STATE AUTHORITY TO TAX TRIBAL CIGARETTE SALES TO NON-MEMBERS:

A LEGAL ANALYSIS

MEMORANDUM PREPARED FOR SUBMISSION TO
NEW YORK SENATE COMMITTEE ON
INVESTIGATIONS AND GOVERNMENT OPERATIONS

Professor Richard Briffault
Columbia Law School
435 W. 116th Street
New York, N.Y. 10027
rb34@columbia.edu

January 26, 2010

State Authority to Tax Tribal Cigarette Sales to Non-Members:
A Legal Analysis

This memorandum examines the legal issues posed by the application of state sales and excise taxes to the sale of cigarettes (hereinafter referred to as "state cigarette taxes") by a Native American tribe or tribal retailers on tribal lands to non-members of the tribe. It considers five questions:

(1) What is the nature of Native American "sovereignty" and how does that affect the cigarette tax question?

(2) May a state subject tribal or tribal retailers' sales of cigarettes to non-members of the tribe to state cigarette taxes?

(3) What mechanisms can a state utilize to collect taxes on the tribal sale of cigarettes to non-tribe-members?

(4) How can a state enforce its tax laws with respect to the tribal sale of cigarettes to non-tribe-members?

(5) How is the New York state cigarette tax question affected by the Treaty of Canandaigua of 1794, 7 Stat. 44 (November 11, 1794), and the Treaty of Buffalo Creek of 1842, 7 Stat. 586 (May 20, 1842)?

The memorandum provides the following answers to these questions:

(1) Indian tribes or nations are not "sovereign" in the same sense that foreign nations are sovereign. Although Indian tribes enjoy what the Supreme Court has called "semi-autonomous" status, the law governing Indian-state relations is determined not by "platonic notions of Indian sovereignty" but by applicable federal statutes and treaties and by a concern for tribal self-government. The Supreme Court has repeatedly upheld the application of state laws, including state taxes, to Indian tribes when not preempted by federal law and not inconsistent with a recognized interest in tribal autonomy.

(2) The Supreme Court has repeatedly upheld the authority of the states to tax the sale of cigarettes by tribes or tribal retailers on tribal lands to non-members of the tribe. The state may impose its taxes even if the tribe levies its own cigarette taxes on the same transaction. The state may impose its tax even if the elimination of the claimed tax exemption cuts into tribal revenues from sales to non-tribe-members.

(3) The courts have upheld a wide range of state laws imposing various requirements on Indian tribes or tribal retailers with respect to collecting cigarette taxes on sales to non-tribe members. These include: detailed

reporting and recordkeeping requirements; requiring the tribal retailer to collect the tax and remit the tax to the state; imposing a quota on the number of tax-exempt cigarettes that will be made available to tribal retailers; and requiring the tribal retailer to pre-pay the tax for all sales and then obtain a refund from the state for sales to tribal members.

(4) The courts have held that the states can enforce their tax laws by collecting the tax from wholesalers; seizing unstamped cigarettes en route to reservations; bringing injunctive or damages actions against tribal retailers; and entering into compacts with the tribes. This is not an exclusive list.

(5) The Treaty of Canandaigua of 1794 and the Treaty of Buffalo Creek do not affect these well-established and generally applicable rules. These treaties have no bearing on the authority of a state to impose its cigarette taxes on sales to non-tribe-members on tribal lands.

I. Native American Sovereignty and State Taxation

As the United States Supreme Court observed more than a century ago, "[t]he relation of the Indian tribes living within the borders of the United States both before and since the Revolution, to the people of the United States has always been an anomalous one, and of a complex character." *United States v. Kagama*, 118 U.S. 375, 381 (1886).

