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Court Picks New Test in Cotton Petroleum

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NOTE

COURT PICKS NEW TEST IN COTTON PETROLEUM

In *Cotton Petroleum Corp. v. New Mexico*[1] the Supreme Court affirmed New Mexico's right to impose a severance tax on oil and gas produced by non-Indian lessees on the Jicarilla Apache reservation even though that same production is subject to tribal severance taxes. The Court found that the taxes were not pre-empted by federal law because there was neither express nor implied congressional intent to ban state taxation. The Court further relied on the fact that federal regulation of the production of the oil and gas was not exclusive, and also noted that New Mexico's taxes had not placed a "substantial" burden on the tribe, which could have resulted in a finding of federal pre-emption.

Cotton Petroleum (Cotton), a non-Indian corporation, produces oil and gas on tribal trust land leased from the Jicarilla Apache Tribe (Tribe). The Tribe receives taxes that equal approximately six percent of its production.[2] Cotton also pays to New Mexico oil and gas production taxes equal to approximately eight percent of its production.[3] The Corporation therefore pays approximately 14 percent of its production value in taxes to tribal and state governments.

In 1982, Cotton sought relief from its tax burden in New Mexico District Court.[4] It argued that the state taxes were invalid under the Commerce Clause because the amount of taxes paid greatly exceeded the value of services provided to Cotton by the state.[5]

The Tribe, which filed an *amicus* brief, argued that state taxation substantially interfered with tribal tax-raising ability.[6] In addition, the

1. 109 S. Ct. 1698 (1989); Cotton Petroleum v. State, 106 N.M. 517, 754 P.2d 1170 (Ct. App. 1987), *cert. quashed* 106 N.M. 511, 745 P.2d 1159 (1987), *prob. juris. noted sub nom.* Cotton Petroleum Corp. v. New Mexico, 485 U.S. 1005 (1988), *aff'd.*, 109 S. Ct. 1698 (1989).

2. Cotton Petroleum v. State, 106 N.M. 517, 518, 745 P.2d 1170, 1171 (Ct. App. 1987).

3. *Id.* at 518, n. 1, 745 P.2d at 1171, n. 1.

4. *Id.* at 518-19, 745 P.2d at 1171-72. The company brought suit in New Mexico district court to obtain a refund of taxes it had paid under protest, and also sought declaratory and injunctive relief. Cotton also filed a second action, seeking a refund of taxes paid prior to the filing of the protest. The two actions were consolidated and the Tribe moved and was granted leave to file an *amicus* brief. (Cotton Petroleum Corp. v. New Mexico is a sequel to Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), in which the Court held that the Tribe had the power to impose a severance tax on oil and gas production by non-Indian lessees on the reservation. Cotton Petroleum Corp. v. New Mexico, 109 S. Ct. 1698 (1989)).

5. Cotton Petroleum v. State, at 520, 745 P.2d at 1173.

6. Cotton Petroleum Corp. v. New Mexico, 109 S. Ct. 1698, 1704 (1989)(citing Trial Record at 124).

Tribe pointed to New Mexico's failure to "provide services commensurate with taxes collected."[7] Because taxation of on-reservation oil and gas production by non-Indian lessees would reduce the desirability of the Tribe's leases, state taxation would weaken the Tribe's economic development contrary to federal policy.

The trial court upheld the state taxes and concluded that the theory of public finance does not require that taxes paid should equal services rendered.[8] The court also found that the economic and legal consequences of the tax affected only Cotton, and had no adverse impact on tribal interests.[9] Finally, the court ruled that the taxes were not pre-empted by federal law because Cotton failed to establish that the taxes imposed by the state had an adverse impact on tribal economic development.[10]

Cotton appealed the decision to the New Mexico State Court of Appeals, which affirmed the trial court.[11] After the New Mexico Supreme Court quashed *cert.*,[12] the case was appealed to the Supreme Court, which noted probable jurisdiction.[13]

By holding that the taxes are not pre-empted by federal law, the Supreme Court has rejected its own historical approach to Indian pre-emption cases, and has reversed the presumption which operates when states try to assert authority over Indian tribes. This article will explore the analytical approach the Court used in deciding *Cotton*, and will compare that approach with the historically accepted analysis previously used by the Court.

BACKGROUND

General Federal Pre-emption Analysis

The Supreme Court in *Cotton* found that New Mexico's taxes were not pre-empted by federal law because Congress had neither expressly nor impliedly acted to pre-empt the taxes. The doctrine of federal pre-emption arises from the Supremacy Clause of the Constitution,[14] which acts to pre-empt state law when it conflicts with federal law. Pre-emption occurs when Congress has specifically prohibited state legislative action in a particular area, or when Congress has occupied a field so extensively that state legislation, by implication, may not stand.

