Fracking in the Badlands: Can Levying a Carbon Tax Against Oil and Gas Companies Help Native American Tribes Raise Revenue While Preserving Cherished Tribal Lands?

DANIEL GICK*

> "Our entire tribal culture and existence is based on the principle that the land equals the people, us; destroy one and you destroy the other."
>
> Corey Sanders, Resident of Fort Berthold[1]

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* Georgetown Law, J.D. 2017; Carleton College, B.A. 2013.

1. Curt Brown, *While North Dakota Embraces the Oil Boom, Tribal Members Ask Environmental Questions*, MINNEAPOLIS STAR TRIBUNE (Feb. 24, 2014), http://www.startribune.com/n-d-tribal-members-question-oil-boom-s-effects-on-sacred-land/233854981/.

INTRODUCTION

Fort Berthold, a Native American reservation[2] in rural North Dakota where approximately half of the 13,357-member Mandan, Hidatsa, and Arikara Nation ("MHA Nation") resides,[3] was long thought to be a barren wasteland "[of] gully, gumbo and clay."[4] A place where "[g]rass won't grow, and horses can't eat and cattle or buffalo can't hardly eat."[5] But within the past six years, oil tycoons have recognized Fort Berthold's drilling potential[6] and hydraulic fracturing or "fracking" has catalyzed the oil industry throughout North Dakota,[7] making the state the second-largest oil producer in the country.[8] The multibillion-dollar Fort Berthold Oil Boom has begun.

More than one-third of North Dakota's total oil output is now extracted from the MHA Nation's lands by oil and gas companies ("O&G companies") owned and operated by nonmembers.[9] This equates to approximately a quarter-million barrels a day.[10] As of October 2014, there are twenty-eight drilling rigs on Fort Berthold—fourteen on trust lands and fourteen on fee lands.[11] There are also 1250 active wells with drilling prepared for another 2150 wells.[12]

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2. The term "reservation" refers to a particular subtype of so-called "Indian country." Indian country is land where "Indian laws and customs and federal laws relating to Indians are generally applicable." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.04(1) Indian Country (Nell Jessup Newton ed., 2012) [hereinafter COHEN'S HANDBOOK]. Indian country includes, inter alia, "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151 (2012). Thus, Native American reservations encompass two types of land: trust and fee lands. COHEN'S HANDBOOK § 3.04(2)(c)(ii). Trust lands are those that are owned and managed by the Federal Government on behalf of the tribe. 25 C.F.R. 151.2(d) (1995). Fee land, on the other hand, is "a form of ownership status where the person may freely alienate and encumber title without federal approval." ACQUISITION OF TITLE TO LAND HELD IN FEE OR RESTRICTED FEE STATUS (FEE-TO-TRUST HANDBOOK), DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS 5 (June 28, 2016). Both tribal members and nonmembers may own fee land; whether owned by members or nonmembers, fee land is part and parcel of a tribe's legislative and adjudicatory jurisdiction. *See* Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 357–58 (1962) (holding that "Indian country" includes fee land owned by members and nonmembers of the tribe).

3. Brown, *supra* note 1.

4. Sari Horwitz, *Dark Side of the Boom: North Dakota's Oil Rush Brings Cash and Promise to Reservation*, WASH. POST (Sept. 28, 2014), http://www.washingtonpost.com/sf/national/2014/09/28/dark-side-of-the-boom/.

5. *Id.*

6. *See* Brown, *supra* note 1.

7. *See* Brown, *supra* note 1.

8. Ernest Scheyder, *Oil Producers Watch Closely as North Dakota Reservation Picks New Leader*, REUTERS (Nov. 3, 2014), http://www.startribune.com/oil-producers-watch-closely-as-north-dakota-reservation-picks-new-leader/281323821/.

9. *Id.*

10. Brown, *supra* note 1.

11. Winona LaDuke, *Time is Ripe to Stop Fracking at Ft. Berthold and Standing Rock*, NATIVE AM. TIMES (Oct. 9, 2014), http://www.nativetimes.com/index.php/life/commentary/10646-time-is-ripe-to-stop-fracking-at-ft-berthold-and-standing-rock.

12. *Id.*

Though the MHA Nation is earning record sums of money—about $1 million dollars each month—from leasing its oil-rich lands, the oil boom is coming at a great environmental cost.[13] For example, in what has become known as the Crestwood Spill, about a million gallons of briny—and possibly radioactive—fracking wastewater burst from a pipeline maintained by a nonmember oil and gas corporation.[14] This wastewater polluted a tributary of Lake Sakakawea, a source of drinking water for the MHA Nation.[15] Moreover, according to the *New York Times*, 850 oil-related environmental incidents were reported on Fort Berthold from 2007 through mid-October 2014, most of which went unpunished.[16] Due to the so-called Halliburton loophole in the Energy Policy Act of 2005, the effects of these incidents on the MHA Nation's drinking water is largely unknown.[17] This is because the loophole precludes the EPA from regulating the entire fracking industry under the Safe Drinking Water Act.[18]

The tribal chairman, Mark Fox, has vowed to increase environmental protection on Fort Berthold.[19] According to Mr. Fox, "[u]ntil now, the boom has brought more negative than positive . . . . But if we change our mentality, we can turn things around. We can remind the oil companies our land is sacred and they need to respect it."[20]

But such increased environmental protection regulation will cost money. The MHA Nation could increase its assets by raising the royalties earned from its oil and gas leases. But these increases could threaten, or even destroy, the tense negotiations the MHA Nation has been making with North Dakota.[21] Another option is for the MHA Nation to levy a novel tax—such as a carbon tax—against companies extracting oil and gas on the reservation. Theoretically, such a tax would serve the dual purpose of preserving an important source of income and reducing environmental harms associated with making that income.

In this Note, I use the MHA Nation as a case study to explore whether a Native American tribe could and should levy such a carbon tax. First, I ask whether the MHA Nation has the legislative authority necessary to implement a carbon tax

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13. Brown, *supra* note 1.

