



10-1975

## Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation

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Grey - Five memo

Discuss  
I'll await views  
over Indian experts

These cases present appeals & cross-appeals from 3 J/Ct in which Indians attacked (for most part successfully) validity of Montana statutes (i) taxing cigarette sales by Indians to Indians & non-Indians on the Reservation, and (ii) taxing personal prop. of Indians living on reservation. 3 J/Ct relied heavily on McClellan

DISCUSS

PRELIMINARY MEMORANDUM

Summer List 11, Sheet 1

No. 74-1656

MOE Application of State personal prop. tax to Tribal members.

CONFEDERATED SALISH AND KOOTENAI TRIBES

Appeal from USDC (Montana) (Browning, Jameson [p.c.]; Smith, dissenting)

Federal/Civil

Timely

No. 75-50

CONFEDERATED SALISH AND KOOTENAI TRIBES

v. Cigarette tax statute - held invalid & not banned by Anti-Inj. Act  
MOE  
Timely

Federal/Civil

Timely

Note  
DKP

The jurisdictional issue is significant & the CA9 resolution not obviously correct.



1. The issues presented here concern the validity of state taxation of (1) cigarette sales by members of certain Indian tribes to Indians and non-Indians on the reservation, and (2) the personal property of Indians who reside on the reservation, including their automobiles. Also drawn into question is the power of the United States District Court to enjoin the enforcement of the state tax laws in light of the general prohibition against such injunctions contained in 28 U.S.C. § 1341.

2. Facts and Opinions Below: The Flathead Indian Reservation, created by the Treaty of Hell Gate of 1855, 12 Stat. 975, consists of approximately 1,245,000 acres, of which approximately 628,642 acres are owned in fee, some by Indians and some by non-Indians, 628,311 acres are held in trust for the Confederated Salish and Kootenai tribes or individual Indians, and 1,017 acres are owned by the United States. The Reservation is located in Montana. Tribal members comprise 19% of the total Reservation population. There are farms, ranches, and communities scattered throughout the inhabited portions of the Reservation. All services provided by the state and local governments are equally available to Indians and non-Indians. The state operates the only schools on the Reservation. A system of streets, county roads, and state highways has also been built and is maintained by the state and local governments. The federal government makes substantial expenditures for education and welfare within the Reservation, including

programs in education, social services, housing improvement, employment assistance, forestry, road construction and maintenance, and Indian business development.

Two separate actions were filed in the USDC (Montana) by the Confederated Salish and Kootenai Tribes and various members. Each case was heard by the same three-judge district court. The first, from which appellees have taken a cross-appeal (No. 75-50), involved application of Montana's cigarette tax statutes to tribal members on the Reservation (hereinafter "Moe"). The second, not involved in the cross-appeal, concerned the application of Montana's personal property tax to tribal members on the Reservation (hereinafter "Montana").

In Moe the cross-appellants <sup>(Indians)</sup> challenged the constitutional validity of the cigarette tax statutes of the State of Montana, R.C.M., 1947, §§ 84-5606-5606.31 and sought a permanent injunction against their future application to them. One of the plaintiffs below (Wheeler), who is now deceased, was a member of the Tribes and had established retail stores on two tracts of land within the Reservation held in trust by the United States, where he sold cigarettes. For the right to sell cigarettes he paid an administrative fee to the Tribes. The Tribes are also authorized by their Constitution to tax cigarette sales within the Reservation but have not done so to date. Wheeler did not possess a state cigarette vendor's license, and did not affix the state cigarette tax sales stamps or precollect the state cigarette sales tax, as



required by Montana law. He was arrested for noncompliance with the state statutes and a portion of his inventory was confiscated. The tax is 12 cents on a package, 4.5 cents of which is allocated by state law to the general revenue fund which is used for the support of services to both Indians and non-Indians.

The three-judge court declared the tax statutes invalid and permanently enjoined their enforcement to the extent that they required members of the Tribes residing on the Reservation to possess state vendor's licenses and to the extent they applied to cigarette sales within the Reservation by tribal members to Indians who resided within the Reservation. The court further held that <sup>But</sup> the statutes were valid insofar as they required tribal members to precollect the state cigarette tax imposed on non-Indian purchasers.<sup>1</sup> It is this latter portion of the judgment which is the subject of the cross-appeal.

