing power exclusively to just tribally made products, but we also did not want to create a situation where the state and tribal tax were both applied to non-Indian customers because it would result in double taxation, which would negatively impact our competitiveness. Therefore, we implemented a tax that allowed the Tribe to tax any product it could acquire without a state tax stamp on it. In practice our tribal tax applied almost exclusively to tribally made products.

34. State of Neb. Office of the Attorney Gen., *supra* note 22.

35. See generally Gale Courey Toensing, *Big Tobacco Rewrites Nebraska Law to Subvert Tribal Sovereignty*, INDIAN COUNTRY MEDIA NETWORK (May 14, 2011),

ignored the state's concerns because the state had no practical way to stop our efforts.

Eventually the Winnebago Tribe also built a factory on the Winnebago reservation. We now sell tribal tobacco with the tribal tax applied and do not make any racial distinction with regards to taxation or pricing. This is an example of the growing tribal economic and legal sophistication leading to unique ways to grow tribal economies, tribal tax bases and bypass some the basic restrictions of federal Indian law.

B. *Minnesota Tobacco Issues*

In the mid-1990s, the state of Minnesota entered into a series of tax agreements with most of the tribes in Minnesota.³⁶ The state tax was \$4.80 per carton at the time and tribes agreed that it would share fifty percent of the tax or \$2.40 per carton.³⁷ In 2003, the state of Minnesota added a fee of \$3.50 per carton for cigarettes produced by manufacturers that were not part of the 1998 settlement of a lawsuit with large tobacco companies.³⁸ In 2005, the state of Minnesota also implemented a health impact fee³⁹ of \$7.50 per carton. The state ignored the tribes' demands to share these new fees under the original agreement, even though they were assessed and collected exactly the same way as the tobacco tax.⁴⁰ The tribes objected because they had negotiated fifty-fifty split of the tobacco taxes. The state was now receiving tax and fee income of \$13.40 per carton and the tribes were still getting just \$2.40 per carton.

The state ignored the tribes' objections for several years. There was very little the tribes could do because the state controlled the tribes' access to the tobacco distribution system and could easily impose their restrictions on the

<https://indiancountrymedianetwork.com/news/big-tobacco-rewrites-nebraska-law-to-subvert-tribal-sovereignty/>.

36. *Tribal Government Agreements*, MINN. DEP'T. REVENUE, http://www.revenue.state.mn.us/collections/Pages/Tribal_Government_Agreements.aspx (last visited Mar. 22, 2017).

37. *Federal and State Cigarette Excise Taxes—United States, 1995–2009*, CTR. DISEASE CONTROL & PREVENTION (May 22, 2009), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5819a2.htm>.

38. See MINN. STAT. § 297F.24 (2013); Settlement Agreement and Stipulation for Entry of Consent Judgment, *Minnesota v. Phillip Morris Inc.*, No. C1-94-8565 (D. Minn. 1998).

39. MINN. STAT. § 256.9658 (2012) (repealed 2013).

40. See Jennifer Brooks, *Minnesota, Leech Lake Band Square off over Cigarette Tax*, STAR TRIB. (Apr. 26, 2014), <http://www.startribune.com/minnesota-leech-lake-band-square-off-over-cigarette-tax/256790121/> (explaining that the state justified its decision not to split the new revenue with the tribes as it had previously done with state taxes because this was a fee, not a tax).

tribes. It was estimated at the time this was costing the tribes approximately ten million dollars per year in lost tax sharing revenue.

I met with a few Minnesota tribes and we discussed their frustrations and the states' lack of incentive to change their position. We decided to work together to help force the state of Minnesota to negotiate a better deal. Four tribes implemented a tribal tobacco tax similar to the Winnebago tobacco tax and developed a tribal tax stamp which, contrary to federal Indian and state law, had no element of race-based pricing and applied to all who entered the tribal jurisdiction equally. The Winnebago tribal company I manage sold the tribal-made tobacco to the Minnesota tribes with the local tribe's tax stamp affixed. The tribal tax was significantly lower than the state of Minnesota's tax scheme, which resulted in a large increase in highly profitable tobacco sales.