In deciding pre-emption cases, the Court has developed standards to

7. *Id.*
8. Cotton Petroleum v. State, 106 N.M. 517, 519, 745 P.2d 1170, 1172 (Ct. App. 1987).
9. *Id.*
10. *Id.*
11. *Id.* at 517, 745 P.2d at 1170.
12. Cotton Petroleum v. State, *cert. quashed*, 106 N.M. 511, 745 P.2d 1159 (1987).
13. Cotton Petroleum Corp. v. New Mexico, 485 U.S. 1005 (1988).
14. U.S. Const. art. VI, cl. 2.

discover congressional intent in enacting particular legislation and to determine if federal legislation pervasively pre-empts state action on the same subject.

Early decisions[15] established various tests designed to find congressional intent. These tests, which were later articulated in *Pennsylvania v. Nelson*,[16] were applied to determine whether federal regulation was so pervasive that it was reasonable to assume that Congress intended that the states could not supplement it. The Court could find that federal statutes concerning a dominant national interest precluded application of state law. Or the Court might decide that enforcement of a state law would conflict with federal administration of a program.[17]

In more recent decisions, the Supreme Court has adopted a strict approach to the application of the pre-emption doctrine. The Court has been "reluctant" to infer pre-emption,[18] and has required that congressional intent to pre-empt the field be clear,[19] either from the language of the statute, or from the extensiveness of the federal regulations,[20] the need for uniformity,[21] or the danger of conflict between state law and the federal regulatory scheme.[22] Consequently, absent a finding of congressional intent to pre-empt a particular area from state action, the Court will allow state legislation to stand.

Indian Law and Pre-emption.

The analysis of pre-emption in the area of Indian law is different. Because Congress has extensive power over Indian tribes,[23] decisions begin with a presumption of an almost exclusive federal occupation of the field.[24]

Federal acts which result in pre-emption in the Indian context can be extremely general. Pre-emption may be implied from treaties setting aside land for a reservation even if the treaties contain no specific pre-emption language.[25] Pre-emption has also been established by statutes which reg-

15. Hines v. Davidowitz, 312 U.S. 52, 62-74 (1941); Rice v. Santa Fe Elevator, 331 U.S. 218, 230-31 (1947).

16. 350 U.S. 497 (1955).

17. *Id.* at 502-10.

18. Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 132 (1978).

19. New York State Dept. of Social Serv. v. Dublino, 413 U.S. 405, 413 (1973) (quoting Schwartz v. Texas, 344 U.S. 199, 202, 203 (1952)).

20. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145-53 (1980).

21. Jones v. Rath Packing Co., 430 U.S. 519 (1977).

22. Kleppe v. New Mexico, 426 U.S. 529, 541-46(1976).

23. Lonewolf v. Hitchcock, 187 U.S. 553 (1903).

24. McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164, 165 (1973); Williams v. Lee, 358 U.S. 217, 221 (1959).

25. *See* Warren Trading Post v. Arizona Tax Comm'n., 380 U.S. 685 (1965); Williams v. Lee, 358 U.S. 217, 223 (1959).

ulate trade with Indians,[26] and from statutes which encourage Indians to establish and strengthen tribal governments.[27]

The basic difference between general federal pre-emption and pre-emption in Indian country is the starting point of the analysis. General pre-emption assumes state intervention unless congressional intent to pre-empt is established. Indian pre-emption, on the other hand, reverses the presumption: federal pre-emption exists unless the Court finds congressional intent to allow state intervention.[28]

The difference in the two approaches is illustrated by the application of state laws regulating wildlife. State wildlife laws generally apply to federal lands, except where they conflict with federal laws.[29] In contrast, courts have consistently found that states may not regulate wildlife within Indian reservations without clear congressional language allowing such action.[30]

Taxation cases also demonstrate the different application of the two pre-emption doctrines. The Court has typically evaluated state taxation on federal functions by looking at the taxes' nondiscriminatory nature, or at the "legal incidence" of the tax involved.[31] However, in Indian taxation cases, the court has held that state taxes are generally inapplicable to activities within the reservation, unless Congress has otherwise provided.[32] In fact, a comprehensive federal regulatory scheme covering the tribal activity has been held sufficient to establish federal pre-emption.[33]

Therefore, while there is no general federal pre-emption without express or implied congressional intent, in Indian law this presumption is reversed: federal pre-emption exists unless the Court finds congressional intent to allow state intervention.

