

State and Tribal Taxation in Context of Federal Indian Law

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Tension and Uncertainty between Tribal and State Taxation Authority

- Tribal members and tribal governments are presumed to be independent from state authority.
- State governments are presumed to possess the authority to regulate the activities of the residents of the state.

Absolute or Per Se Preemption

Legal Incidence

State Taxing Authority in Indian Country

Legal Incidence

- A state tax is prohibited if the legal incidence of the tax falls on the Tribe or a tribal member with respect to on-reservation activities.
 - Example: the legal incidence of Oklahoma's fuel tax fell on the retailer who was the tribe. Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995).
- Determining legal incidence is a matter of statutory construction and governed by Federal law.

State Taxing Authority in Indian Country

- States are without power to tax tribal members, absent the consent of Congress or Tribe.
Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995).
- Where the legal incidence of a state tax falls on non-Indians, dual taxation is possible.
Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989).

Enforcement of State Taxes

- State authority to tax does not necessarily mean the state has the means to enforce that authority.
- Tribes enjoy immunity from suit to collect unpaid taxes. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991).

Other Enforcement Mechanisms

- *The State might, for example:*
 - seize shipments of liquor or cigarettes before they enter Tribal land
 - take some enforcement action against manufacturers, distributors, wholesalers, or consumers
 - pressure the federal government to take some enforcement action.

Particular Areas of State Taxation

Sales and Gross Receipts Taxes

- Tribal members are exempt from state sales tax on purchases in Indian country. Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 480-81 (1976).
- Tribes and tribal members engaging in business as a retailer on tribal lands are exempt from gross receipts tax.

Particular Areas of State Taxation

Use Taxes

- The use tax applies to goods and services the purchaser uses, stores or consumes in the state, and liability for the use tax arises only **after** the sales transaction takes place.
- Use tax is paid by the user, however, out-of-state retailers with “nexus” in the state may be required to collect the use tax.

Particular Areas of State Taxation

Personal Property

- Indians living in Indian Country are exempt from state personal property taxation. Bryan v. Itasca County, 426 U.S. 373, 377-79 (1976) (prohibiting state tax on mobile home).

Particular Areas of State Taxation

Motor Vehicles

- A motor vehicle tax on the ownership of a motor vehicle (as opposed to a sales tax) is the sort of on-reservation activity that a state is not permitted to tax. Oklahoma Tax Commission v. Sac and Fox Nation, 508 U.S. 114 (1993).

Particular Areas of State Taxation

Retail Motor Fuel Sales:

State motor fuel taxes do not apply to retail sales tribal members where the legal incidence of the tax falls on the consumer, but the same tax may be validly imposed on non-Indian consumers. Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995)

Federal Preemption

The Balancing Test

Preemption of State Taxing Authority

Preemption

- There are limitations on the power of states to impose taxes on nonmembers within Indian country.
- A state tax that is outweighed by federal and tribal interests is said to be preempted by federal law, and thus invalid.

Preemption Analysis

- Primarily, states lack jurisdiction when:
 - the subject matter sought to be taxed is preempted by federal law.
 - The tax interfere with a specific regulatory scheme of the federal government which governs the subject matter a state seeks to tax.

Preemption of State Taxing Authority

Taxation of Reservation Generated Value

- States may lack jurisdiction to tax value generated by activities in which the Tribe has a significant financial interest. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 156-57 (1980).
- Tribes cannot simply imports products onto tribal lands and “market[s] an exemption from state taxation to persons who would normally do their business elsewhere...” Id.

Preemption of State Taxing Authority

A state tax may be preempted when it interferes with a specific regulatory scheme of the federal government which governs the subject matter the state seeks to tax.

Preemption of State Taxing Authority

Example:

The pervasive federal statutory and regulatory scheme governing the area of Indian education, which preempted application of New Mexico's gross receipts tax to a non-Indian company building a tribal school on the reservation. Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 632 (1982).

Preemption of State Taxing Authority

Preemption may be based on:


- The Indian trader statutes, Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160, 163-67 (1980) (barring the state from taxing non-Indian retailer's sale of farm machinery to the tribe on its reservation); Warren Trading Post Co. v. Arizona State Tax Commission, 380 U.S. 685, 687-90 (1965).

Preemption of State Taxing Authority

Both the Ninth and Tenth Circuit Court of Appeals held that IGRA preempted state taxation of tribal gaming activities.

- Cabazon Band of Mission Indians v. Wilson, 37 F.3d 430 (9th Cir. 1994) (IGRA preempted state wagering tax imposed on wagers made at an off-reservation tribal facilities operated by non-Indian racing associations).
- Indian Country, U.S.A., Inc. v. Oklahoma, 829 F.2d 967 (10th Cir. 1987) (IGRA preempted imposition of state sales tax on the sale of bingo cards, even though the legal incidence of the sales tax fell upon the consumer).

Chehalis and New Leasing Regulations



Eliminating dual taxation for non-tribally owned businesses wanting to develop and/or own improvements on tribal land

The Ninth Circuit held that the exemption of trust lands from state and local taxation under 25 U.S.C. § 465 extends to permanent improvements on trust lands regardless of the particular form in which the tribe chooses to conduct its business (here, a limited liability company majority owned by the tribe). Confederated Tribes of the Chehalis Reservation v. Thurston County Board of Equalization, 724 F.3d 1153 (9th Cir. 2013).



New Leasing Regulation

- The new leasing regulation set forth at 25 C.F.R § 162.017 preempt taxes, fees, levies, assessments and other charges in three categories: a) permanent improvements on leased land; b) activities conducted on leased premises; and c) leaseholds and possessory interests of land.

Activities conducted on leased premises

- Regarding the exemption for activities, the secretary justifies the exemption by citing two cases involving the taxation of Indian traders.
- The Preamble provides a very broad definition of “activities,” citing the importance of keeping the value of the tribal economic activity on the Tribal Land.
 - Specifically referenced is state sales tax.

Based on Preemption

The leasing regulation notes that “the purpose of residential, business, and WSR [wind and solar resource] leasing on Tribal Lands is to promote Indian housing and to allow Tribal Landowners to use their land profitably for economic development, ultimately contributing to tribal well-being and self-government.”

Can the Regulations be reconciled with U.S. Supreme Court Cases?

The Court has upheld:

- sales taxes on purchases by non-Indian customers, Moe v. Confederated Tribes of the Flathead Reservation, 425 U.S. 463 (1976)
- business privilege taxes on non-Indians operating on reservation, Arizona Dept. of Revenue v. Blaze Construction, 526 U.S. 32 (1999)
- severance taxes assessed on non-Indians engaged in oil and gas production pursuant to an Indian land lease, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 161 (1989)

Benefits relating to Lease of Land

- If potential lessees of Tribes enjoy an exemption from state tax, this creates opportunities for Tribes to attract lessees, negotiate above-market leases and impose tribal taxes.