The state of Minnesota objected but it did not have a direct mechanism for threatening the Winnebago tribal distributor because the distributor was not licensed in Minnesota and, as a tribal company, had sovereign immunity. After a few years of tribes selling an increasingly large amount of tribal tobacco, the state of Minnesota entered into new tax agreements with the tribes that shared fifty percent of the Health Impact Fee and a small percentage of the settlement fee. The tribal share of the state tax scheme was increased from \$2.40 per carton to over \$5.90 per carton, resulting in millions of dollars in additional annual revenue to the tribes in Minnesota. This is an example of the growing economic and legal sophistication of tribes working together and using their inherent advantages to give a state an incentive to amend their tax agreements and share more tax revenue with the tribes.

C. *Gasoline in Winnebago*

After the Winnebago tribe assigned the previously mentioned grocery store to the company I manage, we used some grant money to add gasoline pumps and I had to apply for a state license in order to have gasoline delivered to the store. I was not exactly sure what license I was supposed to apply for and checked the boxes on the state form to be a retailer and a wholesaler of gasoline.

We received both a wholesaler and retailer license. The first time we attempted to purchase fuel, the pipeline fuel vender asked me if I wanted to purchase the gasoline with or without tax. Without much thought I replied, "tax-free?" A licensed wholesaler in Nebraska can buy the fuel without the tax first being applied. As stated earlier, the state required we discount the

fuel for tribal members and ask for a refund. This process was time consuming and somewhat insulting on our own reservation.

At first I simply sold the tax-free fuel to tribal members and sent the tax money for non-Indians to the state. The state objected to this process because they did not have control and it required a level of trust they were not used to granting tribes. As our relationship with the state deteriorated, I requested the tribe implement a three cent-per-gallon tax on everyone who consensually bought fuel at a tribal-owned station.⁴¹ I was trying to create a *Montana v. United States*⁴² consensual relationship between our non-Indian customers. I was not sure I could win the argument in court, but I did not care because all I really needed was a legal justification to position ourselves with the state.

The tribal tax was approximately twenty-one cents-per-gallon below the state tax rate,⁴³ and it attracted additional customers to the reservation. The state wanted to stop our sales and attempted to do so indirectly after we refused to stop. The state threatened the pipeline company in Nebraska, and the pipeline company agreed to stop selling our tribe tax-free fuel despite the fact that we had a valid wholesaler license.⁴⁴

During this dispute with the State of Nebraska, I got a call from a local gas station owner who wanted to know if I would be interested in buying his business. I was not interested because the business was on the neighboring reservation, but I went to meet with the seller anyway. While we were talking, he showed me his fuel distribution operation. He had multiple fuel storage tanks. I asked where he bought ethanol, and he explained that you cannot buy ethanol. You have to buy alcohol and then blend it with gasoline to make the ethanol. I asked the seller how they blended it, and he further explained that if your truck holds 10,000 gallons, you fill it up with 9,000 gallons and then pump in 1,000 gallons of alcohol and mix it up by driving around for a bit. It was called splash blending.⁴⁵ I was stunned by the simplicity of the blending

41. The state of Nebraska tax was twenty-four cents per gallon at that time. See *Historical Fuel Tax Rates*, OFFICIAL NEB. GOV'T WEBSITE, <http://www.revenue.nebraska.gov/fuels/ratehist.html> (last visited Mar. 19, 2017).

42. "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana v. United States*, 450 U.S. 544, 565 (1981) (citations omitted).

43. See *Nebraska Sales Tax Rate Finder*, OFFICIAL NEB. GOV'T WEBSITE, <http://www.revenue.nebraska.gov/ratefinder.html> (last visited Mar. 19, 2017).

44. See *generally Starting a Business in Nebraska*, OFFICIAL NEB. GOV'T WEBSITE, http://www.revenue.nebraska.gov/business/bus_regist.html (last visited Mar. 19, 2017).

45. Jessie Stolark, *How Is Gasoline Blended? Two Groups Ask EPA to Consider this Important Detail*, ENVTL. & ENERGY STUDY INST. (Oct. 24, 2014), <http://www.eesi.org/articles/view/how-is-gasoline-blended-two-groups-ask-epa-to-consider->

process and then jumped to the next obvious conclusion. The Omaha Tribe recently had a Nebraska Attorney General opinion that stated that the Omaha Tribe did not have to pay the state excise tax because its tobacco manufacturing process was a value added event and the state tax was preempted.⁴⁶ I immediately equated the blending process to the tobacco manufacturing process and, within one month, had purchased a similar fuel blending operation and fuel delivery truck from a company located on the Winnebago reservation.