Finding Congressional Intent

To determine whether congressional intent to allow a state to tax on the reservation exists, courts must examine legislative history and purpose. The Indian Mineral Leasing Act of 1938 (IMLA)[34] and the Indian

26. *See* Central Mach. Co. v. Arizona State Tax Comm'n., 448 U.S. 160 (1980); Warren Trading Post v. Arizona Tax Comm'n., 380 U.S. 685 (1965).

27. *See* Fisher v. District Ct., 424 U.S. 382, 387 (1976); 28 F. Cohen, Handbook of Federal Indian Law 272-79 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980).

29. Kleppe v. New Mexico, 426 U.S. 529, 541-47 (1977).

30. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); United States v. County of Fresno, 429 U.S. 452 (1977); Leech Lake Band of Chippawa Indians v. Herbst, 334 F. Supp. 1001 (D. Mn. 1971).

31. United States v. County of Fresno, 429 U.S. 452, 462-64 (1977).

32. Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832 (1982); McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164 (1972).

33. *Ramah Navajo School Bd.*, 458 U.S. 832, 845-47; White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145-49 (1980).

34. 25 U.S.C. § 396a-q (1988).

Reorganization Act of 1934 (IRA)[35] are the two statutes which were examined by the Court in *Cotton* to determine legislative intent.

The IRA was passed "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism."[36] This broad legislation signaled a new approach on the part of the government to Indians and Indian self-sufficiency. The legislation was passed after years of assimilationist policies which had undercut historical tribal land bases, and had prevented the development of strong tribal self-government.

The IMLA, passed four years later, was developed to bring pre-1934 Indian mineral leasing statutes in line with the policies underpinning the IRA.[37] Because the pre-1934 statutes were not "adequate to give the Indians the greatest return from their property,"[38] the IMLA was designed to help Indians maximize their economic gain from mineral leases.

The statutes that controlled prior to the passage of the IMLA contained provisions for the states to tax mineral production by non-Indian lessees on Indian reservations. For example, the Indian Oil Act of 1927[39] expressly waived immunity from state taxation, and the Court determined that under this act, Montana could tax oil and gas production by lessees.[40] However, this statute, and others passed before it, were enacted when the federal approach to the status of Indians was very different from the approach after the passage of the IRA.

Prior to 1934, federal policy was designed to achieve full assimilation of Indians into society, under the complete jurisdiction of the states.[41] The states had a strong interest in the oil and gas reserves within reservations and clearly wanted the right to tax their production. The statutes prior to 1934 can be viewed as a compromise between competing state and Indian interests, with the states authorized to tax, while the tribes were allowed to maintain their reserved rights to the minerals, oil, and gas within their reservations.

Passage of the IRA, however, dramatically changed the political climate. The goal of assimilation was discarded in favor of Indian self-government and economic development. The IMLA, in turn, continued the policies developed by the IRA. Because the pre-1934 statutes were not "adequate to give the Indians the greatest return from their property,"[42] the IMLA was designed to help Indians maximize their economic gain

35. 25 U.S.C. §461-79 (1988).
36. H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934).
37. S. Rep. No. 985, 75th Cong., 1st Sess. 3 (1937).
38. *Id.* at 2.
39. 25 U.S.C. §398c (1988).
40. British-American Oil Producing Co. v. Bd. of Equalization of Montana, 299 U.S. 159 (1936).
41. F. Cohen, Handbook of Federal Indian Law 127-41 (1982 ed.).
42. S. Rep. No. 985, 75th Cong., 1st Sess. 3 (1937).

from mineral leases. The IMLA contains no express provision for taxation by the states, and it has a general repealer clause which states "[all] [Acts] or parts of Acts inconsistent herewith are hereby repealed."[43]

Two more recent federal acts reaffirm the federal policy of encouraging Indian self-determination and economic development. The Indian Financing Act of 1974 (IFA)[44] contains a declaration of congressional policy to "help develop and utilize Indian resources . . . to a point where the Indians will fully exercise responsibiity for the utilization and management of their own resources. . . ."[45]

The Indian Self-Determination and Education Assistance Act of 1975 (ISEA)[46] also exemplifies the federal policy encouraging Indian economic development. The legislation declares federal policy to be provision of quality educational services to Indian children so that they may "achieve the measure of self-determination essential to their social and economic well-being."[47]

In 1983, President Reagan reaffirmed the policies of Indian economic development mandated by the legislation of the 1970s. Reagan pledged to "assist tribes in strengthening their governments by removing federal impediments to tribal self-government and tribal resource development."[48]

The legislation and policy statements clearly establish the broad federal policy encouraging tribal economic development and self-determination. It is apparent that since 1934 the federal government has mandated a strong economic development approach to Indian affairs. This policy forms a backdrop for court decisions regarding taxation and regulation within a reservation. Courts have had to balance the analysis of preemption against this backdrop of economic and governmental tribal self-determination.