The courts have often used the term "sovereignty" to describe the Indians' distinctive status, but Indian tribes or nations are not fully "sovereign" in the sense that a foreign nation is sovereign. As the *Kagama* Court pointed out, Indian tribes are not foreign nations. *Id*. at 379. If they were then the Indian Commerce Clause – the final phrase of Art. I, Sec. 8, Cl. 3 of the Constitution that gives the Congress power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" – would be unnecessary and redundant since the first phrase gave Congress the power to regulate foreign commerce. Instead of being fully sovereign, the tribes "were, and always have been, regarded, as having a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people with the power of regulating their internal and social relations[.]" 118 U.S. at 381-82.

Although earlier cases used the notion of Indian sovereignty more loosely, "[b]y 1880 the Court no longer viewed reservations as distinct nations. On the contrary, it was said that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by Federal law." *Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962) (citation omitted). As the Supreme Court explained in the leading modern decision, *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973), "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction." *Id*. at

172 (footnote omitted). Instead, the Supreme Court has sought to "reconcile the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations." *Id*. at 165.

Consistent with this more functional approach, "[t]he modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power." *Id.* at 172. To be sure, the notion of Indian sovereignty remains as an important "backdrop" concept influencing the interpretation of those treaties and laws, but Indian sovereignty per se is not determinative of issues of state taxing authority. *Id.*

Instead the question of state taxing authority over tribal reservations and members turns on two "independent but related" issues – whether state authority is preempted by federal law, and whether state action is inconsistent with the "right of tribal self-government," that is, "'the right of reservation Indians to make their own rules and be ruled by them.'" *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980), quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959). "Even on reservations state law may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law." *Organized Village of Kake*, 369 U.S. at 75.

If a state tax or regulation is not preempted by federal law and is not inconsistent with tribal self-government it can be applied to economic activity on tribal land. *See, e.g., Rice v. Rehner*, 463 U.S. 713 (1983); *Thomas v. Gay*, 169 U.S. 264 (1898). As the Supreme Court recently observed, "[o]ur cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority in the reservation. State sovereignty does not end at a reservation's border. . . . 'Ordinarily,' it is now clear, 'an Indian reservation is considered part of the territory of the State.'" *Nevada v. Hicks*, 533 U.S. 353, 361-62 (2001) (citations and footnote omitted).

In short, state-tribal relations are "not controlled by 'mechanical or absolute conceptions of state or tribal sovereignty[.]'" *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 838 (1982) (citation omitted). Instead, questions of state and tribal authority are resolved by a "particularized examination of the relevant state, federal, and tribal interests." *Id*. (citation omitted).

II. State Authority to Tax Tribal Cigarette Sales to Non-Tribe Members

In five separate decisions dealing with disputes arising out of five different states -- including New York -- the Supreme Court has held that states may impose their cigarette taxes on tribal sales of cigarettes to non-tribe members. *See Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 482-83 (1976); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 158-59 (1980); *California State Board of Equalization*

v. Chemeheuvi Indian Tribe, 474 U.S. 9, 11-12 (1985); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 512 (1991); *Department of Taxation & Finance of New York v. Milhelm Attea & Bros., Inc*. 512 U.S. 61, 73-75 (1994). These cases have held that state taxation of such sales is neither preempted by federal law nor inconsistent with tribal self-government.

State taxation of tribal sales of cigarettes to non-tribe-members is not preempted by federal law. The Court has dismissed all arguments that state cigarette sales taxes are preempted by federal statutes. *See Moe,* 435 U.S. at 483 (nothing in the state taxation of sales to non-tribe-members "runs afoul of any congressional enactment dealing with the affairs of reservation Indians") (citation omitted); *Colville,* 447 U.S. at 155-159, 160-61 (rejecting arguments that such state taxation of cigarette sales to non-tribe-members is preempted by the Indian Reorganization Act of 1934; the Indian Financing Act of 1974; the Indian Self-Determination and Education Assistance Act of 1975; the Indian trader statutes; the Washington Enabling Act; or the Major Crimes Act); *Milhelm Attea,* 512 U.S. at 70-71 (application of New York tax to wholesalers who sell to reservation Indians not preempted by Indian Trader Statutes). In *Colville,* the Court rejected the argument that the relevant 1855 treaties between the Washington state tribes challenging the tax and the United States limited state taxing authority. These treaties gave the tribes authority to regulate the entry of non-Indians on to tribal land, but that had no effect on the state's power to assess tax on sales to non-members. 447 U.S. at 156.