The fuel blending operation greatly enhanced our legal argument. However, the state of Nebraska continued to apply pressure, contrary to its own laws, on the Nebraska pipeline company to not sell us tax-free fuel.⁴⁷ The Winnebago Tribe is on the border with the state of Iowa so we applied for a license to purchase fuel from a pipeline in Iowa.⁴⁸ Each state allows a wholesaler to purchase fuel tax-free if the fuel has an out of state destination.⁴⁹ This is done because there may not be a nearby fuel source in the destination state. We bought the fuel legally in Iowa, delivered it in our own truck to our fuel blending operation on our reservation, blended alcohol to make ethanol to create a “value added” process and applied our tribal tax at our tribal stores. The state of Nebraska attempted to get Iowa to stop selling to us, but it was a perfectly legal transaction as far as Iowa was concerned. Every other part of the process was tribally controlled and was shielded from a lawsuit by sovereign immunity.

After a few years, the tribe then controlled all of the gas stations on the reservation. After some tough negotiations, the state of Nebraska entered into an innovative fuel tax compact with the Winnebago Tribe.⁵⁰ The new compact implements a reservation-wide tribal fuel tax on all customers regardless of tribal member affiliation or race.⁵¹ In exchange, the Winnebago Tribe agreed to share with the state one-quarter of the fuel tax proceeds.⁵² The

this-important-detail (“Splash blending is how most gasoline in the United States is formulated, and is done by simply adding 10 percent by volume ethanol to finished gasoline.”).

46. State of Neb. Office of the Attorney Gen., *supra* note 22.

47. See NEB. REV. STAT. § 66-741 (2016).

48. See *generally Tribal History*, WINNEBAGO TRIBE NEB., <http://www.winnebago-tribe.com/index.php/about-us/tribal-history> (last visited Mar. 19, 2017).

49. *Fuel Sales and Taxes*, U.S. DEP’T TRANSP. FED. HIGHWAY ADMIN., https://www.fhwa.dot.gov/motorfuel/sales_taxes_exemptions.htm (last visited Mar. 19, 2017) (list of exemptions for each state).

50. John Quinlan, *Nebraska and Winnebago Tribe Resolve Gas Tax Issue*, SIOUX CITY J. (Jan. 30, 2002), http://sioux-city-journal.com/news/local/nebraska-winnebago-tribe-resolve-gas-tax-issue/article_fd9317c3-ba08-5574-86b3-b84fece3a901.html.

51. *Id.*

52. *Id.*

acceptance of a tribal tax over our entire jurisdiction was important because we did not want a simple exemption from a state tax. We wanted recognition of our inherent taxing powers. The compact also ended the real possibility of the state seizing our fuel shipments from Iowa, which would have greatly intensified our dispute. It is my firm opinion that we could have never entered into such an innovative tax compact had we not used our emerging economic power to force the issue.

D. *Another Tribal Gasoline Tax*

A year or so after entering into our compact, I gave a speech discussing the story behind it at a regional tribal economic development conference.⁵³ One tribe was in the middle of building a gas station at its casino. The state in which it was located had some very restrictive fuel compacts that limited its ability to sell discounted fuel to non-Indians. I volunteered my legal services and we discussed how its situation compared to the Winnebago Tribe.

This tribe bordered another state, which allowed it to implement a similar strategy to the Winnebago Tribe. The tribe got licensed as a wholesaler in the nearby state. The tribe purchased the fuel and delivered it in its own truck across state lines to their reservation, where it had set up a value added fuel blending operation to blend gasoline with alcohol to make ethanol.

