Approved: 2-7-06
Date

MINUTES OF THE SENATE FEDERAL AND STATE AFFAIRS COMMITTEE

The meeting was called to order by Chairman Pete Brungardt at 10:30 a.m. on January 12, 2006 in Room 231-N of the Capitol.

All members were present except:
Senator Anthony Hensley- excused

Committee staff present:
Athena Andaya, Kansas Legislative Research Department
Dennis Hodgins, Kansas Legislative Research Department
Mary Ann Torrence, Revisor of Statutes Office
Connie Burns, Committee Secretary

Conferees appearing before the committee:
James Bartle, General Counsel, Kansas Dept. Of Revenue

Others attending:
See attached list.

James Bartle, General Counsel, Kansas Department of Revenue, provided an explanation and implications of the U.S. Supreme Court decision on the motor fuel tax case. (Attachment 1) The United States Supreme Court's Decision in *Wagnon, Secretary, Kansas Department of Revenue v. Prairie Band Potawatomi Nation* and its potential impact on other pending cases. There is currently pending a petition for rehearing that has been filed by the Tribe and the Court is scheduled to consider this petition at its conference on January 20, 2006. In this case Kansas sought to tax a non-tribal motor fuel distributor on its off-reservation receipt of fuel. The distributor later transported the fuel to the Potawatomi reservation where it was sold to retail customers at a tribally-owned facility. The Tribe sued in Federal District Court to enjoin the tax as a violation of its tribal sovereignty. The court declined to issue an injunction, holding that the balance of state, federal and tribal interests favored the State. On appeal, the Tenth Circuit Court of Appeals reversed, holding that the balance of interest favored the Tribe. On December 6, 2005, the Supreme Court not only reversed the Tenth Circuit and upheld the tax, it also declared the interest balancing test set forth in *White Mountain Apache Tribe v. Bracker* to be inapplicable when a state taxes non-Indian, off-reservation transactions. The Court distinguished this case from those in which a tribe or its members were being taxed and found that the legal incidence of the Kansas tax was on the non-tribal distributor, and the tax arises as a result of the distributor's receipt of the fuel, which occurs off-reservation.

The Court rejected the contention that the tax is unlawfully discriminatory because the statute provides an exemption for fuel sold to the Federal Government and for fuel exported to other States but not for fuel sold to Indian Tribes. Discrimination is the basis for the Tribe's petition for rehearing and it is currently pending.

Mary Torrence, Revisor of Statutes Office, updated the committee on the Joint Committee on State-Tribal Relations dealing with SB 9 from 2005 Legislature. The question arose if the tribe had complied with a provision in the bill that requires liability insurance coverage by the tribes to be subject to verification by the Attorney General. The controversy arose because of a provision dealing with reporting requirements, specifically if the tribes needed to submit their insurance policies to the Attorney General's Office or if the Attorney General's Office needed to contact the tribes to verify the policy was in place. The committee passed a motion requiring the tribes to submit verification of insurance to the Attorney General's Office.

Dennis Hodgins, Legislative Research Office, provided information on the status of the Native American Gaming Compact and the implications of Senator John McCain's 2005 amendment to the Indian Gaming Regulatory Act. The bill clarifies that the National Indian Gamin Commission (NIGC) has authority to promulgate and enforce Minimum Internal Control Standards as to Class III gaming; this amendment makes clear that NIGC continues to have the authority it has exercised until now to issue and enforce

MICS, including the ability to inspect facilities and audit premises in order to assure compliance; extends NIGC approval to all significant gaming operations related contracts, so that the Indian gaming industry remains free from unsuitable and unscrupulous contracts and requires all tribes to pay fees to the NIGC. The bill will ensure fairness in the regulation of Indian gaming by assuring all tribes bear their share of the cost of regulations so the industry continues to prosper.

The meeting was adjourned at 11:30. The next scheduled meeting is January 17, 2006.

SENATE FEDERAL & STATE AFFAIRS COMMITTEE GUEST LIST

DATE 1-12-06

RYAN DYER	PRAIRIE BAND POTAWATOMIE NATION
Barbara Cornelius	Prairie Band Potawatomi Nation
Ron Hein	Prairie Band Potawatomi Nation
David Prager, III	"
Bill Heun	KS Credit Union Assn
Claude Jordan	KDA
Andy Shaw	Kearney & Associates
Jack Bottenberg	PSWS
STEVE ORTIZ	Secretary - Prairie Band Potawatomi Nation
CLYDE KENSINGER	KENSINGER & ASSOCIATES
Whitney Damron	Kickapoo Tribe-KS
James Barnett	Dept. of Rev.
Brian R. Johnson	Attorney General Ofc

(1)

K A N S A S

JOAN WAGNON, SECRETARY

KATHLEEN SEBELIUS, GOVERNOR

DEPARTMENT OF REVENUE
LEGAL SERVICES

January 12, 2006

Senate Committee on Federal and State Affairs

Explanation and Implications of the United States Supreme Court's Decision in
Wagnon, Secretary, Kansas Department of Revenue v. Prairie Band Potawatomi Nation

James Bartle, General Counsel, Kansas Department of Revenue

Senator Pete Brungardt, Chair, and Members of the Committee:

Thank you for your invitation to discuss the United States Supreme Court's recent decision in *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. ___ (2005) [2005 WL 3285050 (U.S. Dec. 6, 2005)] (*Wagnon I*),[1] and its potential impact on other pending cases.