14. LaDuke, *supra* note 11; Lisa Song, *'Saltwater' From North Dakota Fracking Spill Is Not What's Found in the Ocean*, INSIDECLIMATE NEWS (July 16, 2014), http://www.bloomberg.com/news/2014-07-16/-saltwater-from-fracking-spill-is-not-what-s-found-in-the-ocean.html.

15. Song, *supra* note 14.

16. Deborah Sontag & Brent McDonald, *In North Dakota, a Tale of Oil, Corruption and Death*, N.Y. TIMES (Dec. 28, 2014), http://www.nytimes.com/2014/12/29/us/in-north-dakota-where-oil-corruption-and-bodies-surface.html?emc=eta1.

17. *See* LaDuke, *supra* note 11.

18. Mike Soraghan, *Hydraulic Fracturing: Senate Votes to Keep 'Halliburton Loophole'*; *Regulation Stays with States*, E&E PUBLISHING (Jan. 29, 2015), http://www.eenews.net/stories/1060012514.

19. Sontag & McDonald, *supra* note 16.

20. *Id.*

21. Ernest Scheyder, *North Dakota Native Americans Hint at Exiting State Oil Tax Deal*, REUTERS (June 14, 2015), http://www.reuters.com/article/2015/07/14/us-north-dakota-tribes-taxation-idUSKCN0PO2OY20150714#mHd4mxWQVFy1SAhY.97.

over O&G companies doing business on (A) trust lands and (B) fee lands. I conclude that, although the MHA Nation most likely has the power to issue the tax against O&G companies operating on trust lands, it most likely lacks the authority to do so against companies operating on fee lands. Second, I address what risks the MHA Nation would assume should it decide to impose a carbon tax. Specifically, I discuss double taxation and retroactivity, concluding that (a) the MHA Nation runs the risk of North Dakota imposing its own carbon tax against the same businesses operating on the reservation, and (b) the tax may be declared unconstitutional if applied retroactively. With these principles in mind, I ultimately conclude that it is not in the best interest of the MHA Nation to impose a carbon tax.

I. WHETHER THE MHA NATION HAS THE AUTHORITY TO IMPOSE A CARBON TAX OVER O&G COMPANIES OPERATING ON (A) TRUST LANDS AND (B) FEE LANDS

A. THE MHA NATION MOST LIKELY WOULD BE ABLE TO IMPOSE A CARBON TAX OVER O&G COMPANIES OPERATING ON TRUST LANDS

The MHA Nation, like all Native American tribes, most likely has the power to levy a carbon tax against O&G companies doing business on trust lands. In *Washington v. Confederated Tribes of Colville Indian Reservation,* the Court held that "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status."[22] Thus, tribal taxing power is a fundamental attribute of sovereignty, so long as the tribe taxes (a) transactions (b) occurring on trust lands (c) significantly involving the tribe or its members, assuming that neither (d) Congressional statute nor (e) the tribe's dependent status has divested this power.

O&G companies operate on Fort Berthold trust lands through lease agreements, which are *Colville* transactions. This is because the leased trust lands significantly affect the tribe by providing it revenue in exchange for the use of its land. What is less clear is whether environmental harms resulting from these leases constitute a transaction within the meaning of *Colville*. Environmental harms must constitute a *Colville* transaction because, if the MHA Nation were to impose a carbon tax, it would be taxing the harm resulting from the leased land, rather than the leased land itself. Environmental harms may either be thought of as (1) a consequence, and so an extension, of the initial lease agreements or (2) a separate transaction divorced from the initial lease agreements, whereby O&G companies essentially provide the MHA Nation (unwanted) environmental harms. Under both lines of reasoning, the MHA Nation satisfies parts (c) (whether the

22. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152 (1980).

transaction significantly involves the tribe or its members) and (d) (whether Congress has divested the tribe of the power to tax in this instance) of the *Colville* test. This is because (1) the harms involve (or affect) the health of the MHA Nation's members, and (2) Congress has not divested the MHA Nation of its power to levy a carbon tax against nonmembers. What is less clear is part (e) (whether the MHA Nation's power to levy a carbon tax against O&G companies has been necessarily divested by implication of its dependent status). But in *Merrion v. Jicarilla Apache Tribe*,[23] the Court strongly suggested that a tribe's taxation power is not so divested.[24]

In *Merrion*, the Court decided whether a Native American tribe may levy and collect a tax against nonmembers doing business on trust lands within the reservation.[25] The Jicarilla Apache Tribe, after obtaining approval from the Secretary of the Interior, levied a severance tax against nonmembers, who, pursuant to long-term leases, extracted oil and gas from trust lands.[26] Justice Thurgood Marshall, writing for the majority, concluded that a Native American tribe has the "inherent power"[27] to levy a severance tax which derives not from a tribe's power to exclude, but from a tribe's "general authority, as sovereign, to control economic activity within its jurisdiction."[28] Relying on *Colville*, the Court reiterated that tribal taxing power is "a fundamental attribute of sovereignty . . . because it is a necessary instrument of self-government and territorial management."[29] Tribal taxing power "enables a tribal government to raise revenues for its essential services."[30] These statements imply that, although the Court did not expressly say so, the tribe's dependent status cannot divest its taxing power, because such a fundamental and necessary aspect of tribal government providing essential services to its people cannot be so divested.

With these principles in mind, were the MHA Nation to levy a carbon tax against O&G companies doing business on trust lands, a court would most likely uphold that tax under *Colville* and *Merrion*. As previously stated, whether environmental harms are (a) a consequence of the initial lease agreements or (b) a separate transaction divorced from the initial lease agreements, they involve (or affect) the health of its members. Neither Congress nor the MHA Nation's dependent status has divested it of its taxing power. Thus, a carbon tax would be upheld.[31]

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23. 455 U.S. 130 (1982).
24. *See id.* at 137.
25. *Id.* at 133.
26. *Id.* at 135–36.
27. *Id.* at 140–41.
28. *Id.* at 137.
29. *Id.*
30. *Id.*
31. There is one limitation on *Merrion's* broad statements concerning tribal taxing power against nonmembers: "[T]he tribe's interest in levying taxes on nonmembers to raise revenues for essential governmental

In the alternative, assuming, as the *Merrion* dissent did, that tribal taxing power derives only from a tribe's power to exclude,[32] the MHA Nation still has the inherent power to impose a carbon tax. In *Merrion*, the Court reasoned that a tribe's power to exclude nonmembers "necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct, such as a tax on business activities conducted on the reservation."[33] A carbon tax would constitute a condition on continued presence for O&G companies that did business on Fort Berthold before the tax is imposed[34] or a condition on entry for O&G companies that come to Fort Berthold after the tax is imposed. Therefore, assuming, *arguendo*, that the MHA Nation's power to levy a carbon tax against O&G companies operating on trust lands derives only from its power to exclude, the tax would be upheld.

