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ARTICLE

TAXATION OF INDIANS: AN ANALYSIS AND COMPARISON OF NEW MEXICO AND OKLAHOMA STATE TAX LAWS

The field of taxation is one in which conflicts have continually arisen. Taxation involves almost every theory of law that can be imagined from sovereignty to civil jurisdiction, from property rights to special privileges of legislative bodies. In the field of Indian taxation the subject is much more complicated. Taxation involves tribal self-government, treaty rights, Congressional powers over individual Indians and tribes, and the relationship of tribal governments to state governments and agencies.

Jay Vincent White, Author¹

I. INTRODUCTION

There are three sovereign entities coexisting in the United States today: the federal government, the states, and the Indian tribes. The most basic meaning of the term “sovereign” refers to the inherent authority to govern, and to make and enforce laws. Taxation continues to be a frequent source of controversy between states and Indian tribes. An important aspect of our federal system is the maxim that a sovereign government is free from taxation by another sovereign.² This concept has been applied to the transactions and activities of Indian tribes and their members within Indian country. States consider Indian reservations part of the states in which they are located; meaning there may be dual sovereignty over that land. This becomes significant when taxation of non-members, for transactions or activities within Indian country, is in question.

Benjamin Franklin noted more than 200 years ago: “[I]n this world nothing can be said to be certain, except death and taxes.”³ In the United States Constitution, the use of the phrase “Indians not taxed”⁴—relating to representation in Congress—gives rise to

1. Jay Vincent White, *Taxing Those They Found Here: An Examination of the Tax Exempt Status of the American Indian* v (Inst. Dev. Indian L. U.N.M. 1972) (Foreword by Vine Deloria, Jr.).

2. *M’Culloch v. Maryland*, 17 U.S. 316 (1819).

3. John Bartlett, *Familiar Quotations: A Collection of Passages, Phrases, and Proverbs Traced to Their Sources in Ancient and Modern Literature* 310 (Justin Kaplan ed., 16th ed., Little, Brown & Co. 1992).

4. The U.S. Constitution, art. I, § 2, cl. 3, provides:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by

the popular belief that Indians are exempt from taxes.⁵ Regardless of what may have been on the minds of the founding fathers of the Constitution, Indians are currently subject to a variety of taxes—federal, state, and tribal.⁶ Nevertheless, there are limitations on the power to tax Indians, a reality which has been called an attribute of sovereignty.⁷ These limitations may be expressed in federal, state, and tribal constitutions or laws, or they may be imposed by contract.⁸ This paper focuses on New Mexico and Oklahoma to provide a representative sampling of how state tax laws affect Indians.

State powers of taxation on Indians are severely limited, and there remains a presumption “that states are preempted from taxing Indian activities, income, or property in Indian country.”⁹ As with other aspects of the law, states often differ in the implementation and enforcement of tax laws on Indians. This article will provide a comprehensive analysis and comparison of the effect of state taxation on Indians in New Mexico and Oklahoma—encompassing income, sales, cigarette, and property taxes, in light of the current status of jurisdiction in Indian country. The intent of this article is to discuss the most sensible and effective taxation approaches, and to give possible alternatives, in order to create uniformity among states and enhance the understanding and stability of state tax laws.

Part II of this article provides a brief introduction to Indian sovereignty. Part III discusses the evolution of tribal and state civil jurisdiction in Indian country. Part IV defines the income, sales, cigarette, and property tax statutes in New Mexico and Oklahoma, and provides an explanation of the governing case law behind those statutes. Part V analyzes and compares the state statutes and case law set forth in Part IV. Finally, this article concludes that uniformity of state tax laws affecting Indians is necessary to provide clarity and stability for laws in light of new technology eroding geographical borders and current matters of law often implicating more than one state.

II. JURISDICTION IN INDIAN COUNTRY

The U.S. Constitution gives Congress general power to legislate with respect to Indian tribes. The Supreme Court has identified the Indian Commerce Clause¹⁰ and the Treaty Clause¹¹ as the sources of this general power.¹² The Commerce Clause gives the

adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

5. Felix S. Cohen, *Handbook of Federal Indian Law* 254 (U.S. Govt. Printing. Off. 1942).
6. *Id.*
7. *Id.*
8. *Id.*
9. William C. Canby, Jr., *American Indian Law in a Nutshell* 137 (3d ed., West 1998).
10. U.S. Const. art. 1, § 8, cl. 3 (“Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).
11. The Treaty Clause of the U.S. Constitution, art. II, § 2, cl. 2, provides:

[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the

federal government ultimate authority over Indian affairs, and while the treaty power authorizes the President, not Congress, to enter into treaties, those treaties empower Congress to legislate on issues it was not otherwise able to regulate.¹³

These provisions of the Constitution initially placed the federal government “in a protective relationship over tribal governments”¹⁴ that preserved “a tribe’s ‘right to self-government’ as a ‘distinct community’”¹⁵ and held unconstitutional any state law in conflict with the tribes’ sovereignty.¹⁶ This protective relationship of the federal government with tribal governments later evolved into an almost completely unrestrained power over them.¹⁷ However, this was not altogether detrimental for tribes because the federal power over them often protected sovereign jurisdiction in their territories.¹⁸

The federal power to regulate Indian affairs in Indian country is plenary.¹⁹ This power is limited only by constitutional restraints that apply to all actions of the federal government.²⁰ Whether general federal legislation is applicable in Indian country “[depends] upon the intention rather than the power of Congress.”²¹ In determining the intent of Congress, the process is to balance the tribal interest of exemption, against the federal interest of applicability.²² The rule often utilized by the courts was first introduced in *United States v. Farris*,²³ and concisely stated in *Donovan v. Coeur d’Alene Tribal Farm*.²⁴

A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches “exclusive rights of self-governance in purely intramural matters”; (2) the application of the law to the tribe would “abrogate rights guaranteed by Indian treaties”; or (3) there is proof “by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations”²⁵

In another case, *McClanahan v. State Tax Commission of Arizona*,²⁶ the United States Supreme Court made it clear that state law would apply in Indian country only when the following two conditions were met: (1) there was no interference with tribal

Congress may by Law vest Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

12. *McClanahan v. St. Tax Commn. of Ariz.*, 411 U.S. 164, 172 n. 7 (1973).