The local state was upset with the tribe and explained that the tribe was acting outside the state's prescribed framework for fuel taxation. The tribe explained how its value added process and tribal tax now preempted the state excise tax. The tribe then offered a tax compact that applied a tribal tax equally on all customers who enter its reservation and shared one-fourth of the tax with the state.⁵⁴

During an early strategy meeting with the tribe, I predicted that the state might simply leave the tribe alone. The state would be reluctant to enter into such a pro-tribal compact, because if it did, then it would have to open itself up to entering into those types of compacts with the other tribes in the state. The state did refuse to enter into the proposed compact, but it never made any effort to stop the tribe. In this instance, the tribe had a strong legal argument, had empowered itself through its own economic activity, and bypassed the normal state control mechanisms. The tribe also had sovereign immunity. The state had no direct or indirect way to stop the tribe from purchasing, blending,

53. Lance Morgan, *Nebraska Builder Award and Commencement Address*, YOUTUBE (Aug. 17, 2013), <https://www.youtube.com/watch?v=y7Qa-0V-RU8>.

54. The tax compact was based on the recent Winnebago tax compact.

and selling tribally taxed fuel. The state also had no incentive to enter into a tax compact that favored the tribe's interests, because it would disrupt its system for controlling the other tribes in the state.

The tribe has been selling tribally-taxed fuel to non-Indians without a tax compact since 2000. Interestingly, you will not read about this in the federal Indian law textbook because it never went to court. You cannot research it because there never was a tribal tax compact. It just happened because a tribe used its tribal law, tribal sovereign immunity, and tribal economic activity to empower a tribal tax.

VII. A HOTEL TAX

Some years ago, I was working with a legal client on a separate tax issue. I had stayed at its tribal casino hotel and noticed that it did not have a hotel tax. I asked the tribal council about it the next day and one of their lawyers said that they looked into it, but their research showed that they could not implement a tax on non-natives. Their lawyer referred to the *Atkinson Trading v. Shirley*⁵⁵ decision, where the Supreme Court ruled that a tribe could not implement a hotel tax on non-members at a hotel owned by a non-Indian, which was located within the tribe's jurisdiction.⁵⁶ I pointed out that this was not the tribe trying to tax a non-Indian owned hotel on their reservation. Rather, it was a tribally-owned hotel, built by the tribe on tribal land. The lawyer said they had thought of that, but they had a tax compact with the state, and even though it did not mention the hotel tax, he believed it indirectly incorporated the hotel tax through a sales tax provision. He said the word "indirectly" and was actually making logical inferences against the tribe's interests.

I suggested that the Tribe just try a hotel tax and see what happens. In this instance, the Tribe owned the property and had sovereign immunity, and there was essentially nothing the state could do about it. Six months later during unrelated compact negotiations with the state, the same tribal lawyer brought up the tribal hotel tax and the state said, much to everyone's surprise, that they knew about it and had come to the conclusion that there was nothing they could do about the tax.

The tax raises over \$100,000 per year for the Tribe and no one has ever complained about it. This is a simple example of a tribe using its new found economic power and mixing it with an expanding tribal taxation system and protecting it all with sovereign immunity. There are obvious distinctions

55. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001).

56. *Id.*

between what this Tribe did and the *Atkinson Trading* case, and you will read about *Atkinson Trading* in the Federal Indian law textbook. You will not, however, read about how this Tribe used its growing economic and legal power to expand its tax base to include non-Indians.

VIII. COTTON PETROLEUM

Tribes with energy resources consider the Supreme Court's decision in *Cotton Petroleum v. New Mexico*⁵⁷ to be particularly bad for tribal taxation rights and energy resource development. In *Cotton Petroleum*, the Court ruled that the state of New Mexico had the power to tax on-reservation oil drilling even though the tribe also had a tax on the exact same activity.⁵⁸ This double taxation of on-reservation activity was justified because the driller was a non-tribal entity, and therefore, the state had concurrent jurisdiction to tax.⁵⁹ In my law school class, I explain this case in racially stark terms. To help illustrate how strange the result of this case actually is, I summarize it in the following way: The state can tax tribal oil and gas production on the reservation because a company owned by white people drilled and operates the well.

After *Cotton Petroleum*, and the *Oklahoma Tax Commission v. Chickasaw Nation*⁶⁰ case a few years later in 1995, states started changing the legal incidence of their various energy taxes to the producer of the energy. In almost all instances the producer was a non-tribal entity, so it made sense from the state's perspective to implement their tax at the producer level.