B. THE MHA NATION MOST LIKELY WOULD NOT BE ABLE TO IMPOSE A CARBON TAX OVER O&G COMPANIES OPERATING ON FEE LANDS

The MHA Nation, like all Native American tribes, may levy a carbon tax against O&G companies that drill on reservation fee land only if it can satisfy one or both of the *Montana* exceptions. *Montana v. United States*[35] "is the pathmarking case concerning tribal civil authority over nonmembers."[36] In *Montana*, the Supreme Court held that "the inherent sovereign powers of an Indian tribe [generally] do not extend to the activities of nonmembers."[37] Tribes may not regulate "beyond what is necessary to protect tribal self-government or to control

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programs is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services." *Merrion*, 455 U.S. at 138 (internal quotations omitted). Whether environmental harms are considered (1) a consequence, and so an extension, of the initial lease agreements or (2) a separate transaction divorced from the initial lease agreements, they involve (i.e. cause harm to) the MHA Nation. And, like in *Merrion*, the taxpayers (i.e. O&G companies) receive tribal services. As in *Merrion*, O&G companies operating on Fort Berthold "benefit from the provision of police protection and other governmental services, as well as from the advantages of a civilized society that are assured by the existence of tribal government." *Id.* at 137–38 (internal quotations omitted). Thus, this limitation on tribal taxing power is unlikely to affect whether the MHA Nation may levy a carbon tax.

32. *Id.* at 137, 149.

33. *Id.* at 144.

34. In *Merrion*, the initial contracts between the nonmember lessees and the tribe did not include any provisions regarding a severance tax. 455 U.S. at 148. However, the Court did not find this fact dispositive: "The fact that the tribe chooses not to exercise its power to tax when it initially grants a non-Indian entry onto the reservation does not permanently divest the tribe of its authority to impose such a tax." *Id.* at 145. Holding otherwise "confuse[s] the Tribe's role as commercial partner with its role as sovereign," *id.*, which "denigrates Indian sovereignty." *Id.* at 146. Thus, the fact that the MHA Nation has not heretofore imposed a carbon tax against O&G companies operating on trust lands is not dispositive; a tribe does not lose an inherent power through silence in a lease agreement or other contract. *Id.* at 145. Only by expressly waiving an inherent sovereign power, presumably, would a tribe lose that power. *See id.* Thus, the MHA Nation can impose a carbon tax on O&G companies doing business on the reservation on which heretofore it has not imposed a carbon tax.

35. 450 U.S. 544 (1981).

36. Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997); *accord* Nevada v. Hicks, 533 U.S. 353, 358 (2001).

37. *Montana*, 450 U.S. at 565.

internal relations;"[38] that is, tribes at least have the authority "to punish tribal offenders, to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members."[39]

There are two important exceptions to the *Montana* presumption against tribal jurisdiction of nonmembers on fee lands. Known as the *Montana* exceptions, they are:

1. "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;"[40] or
2. "A tribe may . . . exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[41]

The *Montana* exceptions thus "concern regulation of the *activities* of nonmembers or the *conduct* of non-Indians on fee land."[42] They are "limited,"[43] and "cannot be construed in a manner that would swallow the rule."[44]

The MHA Nation, like all Native American tribes, most likely will not be able to levy a carbon tax on O&G companies doing business on reservation fee lands. In *Montana* itself and in several subsequent cases, the Supreme Court has made clear that *Montana* applies where a tribe exercises jurisdiction over nonmembers on fee lands.[45] This includes where a tribe levies a tax against nonmembers doing business on fee lands. In *Atkinson Trading Co. v. Shirley*,[46] the Court addressed whether the Navajo Nation may impose a hotel occupancy tax on a nonmember

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38. *Id.* at 564.

39. Nevada v. Hicks, 533 U.S. at 360–61 (quoting Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997)).

40. *Montana*, 450 U.S. at 565.

41. *Id.* at 566.

42. Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 330 (2008) (emphasis in original) (internal quotations omitted).

43. *Id.*

44. *Id.* (internal quotations omitted).

45. *See, e.g.*, Atkinson Trading Co. v. Shirley, 532 U.S. 645, 654 (2001). However, the Court has never explicitly decided whether *Montana* controls when a tribe is exerting civil jurisdiction over nonmembers on trust lands. In *Nevada v. Hicks*, 533 U.S. 353 (2001), Justice Scalia, writing for the Court, found that land ownership status "is only one factor to consider," although "[i]t may sometimes be a dispositive factor." *Id.* at 360. But the Court in *Nevada* "expressly limited" its holding to the facts of the case, leaving open the question of whether *Montana* applies to tribal jurisdiction over nonmembers generally. *See, e.g.*, Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 813 (9th Cir. 2011). Moreover, the Court "did not overrule its own precedent specifying that *Montana* ordinarily applies only to [fee] land." *Id.* Accordingly, some circuit courts have subsequently held that *Montana* does not apply where a tribe exerts authority over nonmembers on trust lands. *See id.* at 812–14 (upholding—under tribe's inherent power to exclude—a tribe's ejection of a nonmember business operating on trust lands that was violating the terms of a lease).

46. Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).

business (the Atkinson Trading Company) operating on fee land.[47] The Court found the tax to be invalid, concluding that a tribal tax levied against a nonmember on fee land is "presumptively invalid"[48] and will only be upheld if the tribe can demonstrate the applicability of at least one of the *Montana* exceptions.[49] The Court reasoned that although *Merrion* (*see* section I.A above) contained broad language suggesting the validity of the tribal taxes levied against nonmembers, *Merrion* "was careful to note" that tribal taxing power "only extended to transactions occurring on trust lands and significantly involving a tribe or its members."[50] *Merrion* did not, the Court concluded, "exempt taxation from *Montana's* general rule that Indian tribes lack civil authority over nonmembers on non-Indian fee land."[51] Because tribes may not regulate "beyond what is necessary to protect tribal self-government or to control internal relations,"[52] a tribal tax levied against nonmembers on fee land is "presumptively invalid"[53] and will only be upheld if the tribe can demonstrate the applicability of one of the *Montana* exceptions.[54]

If the MHA Nation were to levy a carbon tax against O&G companies, under *Atkinson Trading Co.*, that tax would be presumptively invalid and would only be upheld if at least one of the Montana exceptions applies. The burden is on the tribe to prove the applicability of the *Montana* exceptions.[55] The MHA Nation is unlikely to satisfy the first *Montana* exception. The first *Montana* exception requires a consensual relationship to exist between the tribe and the nonmember.[56] A consensual relationship "must stem from commercial dealing, contracts, leases, or other arrangements."[57] Where a nonmember company is doing business on fee lands, neither a contract nor lease agreement between the company and the tribe is required. "*Montana* and [other precedent] establish that when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands."[58] Thus, in this case, an O&G company does not need the MHA Nation's consent—through contract or lease—to enter onto Fort Berthold fee lands. Thus, if the first *Montana* exception is to apply, it must be through other arrangements. But, in *Atkinson Trading Co.*, the Court narrowly construed the meaning of other

47. *See id.* at 647–48.
48. *Id.* at 659.
49. *Id.* at 658–59.
50. *Id.* at 653 (internal quotations omitted).
51. *Id.* at 654.
52. *Id.* at 650.
53. *Id.* at 659.
54. *Id.*
55. Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 330 (2008).
56. Montana v. United States, 450 U.S. 544, 565 (1981).
57. *Atkinson Trading Co.*, 532 U.S. at 655 (internal quotations omitted).
58. South Dakota v. Bourland, 508 U.S. 679, 689 (1993).

arrangements. In rejecting the Navajo Nation's tax,[59] the Court held that the "actual or potential receipt of [tribal] services" by the hotel and its guests did not constitute the requisite nexus between tribe and nonmember as required under the first *Montana* exception.[60] The Court reasoned that if receipt of such services constituted an other arrangement under the first *Montana* exception, "the exception would swallow the rule."[61] This is because "[a]ll non-Indian fee lands within a reservation benefit, to some extent, from the advantages of a civilized society offered by the Indian tribe."[62] Relying on *Strate v. A-1 Contractors*,[63] where the Court had held that nonmembers had not entered into a consensual relationship with the tribe by availing themselves of tribal police protection while traveling on reservation roads,[64] the Court "reject[ed] [the Navajo Nation's] broad reading of *Montana's* first exception, which ignores the dependent status of Indian tribes and subverts the territorial restriction upon tribal power."[65]

As in *Atkinson Trading Co.*, the principle link between the MHA Nation and O&G companies operating on Fort Berthold fee land is the receipt of tribal services. This is because neither lease nor contract with the MHA Nation is necessary for an O&G company to enter Fort Berthold fee lands. But, as the Court in *Atkinson Trading Co.* made clear, the receipt of tribal services—actual or potential—is insufficient to constitute an other arrangement within the meaning of the first *Montana* exception. Holding otherwise would cause "the exception [to] swallow the rule."[66] Thus, the MHA Nation is unlikely to satisfy the first *Montana* exception.

Furthermore, in *Nevada v. Hicks*,[67] Justice Scalia suggested in a footnote that an other arrangement is "clearly another private consensual relationship."[68] This statement is dictum and was hotly contested by Justice O'Connor in her concurring opinion.[69] Perhaps this was because it essentially reads other arrangement out of the first *Montana* exception, for what is a private consensual relationship if not a contract or lease? But if a court were to follow Justice Scalia's suggestion, where, as here, a nonmember company does not need the tribe's consent—through lease, contract, or otherwise—to enter fee land, the tribe

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59. *See Atkinson Trading Co.*, 532 U.S. at 647.
60. *See id.* at 655.
61. *Id.*
62. *Id.* (internal quotations omitted).
63. 520 U.S. 438, 455–56 (1997).
64. *See id.* at 456–57.
65. *Atkinson Trading Co.*, 532 U.S. at 655.
66. *Id.*
67. 533 U.S. 353 (2001).
68. *Id.* at 359 n.3.
69. *Id.* at 392 ("The majority in this case dismisses the applicability of [the first *Montana*] exception in a footnote, concluding that any consensual relationship between tribes and nonmembers 'clearly' must be a 'private' consensual relationship 'from which the official actions at issue in this case are far removed.'") (citing *id.* at 359 n.3).

could never satisfy the first *Montana* exception, unless the company voluntarily chooses to enter into contract with the tribe. To my knowledge, no such contracts have been executed at Fort Berthold.

The MHA Nation may satisfy the second *Montana* exception, although the probability of satisfaction would depend on what standard the court employs. Case law concerning the scope of the second *Montana* exception is murky at best. On the one hand, in a footnote dropped in *Atkinson Trading Co.*, Chief Justice Rehnquist wrote that "unless the drain of the nonmember's conduct upon tribal services and resources is so severe that it actually 'imperils' the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands."[70]

The MHA Nation is unlikely to satisfy the second *Montana* exception under the *Atkinson Trading Co.* standard. Oil spills and other environmental harms, even those with the same magnitude as the Crestwood Spill, are unlikely to drain the tribe of its services and resources so severely as to imperil its political integrity. Under Chapter 15 of the MHA Environmental Code, the MHA Nation can recover damages and fines from companies, like Crestwood, that are responsible for spills.[71] Because the MHA Nation need not foot the bill for an environmental harm caused by an O&G company, a court is unlikely to hold that nonmember companies drain the MHA Nation of its services and resources so severely as to imperil its political integrity.