13. *U.S. v. Lara*, 541 U.S. 193, 199–202 (2004).

14. David H. Getches, Charles F. Wilkinson & Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law* 315 (5th ed., West 2005).

15. *Id.* at 315–16.

16. *Id.* at 316.

17. *Id.* This idea is discussed more in the following pages regarding civil jurisdiction in Indian country.

18. *Id.*

19. *U.S. v. Kagama*, 118 U.S. 375 (1886).

20. *Morton v. Mancari*, 417 U.S. 535 (1974).

21. Canby, *supra* n. 9, at 265.

22. *Id.*

23. 624 F.2d 890, 893–94 (9th Cir. 1980).

24. 751 F.2d 1113 (9th Cir. 1985).

25. *Id.* at 1116 (quoting *Farris*, 624 F.2d at 893–94) (bracket in original).

26. 411 U.S. 164 (1973).

self-government, and (2) non-Indians were involved.²⁷ The Court also introduced a new approach to the doctrine of tribal sovereignty:

[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. The 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.

The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government.²⁸

The Court's result in *McClanahan* protected tribal sovereignty by reducing it to a mere backdrop, and relied instead on federal preemption.²⁹ However, the Court's analysis seems to shift the presumption of tribal sovereignty over all activities and persons on the reservation to an assumption that a state has power in Indian country unless preempted by federal law.³⁰

Since Congress rarely expresses its intent clearly, the preemption analysis following *McClanahan* generally involves a calculated evaluation of the competing state and federal interests. A decade later in *New Mexico v. Mescalero Apache Tribe*,³¹ the Supreme Court held: "State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."³² The Court has generally considered tribal self-determination to be a strong federal interest.³³ However, the Court has not gone so far as to create a presumption that a state is preempted from intruding in all reservation activities that affect tribes.³⁴

While the preemption analysis of *McClanahan* has remained a strong advocate for protecting tribal sovereignty, it has not been invincible.³⁵ The only area where the Supreme Court avidly protects tribal sovereignty is in barring states from exercising civil jurisdiction that would interfere with tribal court jurisdiction when a matter involves tribal members on a reservation.³⁶

A. *Civil Jurisdiction in Indian Country*

Jurisdiction of federal, tribal, or state courts in Indian country usually turns upon two determinative issues: "(1) whether the parties involved are Indians, and (2) whether

27. *Id.* at 179–81.

28. *Id.* at 172 (footnote omitted, citations omitted).

29. Canby, *supra* n. 9, at 81.

30. *McClanahan*, 411 U.S. at 180–81.

31. 462 U.S. 324 (1983).

32. *Id.* at 334.

33. Canby, *supra* n. 9, at 83.

34. *See Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 845–46 (1982); Canby, *supra* n. 9, at 82–85.

35. Canby, *supra* n. 9, at 84.

36. *Id.* at 84–85.

the events in issue took place in Indian country.”³⁷ Congress gave “Indian country” its present definition in the Major Crimes Act of 1948.³⁸ This definition is contained within the context of the criminal code, but is also used for civil jurisdiction.³⁹ Title 18, section 1151 of the United States Code defines Indian country as:

(a) 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, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.⁴⁰

Subsection (a) includes all of the territory within an Indian reservation.⁴¹ “[N]otwithstanding the issuance of any patent”⁴² means that “even land owned by non-Indians in fee simple . . . is still ‘Indian country’ if it is within the exterior boundaries of an Indian reservation.”⁴³

Subsection (b) includes “dependent Indian communities”⁴⁴ in the definition of Indian country. This is a codification of the Supreme Court’s holding in *United States v. Sandoval*,⁴⁵ a case involving the New Mexico Pueblos who held land not designated as reservations in fee simple under Spanish grants.⁴⁶ In that case, “[t]he Court held that the Pueblo lands were Indian country nevertheless, since the Pueblos were wards dependent upon the federal government’s guardianship.”⁴⁷ Therefore, subsection (b) includes “[d]ependent Indian communities [as part of] Indian country whether or not they are located within a recognized reservation,”⁴⁸ and “subsequently acquired territory thereof”⁴⁹ includes reservation land held in fee in Indian country.⁵⁰

Subsection (c) includes Indian allotments still held in trust by the federal government as part of Indian country. These allotments need not be within the boundaries of a reservation to be included in this subsection.⁵¹

In *Williams v. Lee*,⁵² the Supreme Court held that state courts did not have jurisdiction over an action brought by a non-member “against an Indian couple for the purchase price of goods sold to the Indians on the Navajo reservation in Arizona.”⁵³

37. *Id.* at 112.

38. *Id.* (citing Pub. L. No. 80-53, 62 Stat. 757 (1948) (codified at 18 U.S.C. § 1151 (2000))).

39. *Id.*

40. Canby, *supra* n. 9, at 112 (citing 18 U.S.C. § 1151).

41. *Id.* at 120.

42. 18 U.S.C. § 1151(a).

43. Canby, *supra* n. 9, at 114.

44. 18 U.S.C. § 1151(b).

45. 231 U.S. 28 (1913).

46. Canby, *supra* n. 9, at 120–21.

47. *Id.* at 121.

48. *Id.* (citing 18 U.S.C. § 1151(b)).

49. 18 U.S.C. § 1151(b).

50. Canby, *supra* n. 9, at 121.

51. *Id.* at 123.

52. 358 U.S. 217 (1959).