I had never worked much with energy tribes, but was having lunch with an energy tribe. We were discussing the *Cotton Petroleum* case and the impact of state and tribal double taxation on the ability of the tribe to attract development on its lands. I asked the tribe a few questions about how the transactions on their reservation actually worked. Typically, the tribe leased the property to a non-tribal development company in exchange for a royalty. The development company was considered the producer, but often the producer would hire an oil service field company to do the actual drilling under a sub-contract.

57. *Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163 (1989).

58. *Id.* at 163, 192–93.

59. *Id.* at 191–92.

60. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995). The Supreme Court ruled that the legal incidence of a state tax fell upon the tribes, *id.* at 466–67, but the long-term result was that states began to amend their tax statutes to move the legal incidence of their taxes to non-tribal entities.

During my efforts to develop the gasoline and tobacco tribal tax codes of the Winnebago Tribe, we took great care to place the legal incidence of the tax on tribal entities who were both state tax exempt and had sovereign immunity. We reasoned that if the state could impose the legal incidence of the tax on someone calculated to maximize their ability to impose their will on the tribe, then we should do the exact same thing in the development of the tribal tax codes by placing the legal incidence on tribal entities.

I made the suggestion to the tribe that they create a tribal oil and gas production company under a tribal corporate code. The tribal development company would enter into a royalty agreement with the tribe. The tribal company would be considered the producer for state purposes. The Tribe did not have much experience or the capital to develop an energy company, but I pointed out the new company would control the development and could enter into industry standard sub-contracting agreements with the entities that could drill and operate the wells. Under this structure, a tribal production company would be the entity at the point of the legal incidence of the state tax and categorically exempt. The Tribe did not believe it could be that easy, so we called the state tax office. We spoke to the person in charge of this particular tax and asked if a tribal company was the production company, would that company owe the state tax? The answer was, "I have never heard of that, but I suppose not."

Several tribes have followed this model and have in effect bypassed the double taxation of the *Cotton Petroleum* case. This is another example of a tribe using its growing economic and legal sophistication to craft a legal and corporate structure to maximize tribal gain and minimize the influence of biased Supreme Court precedent. This structure cannot be found in any federal Indian law textbook because it never was a court case. In fact, this kind of structure is rarely discussed publicly because of concern that the state may try and adapt their tax codes again to find other non-Indians to tax in the chain of commerce.

IX. INTERNET AND THE WILD WEST

As I have explained several times, the state controls the stream of commerce and can impose its will on tribes indirectly. However, the Internet opens up a whole new set of possibilities for tribes to use their sovereign status and completely bypass the normal control mechanisms for states to

control tribes.⁶¹ I want to briefly discuss this area because it holds so much promise for changing the current tribal economic and legal dynamic.

A. The Pact Act: The Bursting of the Tribal Internet Bubble

In 1998, forty-six states and several major tobacco companies settled a major lawsuit and entered into what is called the Master Settlement Agreement.⁶² It had the effect of raising the price of cigarettes significantly by increasing the wholesale price of the products. The states and the tobacco companies essentially split the wholesale price increase between them.⁶³ The states would not share this additional revenue with the tribes under their existing tax agreements because it was not technically considered a tax.⁶⁴ Multiple tribes and tribal entrepreneurs responded by building their own tobacco factories and setting up a tribal-only distribution system.⁶⁵

The ready supply of low cost tribal tobacco products and the corresponding rise of Internet commerce, led to a large rise in online tribal tobacco sales.⁶⁶ Normally, a person had to travel to a reservation to buy tribally made products, which limited the potential market for tribal tobacco. Internet commerce combined with tribal manufacturing and the now much higher state tobacco prices created a new market, which allowed tribes to begin mailing large amounts of tobacco around the country.⁶⁷

The states responded by threatening the delivery companies and eventually only the U.S. Post Office would deliver tribal tobacco.⁶⁸ The states also threatened the credit card companies and eventually the credit card companies agreed to not process credit card transactions for tribal tobacco

61. See *Internet Infrastructure in Native Communities: Equal Access to E-Commerce, Jobs and the Global Marketplace: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 36–41 (2011) [hereinafter *Internet Infrastructure*] (statement of Lance Morgan, President/CEO, Ho-Chunk, Inc.).