Tribal Sovereignty as a Backdrop

The status of Indian tribes as distinct sovereign entities generally means that state law cannot penetrate reservation boundaries.[49] However, this doctrine of sovereignty has been slowly eroded by the Court[50] and federal legislation.[51]

43. 25 U.S.C. § 396a (1988).
44. 25 U.S.C. §§ 1451-1534 (1988).
45. *Id.* at § 1451.
46. 25 U.S.C. §§ 450-450n (1988).
47. *Id.* at § 450a(c).
48. Indian Policy Statement, 19 Weekly Comp. Pres. Doc. 98, 99 (Jan. 24, 1983).
49. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).
50. *See* Rice v. Rehner, 463 U.S. 713 (1983); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164, 172 (1973).
51. *See, e.g.*, Pub. L. No. 280, 67 Stat 588 (1953), (current version at 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1988)) (federal law granting several states full civil and criminal jurisdiction over specific Indian reservations).

The modern approach to the use of tribal sovereignty as a bar to state jurisdiction emanates from *Williams v. Lee*:[52] "Absent governing Acts of Congress, the question [is] whether the state action infringe[s] on the right of reservation Indians to make their own laws and be ruled by them."[53] A finding of either infringement or pre-emption barred the state's action.[54]

Recently, the Court has shifted away from Indian sovereignty as a bar to state jurisdiction, and instead, has used it primarily as a backdrop to pre-emption analysis.[55] At the same time, the Court has begun to balance the state's interests against federal and tribal interests.[56] Despite the weakened use of tribal sovereignty as a bar to state jurisdiction, however, the Court has continued to acknowledge tribal sovereignty as a factor when applying the pre-emption test.[57]

ANALYSIS

The decision in *Cotton* included both a consideration of tribal sovereignty and an examination of relevant statutes to determine congressional intent. However, the majority failed to apply the presumption traditionally applied in Indian law cases, that is, a presumption of federal pre-emption absent clear congressional intent to allow state regulatory activity. In *Cotton* the Court applied the general pre-emption approach: absent congressional intent to pre-empt state activity, the state regulation may stand.

Finding Congressional Intent

Cotton and the Tribe argued that federal laws and policies promoting tribal economic development indicate federal intent to insure that Indian tribes realize the maximum benefit from their oil and gas leases. They argued that New Mexico taxes were pre-empted[58] by federal legislation and policies "which support the maximization of tribal revenues and the strengthening of tribal government."[59] Cotton and the Tribe contended that any attempt by the state to tax the production by the lessees necessarily

52. 358 U.S. 217 (1959)(Arizona has no jurisdiction over a civil action by non-Indian against Indian for price of goods sold on the reservation).

53. *Id.* at 220.

54. *Id.*

55. McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164, 172 (1972).

56. Rice v. Rehner, 463 U.S. 713, 720-25 (1983).

57. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

58. Cotton Petroleum Corp. v. New Mexico, 109 S. Ct. 1698, 1707 n.11 (1989). The Supreme Court concluded the pre-emption argument was properly before the Court even though Cotton did not raise this issue before the New Mexico Court of Appeals. The Court concluded that because the court of appeals was fully briefed on this issue by the Tribe as an *amicus curiae*, and had fully considered and passed on the pre-emption issue, the matter was properly before the Court. *Id.*

59. Brief *Amici Curiae* of Crow Tribe *et al.* at 25, Cotton Petroleum Corp. v. New Mexico, 109 S. Ct. 1698 (1989) (No. 87-1327).

reduces the desirability of the tribal leases, and potentially undercuts the tribal economy, because these leases represent the major source of tribal revenues. [60]

In spite of the language and the legislative intent embodied in legislative acts of the past 50 years, the majority in *Cotton* refused to find implicit congressional intent barring state taxation. In so doing the Court ignored a standard canon of construction in Indian law: "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."[61]

More importantly, the majority failed to apply the standard Indian pre-emption principles. The Court should have started with a presumption of pre-emption based on the pervasive regulatory scheme and searched for express congressional intent waiving immunity from taxation. Instead the Court presumed the applicability of state taxes in the absence of express congressional intent barring taxation.