53. Canby, *supra* n. 9, at 132.

Justice Black's opinion set forth a test for determining whether a state could assume jurisdiction: "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."⁵⁴ While this test appeared to be protective of tribal jurisdiction, it was also possible to interpret the test as "permit[ting] increased exercise of state power within Indian country."⁵⁵ For example, if the state wanted to tax the sales of goods to member Indians in Indian country, the state could argue it was not infringing on the right of tribal government to impose its own tax in addition to the state tax.

This uncertainty was not settled until more than ten years later with the Supreme Court's decision in *McClanahan*. In *McClanahan*, Arizona attempted to tax the income of an Indian who lived on the Navajo Reservation, and whose income was entirely derived from work performed on that reservation.⁵⁶ Invoking the test set forth in *Williams*, the State argued that taxing the income of an individual Indian did not interfere with tribal self-government, and was therefore allowed.⁵⁷ Noting that the argument that state imposition of taxes on reservation members is not an interference with tribal self-government was unpersuasive, the Court clarified its test in *Williams* and held the test "was never intended to apply to the attempted exercise of state jurisdiction over Indians."⁵⁸ The Court further held the test to balance the state and tribal interests by determining whether or not state jurisdiction would infringe upon tribal self-government was appropriate only when the State asserted power over *non-Indians* in Indian country.⁵⁹

The Supreme Court again qualified the extension of state civil jurisdiction over non-members in *Montana v. United States*,⁶⁰ where it held a tribe had no right to regulate hunting and fishing on non-Indian-owned fee land contained within the reservation by non-Indians.⁶¹ *Montana* held that tribes presumptively *possess* civil jurisdiction over non-members on *trust* land within the boundaries of Indian country; and tribes presumptively *lack* civil jurisdiction over non-members on *fee* land within the boundaries of Indian country.⁶² In other words, under *Montana*, the dispositive issue relates to the status of the land—whether the incident in question occurred on trust or fee land. However, two exceptions were stated to rebut the presumption against tribal jurisdiction over non-members on fee land: (1) where there is a consensual relationship between the non-member and "the tribe or its members, through commercial dealing, contracts, leases, or other arrangements,"⁶³ and (2) where there are "direct effect[s] on the political integrity, the economic security, or the health or welfare of the tribe."⁶⁴

54. *Williams*, 358 U.S. at 220.

55. Canby, *supra* n. 9, at 133.

56. *McClanahan*, 411 U.S. at 165.

57. *Id.* at 167–72.

58. Canby, *supra* n. 9, at 134.

59. *McClanahan*, 411 U.S. at 179.

60. 450 U.S. 544 (1981).

61. *Id.* at 566–67.

62. *Id.* at 557.

63. *Mont.*, 450 U.S. at 565.

64. *Id.* at 566.

In 2001, the Supreme Court modified the test set forth in *Montana* with its decision in *Nevada v. Hicks*.⁶⁵ While a state's adjudicatory jurisdiction is at least as broad as its legislative jurisdiction, *Hicks* set forth the proposition that a tribe's judicial jurisdiction is no broader than its legislative jurisdiction, and may even be narrower.⁶⁶ After *Hicks*, the status of land is no longer the dispositive issue; now the key question in the *Montana* test is whether tribal jurisdiction over non-members is "necessary to protect tribal self-government or control internal tribal relations."⁶⁷ To determine this necessity, three factors are considered in the following order: (1) the status of the land,⁶⁸ (2) whether there is a consensual relationship between the non-member and the tribe or its members,⁶⁹ and (3) whether there are direct effects.⁷⁰ It seems the effect of this change would be to reduce tribal civil jurisdiction by reducing the importance of the status of the land. However, it must be noted that the Court limited the holding in this case "to the question of tribal-court jurisdiction over state officers enforcing state law,"⁷¹ and it expressly left open the question of its application to non-members in general.⁷² In fact, courts have been reluctant to extend the Supreme Court's holding in *Hicks* to subsequent cases.⁷³

It is clear that both tribal sovereignty and tribal jurisdiction have been slowly eroding since colonial times when Indian land was entirely the province of the tribes and the tribes had sole jurisdiction over all persons and activities on their lands. While state powers of taxation on Indian lands continue to be severely limited, this may change if the Supreme Court continues its pattern of stripping Indians of jurisdiction.

III. STATE TAXATION OF INDIANS

The leading case regarding the attempted imposition of state taxes on Indians in Indian country is *McClanahan*.⁷⁴ In *McClanahan*, the Supreme Court held that states may not tax the income derived entirely from reservation sources of tribal members domiciled on the tribe's reservation.⁷⁵ Individual tribal members are not subject to state taxation for activities conducted inside Indian-owned lands.⁷⁶ For this exemption to apply to income taxes, the individual Indian member must both live and work on the

65. 533 U.S. 353 (2001).

66. *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997); see also Melissa L. Tatum, *A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Acts*, 90 Ky. L.J. 123, 154-55 (2002).

67. *Hicks*, 533 U.S. at 360-61 (quoting *Montana*, 450 U.S. at 546) (emphasis added); see also Tatum, *supra* n. 66, at 157-65.

68. *Hicks*, 533 U.S. at 359-60; see also Tatum, *supra* n. 66, at 157-65.

69. *Hicks*, 533 U.S. at 359-61; see also Tatum, *supra* n. 66, at 157-65.

70. *Id.*

71. *Hicks*, 533 U.S. at 358 n. 2.

72. *Id.*

73. See *MacArthur v. San Juan County*, 309 F.3d 1216 (10th Cir. 2002); *Tunica-Biloxi Indians of La. v. Pecot*, 248 F. Supp. 2d 576 (W.D. La. 2003); *Chiwewe v. Burlington N. & Santa Fe Ry. Co.*, 239 F. Supp. 2d 1213 (D.N.M. 2002); *Fidelity & Guaranty Ins. Co. v. Bradley*, 212 F. Supp. 2d 163 (W.D.N.C. 2002); *U.S. v. Archambault*, 206 F. Supp. 2d 1010 (D.S.D. 2002).

74. 411 U.S. 164.