Indeed, in several recent cases, the lower federal courts have held that enforcement of state restrictions on sales of tax-exempt cigarettes to non-tribe-members advances the goals of federal law, including such federal statutes as the Contraband Cigarette Trafficking Act. *See, e.g., City of New York v. Milhelm Attea & Bros.*, 550 F. Supp. 2d 332, 341 (E.D.N.Y. 2008). As one federal district judge recently observed, "the federal government has been generally supportive of state regulation of cigarette sales." *Ward v. State of New York*, 291 F. Supp. 2d 188, 204 (W.D.N.Y. 2003).

Moreover, the Supreme Court has repeatedly held that state taxation of sales to non-tribe members does "nothing . . . which frustrates tribal self-government." *Moe,* 425 U.S. at 483 (emphasis added); *accord, Colville,* 447 U.S. at 156-159; *Milhelm Attea,* 512 U.S. at 73-75. In each of these cases, the Court validated state taxation of tribal sales of cigarettes to non-tribe members even though the sale occurred on tribal land. The critical fact was not the place of sale but the identity of the ultimate cigarette consumer. The states cannot tax sales on tribal land to tribal members. *Moe*, 425 U.S. at 475-81. But a state can tax sales to non-tribal consumers. "Regulation of sales to non-Indians or nonmembers of the . . . Tribe simply does not 'contravene the principle of tribal self-government[.]'" *Rice v. Rehner, supra*, 463 U.S. at 720 n. 7 (citation omitted).

These five Supreme Court cases came from five different states, involved many different tribes, and arose in a variety of factual circumstances. In *Moe*, the tax was imposed on tribal retailers operating on tribal lands. In *Chemeheuvi* and in *Citizen Band*, the tribe itself sold the cigarettes. In *Colville,* three tribes functioned as retailers, while the fourth tribe in the case acted as a wholesaler, purchasing the cigarettes from out-of-state dealers and then selling them to its retailers. 480 U.S. at 144-45. In *Milhelm Attea*, the state imposed tax collection and recordkeeping obligations on federally regulated non-Indian wholesalers.

But the result in each of the five cases was the same. The dispositive question was whether the legal incidence of the tax – that is, the duty to pay the tax -- fell on the ultimate consumer. If it did, then the tax could be imposed and the burden of collecting the tax could be placed on the wholesaler or the retailer, on a private firm or the tribe itself.

The state's power to tax sales of cigarettes to non-tribe-members is not affected by the fact that the tribe imposes its own cigarette tax. That was the central question in *Colville*. The Supreme Court upheld the authority of the tribes in that case to impose such a tax, but denied that the tribal tax limited the state's power to tax cigarette sales to non-tribe-members. As the Court determined, "[t]here is no direct conflict between the state and tribal schemes, since each government is free to impose its taxes without ousting the other." 447 U.S. at 158. *Chemeheuvi* also upheld application of a state tax to sales to non-members that were also subject to tribal tax. 474 U.S. at 10.

Finally, the Supreme Court has upheld state taxation of tribal sales of cigarettes to non-tribe-members even though the tribe's inability to provide a tax exemption for those sales will have an impact on tribal finances. Indeed, the Court has been totally unsympathetic to this argument. As the Court explained in *Moe*, "the competitive advantage which the Indian seller doing business on tribal land enjoys over all other cigarette retailers, within and without the reservation, is dependent on the extent to which the non-Indian purchaser is willing to flout his legal obligation to pay the tax." 425 U.S. at 482.

