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### Taxation in Indian Country

Richard B. Collins

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TAXATION IN INDIAN COUNTRY

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NATURAL RESOURCE DEVELOPMENT IN INDIAN COUNTRY

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## TAXATION IN INDIAN COUNTRY

by Richard B. Collins, University of Colorado

### I. ASSUMPTIONS

A. Indians, Tribes, and Indian Country. In my talk, I generally assume that legal applications of these terms are not at issue. Most of the time these terms mean what most people expect them to: tribes mean tribes native to the United States; Indians mean members of those tribes; and tribal Indian country means tribal reservations. See Felix S. Cohen's Handbook of Federal Indian Law (1982 ed.) (hereinafter Cohen) ch. 1. A few issues that arise fairly often respecting taxation will be mentioned. See Cohen ch. 7 sec. E.

B. Preemption. When a federal treaty or statute overrides state law, the operative constitutional provision is the supremacy clause, article VI, clause 2. In modern times, the Supreme Court refers to most supremacy issues under the rubric of preemption, asking whether a federal law preempts state law, and the Court has consistently applied this principle to federal Indian law. See Cohen ch. 5. While some scholars have debated the Court's theory, for today's talk I assume it to be correct.

C. Tribal Sovereignty. In early Indian law decisions, the Supreme Court implied from the making of treaties with tribes that they retain internal sovereignty within tribal territory, and that the treaties implicitly preempt state law that interferes with tribal sovereignty.

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cohen ch. 4 sec. A. In Indian law, this is the most important subject on which state law is preempted. See White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980). Taxation is one of the basic powers of a sovereign. Tribes have substantial taxing power, and tribes and Indians have substantial immunity from state tax laws, within tribal territory. See Cohen ch. 7 sec. C, D.

D. Canons of Construction. The Supreme Court interprets federal statutes applied to Indians and tribes, and Indian treaties, favorably to tribal sovereignty and other Indian rights. This principle is articulated in several, similar canons of construction. See Cohen ch. 3 sec. 2.b(2). In practical application, these rules protect the reasonable expectations of the Indian people at the time when a treaty was made or a federal statute was passed.

## II. FEDERAL TAXATION IN INDIAN COUNTRY

A. Federal Constitutional Power. Congress has very broad legislative power over Indian country, which the Supreme Court has characterized as "plenary." Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 83-84 (1977). Some scholars and advocates for Indians have challenged this concept, but in fact very few federal Indian statutes have ever been held unconstitutional, and no statute imposing a federal tax has been invalidated. See generally Cohen ch. 3. Thus as a practical matter, disputes over federal taxation of Indians and tribes are about interpretation of

federal statutes and treaties, not about the constitutional power of the federal government to tax.

B. Federal Income Taxation of Tribes. Tribes are not subject to the federal income tax. The IRS has interpreted the code that way from its inception; the code taxes the income of individuals, corporations, estates, and trusts, and these terms are assumed not to encompass tribes. This treats tribes like state and local governments. See Cohen ch. 7 sec. B2.

This exemption has some practical applications in structuring economic development in Indian country (although the exemption is probably not confined to Indian country). There are untested issues about how closely related to the tribe an enterprise must be to claim the exemption. The IRS has treated tribal corporations formed under section 17 of the Indian Reorganization Act, 25. U.S.C. sec. 477, as exempt. The status of other corporations formed by tribes is uncertain.

C. Other Federal Taxes on Tribes. Tribes are probably subject to most federal taxes levied on employers. There are some messy issues about unemployment compensation taxes because they are state-administered. See Cohen ch. 7 sec. B4, B5. Under a 1982 statute, tribes and their subdivisions are exempt from a number of federal excise taxes in common with state and local governments. I.R.C. sec. 7871.

D. Federal Taxation of Indians. The courts have upheld federal taxes levied on Indians, whether or not in Indian country. Many unsuccessful attempts to exempt various kinds of Indian income from the federal income tax have been made.