75. *Id.* at 165.

76. *Id.* at 168.

reservation.⁷⁷ Either a residence or work outside the reservation is sufficient to become subject to state income taxation.⁷⁸

The location of the sale or property, and the member or non-member status of the consumer are generally determinative for other taxes, such as property, sales, motor vehicle, and excise taxes.⁷⁹ “To the extent that Indians and Indian property within an Indian reservation are not subject to state laws, they are not subject to state tax laws.”⁸⁰ Indian immunity from state taxation arises from federal policies, and in the absence of express congressional authorization, states lack the power to tax.⁸¹

The following pages define the income, sales, cigarette, and property tax laws of New Mexico and Oklahoma as they affect Indians. The intention is to merely define the relevant statutes, identify where the statutes are found, and explain the governing case law behind those statutes.

A. *New Mexico Tax Laws*

1. *Income Tax*

The Income Tax Act is found at chapter 7, article 2 of the New Mexico Statutes Annotated.⁸² Section 7-2-5.5 expressly states:

Income earned by a member of a New Mexico federally recognized Indian nation, tribe, band or pueblo, his spouse or dependent, who is a member of a New Mexico federally recognized Indian nation, tribe, band or pueblo, is exempt from state income tax if the income is earned from work performed within and the member, spouse or dependent lives within the boundaries of the Indian member’s or the spouse’s reservation or pueblo grant or within the boundaries of lands held in trust by the United States for the benefit of the member or spouse or his nation, tribe, band or pueblo⁸³

This statute reinforces the holding in *McClanahan* by allowing an Indian who lives and works on the reservation an exemption from state income tax.

Section 7-3-3 of the Withholding Tax Act⁸⁴ requires any employer who “deducts and withholds a portion of an employee’s wages for payment of income tax under the provisions of the Internal Revenue Code shall [also] deduct and withhold”⁸⁵ the state withholding tax.⁸⁶ There is no express exception in the statute for the income of Indians who live and work on the reservation. However, in *O’Cheskey v. Hunt*⁸⁷ the Supreme

77. *Id.* at 175–76.

78. *Id.*

79. Henry H. Bloch Sch. of Bus. Administration, UMKC, *Native American Tax Policy Project, State Taxation: Executive Summary*, <http://www.bloch.umkc.edu/natpp/statexecsummary.html> (last accessed Sept. 21, 2005).

80. Cohen, *supra* n. 5, at 254.

81. *McClanahan*, 411 U.S. at 171.

82. N.M. Stat. Ann. §§ 7-2-1–7-2-36 (2005).

83. *Id.* at § 7-2-5.5.

84. N.M. Stat. Ann. §§ 7-3-1–7-3-12 (2005).

85. *Id.* at § 7-3-3.

86. *Id.*

87. 512 P.2d 961 (1973).

Court of New Mexico held that applying the withholding tax to the income of Indians who reside and work on the reservation, would interfere with the exclusive province of the federal government, and the Indians themselves.⁸⁸

2. Sales Tax

The Gross Receipts and Compensating Tax Act is found at chapter 7, article 9 of the New Mexico Statutes Annotated.⁸⁹ This Act addresses sales taxes within New Mexico, and its purpose is “to provide revenue for public purposes by levying a tax on the privilege of engaging in certain activities within New Mexico.”⁹⁰ The gross receipts from activities or transactions occurring in the sovereign territory of any Indian nation, tribe or pueblo, are expressly exempted from the gross receipts tax.⁹¹

The case of *Rodey, Dickason, Sloan, Akin & Robb, P.A. v. Revenue Division of the Department of Taxation and Revenue of the State of New Mexico*⁹² involved a non-Indian law firm located outside of a reservation attempting to claim a gross receipts tax exemption for legal services performed on behalf of Indian tribes for claims against the United States. The appellate court applied “[t]he federal preemption by implication doctrine created by the United States Supreme Court to protect Indian interests on the reservation.”⁹³ The U.S. Supreme Court had previously held “state taxes sought to be imposed on activities of non-Indians that took place on the reservation were implicitly preempted by federal laws.”⁹⁴ The New Mexico Supreme Court reversed the appellate court, concluding the doctrine “does not apply to activities of non-Indians occurring off Indian reservations.”⁹⁵ The Court pointed out that the U.S. Supreme Court has repeatedly enforced the premise that

exemptions from state tax by implication are permitted only where the taxed activity of the non-Indian occurred on the reservation. . . . [Such] exemption by implication requires the balancing of federal interests determined from the relevant federal laws, with tribal interests as revealed by “traditional notions of tribal sovereignty,” and with state interests to raise revenues from those to whom it provides governmental services.⁹⁶

The Court further noted that “[c]ertain privileges of tribal sovereignty do not extend beyond the political and geographical boundaries of the sovereign.”⁹⁷ Thus, the New Mexico Supreme Court held the law firm could not claim a gross receipts tax exemption for legal services performed on behalf of Indian tribes for claims against the United States.⁹⁸

88. *Id.*

89. N.M. Stat. Ann. §§ 7-9-1–7-9-98 (2005).

90. *Id.* at § 7-9-2.

91. *Id.* at § 7-9-13.

92. 759 P.2d 186 (N.M. 1988).

93. *Id.* at 187.

94. *Id.* at 189.

95. *Id.* at 187.

96. *Id.* at 188 (citations omitted).

97. *Rodey, Dickason, Sloan, Akin & Robb*, 759 P.2d at 189.

98. *Id.*

3. Cigarette Tax

Article 12 of chapter 7 of the New Mexico Statutes Annotated is the Cigarette Tax Act.⁹⁹ Section 7-12-4 of this Act expressly exempts the sales of cigarettes “to the governing body or to any enrolled tribal member licensed by the governing body of any Indian nation, tribe or pueblo for use or sale on that reservation or pueblo grant”¹⁰⁰ from the cigarette tax.¹⁰¹ This means the sales from any suppliers of cigarettes to tribal retailers or individual members are exempt from the tax.