Again, in *Colville*, the Court acknowledged that the result of applying state taxes "will be to lessen or eliminate tribal commerce with nonmembers" but dismissed that concern because "that market existed in the first place only because of a claimed exemption from these very taxes." 447 U.S. at 157. Indeed, the Court stressed "[i]t is painfully apparent that the value marketed by the smokeshops to the persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest" but consists instead "solely of an exemption from state taxation." *Id.* at 155. "We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere." *Id.*

The Court made a similar point about the priority of the state's interest in preventing tax evasion over the tribal interest in raising revenue in the New York case when it emphasized that "the States have a valid interest in ensuring compliance with lawful taxes that might easily be evaded through purchases of tax-exempt cigarettes on reservations; that interest outweighs tribes' modest interest in offering a tax exemption to customers who would ordinarily shop elsewhere." *Milhelm Attea*, 512 U.S. at 73.

III. States May Require Tribes or Tribal Retailers to Assist in Collecting State Taxes on Sales of Cigarettes to Non-Tribe-Members

The courts have upheld a variety of state laws imposing obligations on tribes or tribal retailers in order to promote enforcement of the requirement that non-tribe-members pay cigarette taxes on cigarettes purchased from tribal retailers.

States may (a) require tribes or tribal retailers to collect the sales tax due from non-tribal members and remit them to the state; (b) establish detailed recordkeeping requirements concerning sales to both tribal members and non-members; (c) impose the tax on wholesalers; (d) establish a coupon or quota system to limit the delivery of tax-exempt cigarettes to tribal retailers; and (e) even require tribal retailers to prepay the cigarette tax with respect to *all* tobacco products sold, including products sold to non-members, with the state subsequently refunding the portion of the taxes attributable to tax-exempt sales.

A. Tribal Retailer Collection of Tax: In *Moe*, the Supreme Court upheld a Montana law requiring the tribal retailer to sell tax-stamped cigarettes, in effect requiring the retailer to pay the tax initially, and then add the tax to the sales price and, thus, get it back from the consumer. Although the tribe protested that this turned the tribal retailer into an "'involuntary agent' for the collection of taxes owed by non-Indians," 425 U.S. at 482 (citation omitted), the Court concluded it was only a "minimal burden" reasonably designed to prevent evasion of the duty to pay a lawful tax. *Id*. at 483. *Accord*, *Chemeheuvi*, 474 U.S. at 11 (upholding state law requiring tribe to collect the tax and remit it to the state); *Citizen Band*, 498 U.S. at 512-13.

B. Detailed Recordkeeping Requirements: The Washington law at issue in *Colville* was somewhat more burdensome. It required tribal smokeshops to affix stamps purchased from the state to individual packages of cigarettes prior to sale to nonmembers of the tribe. It also required smokeshop operators to keep detailed records of both taxable and nontaxable transactions, including the number and dollar volume of sales to nonmembers of the tribe. With respect to tax-exempt sales, the retailers were also required to record and retain for state inspection the names of all Indian purchasers, their tribal affiliations, the Indian reservations within which the sales were made, and the dollar amount and date of the sales. Moreover, unless the Indian purchaser was personally known to the retailer, the purchaser was required to present a tribal identity card at the time of purchase.

The Supreme Court upheld both the tax-stamp and recordkeeping requirements as reasonable means of "preventing fraudulent transactions." 447 U.S. at 159-60.

C. Regulation of Wholesalers and Use of Coupon/Quota System: In *Milhelm Attea*, the Supreme Court unanimously upheld New York's system which placed the burden of purchasing and affixing New York cigarette tax stamps and collecting taxes on nonexempt sales on wholesale distributors. To limit the availability of untaxed cigarettes to non-tribal members, the state adopted a coupon system under which a certain number of "tax exemption coupons" would be available to tribal retailers, entitling them to a monthly allotment of tax-exempt cigarettes. The retailers would present the coupons to the wholesalers, who would forward them to the state's department of taxation and finance, whose preapproval was necessary before tax-free cigarettes could be delivered to a tribe. The number of tax exemption coupons available to a tribe would be based on the state's calculation of the tribe's "probable" demand. The entire system of restricting deliveries to wholesalers, "quotas on untaxed cigarettes," state preapproval of deliveries of tax-exempt cigarettes, and attendant record-keeping was upheld by the Supreme Court as a "'reasonably necessary' method of 'preventing fraudulent transactions[.]'" 512 U.S. at 73-78 (citation omitted).