62. See NAT'L ASS'N OF ATTORNEYS GEN., MASTER SETTLEMENT AGREEMENT (1998), <http://www.naag.org/assets/redesign/files/msa-tobacco/MSA.pdf>; see also Peter Levin, *The ABCs of the Tobacco Master Settlement Agreement*, NAT'L ASS'N ATTORNEYS GEN. (Nov. 6, 2007), http://www.naag.org/publications/naagazette/volume_1_number_2/the_abcs_of_the_tobacco_master_settlement_agreement.php.

63. See generally Levin, *supra* note 62.

64. See David Y. Kwok, *Taxation Without Compensation as a Challenge for Tribal Sovereignty*, 84 MISS. L.J. 91, 92 (2014).

65. *Id.* at 123 (“Rather than simply buying cigarettes from national manufacturers and retailing those cigarettes on tribal land, tribes have greater incentive to purchase tobacco and manufacture cigarettes themselves and thus avoid state taxation on the cigarettes.”).

66. *Internet Infrastructure*, *supra* note 61, at 37, 39–40.

67. See *id.* at 38–40.

68. See *id.* at 38, 40.

companies.⁶⁹ However, against state wishes, the tribes were still able to use the banking ACH system to process transactions. After several failed efforts, the states were able to convince Congress to pass the Prevent All Cigarette Trafficking Act or (“Pact Act”) which in effect made it illegal for the U.S. Post Office to ship tribal tobacco products.⁷⁰ The lack of a method of shipping effectively killed the tribal internet tobacco business and hundreds of people lost their jobs in Indian Country.⁷¹

The states were frustrated by their normal approaches and went to Congress to try and impose their will indirectly again through the Pact Act. In Senate testimony on this subject, I warned that the Congress should not allow states to use Congress to further encroach in the developing area of tribal rights on the Internet or it would risk setting up an entirely new system of state control over tribal activities.⁷²

B. *Internet Lending*

The rise over the last several years of tribal online lending is another example of tribes using their own civil regulatory authority and sovereign immunity to develop a short-term lending market online.⁷³ This area has been controversial and subject to multiple state challenges and increasingly tough federal oversight.⁷⁴ The primary objection is that non-Indians are involved in the business activity.⁷⁵ I am personally not a great proponent of short-term lending, but objecting to the tribes doing it because they have partners or sub-contractors who are not native is completely wrong. No business functions in isolation anymore and companies always have outside relationships or sub-contractors. Banks themselves almost always outsource the servicing of their mortgage loans and other activities. A tribe should have equal rights to do the same thing. Applying a higher standard to tribal economic activity is a convenient way to rationalize stopping tribes from participating in online lending. It also ignores normal economic reality and is a definite sign of disparate treatment of tribes.

69. *See id.* at 38.

70. 15 U.S.C § 376 (2010).

71. *See Internet Infrastructure*, *supra* note 61, at 38.

72. *See id.* at 38–41.

73. Joe Mont, *Tribal-Land Payday Loans Spark Reservations*, STREET (Jul. 6, 2011), <https://www.thestreet.com/story/11174918/1/tribal-land-payday-loans-spark-reservations.html>.

74. *Id.*

75. *Id.* (“Critics say the connection to reservations is tenuous at best, describing the partnerships as ‘rent-a-reservation.’”).

I suspect the area of Internet lending will find a new balance in the coming years as long as the federal government does not overreach with selective enforcement actions or new laws from Congress targeted at tribal lending.

The use of technology and the Internet is evolving rapidly and represents a great opportunity for tribes to advance their legal and economic interests. I would urge tribes to continue to be aggressive in this area, but also to be watchful of efforts by the states to try and recreate their indirect power structure over tribes by getting Congress to use its plenary power over tribes to pass more restrictive legislation.

CONCLUSION

I meet with various state and federal officials often to negotiate tribal business issues. They typically have done some research and like to quote cases and restrictions to me. The meetings are frustrating. Everything they quote is usually legally correct, but they are not even close to understanding the new reality that has been emerging in our world. The balance of power in these situations is tilting back to the tribes' favor. Tribes are not beggars in our own land anymore. Tribes have opened their eyes to what is possible and the growth of tribal law has given tribes an evolving means to achieve their goals. I believe tribes are in the middle of an emerging economic civil rights movement. It will have stops and starts but, if tribes continue to grow, so much of what is considered federal Indian law will be recognized as the anachronism it is and will eventually just fade away.