I must first advise you that the decision in this case is not final. There is currently pending a petition for rehearing that has been filed by the Tribe. The Court is scheduled to consider this petition at its conference on January 20, 2006.

By way of background, this is the case in which Kansas sought to tax a non-tribal motor fuel distributor on its off-reservation receipt of fuel. The distributor later transported the fuel to the Potawatomi reservation where it was sold to retail customers at a tribally-owned facility.

The Potawatomi sued in Federal District Court to enjoin the tax as a violation of its tribal sovereignty. The court declined to issue an injunction, holding that the balance of state, federal and tribal interests favored the State. On appeal, the Tenth Circuit Court of Appeals reversed, holding that the balance of interests favored the Tribe.

In its opinion dated December 6, 2005, the Supreme Court not only reversed the Tenth Circuit and upheld the tax, it also declared the interest balancing test set forth in *White Mountain Apache Tribe v. Bracker* to be inapplicable when a state taxes a non-Indian on off-reservation transactions.

[1] A copy of the Syllabus of the Court's slip opinion is attached. The full text of the opinion (18 pages) and the dissent (17 pages) is available on-line. Go to: www.supremecourtus.gov and click on Recent Decisions.

The Court distinguished this case from those in which a tribe or its members were being taxed and found that the legal incidence of the Kansas tax was on the non-tribal distributor. Moreover, the tax arises as a result of the distributor's receipt of the fuel, which occurs off-reservation.

These findings were significant in light of the Court's prior decision in *Mescalero Apache Tribe v. Jones*, which held that "absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state laws otherwise applicable to all citizens of the State." Accordingly, the Kansas tax was held not to violate tribal sovereignty nor was it otherwise preempted by the Commerce Clause.

One argument against the tax was that the State should not be permitted do indirectly what the law prohibits it from doing directly: i.e., taxing the distributor's receipt of fuel off-reservation instead of taxing the tribal retailer's sale of fuel on-reservation. However, the Court found that the legal incidence of the tax was determinative, notwithstanding the fact that the economic burden of the tax may flow through to the Tribe and its customers.

It was also argued that the State's tax interfered with the imposition of the Tribe's own fuel tax, the proceeds of which are used to fund the maintenance and improvement of reservation roads. However, the Court said this was also a complaint about the downstream economic consequences of the State's tax, and that neither a decrease in tribal fuel tax revenues nor a reduction in profits at the tribally-owned fuel station would cause the tax to be invalid.

Lastly, the Court rejected the contention that the tax is unlawfully discriminatory because the statute provides an exemption for fuel sold to the Federal Government and for fuel exported to other States but not for fuel sold to Indian tribes. This issue of discrimination is the basis for the Tribe's petition for rehearing, which, as I've indicated, is currently pending.

In summary, the Court upheld the constitutionality of the Kansas motor fuel tax because the legal incidence of the tax is on a non-tribal entity and the activity being taxed occurs off-reservation. It is also highly significant that the *White Mountain Apache Tribe v. Bracker* interest balancing test was declared inapplicable to state laws regulating the off-reservation activities of non-Indians.

Ramifications of *Wagnon I*

The Court's decision in the fuel tax case had an immediate impact on another case in which the the Potawatomi had sued the State of Kansas, this one concerning whether the State could enforce its motor vehicle registration requirements with respect to the off-reservation operation of vehicles tagged and titled by the Tribe. *Wagnon v. Prairie Band Potawatomi Nation*, U.S. Sup. Ct. No. 04-1740 (*Wagnon II*).

In *Wagnon II*, both the Federal District Court and the Tenth Circuit Court of Appeals had previously ruled that, under *White Mountain Apache*, the state interest in enforcing motor vehicle code requirements was outweighed by the federal and tribal interests in protecting tribal sovereignty and promoting self-government. The State petitioned the U.S. Supreme Court for a writ of certiorari, contending that the *White Mountain Apache* balancing test was inapplicable for purposes of determining the validity of state efforts to regulate off-reservation activity. This petition was pending at the time *Wagnon I* was decided.