The three leading U.S. Supreme Court cases regarding the imposition of state taxation on the sales of cigarettes on non-members on sales made in Indian country are *Washington v. Confederated Tribes of the Colville Indian Reservation* (“*Colville*”),¹⁰² *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma* (“*Potawatomi*”),¹⁰³ and *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.* (“*Milhelm Attea*”).¹⁰⁴ *Colville* involved Indian tribes challenging Washington’s imposition and collection of various taxes for sales made on reservations.¹⁰⁵ *Potawatomi* involved an Indian tribe seeking to enjoin the assessment and collection of state taxes on prior cigarette sales made on land held in trust for the tribe.¹⁰⁶ *Milhelm Attea* involved a cause of action brought by wholesalers engaged in business on Indian reservations seeking an injunction against the enforcement of state tax regulations imposed on cigarettes sold on the reservations.¹⁰⁷

a. *The Colville case*

The issues involved in *Colville* had not previously been considered by the Supreme Court. First, each of the tribes involved had imposed “its own tax on cigarette sales, and obtain[ed] further revenues by participating in the cigarette enterprise at the wholesale or retail level.”¹⁰⁸ The State contested the taxing ability of the tribes, and the tribes contended that the imposition of their own taxes on the sales preempted the state’s power to impose its sales and cigarette taxes on sales to non-members.¹⁰⁹ Second, the State required each retailer on a reservation to keep detailed reports of sales, whether exempt or nonexempt, in addition to pre-collecting its tax.¹¹⁰ Third, the State raised a question regarding the imposition of the state tax on Indians residing on the reservations who were not members of the governing tribe of that reservation.¹¹¹ Fourth, the State had seized shipments of unstamped cigarettes while they were being shipped to the

99. N.M. Stat. Ann. §§ 7-12-1–7-12-17 (2005).

100. *Id.* at § 7-12-4.

101. *Id.*

102. 447 U.S. 134 (1980).

103. 498 U.S. 505 (1991).

104. 512 U.S. 61 (1994).

105. 447 U.S. at 139–40.

106. 498 U.S. at 507–08.

107. 512 U.S. at 64–65.

108. *Colville*, 447 U.S. at 151.

109. *Id.* at 152, 154.

110. *Id.* at 151.

111. *Id.* at 152.

reservations from out-of-state wholesalers, and threatened to continue to do so if the tribes continued to resist collecting the state's taxes.¹¹²

Initially, the Supreme Court held the tribes had every right to impose their own taxes on cigarette sales made to non-members: "The 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."¹¹³ The Court found no overriding federal interest barring tribal taxation.¹¹⁴ It therefore upheld the tribal tax, commenting that:

One of the powers essential to the maintenance of any government is the power to levy taxes. That this power is an inherent attribute of tribal sovereignty which continues unless withdrawn or limited by a treaty or by act of Congress is a proposition that has never been successfully disputed.¹¹⁵

Additionally, the tribes argued the tribal tax gave them the ability to preempt the state tax, and provided them with an incentive to offer non-member consumers seeking to avoid state sales and cigarette taxes.¹¹⁶ The tribes contended that without this ability they would be harmed economically, because if an incentive no longer existed, non-members would no longer frequent the tribal businesses, thus causing a decrease in revenue for the tribes.¹¹⁷ The Court held there were no principles of federal Indian law that would authorize Indian tribes "to market an exemption from state taxation to persons who would normally do their business elsewhere."¹¹⁸ In addition, the relevant federal statutes and treaties did not evince congressional intent to allow tribes the ability to preempt state taxes otherwise collectible on sales to non-members.¹¹⁹

In 2001, the Supreme Court took a different approach on tribal taxation of non-members on reservation fee land in *Atkinson Trading Company, Inc. v. Shirley* ("Shirley").¹²⁰ The Court cited the general rule from *Montana* that, "with limited exceptions, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian fee land within a reservation."¹²¹ The issue presented in *Shirley* is whether the general rule "applies to tribal attempts to tax nonmember activity occurring on non-Indian fee land."¹²²

The Navajo Nation in Arizona had implemented a hotel occupancy tax that imposed an "8 percent tax upon any hotel room located within the exterior boundaries of the Navajo Nation Reservation."¹²³ The burden of the tax was directly on the guests, but

112. *Id.*

113. *Colville*, 447 U.S. at 152.

114. *Id.* at 154.

115. Cohen, *supra* n. 5, at 142.

116. *Colville*, 447 U.S. at 154.

117. *Id.*

118. *Id.* at 155.

119. *Id.* at 156-57.

120. 532 U.S. 645 (2001).

121. *Id.* at 647 (citing *Mont.*, 450 U.S. 544).

122. *Id.*

123. *Id.* at 648.

the operator of the hotel was required to collect and remit the tax to the Navajo Tax Commission.¹²⁴

The Court stated that “[f]or powers not expressly conferred upon [tribes] by federal statute or treaty, Indian tribes must rely upon their retained or inherent sovereignty.”¹²⁵ It concluded by noting the “exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes.”¹²⁶ The Court reiterated the two exceptions stated in *Montana*:

First, “[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 dealings, contracts, leases, or other arrangements.” Second, “[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.”¹²⁷

The tribe argued the hotel and its guests entered into a consensual relationship with the tribe because of their “actual or potential receipt of tribal police, fire, and medical services.”¹²⁸ The Court rejected the argument stressing “[t]he consensual relationship must stem from ‘commercial dealing, contracts, leases, or other arrangements’”¹²⁹ because allowing such an exception would swallow the rule: “All non-Indian fee lands within a reservation benefit, to some extent, from the ‘advantages of a civilized society’ offered by the Indian tribe.”¹³⁰

The tribe then argued that the second *Montana* exception applied and the tax was warranted because the hotel had direct effects on the tribe.¹³¹ The Court responded: “[W]e fail to see how petitioner’s operation of a hotel on non-Indian fee land ‘threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.’”¹³²

The Court concluded that “Indian tribes are ‘unique aggregations possessing attributes of sovereignty over both their members and their territory,’ but their dependent status generally precludes extension of tribal civil authority beyond these limits.”¹³³ Because the imposition of the hotel occupancy tax did not meet either *Montana* exception, the tax was held invalid.¹³⁴

The second issue from *Colville* related to the state requirement that tribal retailers keep detailed records on both exempt and nonexempt sales.¹³⁵ The Court held when a state’s tax is valid, “the State may impose at least minimal burdens on Indian businesses

124. *Id.*

125. *Shirley*, 532 U.S. at 649–50.