D. Imposition of Tax on All Tribal Cigarette Sales, with Refund for Tax-exempt Sales to Tribal Members: The United States Court of Appeals for the Sixth Circuit recently upheld a Michigan law requiring tribal retailers to pre-pay the cigarette tax with respect to all tobacco products to be sold on tribal territory. The tribal retailer could then apply for a refund with respect to sales to tribal members. The state could withhold payment for the refund for up to 45 days without paying interest. The court found that the state had raised "substantiated and valid concerns about enforcement of the cigarette tax as a justification for the pre-collection of the taxes" and concluded that "any additional burden created by the refund system is minimal." *Keweenaw Bay Indian Cmt'y v. Rising*, 477 F.3d 881, 892 (6th Cir. 2007). The state also offered the tribes the alternative of utilizing a quota system whereby they could purchase a certain number of tobacco products tax free for sale to tribal members, thereby avoiding the "temporary tax" associated with payment. Citing the Indian Community's "repeated, brazen, and willful attempts to avoid remittance of the tax so as to profit from illegal sales of tax-free cigarettes to nontribal members," the Court found the state's "more aggressive approach to the collection of tobacco taxes," *id*., was justified.

In other words, the basic structure of New York's current cigarette tax law concerning tribal sales was upheld by the United States Supreme Court in *Milhelm Attea* sixteen years ago.

IV. The Courts Have Held that there are a Variety of Mechanisms to Enforce these Requirements

In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S, 505 (1991), the Supreme Court held that the sovereign immunity doctrine precludes a direct damages action by a state against a tribe for cigarette taxes the state claimed the tribe owed based on sales to non-tribe-members. The sovereign immunity doctrine bars direct damages actions against the tribe – much like the comparable state sovereign immunity doctrine bars direct damages actions against a state -- absent a clear waiver by the tribe or congressional abrogation. *Id*. at 509-10. But *Citizen Band* emphasized that are "adequate alternatives" by which the state can enforce its tax laws. These include (a) state actions for damages against individual agents or officers of a tribe; (b) collection of the tax from cigarette wholesalers; (c) seizing unstamped cigarettes off the reservation; (d) assessing wholesalers that supply unstamped cigarettes to tribal stores; and (e) entering into legally enforceable agreements, or compacts, with the tribes "to adopt a mutually satisfactory regime for the collection of this sort of tax." *Id*. at 514. This list is not meant to be exhaustive, and there may be other enforcement mechanisms.

As an example of a valid enforcement mechanism, in *Colville*, the Court had previously upheld the authority of a state to seize as contraband unstamped cigarettes en route to a reservation. By such a seizure of unstamped cigarettes, "the State polices against wholesale evasion of its own valid taxes without unnecessarily intruding on core tribal interests." 447 U.S. at 162.

So, too, actions can be brought against cigarette wholesalers for nonpayment of cigarette taxes, *see, e.g., City Vending of Muskogee, Inc. v. Oklahoma Tax Comm'n*, 898 F.2d 122 (10th Cir.), *cert. denied*, 498 U.S. 823 (1990), cited *by Citizen Band*, 498 U.S. at 514; or as a civil forfeiture action against a wholesaler for the gross receipts derived from the sale and transport of contraband cigarettes, *see, e.g., United States v. Funds From First Regional Bank Account #XXXX1859 Held in the Name of RK Co.*, 639 F. Supp. 2d 1203 (W.D. Wash. 2009); or for injunctive relief against Native American cigarette retailers, enjoining them from selling unstamped cigarettes to anyone other than members of their tribe, *see, e.g., City of New York v. Golden Feather Smoke Shop, Inc.*, No. 08-CV-3966, 2009 WL 2612345 (E.D.N.Y. Aug. 25, 2009).