Less than a week after its decision in the fuel tax case, the Supreme Court granted certiorari in *Wagnon II*, vacated the judgment of the Tenth Circuit and remanded the case for further consideration in light of *Wagnon I*. The obvious implication is that the *White Mountain Apache* test does not apply for purposes of determining whether the State's off-reservation regulation of tribally-licensed vehicles is preempted.

We anticipate that the Court of Appeals will ask the parties to rebrief and reargue the issues in this case.

As I previously explained, *Wagnon I* involved the imposition of Kansas motor fuel tax on an in-state, non-Indian distributor. This decision will affect whether tax may also be imposed on a non-resident tribal importer. This issue has been raised in *Winnebago Tribe of Nebraska v. Kline*, U.S. Dist. Ct. (Kan.) No. 02-4070-JTM, a case in which several Indian tribes in Kansas have sued to enjoin the taxation of fuel imported from out-of-state and delivered to their reservations by the Winnebago Tribe of Nebraska.

Winnebago is currently before the Kansas Supreme Court for purposes of deciding a question of state law certified by the Federal District Court. [Kan. Sup. Ct. No. 05-94781.] The briefing in this case is in the process of being finalized and the court will hear oral argument later this year.

Before concluding, I would remind the Committee that tribal sovereignty cases raise complex legal issues and there are always two sides to every story. We respect the Tribes and their members and appreciate that they may have different views as to the interpretation and application of these judicial decisions. To the extent you decide to delve deeper into these issues, I'd encourage you to get input from their officials and representatives before taking any final action.

I know both the Governor and Secretary Wagnon would like to see these issues resolved on an agreed basis whenever possible and they regard litigation as a last resort. Hopefully, the action taken by the U.S. Supreme Court has helped to clarify those situations in which state taxes affecting tribal interests may be imposed, and this, in turn, will enhance the prospects for future cooperation and consensus on these important matters.

Thank you for the opportunity to make this presentation.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WAGNON, SECRETARY, KANSAS DEPARTMENT OF REVENUE *v.* PRAIRIE BAND POTAWATOMI NATION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 04–631. Argued October 3, 2005—Decided December 6, 2005

Kansas' motor fuel tax applies to the receipt of fuel by off-reservation non-Indian distributors who subsequently deliver it to the gas station owned by, and located on the Reservation of, the Prairie Band Potawatomi Nation (Nation). The station is meant to accommodate reservation traffic, including patrons driving to the casino the Nation owns and operates there. Most of the station's fuel is sold to such patrons, but some sales are made to persons living or working on the reservation. The Nation's own tax on the station's fuel sales generates revenue for reservation infrastructure. The Nation sued for declaratory judgment and injunctive relief from the State's collection of its tax from distributors delivering fuel to the reservation. Granting the State summary judgment, the District Court determined that the balance of state, federal, and tribal interests tilted in favor of the State under the test set forth in *White Mountain Apache Tribe* v. *Bracker,* 448 U. S. 136. The Tenth Circuit reversed, agreeing with the Nation that the Kansas tax is an impermissible affront to its sovereignty. The court reasoned that the Nation's fuel revenues were derived from value generated primarily on its reservation—*i.e.,* the creation of a new fuel market by virtue of the casino—and that the Nation's interests in taxing this reservation-created value to raise revenue for reservation infrastructure outweighed the State's general interest in raising revenues.

Held: Because Kansas' motor fuel tax is a nondiscriminatory tax imposed on an off-reservation transaction between non-Indians, the tax is valid and poses no affront to the Nation's sovereignty. The *Bracker* interest-balancing test does not apply to a tax that results from an off-reservation transaction between non-Indians. Pp. 4–18.

Syllabus

1. The Kansas tax is imposed on non-Indian distributors based upon their off-reservation receipt of motor fuel, not on the on-reservation sale and delivery of that fuel. Pp. 4–12.

(a) Under this Court's Indian tax immunity cases, the "who" and the "where" of a challenged tax have significant consequences. "The initial and frequently dispositive question . . . is *who* bears [a tax's] legal incidence," *Oklahoma Tax Comm'n* v. *Chickasaw Nation,* 515 U. S. 450, 458 (emphasis added). Moreover, the States are categorically barred from placing a tax's legal incidence "*on a tribe or on tribal members* for sales made *inside Indian country*" without congressional authorization. *Id.*, at 459 (emphasis added). Even when a State imposes a tax's legal incidence on a non-Indian seller, the tax may nonetheless be pre-empted if the transaction giving rise to tax liability occurs on the reservation and the imposition of the tax fails to satisfy the *Bracker* interest-balancing test. See, *e.g., Central Machinery Co.* v. *Arizona Tax Comm'n,* 448 U. S. 160. Pp. 4–5.