In reaching this holding the court rejected the contention that it lacked the power to issue an injunction because of the Federal Tax Injunction Act, 28 U.S.C. § 1341. In its first opinion the court found § 1341 inapplicable under the federal instrumentality doctrine. Appx. 77-79. In its second opinion it recognized that the validity of

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<sup>1</sup> Four separate opinions were issued by the three-judge court in these cases, the first on October 10, 1973. The subsequent opinions build upon the first, and the final judgment was filed March 19, 1975.

this doctrine as a basis for immunity from state taxation with respect to Indians and Indian property was questionable after Mescalero Apache Tribe v. Jones, 411 U.S. 145, 150-55 (1973), and McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164, 169-70 & n.5 (1974). Appx. 43 n.9. It thus reconsidered this question and examined the legislative history of § 1341 and the cases decided thereunder. Appx. 41-47. The court concluded from this analysis that § 1341 does not bar federal court jurisdiction where "immunity from state taxation is asserted on the basis of federal law with respect to persons or entities in which the United States has a real and significant interest." Id. 43. Accordingly it found it unnecessary to decide whether plaintiff Wheeler's business venture was an instrumentality of the United States since there was no doubt that the United States has a real and significant interest in the Tribes and its members.

The three-judge court then examined the existing jurisdictional relationships between the Tribes and Montana.

Montana had assumed complete criminal and limited civil jurisdiction over the Indians residing in the Reservation <sup>P.L. 280, 67 Stat. 588, August 15, 1953,</sup> under the predecessor statute to 25 U.S.C. §§ 1322, 1324 considered by this Court in McClanahan. Even assuming the validity of this assumption of jurisdiction under P.L. 280

the court reasoned that the tax laws were civil, not criminal, in nature and that Montana's limited existing civil jurisdiction over the Reservation Indians (see Appx. 49) did not justify the tax statutes here.



It noted that under McClanahan and the prior decisions of this Court Indian citizens living on the Reservation are still regarded as a separate, semi-independent people, with the power of regulating their internal affairs, free from state interference. The court thus concluded that consistent with these principles Montana did not have the power to impose a tax upon cigarette sales between Tribe members on the Reservation or require a Tribe member who sells cigarettes on the Reservation to obtain a dealer's license.

The court reached an opposite conclusion with respect to the pre-collection of cigarette excise taxes relating to sales to non-Indians. In reaching this conclusion the court first cited the state statutory provision which indicated that the cigarette taxes were conclusively presumed to be a direct sales tax on the retail customer, pre-collected for the purpose of convenience only. Under this system the seller pays the tax to the wholesaler and adds the cost to the purchase price of the cigarettes. The court then considered the many decisions of this Court concerning the power of the states over Indians, finding none controlling. It noted, for example, that this was not a case like Warren Trading Post Co. v. Arizona Tax Comm'n., 380 U.S. 685 (1965), where a licensed trader established a store for the benefit of Indians residing on the Reservation. These stores were located on U. S. Highway 93 and the court considered it a reasonable inference that the stores had not been established primarily for the benefit of Indians residing on the Reservation

*Sales tax on customer*

but instead were intended to sell cigarettes to prospective customers passing on the highway and to residents of neighboring communities who wished to avoid the sales tax. The court concluded that the tax was constitutional since collection of it by the Indian seller would not impose a tax burden on the Indians residing on the Reservation or infringe in any way tribal self-government. In support of this holding, it also cited the similar conclusion reached by the Supreme Court of Washington after the remand by this Court in Tonasket v. Washington, 411 U.S. 451 (1973), for consideration of McClanahan. The Washington Supreme Court had concluded that McClanahan did not mandate the conclusion that a state could not impose a cigarette excise tax on sales to non-Indians on the Reservation. 525 P.2d 744. The three-judge court thus rejected the holding of the Supreme Court of Idaho in Mahoney v. State of Idaho Tax Comm'n., 524 P.2d 187 (1974), cert. denied, \_\_\_\_ U.S. \_\_\_\_ (1974), that the Idaho Tax Commission had "no jurisdiction to tax the on-reservation sale of cigarettes by an Indian seller whether the purchasers were Indians or non-Indians."

Although agreeing that the court had jurisdiction, the Moe dissent said that the majority opinion accomplished a constitutionally suspect discrimination in favor in Indians neither mandated by treaty or Act of Congress. The dissent disagreed with this Court's construction of the Buck Act in McClanahan to the effect that § 109 of the Act evidenced a Congressional intent to maintain the tax exempt status of



Indians. Appx. 30. It then reasoned that if McClanahan were based on implication of tax exemption rather than on lack of jurisdiction it would have no difficulty distinguishing the situation here except with respect to sales on trust lands. Unlike the Navajos in McClanahan the Tribes here had no tradition of sovereignty until after the Indian Reorganization Act of 1934 when tribal courts were created for the first time.