126. *Id.* at 650–51 (quoting *Mont.*, 450 U.S. at 564).

127. *Id.* at 651 (quoting *Mont.*, 450 U.S. at 565–66) (citation omitted).

128. *Id.* at 646.

129. *Id.* at 655 (quoting *Mont.*, 450 U.S. at 565).

130. *Shirley*, 532 U.S. at 655 (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 131 (1982)).

131. *Id.* at 657.

132. *Id.* (quoting *Mont.*, 450 U.S. at 566).

133. *Id.* at 659 (quoting *U.S. v. Mazurie*, 419 U.S. 544, 557 (1975)).

134. *Id.*

135. *Colville*, 477 U.S. at 159–60.

to aid in collecting and enforcing that tax.”¹³⁶ The burden of showing that the recordkeeping requirements are invalid is on the tribes, and the Court held the tribes failed to demonstrate the invalidity of those requirements.¹³⁷

For the third issue in *Colville*, regarding whether the state may impose its taxes on Indians residing on the reservation who were not members of the governing tribe of that reservation, the Court held the state had such a right.¹³⁸ The Court determined even though these non-member Indians do fall under the definition of “Indian” as defined in the Indian Reorganization Act of 1934,¹³⁹ there was no congressional intent to exempt them from state taxation.¹⁴⁰ In essence, those Indians were the equivalent of non-Indian residents on the reservation, and therefore the State could impose taxes on sales made to them.¹⁴¹

Finally, the fourth issue in *Colville* concerned the state’s power to seize unstamped cigarettes en route to the reservations from out-of-state wholesalers unless the tribes agreed to comply with the collection of state cigarette taxes.¹⁴² The Court held that “[b]y seizing cigarettes en route to the reservation, the State polices against wholesale evasion of its own valid taxes without unnecessarily intruding on core tribal interests.”¹⁴³

b. *The Potawatomi Case*

In *Potawatomi*, the Supreme Court encountered the issue of whether a state may tax sales of goods to members and non-members on land held in trust for a federally recognized Indian tribe.¹⁴⁴ The tribe had engaged in cigarette sales for many years on land held in trust by the federal government without collecting the state cigarette tax.¹⁴⁵ In 1987 the tribe was served with a tax assessment letter demanding payment of \$2.7 million in back taxes for the years of 1982–1986, after which suit was initiated to enjoin the assessment.¹⁴⁶ The State counterclaimed, seeking enforcement of its \$2.7 million claim against the tribe, and seeking to enjoin the tribe from future cigarette sales without collection of state taxes on those sales.¹⁴⁷

Citing the rule from *Colville*, the *Potawatomi* Court held that while the doctrine of tribal sovereignty applies to the tribe, it did not relieve the tribe from its obligation to collect valid state sales taxes.¹⁴⁸ The State had the authority to tax sales of cigarettes to non-members on the reservation.¹⁴⁹ Additionally, the Court determined that requiring

136. *Id.* at 159.

137. *Id.* at 160.

138. *Id.* at 160–61.

139. 25 U.S.C. § 479 (2000).

140. *Colville*, 447 U.S. at 161.

141. *Id.*

142. *Id.* at 161.

143. *Id.* at 162.

144. *Potawatomi*, 498 U.S. at 507–08.

145. *Id.*

146. *Id.* at 507.

147. *Id.* at 507–08.

148. *Id.* at 512.

149. *Potawatomi*, 498 U.S. at 512.

tribal retailers to collect the state sales taxes was a “minimal burden justified by the State’s interest in assuring the payment” of state taxes.¹⁵⁰

Finally, the Court held that tribal sovereign immunity did not leave the State without a remedy regarding its right to tax the sales of goods to non-members of the tribe.¹⁵¹ The State is not barred from seeking damages in an action against individual agents or officers of a tribe, seizing unstamped cigarettes outside of a reservation, assessing wholesalers that supply the unstamped cigarettes to the tribal retailers, or entering into agreements with tribes in order to come to a mutual agreement on a process of collecting state sales and cigarette taxes.¹⁵²

c. *The Milhelm Attea case*

In *Milhelm Attea*,¹⁵³ the New York had implemented a “regulatory scheme that imposes recordkeeping requirements and quantity limitations on cigarette wholesalers who sell untaxed cigarettes to reservation Indians”¹⁵⁴ in order to preclude non-members from escaping the cigarette tax. This case was brought by wholesalers challenging the regulations.¹⁵⁵

New York imposes a cigarette tax which is enforced through the purchase of tax stamps placed on each pack of cigarettes prior to sale.¹⁵⁶ Cigarettes sold on reservations to tribal members are exempt from this tax, but cigarettes sold on reservations to non-members are not subject to the exemption.¹⁵⁷ Regulations enacted by the State limit the quantity of untaxed cigarettes allowed for sale to tribes and tribal retailers by wholesalers based on the “probable demand” of Indian consumers.¹⁵⁸ Probable demand is calculated either by relying on evidence of member demand submitted by the tribe, or by “multiplying the ‘New York average [cigarette] consumption per capita’ by the number of enrolled members of the affected tribe.”¹⁵⁹ All wholesalers who sell to tribes, or tribal retailers, are required to “ensure that the buyer intends to distribute the cigarettes to tax-exempt consumers, takes delivery on the reservation, and holds a valid state tax exemption certificate.”¹⁶⁰

The Court stated:

It would be anomalous to hold that a State could impose tax collection and bookkeeping burdens on reservation retailers who are themselves enrolled tribal members, including stores operated by the tribes themselves, but that similar burdens could not be imposed on wholesalers, who often . . . are not [enrolled tribal members].¹⁶¹

150. *Id.*

151. *Id.* at 514.