As these cases indicate, neither individual tribe members, including tribal officers as well as tribal retailers, nor wholesalers, including licensed Indian traders, are sheltered by the tribe's sovereign immunity from suit. And non-tribal-member consumers are liable for the cigarette tax as well.

V. New York State's Power to Tax Tribal Sales of Cigarettes to Non-Tribe Members is Not Affected by the Treaty of Canandaigua of 1794 or the Treaty of Buffalo Creek of 1842

On several occasions in recent years the Seneca Nation has contended that the application of New York's cigarette tax laws to transactions on Seneca tribal lands would violate treaties between it and the United States. The United States Supreme Court noted this contention in a footnote in the *Milhelm Attea* case but did not address it because it had not been raised before the court of appeals earlier in the litigation. The two treaties said to bar the application of the state cigarette tax to transactions on Seneca land are the Treaty with the Six Nations, Nov.11, 1794, 7 Stat. 44, generally known as the Treaty of Canandaigua; and the Treaty with the Seneca, May 20, 1842, 7 Stat. 586, also known as the Second Treaty of Buffalo Creek. Neither treaty has any application to New York's cigarette taxes. The Treaty of Canandaigua says nothing about taxation. The Second Treaty of Buffalo Creek limits only taxes on land. Even with the canon of liberal interpretation of Indian treaties in favor of Indian claimants, there is nothing to these treaty-based arguments.

The relevant provision of the Treaty of Canandaigua simply acknowledges certain lands as "the land of the Seneka Nation," with the United States pledging it "will never claim the same, nor disturb the Seneka Nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof[.]" Article 3. As the Supreme Court has explained, this Treaty "was one of peace and friendship between the United States and the Indians." *People of the State of New York ex rel. Ray v. Martin*, 326 U.S. 496, 500 (1946). It did not address the taxation of non-Indians. Instead, the treaty's "entire emphasis" was "focused upon the treatment of the Indians themselves and their property." *Id*. at 501.

At least three federal courts have rejected claims that the Treaty of Canandaigua bars the application of certain taxes to residents of, or activities occurring on, the lands referred to in the treaty. In *Lazore v. Commissioner of Internal Revenue*, 11 F.3d 1180 (3rd Cir. 1993), the United States Court of Appeals for the Third Circuit rejected the claim that the treaty barred the application of the federal income tax to tribal land residents. As the court noted, "a treaty-based tax exemption must have a textual basis[.]" *Id.* at 1185. The court determined that at most, even applying a rule of generous construction, the treaty might support an exemption for a tax on income derived directly from land, but that there could be no broader exemption. *Id*. at 1185-87.

In *Cook v. United States*, 32 Fed. Cl. 170 (1994), the federal Court of Claims rejected the assertion that the 1794 treaty created an exemption from the federal excise tax on the storage and sale of diesel fuels. According to the court, "the treaty provision applies to the use of land. The excise statute in question taxes a

particular activity, not the land itself or the [Indians'] use of the land." *Id*. at 174. As a result, there was no tax exemption.

The United States Court of Appeals for the Federal Circuit affirmed, emphasizing "there is no language in the treaties cited which could be construed as conferring an exemption from federal excise tax." *Cook v. United States*, 86 F.3d 1095, 1097 (Fed. Cir.), *cert. denied,* 519 U.S. 932 (1996). Like other treaties determining land boundaries and protecting "peaceful possession, it "applies to the use of land." But an excise tax – like the diesel fuel tax in *Cook* or the cigarette tax – "is a tax on the sale of a commodity." *Id*. at 1097-98.

The Solicitor General of the United States reached a similar conclusion in an amicus brief filed in the Supreme Court in the *Milhelm Attea* case, which the Supreme Court cited at 512 U.S. at 77 n.11. According to the Solicitor General, this treaty and other early treaties (the Treaty of Fort Stanwix of 1784, 7 Stat. 15 (Oct. 22, 1784), and the Treaty of Fort Harmar of 1789, 7 Stat. 33 (Jan. 9, 1789)) "do not address the subject of state taxing and other jurisdiction over non-Indians within the territories of the Six Nations." 1994 U.S. S. Ct Briefs LEXIS 29, at *37-*39 (Jan. 18, 1994). The Solicitor General also noted that these treaties afforded the Six Nations no greater protection than "the relevant language in the treaties and statutes protecting the use and occupancy of the reservations in Moe, Colville and Potawatomi appear to afford those Tribes[.]" *Id*. at *39.