On the other hand, in *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*,[72] Justice White, writing for the plurality of the Court, found that, for the second *Montana* exception to apply, the impact "must imperil the political integrity, the economic security, or the health and welfare of the tribe."[73] This standard is less demanding than that promulgated under *Atkinson Trading Co*. Whereas under *Atkinson Trading Co.*, the second *Montana* exception concerns only the political integrity of the tribe, the *Brendale* understanding includes a concern for tribal health and welfare. The health and welfare of the MHA Nation is at risk when O&G companies release toxic wastewater onto fee lands. This is especially true when, as in the Crestwood Spill, wastewater leaks onto both fee and trust lands and nearly comes into contact with the tribe's drinking water

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70. *Atkinson Trading Co.*, 532 U.S. at 657 n.12. *Plains Commerce* may be in accord. Chief Justice Roberts, writing for the majority, noted that nonmember conduct must not only "imperil" the tribe but also must be such that "tribal power [is] necessary to avert catastrophic consequences." Plains Commerce Bank v. Long Family Land & Cattle Co., 544 U.S. 316, 341 (2008) (internal quotations omitted). Although Roberts addressed only whether the case at bar was catastrophic for tribal self-government, he did not *per se* hold that consequences catastrophic for economic security or health and welfare may not satisfy the second *Montana* exception. *See id.*

71. MHA NATION NATURAL RESOURCES STAFF, MHA NATION, CRESTWOOD/ARROW BEAR DEN SPILL 3 (July 8, 2014), http://www.mhanation.com/main2/Home_News/Home_News_2014/News_2014_09_September/Crestwood%20Arrow%20Bear%20Den%20Spill.pdf.

72. 492 U.S. 408 (1989).

73. *Id.* at 431.

sources.[74] Imperil, however, is still a high threshold, and so whether environmental harms such as the Crestwood Spill imperil the health and welfare of the tribe under *Brendale* is uncertain.

In *Plains Commerce Bank v. Long Family Land & Cattle Co.*, Chief Justice Roberts, writing for the majority, wrote that "[t]he uses to which the land is put . . . may well affect the tribe and its members . . . . [T]he tribe may quite legitimately seek to protect its members from noxious uses that threaten tribal welfare or security."[75] It seems likely that potentially radioactive spills like Crestwood[76] would constitute a noxious use under the *Plains Commerce* standard. Thus, the second *Montana* exception may apply because O&G companies satisfy the "noxious use" test under *Plains Commerce*.

C. INTERIM SUMMARY: A TRIBAL CARBON TAX IS MOST LIKELY FEASIBLE ON TRUST LANDS AND INFEASIBLE ON FEE LANDS

In sum, although the MHA Nation most likely has the legislative authority to impose a carbon tax against O&G companies operating on trust lands, it likely lacks the authority to do so against companies operating on fee lands. This principle applies to all other Native American tribes seeking to levy a carbon tax. Assuming the power to tax derives from the MHA Nation's inherent sovereignty, the tax would be upheld. Whether environmental harms are (a) a consequence of the initial lease agreements or (b) a separate transaction divorced from the initial lease agreements, they involve (or affect) the health of the MHA Nation's members, and neither Congress nor the MHA Nation's dependent status has divested the MHA Nation of its taxing power. In the alternative, assuming the power to tax derives from the MHA Nation's power to exclude, a carbon tax would be valid because it would constitute a condition on entry or continued presence on the reservation.

In contrast, the MHA Nation lacks the authority to levy a carbon tax against nonmembers operating on fee lands. To impose a tax against nonmembers on fee land, the MHA Nation must satisfy either the first or second *Montana* exception. Under the first *Montana* exception, there must be a "consensual relationship" between tribe and nonmember, which "must stem from commercial dealing, contracts, leases, or other arrangements."[77] Because no such arrangements exist between the MHA Nation and the O&G companies, the first *Montana* exception does not apply. In the alternative, under the second *Montana* exception, the nonmember's activities must "imperil the political integrity of the tribe" only;[78]

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74. MHA NATION NATURAL RESOURCES STAFF, *supra* note 71, at 3.
75. Plains Commerce Bank v. Long Family Land & Cattle Co., 544 U.S. 316, 336 (2008).
76. Song, *supra* note 14.
77. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 655 (2001).
78. *Id*. at 657 n.12.

"imperil the political integrity, the economic security, or the health and welfare of the tribe;"[79] or, constitute a "noxious use that threatens tribal welfare or security,"[80] depending on which standard is applied. Because "imperil" is such a high threshold, it is unlikely that the environmental harms caused by O&G companies will be found to imperil the tribe, although they may constitute a noxious use.

II. WHAT RISKS WOULD THE MHA NATION ASSUME SHOULD IT IMPOSE A CARBON TAX AGAINST O&G COMPANIES?

A. THE MHA NATION RISKS THAT O&G COMPANIES WILL BE SUBJECT TO DOUBLE TAXATION SHOULD IT DECIDE TO LEVY THE CARBON TAX

Assuming the MHA Nation chooses to impose a carbon tax against O&G companies operating on Fort Berthold, it assumes the risk that North Dakota will impose its own version of the tax on the same businesses.[81] This risk—known as double taxation—would apply to any other Native American tribe seeking to levy a carbon tax against nonmembers.

In *White Mountain Apache Tribe v. Bracker*, the Court invalidated two state taxes imposed on nonmembers doing business on reservation lands.[82] Arizona imposed two taxes—a motor carrier license and a use fuel tax—on a nonmember logging company that used roads located exclusively within the White Mountain Apache Tribe's reservation.[83] The Court applied a test balancing the tribal, state, and federal interests at stake:

> This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.[84]

The Court concluded that

> [where] the Federal Government has undertaken comprehensive regulation of the [activity at issue], where a number of the policies underlying the federal regulatory scheme are threatened by the taxes [the state] seek[s] to impose, and where [the state] [is] unable to justify the taxes except in terms of a generalized interest in raising revenue, we believe that the proposed exercise of state authority is impermissible.[85]

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79. Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 431 (1989).
80. Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 336 (2008).
81. *See, e.g.*, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 190 (1989).
82. 448 U.S. 136, 151–53 (1980).
83. *Id.* at 137–38.
84. *Id.* at 145.
85. *Id.* at 151.