(74-1656)

In Montana the appellees sought (1) a judgment declaring unconstitutional as applied to them Montana statutes providing for the assessment and collection of state personal property taxes generally, and in particular, of personal property taxes on motor vehicles, (2) an injunction against the statutes' enforcement, and (3) a refund of personal property taxes paid to the date of the court's final judgment. In its opinion the three-judge court emphasized that the appellees did not challenge the state's vehicle registration fee which is used for the construction and maintenance of roads. They challenged only the motor vehicle property tax which is not a designated road tax and is used instead for general governmental purposes as are other personal property taxes. Relying on its decision in Moe the court held the challenged statutes unconstitutional insofar as they required the payment of a motor vehicle tax and other personal taxes by members of the Tribes residing on the reservations. McClanahan again was regarded as controlling. As in Moe the court reserved consideration of all further issues pending

final determination of the unconstitutionality of the statute.

The dissent objected to the judgment insofar as it declared unconstitutional R.C.M. § 53-114 which conditions the issuance of a license on the payment of property and license taxes. The dissent reasoned that although the holding in Moe mandated that the Reservation be considered a tax-free sanctuary, this should not prevent the state from requiring Indians to pay for the right to drive on off-reservation highways and the right to the protection afforded by the off-reservation machinery of the Registrar of Motor Vehicles.

3. Contentions: The appellants' (No. 74-1656) first contention is that the immunity from state taxation granted to the Indians of the Flathead Reservation is a racial discrimination in favor of Indians and against non-Indian citizens repugnant to fundamental principles of equal protection and due process. Appellants cite a host of due process and equal protection cases, e.g., Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Board of Education, 349 U.S. 294 (1954), in support of the proposition that the three-judge court decision forces Montana to engage in invidious discrimination based on race.

Appellants' second contention is that the immunity from taxation afforded the Flathead Reservation Indians is contrary to section 349 of the General Allotment Act, 25 U.S.C. § 349, and related legislation. Appellants cite the language



of section 349 which provides that at the termination of the trust period provided for in the Act the land was to be conveyed to the Indian in fee and the allottee "shall have the benefit of and be subject to the laws, both civil and criminal of the state or territory" in which he resided. Appellants recognize that the General Allotment Act became "inoperative" after the Indian Reorganization Act of 1934, 48 Stat. 984, but contend that it has not specifically been repudiated and is consistent with other federal legislation against discrimination.

Appellants' third contention is that the three-judge court relied on the federal instrumentality doctrine to establish jurisdiction here in the face of the § 1341 prohibition and that this is contrary to Mescalero and McClanahan. Appellants also contend that since jurisdiction over the action of the individual tribal members was upheld under 28 U.S.C. § 1343, this decision is in conflict with American Commuters Assoc., Inc. v. Levitt, 405 F.2d 1148 (2d Cir. 1969), and Bland v. McHann, 463 F.2d 21 (5th Cir. 1972), cert. denied, 410 U.S. 966 (1973), holding that allegations of deprivations of civil rights involved in collection of taxes do not permit an exception to the § 1341 prohibition.

In response appellees (No. 74-1656) in part cite the Treaty of Hell Gate which reserved for the "exclusive use and benefit" of the Salish and Kootenai Tribes the land encompassed by the Flathead Reservation and also the Montana Enabling Act of February 22, 1889, 25 Stat. 676, 677, which required the

state to disclaim all right and title to the Indian lands within its borders. They argue that there is no significant difference between the Flathead Reservation and the Navajo Reservation in McClanahan. Since there is no distinction between the taxes here and the income tax in McClanahan, the outcomes must be the same.

The cross-appellants (No. 75-50) contend that although the three-judge court correctly recognized that the Williams v. Lee, 358 U.S. 217, 220 (1959), test -- state laws are invalid when they reach the point of interfering with tribal self-government -- is applicable here, they misapplied it. The pre-collection of taxes with respect to sales to non-Indians interferes with tribal self-government since the Tribes are inhibited from exercising their tribal constitutional authority to impose a tax on the merchandise because the tribal retailers would then be placed at a competitive disadvantage. The Tribes are precluded from this source of revenue. Moreover, the three-judge court's decision is contrary to Warren Trading Post. Finally, cross-appellants contend that here, as in McClanahan, Montana has not assumed general jurisdiction over tribal members on the Reservation and there is no way the state can enforce the tax laws in question. Jurisdiction is the power to compel and the state lacks that power here. See 411 U.S. at 178-79.