The Second Treaty of Buffalo Creek (Treaty with the Seneca 1842) (May 20, 1842), which defined the reservations at Cattaraugus and Allegany and restored the rights of the Seneca, does address state taxation, but it is concerned solely with taxes on land. Article Ninth of the Treaty states:

> The parties to this compact mutually agree to solicit the influence of the Government of the United States to protect *such of the lands* of the Seneca Indians, within the State of New York, as may from time to time remain in their possession *from all taxes, and assessments for roads, highways, or any other purposes* until such lands shall be sold and conveyed by the said Indians, and the possession thereof shall have been relinquished by them.

(emphasis supplied).

The Treaty's textual focus on taxes and assessments on land is confirmed by the Treaty's history. In *In re New York Indians*, 72 U.S. (5 Wall.) 761 (1866), the Supreme Court reviewed the relationship between the Seneca and the counties of Allegany, Cattaraugus, and Erie, in which the Seneca lands were located, during the period between 1838 when, by treaty, the Seneca agreed to removal to west of the Mississippi within five years of the proclamation of the treaty by the president, and the Indians conveyed their lands to certain white purchasers, and the Treaty of 1842, which scrapped the removal plan, confirmed the Indians' reservation rights, and cancelled the conveyance. During that period the state legislature authorized,

and the counties imposed assessments on the Seneca lands to fund construction and repair of highways, roads and bridges on those lands. The assessment legislation also provided for state acquisition and sale of the lands for nonpayment of the assessments, subject to the Indians' right to occupy the lands. When highway assessments and ordinary town and county taxes for 1840, 1841, 1842, and 1843 were not paid, the lands were sold, subject to the Indian right of occupancy. *Id.* at 763-64. The Supreme Court subsequently held that the taxes assessed upon the Seneca lands were illegal and void. *Id*. at 769-72. Indeed, in the course of the opinion the Court noted that the state legislature had in 1857 repealed the taxes and adopted the law – the predecessor of section 6 of the Indian Law – barring the assessment of taxes on Indian reservation lands. *Id*. at 771.

The history chronicled in *New York Indians* explains the specific reference to "assessments for roads, highways, and other purposes" in Article 9 of the Second Treaty of Buffalo Creek, and indicates that the treaty's concern was with taxes and assessments that could lead to forfeiture of the land.

This was the conclusion reached by the Appellate Division for the Fourth Department in *Snyder v. Wetzler*, 193 A.D.2d 329 (4th Dep't 1993), *aff'd,* 84 N.Y.2d 941 (1994), which determined that "the Treaty clearly refers only to taxes levied upon real property or land." *Id*. at 331. The court emphasized that a challenge to a sales or excise tax is "not a case about land taxes." *Id*. at 335.

Four years later, in *New York State Department of Taxation & Finance v. Bramhall*, 235 A.D.2d 75 (4th Dep't 1997), the Fourth Department reaffirmed its position. The court held: "[T]he 1842 Treaty (7 Stat 586), although it prohibits the State from taxing reservation land, does not bar the imposition of excise and sales taxes on cigarettes and motor fuel sold to non-Indians on the Seneca Nation's reservations." *Id*. at 85.

The United States Court of Appeals for the Second Circuit reached the same result in *United States v. Kaid*, 241 Fed. Appx. 747 (2nd Cir. 2007): "[T]he treaty . . . clearly prohibit[s] only the taxation of real property, not chattels like cigarettes." *Id.* at 750-51.