If the MHA Nation were to levy a carbon tax against O&G companies doing business on the reservation, and if North Dakota were to levy the same tax, a court, weighing the tribal, federal, and state interests, would most likely conclude that North Dakota's tax is not preempted by federal law.

First, a court would address the tribal interest at stake and most likely would conclude that the tribal interests do not weigh in favor of preemption. Where the economic burden of a state tax does not fall on the tribe, a court is less likely to hold that the state tax is preempted.[86] In *Cotton Petroleum Corp. v. New Mexico*, a post-*Bracker* case, the Court upheld the New Mexico district court's finding "that no economic burden falls on the tribe by virtue of the state taxes, and that the Tribe could, in fact, increase its taxes without adversely affecting on-reservation oil and gas development."[87] This fact was dispositive: although New Mexico's taxes had "at least a marginal affect on the demand for on-reservation leases, the value to the Tribe of those leases, and the ability of the Tribe to increase its tax rate," these effects were "too indirect and too insubstantial" to preempt the state tax.[88]

The economic burden of North Dakota's carbon tax most likely would not fall on the MHA Nation. It is certain that O&G companies—not the MHA Nation or its members—would pay the carbon tax. Less certain is to what extent North Dakota's carbon tax would "adversely affect[] on-reservation oil and gas development." In *Colville*, the Court found that where "tribal retailers will actually be placed at a competitive disadvantage, as compared to retailers elsewhere, due to the overlapping impact of tribal and state taxation . . . . this argument is not without force."[89] Thus, if overlapping state and tribal carbon taxes would place the tribe at a competitive disadvantage vis-à-vis the state, the state tax most likely will adversely affect economic development and may be invalidated. The Court in *Colville* was unwilling to find that a single tax levied by the tribe and the state placed the tribe at a competitive disadvantage,[90] and so it is unlikely that a single carbon tax would adversely affect economic development and be invalidated. But if an O&G company on Fort Berthold faces multiple double taxes—say, a severance tax and a carbon tax—a court may be willing to find that the state tax is preempted. Given that there is a possibility that O&G companies on Fort Berthold may face multiple double taxes,[91] a court may find that the MHA Nation's interests weigh in favor of preemption, but only if that possibility is realized. Thus, a court is most likely to hold that the tribal interests do not weigh in favor of preemption.

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86. *See* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 185–186 (1989).
87. *Id.* at 185 (internal citations omitted).
88. *Id.* at 186–87.
89. Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 157 (1980).
90. *See id.* at 170–71.
91. *See* Scheyder, *supra* note 21.

Second, a court, addressing the federal interests at stake, is most likely to conclude that the federal interests do not weigh in favor of preemption. Where federal regulations govern the daily activities of the industry at issue, a court is more likely to find that the federal regulations are extensive, which weighs in favor of preemption.[92] In *Bracker*, the Court held that "the federal regulatory scheme is so pervasive as to preclude [the state taxes]."[93] The roads at issue were "built, maintained, and policed exclusively by the Federal Government, the Tribe, and its contractors."[94] Under the regulations promulgated by the Bureau of Indian Affairs ("BIA"),[95] not only must BIA approve any contract between the non-Native and Native timber companies operating on the reservation, but it must also draft some of the contracts between the companies.[96] Moreover, "[BIA] regulate[s] the cutting, hauling, and marking of timber by [the companies]."[97] And BIA determines "how much timber will be cut, which trees will be felled, which roads are to be used, which hauling equipment [the timber company] should employ, the speeds at which logging equipment may travel, and the width, length, height, and weight of loads."[98] The Court concluded that the BIA "exercises literally daily supervision over the harvesting and management of tribal timber."[99]

In contrast, the federal regulatory scheme governing oil and gas extraction on Fort Berthold is scant. Under the Federal Land Policy and Management Act ("FLPMA"), Native American mineral leasing laws, and other environmental statutes, the Bureau of Land Management ("BLM") "administer[s] oil and gas operations in a manner that protects Federal and Indian lands while allowing for appropriate development of the resource."[100] On March 26, 2015, BLM promulgated a final rule regarding fracking on public and Native American lands ("Rule"). The Rule provides "a strong framework for the environmentally safe and economically viable development of onshore oil and gas that addresses such issues as water protection, public disclosure of chemicals, and well-bore integ-

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92. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 148 (1980).

93. *Id.* at 148.

94. *Id.* at 150.

95. For example, the regulations "restrict clear-cutting, § 141.5; establish comprehensive guidelines for the sale of timber, § 141.7; regulate the advertising of timber sales, §§ 141.8, 141.9; specify the manner in which bids may be accepted and rejected, § 141.11; describe the circumstances in which contracts may be entered into, §§ 141.12, 141.13; require the approval of all contracts by the Secretary, § 141.13; call for timber-cutting permits to be approved by the Secretary, § 141.19; specify fire protective measures, § 141.21; and provide a board of administrative appeals, § 141.23. Tribes are expressly authorized to establish commercial enterprises for the harvesting and logging of tribal timber. § 141.6." *Id.* at 147.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Final Rule, 80 Fed. Reg. 16,127, 16,129 (March 26, 2015) (to be codified at 43 C.F.R. 3160).

rity."[101] However, prior to the release of the Rule, no federal rules had been promulgated addressing "the increased complexities of hydraulic fracturing" for over three decades.[102] Moreover, litigation stayed the effective date of the Rule.[103] In sum, although BLM has the authority, under FLPMA, Native American mineral leasing laws, and other environmental statutes to promulgate rules regulating fracking on Native American lands, the agency released its first such rule in over thirty years, and that rule has been stayed. Although other federal agencies have some additional regulatory authority over oil and gas extraction on Native American lands,[104] the extent thereof is much less than that of BIA's regulation of the timber industry in *Bracker*. Thus, a court is unlikely to find that the federal interests at stake weigh in favor of preemption.