Balancing of Federal state and Tribal Interests

Even though the Court rejected the Tribe's argument regarding congressional intent, the Court could have found that the taxes were pre-empted by the established Indian pre-emption analysis. "This inquiry . . . [calls] for a particularized inquiry into the nature of the state, federal and tribal interests at stake. . . ."[62] The federal and tribal interests arise from broad congressional power to regulate Indian affairs under the Indian Commerce Clause,[63] and from the sovereign status of tribes. "These interests tend to erect two 'independent but related' barriers to the exercise of state authority over commercial activity on an Indian reservation. . . ."[64]

Generally, the exercise of state authority is impermissible where there is federal pre-emption as shown by an extensive regulatory scheme which leaves no room for the exercise of state authority,[65] or where state authority infringes on the right of Indians to "make their own laws and be ruled by them."[66] This analysis requires a balancing of the various interests of each entity. For example, a state's regulatory interest will be given more

60. Cotton Petroleum Corp. v. New Mexico, 109 S. Ct. 1698, 1725 (1989) (Blackmun, J. dissenting) (90 percent of tribal income comes from oil and gas royalties).

61. Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985); *see also* McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164, 174 (1973).

62. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980).

63. U.S. Const. art. I, § 8, cl. 3.

64. Ramah Navajo School Board Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 837 (1982) (citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980)).

65. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980); Warren Trading Post v. Arizona Tax Comm'n., 380 U.S. 685, 690 (1965).

66. *White Mountain Apache Tribe*, 448 U.S. at 142 (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)).

weight if the state can show off-reservation effects that compel state intervention.[67]

The exercise of state authority which burdens tribal revenues must be justified by state services rendered in connection with the on-reservation activity.[68] Therefore, when a state seeks to impose a tax on a transaction between a tribe and non-Indians, the state must illustrate more than a general interest in raising revenues.[69]

In this case, the majority found that New Mexico provided services to the Tribe and to Cotton that justified its imposition of taxes. The majority also found that the federal regulatory scheme was not exclusive, because New Mexico had imposed state regulations as well.[70]

Although the majority stated it was applying a "flexible" approach in its pre-emption analysis, the Court has, in fact, imposed a rigid standard on the Tribe. Distinguishing *Cotton* from other cases in which pre-emption was found, the majority points to services provided by the state, the fact that the economic burden of the taxes falls on the lessees, and the state regulation of the oil fields as justification for the taxes imposed. The Court appears to hold that if a state provides some services,[71] sufficient justification for taxation exists, especially if the economic burden of the taxes does not fall directly on the Tribe. Yet with a flexible approach, the Court would balance the nature and extent of the services provided by the state against the underlying federal policies promoting Indian economic development and tribal self-government. The same approach is seen with the concept of federal regulation. State regulation of the on-reservation production of oil and gas is minimal,[72] and must be approved by the Bureau of Land Management prior to its application.[73] The Court found that this minimal regulation, along with the state services and the fact that the economic burden of the taxes does not fall directly on the Tribe, was sufficient to reject a finding of federal pre-emption.

The Court has now established a standard which will be extremely difficult to meet. It suggests that in the absence of affirmative congres-

67. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 336 (1983).

68. Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 843 (1982).

69. *Id.* at 845. *See also* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 150 (1980); Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685, 691 (1965).

70. Oil-and-gas-related revenues expended by the state for the Tribe over the 5-year period contested were $89,384, compared to $1,206,800 in federal funds and $736,358 in tribal funds. Cotton Petroleum v. New Mexico, 109 S. Ct. 1698, 1724 (1989) (Blackmun, J. dissenting) (citing Brief for Jicarilla Apache Tribe as *Amicus Curiae* 10-11, n.8).

71. New Mexico regulates the spacing and the mechanical integrity of the wells. Cotton Petroleum Corp. v. New Mexico, 109 S. Ct. 1698, 1714-15 (1989) (citing New Mexico district court finding App. to Juris statement 16).

72. *Id.*

73. 43 C.F.R. §§ 3162 3-1(a) and (b) (1987).

sional intent to pre-empt, pre-emption will depend on findings that the economic burden of the tax falls directly on the tribe, and that the state provides neither services nor regulates the particular cactivity taxed.

This standard was not imposed in earlier decisions. The standard had previously required a finding of comprehensive federal regulation, not exclusive federal regulation.[74] The approach taken by the Court in *Cotton* undermines the clear federal policy promoting Indian self-sufficiency through economic development.

CONCLUSION

The majority in *Cotton* has made it more difficult for Indians to develop tribal economic resources. While the decision was an expedient solution for a state that is extremely dependent upon revenues produced by taxation of oil and gas production, the short-term benefits will not out-weigh the long-term detrimental effect on Indian tribes. The Court has chipped away at traditional notions of tribal sovereignty and Indian pre-emption analysis, leaving the Tribes poorer both economically and in terms of inherent power.

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74. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980).