(b) The Court rejects the Nation's argument that it is entitled to prevail under *Chickasaw*'s categorical bar because the fairest reading of the Kansas statute is that the tax's legal incidence actually falls on the Tribe on the reservation. Under the statute, the tax's incidence is expressly imposed on the distributor that first receives the fuel. Such "dispositive language" from the state legislature is determinative of who bears a state excise tax's legal incidence. *Chickasaw, supra,* at 461. Even absent such "dispositive language," the Court would nonetheless conclude that the tax's legal incidence is on the distributor because Kansas law makes clear that it is the distributor, not the retailer, that is liable for the tax. The lower courts and the Kansas agency charged with administering the motor fuel tax reached the same conclusion. *Kaul* v. *Kansas Dept. of Revenue*, 266 Kan. 464, 970 P. 2d 60, distinguished. Pp. 5–8.

(c) Also rejected is the Nation's alternative argument that the *Bracker* test must be applied irrespective of who bears the Kansas tax's legal incidence because the tax arises as a result of the *on-reservation* sale and delivery of fuel. The Nation presented a starkly different, and correct, interpretation of the statute in the Tenth Circuit, arguing that the balancing test is appropriate even though the tax's legal incidence is imposed on the Nation's non-Indian distributor and is triggered by the distributor's receipt of fuel *outside the reservation*. The Nation's argument here is rebutted by provisions of the Kansas statute demonstrating that the only taxable event occurs when the distributor first receives the fuel and by a final determination by the State reaching the same conclusion. The Nation's theory that the existence of statutory deductions for certain postreceipt transactions make it impossible for a distributor to calculate its ulti-

mate tax liability without knowing whether, where, and to whom the fuel is ultimately sold or delivered suffers from several conceptual defects. For example, availability of the deductions does not change the nature of the taxable event, the distributor's receipt of the fuel. Pp. 8–12.

2. The Tenth Circuit erred in concluding that the Kansas tax is nevertheless subject to *Bracker*'s test. That test applies only where "a State asserts authority over the conduct of non-Indians engaging in activity on the reservation." 448 U. S., at 144. It has never been applied where, as here, a state tax imposed on a non-Indian arises from a transaction occurring off the reservation. The Court's Indian tax immunity cases counsel against such an application. Pp. 12–18.

(a) Limiting the *Bracker* test exclusively to *on-reservation* transactions between a nontribal entity and a tribe or tribal member is consistent with this Court's unique Indian tax immunity jurisprudence, which relies "heavily on the doctrine of tribal sovereignty [giving] state law 'no role to play' within a tribe's territorial boundaries," *Oklahoma Tax Comm'n* v. *Sac and Fox Nation,* 508 U. S. 114, 123–124. The Court has taken an altogether different course, by contrast, when a State asserts its taxing authority outside of Indian Country. *E.g., Chickasaw*, 515 U. S. 450. In such cases, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe* v. *Jones,* 411 U. S. 145, 148–149. If a State may apply a nondiscriminatory tax to Indians who have gone beyond the reservation's boundaries, it may also apply a nondiscriminatory tax where, as here, the tax is imposed on non-Indians as a result of an off-reservation transaction. In these circumstances, *Bracker* is inapplicable. Cf. *Arizona Dept. of Revenue* v. *Blaze Constr. Co.*, 526 U. S. 32, 37. The application of the test here is also inconsistent with the Court's efforts to establish "bright line standard[s]" in the tax administration context. *Ibid.* The Nation is not entitled to interest balancing by virtue of its claim that the Kansas tax interferes with the Nation's own motor fuel tax. This is ultimately a complaint about the state tax's downstream economic consequences. The Nation cannot invalidate that tax by complaining about a decrease in its revenues. See, *e.g., Washington* v. *Confederated Tribes of Colville Reservation,* 447 U. S. 134, 156. Nor would the Court's analysis change if legal significance were accorded the Nation's decision to label a portion of its gas station's revenues as tax proceeds. See *id.*, at 184, n. 9. Pp. 12–17.

(b) This Court rejects the Nation's contention that the Kansas tax is invalid notwithstanding the *Bracker* test's inapplicability be-

Syllabus

cause it exempts from taxation fuel sold or delivered to state and federal sovereigns and is therefore impermissibly discriminatory. The Nation is not similarly situated to the exempted sovereigns. While Kansas' tax pays for roads and bridges on the Nation's reservation, including the main highway used by casino patrons, Kansas offers no such services to the several States or the Federal Government. Moreover, to the extent Kansas retailers bear the tax's cost, that burden applies equally to all retailers within the State regardless of whether they are located on a reservation. P. 18.

379 F. 3d 979, reversed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, O'CONNOR, SCALIA, SOUTER, and BREYER, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which KENNEDY, J., joined.