Third, a court would address the state interests at stake and most likely conclude that the state interests are sufficient to overcome preemption. First, where a state provides "substantial services" to the tribe and the nonmember companies operating on the reservation, a court is more likely to find that the state interests are sufficient.[105] In *Cotton Petroleum*, New Mexico provided such services totaling three million dollars per year.[106] Although the amount of services was arguably disproportionate to the amount the state extracted in taxes, the Court did not find this dispositive.[107] Thus, an extreme reading of *Cotton Petroleum* suggests that even where the state provides a *de minimis* amount of services to a nonmember company, it has a legitimate monetary interest in imposing its tax. Thus, should North Dakota wish to impose its own carbon tax, it need only provide at least a *de minimis* amount of services to O&G companies operating on the MHA Nation's lands to demonstrate its legitimate interest in the tax.

Moreover, in *Cotton Petroleum*, the Court distinguished the "exclusive" federal and tribal regulations in *Bracker* with the "extensive" federal and tribal

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101. BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR, ENVIRONMENTAL ASSESSMENT MARCH 2016 OIL & GAS LEASE SALE 147 (2016), https://eplanning.blm.gov/epl-front-office/projects/nepa/52704/63990/69333/March_2016_Oil_and_Gas_Lease_Sale_Print_PDF.pdf.

102. *Id.*

103. *Id.*

104. For example, under the Clean Air Act, EPA has limited authority to promulgate rules to reduce air pollution caused by drilling on Native American lands. *See, e.g.*, Managing Emissions From Oil and Natural Gas Production in Indian Country, 79 Fed. Reg. 32,502 (to be codified at 40 C.F.R. pt. 49). However, in general, EPA lacks authority over the oil and gas sector (on Native American lands or otherwise) in whole or in part under Comprehensive Environmental Response, Compensation, and Liability Act, Resource Conservation and Recovery Act, Safe Drinking Water Act, Clean Water Act, Clean Air Act, National Environmental Policy Act, and the Toxic Release Inventory under the Emergency Planning and Community Right-to-Know Act. *See* RENEE LEWIS KOSNIK, OIL & GAS ACCOUNTABILITY PROJECT, THE OIL AND GAS INDUSTRY'S EXCLUSIONS AND EXEMPTIONS TO MAJOR ENVIRONMENTAL STATUTES 2 (2007), https://www.shalegas.energy.gov/resources/060211_earthworks_petroleumexemptions.pdf.

105. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 185 (1989).

106. *Id.*

107. *Id.*

regulations in *Cotton Petroleum*. The Court noted that "the State regulates the spacing and mechanical integrity of wells located on the reservation. Thus, although the federal and tribal regulations in this case are extensive, they are not exclusive, as were the regulations in *Bracker*."[108] This suggests that even where federal and tribal regulations are extensive, the state interests at stake may be sufficient to overcome preemption.

As previously suggested, the federal regulations governing oil and gas production on Native American lands are neither exclusive nor extensive. Moreover, although the MHA Nation has promulgated ordinances concerning some aspects of the oil and gas industry,[109] tribal regulations are also quite scant. In contrast, North Dakota has taken the lead in issuing regulations governing the oil and gas operations in the state. Under North Dakota Law, the Industrial Commission has the authority "to adopt and to enforce rules and orders . . . [concerning] locations within this state which may also be under the jurisdiction of the federal government or a tribal government."[110] Like New Mexico in *Cotton Petroleum*, the Industrial Commission promulgated regulations under this authority to regulate the spacing[111] and mechanical integrity[112] of wells. Furthermore, North Dakota's environmental regulatory agencies do affirmatively monitor all aspects of the oil companies' development and production processes and protocols so as to either avoid or to quickly remedy any substantial threat to the state's environmental interests and values. As a result, "[t]hese same agencies can, and have, levied hefty fines on those oil companies that have allowed substantial environmental damage to occur."[113] Because North Dakota's regulations are more extensive than the combination of federal and tribal regulations, a court will most likely hold that the state interests are sufficient to overcome preemption.

B. THE MHA NATION RISKS THAT THE TAX MAY BE INVALIDATED ON THE GROUND THAT IT VIOLATES THE CONSTITUTIONAL RIGHTS OF O&G COMPANIES

If the MHA Nation chooses to impose a carbon tax, it must decide, like all Native American tribes choosing to impose a carbon tax, whether to levy the tax (1) against only those O&G companies *who will do business* on the reservation or (2) against those O&G companies *who are doing business and who will do business* on the reservation. For the sake of succinctness, I will call the first

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108. *Id.* at 185–86.

109. *See* MHA NATION ENERGY DIVISION, MHA NATION, MHA ENERGY (July 2013), http://www.mhanation.com/main2/departments/mha_energy_division/mha_energy_website/MHA%20Nation%20Energy%20Division%20Regulatory%20Handbook.pdf. For example, the MHA Nation has promulgated regulations concerning disposal of waste from oil and gas drilling. *See id.* at 6.

110. N.D. CENT. CODE § 38-08-04 (2017).

111. *See* N.D. CENT. CODE § 38-08-07 (2017); *see also* N.D. ADMIN. CODE § 43-02-03-18 (2017).