152. *Id.*

153. 512 U.S. 61.

154. *Id.* at 64.

155. *Id.* at 67.

156. *Id.* (citing N.Y. Tax Law § 471 (McKinney 2005)).

157. *Id.*

158. *Milhelm Attea*, 512 U.S. 66 (citing 20 N.Y. Comp. Codes, R. & Regs. tit. 20, § 336.7(d)(1) (1992)).

159. *Id.* (quoting 20 N.Y. Comp. Codes, R. & Regs. §§ 336.7(d)(i), (d)(2)(ii) (1992)).

160. *Id.* at 67 (footnote omitted).

161. *Id.* at 74 (footnote omitted).

Indian traders are not “immune from state regulation that is reasonably necessary to the assessment or collection of lawful state taxes.”¹⁶² Accordingly, the Court held that the state regulation of cigarette wholesalers requiring valid exemption certificates to be produced by consumers and detailed records to be kept by wholesalers, did not “unduly interfere with Indian trading.”¹⁶³

In summary, New Mexico’s cigarette tax laws comply with the leading Supreme Court cases on the issue. While the state’s cigarette tax laws are not overly descriptive in light of the Supreme Court holdings in *Colville*, *Potawatomi*, and *Milhelm Attea*, the state does exempt sales of cigarettes for sale or use by tribes.¹⁶⁴

4. Property Tax

Articles 35 to 38 of chapter 7 of the New Mexico Statutes Annotated are the Property Tax Code.¹⁶⁵ Section 2 of article XXI of the New Mexico Constitution, which is part of the New Mexico Enabling Act, expressly prohibits the taxation of property reserved by the United States for Indian Tribes.¹⁶⁶ However, the state is not precluded from taxing any lands or other property outside of an Indian reservation that is owned or held by an Indian unless such land is under the absolute jurisdiction and control of the United States Congress.¹⁶⁷

*Prince v. Board of Education of Central Consolidated Independent School District No. 22*¹⁶⁸ involved a claim brought by residents of a school district seeking a declaratory judgment against the district constructing or improving buildings on a reservation held in trust by the federal government.¹⁶⁹ The New Mexico Supreme Court held that article XXI, section 2 of the state’s Constitution “precludes the state from taxing Indian lands and Indian property on the reservation.”¹⁷⁰ The Court recognized this section would not

162. *Id.* at 75.

163. *Milhelm Attea*, 512 U.S. at 76.

164. *See* N.M. Stat. Ann. § 7-12-4 (2005).

165. N.M. Stat. Ann. §§ 7-35-1–7-38-93 (2005).

166. The New Mexico Constitution, art. XXI, § 2, provides:

The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof, and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through the United States, or any prior sovereignty; and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States; and that the lands and other property belonging to citizens of the United States residing without this state shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by this state upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein shall preclude this state from taxing as other lands and property are taxed, any lands and other property outside of an Indian reservation, owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid, or as may be granted or confirmed to any Indian or Indians under any act of congress; but all such lands shall be exempt from taxation by this state so long and to such extent as the congress of the United States has prescribed or may hereafter prescribe.

167. *Id.*

168. 543 P.2d 1176 (N.M. 1975).

169. *Id.* at 1177.

170. *Id.* at 1181.

prevent the state from taxing the property of non-Indian corporations leasing land from a tribe, regardless of whether the property is within the boundaries of the reservation.¹⁷¹ In such a situation, the state may not impose its tax on the land, but may tax the non-Indian property of the corporation because non-Indian corporations cannot evade state tax obligations by locating their businesses on Indian property.¹⁷²

Residents of New Mexico argued that article XII, section 3 of the state's Constitution¹⁷³ precluded the school district "from building and maintaining schools on lands located on the [reservation] and leased from the [tribe]."¹⁷⁴ The Court determined the purpose of section 3 of the state's Constitution "is to insure exclusive control by the state over [the] public educational system."¹⁷⁵ The Court held that schools located on leased lands would not interfere with the exclusive control of the schools by the state, regardless of the fact that the leased land was located on a reservation.¹⁷⁶ Finally, the Court concluded that Indian self-government and the federal preemption doctrine did not interfere with "the state's operation and exclusive control of the schools located on Reservation lands leased by the [school district] with approval of both the . . . tribe and the Secretary of the Interior."¹⁷⁷

In conclusion, New Mexico's tax laws reflect the U.S. Supreme Court's holdings in *McClanahan*, i.e., that states do not have the power to tax the income derived entirely from reservation sources of tribal members domiciled on the tribe's reservation,¹⁷⁸ that Indian immunity from state taxation arises from federal policies, and that in the absence of express congressional authorization, states lack the power to tax.¹⁷⁹

B. Oklahoma Tax Laws

1. Income Tax

The Oklahoma Income Tax Act is found at title 68, article 23 of the Oklahoma Statutes.¹⁸⁰ Oklahoma Statute, title 68, section 2355, imposes a tax on the income of every resident or nonresident individual of Oklahoma.¹⁸¹ There is no express exemption for Indians in the Income Tax Act. However, as previously mentioned, the Supreme Court provided the rule in *McClanahan* that states are preempted from taxing the income

171. *Id.*

172. *Id.*

173. The New Mexico Constitution, art. XII, § 3, provides:

The schools, colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university.

174. *Prince*, 543 P.2d at 1181.

175. *Id.* at 1182.

176. *Id.*

177. *Id.* at 1183.