There is one major exception, for income derived directly from Indian trust allotments, meaning land held in trust by the U. S. for individual Indians rather than tribes. See *Squire v. Capoeman*, 351 U.S. 1 (1956). The allotment exception is complex, but it applies to natural resource development of the land itself, to production of minerals, timber, and crops. See Cohen ch. 7 sec. B3, ch. 11 sec. B.

### III. TRIBAL AND STATE TAXATION IN INDIAN COUNTRY

A. Territorial Limits. Our remaining discussion is about tribal and state taxing power in Indian country, essentially, within tribal reservations. Outside Indian country, states have their normal authority to tax Indians. They probably cannot tax some tribal income anywhere, but can impose direct taxes on tribal businesses. See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (sustaining state gross receipts tax on tribal business activity conducted on off-reservation land leased by tribe from federal government). Tribal taxing power outside Indian country is confined to tribal members and is not exercised in practice.

B. State Taxation of Indians and Tribes. As a rule, states lack jurisdiction to tax Indians or tribes in Indian country absent federal consent. There are a few specific consent statutes but no general ones. See Cohen ch. 7 sec. C2a, C2b. The most important issues about federal consent concern state taxation of mineral production on reservations. See *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985) (striking down state oil and gas production taxes levied on tribal royalties). See also *Rice v. Rehner*, 463 U.S. 713 (1983) (sustaining state authority to require reservation Indian seller of liquor to have state license).

An important issue about the extent of this immunity is the status under it of corporations chartered by the state. See *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982); Cohen ch. 7 sec. E. Another issue that arises often is the status of Indians who reside on a tribal reservation but are members of a different tribe. See *Washington v. Confederated Colville Tribes*, 447 U.S. 134 (1980); *Duro v. Reina*, 821 F.2d 1358 (9th Cir. 1987), pet. reh. pending (No. 85-1718); *Greywater v. Joshua*, 8th Cir. No. 87-5233-ND (pending).

Much Indian land is held in trust by the United States, and the trust is an additional basis for immunity from state taxes, both on and off tribal reservations. See Cohen ch. 7 sec. C3. But see *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (sustaining state gross receipts tax on tribal business activity conducted on off-reservation land leased

by tribe from federal government).

C. State Taxation of Non-Indians. States have their normal jurisdiction in Indian country when Indians and tribes are not involved. Applied to taxation, this means that states have full jurisdiction to tax non-Indians and their property in Indian country if Indians or tribes are not directly affected. See Cohen ch. 7 sec. C2c.

When states levy taxes on non-Indians engaged in transactions with Indians or using Indian land, state taxes are preempted in some circumstances. A few statutes do so explicitly. See Cohen ch. 7 sec. C1. Many lawsuits have raised issues about implicit preemption of state taxes, and some have succeeded. The Supreme Court's general test is a flexible interest analysis that weighs the competing interests of the state, tribal, and federal governments in light of the applicable federal statutes. In reverse chronological order, the leading cases are:

1. Cotton Petroleum Corp. v. New Mexico, 745 P.2d 1170 (App. 1987) (sustaining oil and gas production taxes on non-Indian mineral lessee of tribe), probable jurisdiction noted, 108 S.Ct. \_\_\_\_ (1988).

2. Crow Tribe v. Montana, 819 F.2d 895 (9th Cir. 1987), aff'd mem., 108 S.Ct. 685 (1988) (striking down or limiting state coal severance tax on non-Indian mineral lessees of tribe).

3. Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832 (1982) (striking down state gross

receipts tax on non-Indian construction contractor building Indian-operated school).

4. Central Machinery Co. v. Arizona Tax Comm'n, 448 U.S. 160 (1980) (striking down state gross receipts tax on non-Indian selling machinery to tribe).

5. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (striking down state motor fuel taxes on non-Indian timber harvesters operating on tribal trust land).

6. Washington v. Confederated Colville Tribes, 447 U.S. 134 (1980) (sustaining state cigarette tax on non-Indian customers of tribal "smoke shops").

7. Ft. Mojave Tribe v. Country of San Bernardino, 543 F.2d 1253 (9th Cir. 1976), cert. denied, 430 U.S. 983 (sustaining state property tax on non-Indian's leasehold in tribal trust land).

8. Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965) (striking down state gross receipts tax on non-Indian's retail sales to reservation Indians).

9. Wagoner v. Evans, 170 U.S. 588 (1898) (sustaining territorial property tax on non-Indians' cattle grazed on Indian land).

10. Utah & N. Ry. v. Fisher, 116 U.S. 28 (1885) (sustaining territorial property tax on railroad right-of-way across tribal trust land).

11. See also California v. Cabazon Band of

Mission Indians, 107 S.Ct. 1083 (1987) (striking down state attempt to regulate Indian-run bingo game serving non-Indian players).

D. Tribal Taxation of Non-Indians. Tribal jurisdiction over non-Indians requires both presence within tribal territory and some additional tribal interest; presence alone is not enough to confer jurisdiction. *Montana v. United States*, 450 U.S. 544 (1981). Voluntary transactions with Indians or tribes (contracts, leases, etc.) are a sufficient basis for tribal taxing jurisdiction. *Kerr McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985) (sustaining tribal business activity tax on non-Indian lessees of tribal trust land without prior approval of Sec. of Interior); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (sustaining tribal oil and gas severance tax on non-Indians holding previously-granted mineral leases on tribal trust land). See also Cohen ch. 7 sec. D.

#### IV. DEVELOPMENT ISSUES AFFECTED BY TAXES

A. Double Taxation. Tribal taxes added to state taxes on the same activity yield a higher tax burden for non-Indians doing business in Indian country than for competing businesses in the same state outside Indian country, a substantial disincentive to investment in reservation businesses. This fact has undoubtedly deterred some tribes from imposing taxes and restrained the size of tribal taxes. It has also spurred lawsuits to challenge tribal and state taxes. Taxpayer attacks on tribal taxes

having failed, the focus is on competing state taxes.

The Crow Tribe succeeded in attacking Montana's 30% coal severance tax on preemption grounds, based in part on the tribe's own desire to tax. *Crow Tribe v. Montana*, 819 F.2d 895 (9th Cir. 1987), *aff'd mem.*, 108 S.Ct. 685 (1988) (striking down or limiting state coal severance tax on non-Indian mineral lessees of tribe). Recently, the Supreme Court decided to review a taxpayer attack on state taxes on oil and gas production from reservation leases. One theory is preemption, but the appellant also raises the question whether the "dormant" commerce clause limits on state taxation apply when states and tribes tax the same activity. *Cotton Petroleum Corp. v. New Mexico*, 745 P.2d 1170 (App. 1987) (sustaining oil and gas production taxes on non-Indian mineral lessee of tribe), probable jurisdiction noted, 108 S.Ct. \_\_\_\_ (1988). The Court added its own question presented:

Does the commerce clause require that Indian tribes be treated as states for purposes of determining whether state tax on non-tribal activities conducted on Indian reservation must be apportioned to account for taxes imposed on those same activities by Indian tribe?

B. Tax Status of Tribes. Before 1982, tribes did not have a number of the federal tax privileges of state and local governments. Although they were exempt from the income tax on their own income, donors were not entitled to deduct gifts to them, their taxes were not deductible as

taxes, they were probably subject to federal excise taxes, and tribes could not issue tax-exempt bonds. The 1982 Indian Governmental Tribal Tax Status Act extended to tribes many, but not all, of the tax status benefits enjoyed by state and local governments. Pub. L. No. 97-473, 96 Stat. 2607. See I.R.C. sec. 7871; Williams, 22 Harv. J. Legis. 335 (1985). The most important limit is that tribes may issue tax-exempt bonds only when the proceeds will be used in an "essential governmental function," not for economic development.

C. Do Tax Advantages Affect Investments?

Planners and investors may consider tax advantages to doing business in Indian country. These include tribal and Indian immunity from state taxes, tribal exemption from the federal income tax, the allotment income exemption from the federal income tax, and a tribe's ability to agree to limit or forgo its own taxes to induce investments. Some reservation investors have obtained tax limiting agreements from tribes, but there is little evidence that tax exemptions and immunities have played a significant role in investment decisions of private, non-Indian investors.