112. N.D. ADMIN. CODE § 43-02-05-07 (2017).

113. Raymond Cross, *Development's Victim or Its Beneficiary?: The Impact of Oil and Gas Development on the Fort Berthold Indian Reservation*, 87 N.D. L. REV. 535, 539–40 (2011).

option a prospectively applied tax and the second option a retroactively applied tax. Under the first option, the MHA Nation would grandfather in companies already doing business on Fort Berthold, and so the tax would be meaningless if no new companies begin operations on the reservation after the tax is imposed. Under the second option, the MHA Nation would impose the tax on all O&G companies—present and future. Although this would preclude the MHA Nation from issuing a mere paper tax, it inherently assumes the risk that the tax may be invalidated on the ground that it violates the constitutional rights of O&G companies. In *Merrion*,[114] Justice Stevens, dissenting with two Justices, implied that a retroactively applied tax violates the constitutional rights of nonmembers on the reservation:

> Tribal powers over nonmembers are appropriately limited because nonmembers are foreclosed from participation in tribal government. [Where] the power to tax is limited to situations in which the tribe has the power to exclude, then the nonmember is subjected to the tribe's jurisdiction only if he accepts the conditions of entry imposed by the tribe. . . . [This accords with] the fundamental principle . . . in this Nation [that] each sovereign governs only with the consent of the governed.[115]

Justice Stevens implies that where a tribe imposes a tax as a condition on continued presence on the reservation, the tax is a violation of that nonmember's constitutional rights.

Plains Commerce Bank v. Long Family Land & Cattle Co.,[116] the Court's most recent opinion on Native American sovereignty, seems to be in accord with Justice Stevens' dissent in *Merrion*. Justice Roberts, writing for the majority, stated in dicta that "[t]he tribe's traditional and undisputed power to exclude persons from tribal land, for example, gives it the power to set conditions on entry to that land via licensing requirements and hunting regulations. *Much taxation can be justified on a similar basis*."[117] Although he recognized that "[t]he power to tax certain nonmember activity can also be justified as a necessary instrument of self-government and territorial management,"[118] he limited the scope of inherent taxing authority to situations where it "enables a tribal government to raise revenues for its essential services, to pay its employees, to provide police protection, and in general to carry out the functions that keep peace and order."[119] Applying the canon of *ejusdem generis*,[120] Justice Roberts seems to suggest that a

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114. 455 U.S. 130, 182 (1982).
115. *Id.* at 172–73, 183–84.
116. 554 U.S. 316 (2008).
117. *Id.* at 335 (emphasis added) (internal citations omitted).
118. *Id.* (internal citations omitted).
119. *Id.* (internal citations omitted).
120. *See, e.g.*, Shipp v. State, 331 S.W.3d 433, 437 (Tex. Crim. App. 2011) ("*Ejusdem generis* means, literally, 'of the same kind.' The rule of *ejusdem generis* provides that '[w]here general words follow specific

tribe only has the inherent power to tax where that tax funds tribal infrastructure. A carbon tax does not fund tribal infrastructure, unless infrastructure is broadly interpreted to include the health and welfare of tribal members. Given the Court's reluctance to broadly interpret the second *Montana* "health and welfare" exception (see section I.A. above), it is dubious that the Court will broadly interpret infrastructure to include the health and welfare of the tribe here.

C. INTERIM SUMMARY: A TRIBAL CARBON TAX MAY BE SUBJECT TO DOUBLE TAXATION AND MAY BE UNCONSTITUTIONAL IF APPLIED RETROACTIVELY

In sum, should the MHA Nation choose to impose a carbon tax against O&G companies, it assumes the risk that (a) North Dakota will levy its own carbon tax against the same companies and (b) the tax will be invalidated on the ground that it violates the constitutional rights of the nonmember companies. Under the *Bracker* balancing test, a court would balance the interests of the tribal and the federal government against the interest of the state to determine whether the federal interest is so strong as to preempt the state's tax. Here, the tribal and federal interests weigh against preemption because: (1) the economic burden of a state tax does not fall on the tribe; (2) it is possible, though unlikely, that the state tax would adversely affect on-reservation oil and gas development; and (3) the federal regulations governing the oil and gas industry on Native American reservation are minimal rather than extensive. In contrast, the state interests are strong because: (1) North Dakota need only provide *de minimis* services to the tribe and the O&G companies to have a sufficient interest in its tax; and (2) North Dakota has promulgated more regulations over the oil and gas sector than the MHA Nation and the federal government combined.

The MHA Nation also assumes the risk that the tax—if applied retroactively—will be invalidated due to its unlawful infringement on the constitutional rights of nonmembers. In *Plains Commerce*, the majority of the Court implied in dicta that retroactively applied taxes are only enforceable when they provide necessary funding for tribal infrastructure. Although a carbon tax would benefit the health and welfare of the MHA Nation, it is unlikely that a court would consider this a benefit to *tribal infrastructure*.

CONCLUSION

In the beginning of this Note, I asked whether a Native American tribe could and should levy a carbon tax against O&G companies operating on fee and trust lands within the reservation. We have seen that although a tribe most likely has the civil authority necessary to impose a carbon tax against O&G companies

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words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'").

doing business on trust lands, it lacks this authority on fee lands. Thus, pockets of reservation land—which often constitute a significant portion of the reservation—would be unprofitable and vulnerable to environmental harms. Furthermore, we have seen that if a tribe chooses to levy a carbon tax against on O&G companies operating on trust lands, it assumes two risks: (1) that the companies would be forced to pay two carbon taxes from two competing sovereigns (the tribe and the state); and (2) that the tax may be declared unconstitutional if applied retroactively. As to the first risk, double taxation (or even the threat thereof) may incentivize O&G companies to leave the reservation, depriving the tribe of much needed revenue. In the alternative, assuming that it is either too burdensome for companies to move drilling equipment or all mineable land in a given state has already been leased by other companies, a tribe is still faced with the fact that the tax can only be imposed on trust lands. As to the second risk, whether a tribe decides to impose the tax prospectively or retroactively, it faces a catch-22: if a tribe applies the tax prospectively, it may be left with nothing more than a paper tax; but if it applies it retroactively, the tax may be invalidated as an unlawful infringement on the constitutional rights of nonmember companies. Thus, the answer to our question presented is simple—although a Native American tribe most likely can impose a carbon tax against O&G companies, it probably should not.

Nonmember companies extracting precious mineral resources from Native American reservations should be regulated. This Note demonstrates that the levying of a carbon tax is most likely not the answer. But a carbon tax is just one possible remedy available to Native American tribes. Other possibilities can—and should—be investigated.