The Solicitor General's amicus brief in *Milhelm Attea* also found that the Second Treaty of Buffalo Creek had no role to play in assessing New York's cigarette tax collection system. The Solicitor General agreed with the Fourth Department that the Treaty's language "is limited to taxes assessed against the land itself. It does not, on its face, address the distinct question of the extent to which the State may assess its sales tax against non-Indians who engage in transactions with Indians on those lands." 1994 U.S. S.Ct. Briefs LEXIS at *41 (footnote omitted). The Solicitor General determined that the legality of New York's cigarette tax structure should be "resolved under the general preemption principles [the Supreme] Court has developed." *Id*.

Indian treaties are part of the body of federal law that the courts examine and construe when they determine whether or not state regulations or state taxes are preempted. The courts regularly interpret Indian treaties. *See, e.g., Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 465-66 (1995); *Oliphant v. Suquamish Indian Tribe*, 435 U.S, 191, 206-08 (1978); *People of New York ex rel. Ray v. Martin*, 326 U.S. at 499-501. The *Colville* decision upholding Washington's taxation of the tribal sale of cigarettes to non-tribe-members turned in part on the interpretation of three Indian treaties – the Treaty of Point Elliott, 12 Stat. 927 (Jan. 22, 1855) (Lummi Tribe); Treaty with the Makah Tribe, 12 Stat. 939 (Jan. 31, 1855); Treaty with the Yakimas, 12 Stat. 951 (June 9, 1855). *See* 447 U.S. at 156. *See also Confederated Tribes & Bands of the Yakama Nation v. Gregoire*, No. CV08-3056, 2010 WL 55904, at *8 (E.D. Wash. 2010) (interpreting Yakama Treaty of 1855, and treating *Colville*'s reading as res judicata).

As a rule, "treaties should be construed liberally in favor of the Indians." *Oneida County, N.Y. v. Oneida Indian Nation of New York*, 470 U.S, 226, 247 (1985) (citation omitted). But even the rule of liberal construction may be inadequate to save a tribal claim. *See Chickasaw Nation,* 515 U.S. at 466. Even when Indian-treaty-based claims are at issue, "exemptions to tax laws should be clearly expressed." *Squire v. Capoeman*, 351 U.S. 1, 6 (1956). "Although ambiguous statutes and treaties are to be construed in favor of Indians, they are not to be construed to grant tax exemptions unless they contain language which can be reasonably so construed." *Hoptowit v. Commissioner of Internal Revenue*, 709 F.2d 564, 565 (9th Cir. 1983) (citation omitted).

"Even though 'legal ambiguities are to be resolved to the benefit of the Indians . . . courts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' . . . clearly runs counter to a tribe's later claims." *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) (citations omitted). The "plain language" of the text of the Second Treaty of Buffalo Creek provides an exemption only for taxes and assessments on land. That reading of the plain language, in turn, is confirmed by the "historical context" which demonstrates that Article 9 of the Treaty was motivated by the specific experience of the imposition of highway, road, and bridge assessments on Seneca lands, backed up by enforcement through sale of those lands, in the years immediately preceding the Treaty. The Treaty was plainly intended to prevent recurrence of those assessments. But it says nothing about and has no bearing on sales and excise taxes which have no impact on the ownership, occupancy, use or enjoyment of land.

***

In short, the concept of Native American sovereignty is not a bar to the application of state cigarette taxes to non-tribe-members. Indeed, the Supreme Court has five times upheld state laws that do just that. State cigarette taxes are

not preempted by federal law, and state taxation of sales to non-tribe members has been held *not* to "contravene the principle of tribal self-government." New York's cigarette tax framework was specifically upheld by the Supreme Court in the *Milhelm Attea* decision in 1994. Nothing in the Treaty of Canandaigua or the Second Treaty of Buffalo Creek limits the state's power to tax tribal sales of cigarettes to non-tribe-members. Although the Second Treaty of Buffalo Creek refers to state taxation both the text and the history of the Treaty make it clear that the Treaty limits only taxes and assessments on land, not taxes like the cigarette tax.