Cross-appellees argue that the retail outlets were operated by individual Indians, not the Tribes. Cross-appellants are not comparable to the licensed traders in Warren Trading



Post. The tax is not upon the Indian seller, but the ultimate purchaser. There is in fact no requirement that the Indian seller prepay the tax to the wholesaler when he purchases cigarettes for resale. Sales to non-Indians without collection of the tax invites violation of criminal law by the non-Indian purchaser. R.S.M. § 84-5608.18 (1947). No decision of this Court suggests that such a result would find judicial acceptance.

4. Discussion: Despite the demise of the federal instrumentality doctrine as a reason for insulating Indian affairs from state tax laws, see Mescalero Apache Tribe v. Jones, supra, at 150 and cases cited therein, an exception to the § 1341 prohibition for actions brought by Indians appears reasonable in light of the special federal interest in their affairs. The three-judge court indicated that the legislative history of § 1341 demonstrated that it was intended to eliminate the disparity between the rights afforded citizens of a state, and nonresidents and foreign corporations who because of diversity jurisdiction were able to obtain injunctions in federal courts. This purpose would not be affected by the result here. The test of a "real and significant" federal interest in the particular group affected is perhaps too broad, however, since such an exception might arguably apply to any class of persons which the Congress has protected by statute. But see Bland v. McHann, supra at 24-25 (allegations of deprivations of civil rights involved in tax collections does not provide an exception to § 1341 prohibition).

Assuming that the three-judge court had jurisdiction then insofar as it held the Montana tax statutes unconstitutional, the result appears correct under Warren Trading Post, McClanahan, Williams, and the other decisions of this Court in this area. But, despite the fact (1) the cigarette tax was upon the final purchaser, not the Indian seller, (2) the stores were located so as to attract non-Indian business, and (3) the cigarettes are in no way connected with reservation production or manufacture, the holding that the cigarette excise tax with respect to sales on the Flathead Reservation to non-Indians is constitutional is questionable. This is particularly so because the cross-appellants assert that the state has not validly assumed general jurisdiction over the tribal members on the Reservation and consequently, as in McClanahan, it does not <sup>State may not</sup> have the jurisdiction necessary to enforce the tax. The three-judge court did not deal with this question. In its analysis of the validity of the <sup>tax on cigarette</sup> sales to Indians on the Flathead Reservation it assumed, arguendo, that the state had validly assumed complete criminal and limited civil jurisdiction over the Indians residing there. It then concluded that, even though subject to being enforced by criminal statutes, the taxing statutes were civil in nature, and that the prior limited assumption of civil jurisdiction did not support the taxing statutes here. why?

The appellees in both the main appeal and the cross-appeal have filed motions to affirm.

August 12, 1975

Palm

Ops in Appx to Appellants (No. 74-1656)  
Jur. Statement

*Greg - this sentence is a bit difficult*



Conference 9-29-75

Court USDC, D. Mont. Voted on....., 19...  
 Argued ....., 19... Assigned ....., 19... No. 75-50  
 Submitted ....., 19... Announced ....., 19... (Vide 74-1656)

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, ET AL., Appellants

vs.

JOHN C. MOE, ETC., ET AL.

7/9/75 Appeal filed.

*Uolt*  
 &  
*Consolidate*  
 with  
 74-1656

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		AB-SENT	NOT VOT-ING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Rehnquist, J.				✓									
Powell, J.				✓									
Blackmun, J.				✓									
Marshall, J.													
White, J.				✓									
Stewart, J.								✓					
Brennan, J.				✓									
Douglas, J.				✓									
Burger, Ch. J.								✓					

*or Postpone Jan 3*

Conference 9-29-75

Court USDC, D. Mont. Voted on....., 19...  
 Argued ....., 19... Assigned ....., 19... No. 74-1656  
 Submitted ....., 19... Announced ....., 19... 75-50

JOHN C. MOE, ETC., ET AL., Appellants  
 vs.

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD  
 RESERVATION, ET AL.

6/30/75 Appeal filed.

*Holding on  
 Anti-discrimination  
 Act said to be  
 imp. by Brennan*

*Note  
 ↓  
 Consolidate  
 with 1656*

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		AB-SENT	NOT VOT-ING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Rehnquist, J.				✓									
Powell, J.				✓									
Blackmun, J.				✓									
Marshall, J.													
White, J.				✓									
Stewart, J.								✓					
Brennan, J.				✓									
Douglas, J.				✓									
Burger, Ch. J.								✓					

*Join 3*