178. *McClanahan*, 411 U.S. at 165.

179. *Id.* at 171.

180. Okla. Stat. tit. 68, §§ 2351–2356 (2001).

181. *Id.* at § 2355.

of member Indians residing on reservations derived from reservation sources.¹⁸² This rule was upheld in 1993 in *Oklahoma Tax Commission v. Sac and Fox Nation*.¹⁸³

In *Sac & Fox Nation*, the Supreme Court stated that the first step in determining whether a tribal member is exempt from state income taxes under *McClanahan* is to determine the residence of that tribal member.¹⁸⁴ The Court concluded that “the *McClanahan* presumption against state taxing authority applies to all Indian country, and not just formal reservations.”¹⁸⁵

Conversely, *Choteau v. Burnet*,¹⁸⁶ involved an Indian residing on a reservation whose income was derived solely from oil and gas leases on lands held in trust by the federal government.¹⁸⁷ The income from the oil and gas leases were placed in the United States Treasury and credited quarterly to the tribal members.¹⁸⁸ The Supreme Court held that while

[r]oyalties received by the government from mineral leases of Indian lands have been held to be beyond a state’s taxing power . . . it cannot properly be said that the share of it paid as royalties to the petitioner constituted in his hands an instrumentality of the government and was therefore beyond the scope of the tax.¹⁸⁹

Therefore, while the general rule is that income derived from reservation sources by Indians residing on the reservation is exempt from state income taxation, there is an exception to that rule for income earned from oil and gas leases on land held in trust by the federal government. This holding was upheld five years later in *Leahy v. State Treasurer of Oklahoma*¹⁹⁰ in which the facts were substantially similar to those in *Choteau*. The issue has not been challenged since.

2. Sales Tax

The Oklahoma Sales Tax Code begins at title 68, section 1350 of the Oklahoma Statutes.¹⁹¹ The only express exemption provided for Indians under the Oklahoma Sales Tax Code is for cigarette and tobacco products sales on Indian reservations to Indian tribal members.¹⁹² However, as mentioned previously, there is a presumption against state taxing power in Indian country in the absence of express congressional legislation.¹⁹³

Section 346 of title 68 states:

The doctrine of tribal sovereign immunity prohibits the State of Oklahoma from bringing a lawsuit against an Indian tribe or nation to compel the tribe or nation to collect

182. *McClanahan*, 411 U.S. at 165.

183. 508 U.S. 114, 125.

184. *Id.* at 124.

185. *Id.* at 125.

186. 283 U.S. 691 (1931).

187. *Id.* at 692.

188. *Id.* at 693.

189. *Id.* at 696–97 (citations omitted).

190. 297 U.S. 420, 420 (1936).

191. Okla. Stat. tit. 68, § 1350 et seq. (2001).

192. *Id.* at § 1355(8).

193. Cohen, *supra* n. 5, at 254.

state taxes on sales made in Indian country to either members or nonmembers . . . without a waiver of immunity by the tribe or nation.¹⁹⁴

As noted above, the Supreme Court held in *Potawatomi* that while the doctrine of tribal sovereignty is applicable to the tribe, it does not relieve the tribe from its obligation to collect valid state sales taxes.¹⁹⁵ In *Potawatomi*, the State was entitled to state sales taxes on sales to non-members on the reservation.¹⁹⁶ The Court concluded requiring tribal retailers to collect the state sales taxes was a “minimal burden justified by the State’s interest in assuring the payment”¹⁹⁷ of the state’s taxes.

As stated in *McClanahan*, “Congress’ intent to maintain the tax-exempt status of reservation Indians is especially clear in light of the Buck Act, which provides comprehensive federal guidance for state taxation of those living within federal areas.”¹⁹⁸ Section 105(a) of the Buck Act¹⁹⁹ states:

No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.²⁰⁰

Section 109 of the Buck Act states: “Nothing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed.”²⁰¹ It is therefore clear that Congress has shown the requisite intent to expressly prohibit the application of state sales taxes to sales made to Indians on reservations.

3. Cigarette Tax

Oklahoma has an extensive and intricate collection of statutes regarding taxes on sales of cigarettes beginning at title 68, section 301 of the Oklahoma Statutes. Section 321 states “[a]ll sales to a federally recognized Indian tribe or nation which has entered into a compact with the State of Oklahoma . . . or to a licensee of such a tribe or nation”²⁰² are exempt from the stamp excise tax levied pursuant to Oklahoma Statute title 68, section 301 et seq.²⁰³

Section 346 of title 68 expressly recognizes that federal law prevents the state from imposing its cigarette tax on sales to Indian tribes or members.²⁰⁴ It also expressly recognizes that the doctrine of tribal sovereign immunity bars the state from bringing a

194. Okla. Stat. tit. 68, § 346(A)(2) (Supp. 2004).

195. *Potawatomi*, 498 U.S. at 512.

196. *Id.*

197. *Id.*

198. *McClanahan*, 411 U.S. at 176 (citation omitted).

199. 4 U.S.C. §§ 101–126 (2000).

200. *Id.* at § 105(a).

201. *Id.* at § 109.

202. Okla. Stat. tit. 68, § 321 (2000) (footnote omitted).

203. *Id.*

204. *Id.* at § 346(A)(1).

cause of action against an Indian tribe to compel the tribe to collect state taxes on sales made on the reservation to either members or non-members.²⁰⁵

In addition, section 346 recognizes that in *Potawatomi*, the Supreme Court suggested the state may enter into agreements with Indian tribes in order to collect state taxes on sales to non-members.²⁰⁶ Apparently in response to the *Potawatomi* decision, the statute expressly authorizes the Governor of Oklahoma to enter into cigarette tax compacts with federally recognized Indian tribes or nations in Oklahoma.²⁰⁷ The legislative intent regarding the cigarette tax compacts was

to establish a system of state taxation of sales of cigarettes and tobacco products made by federally recognized Indian tribes or nations . . . under which the rate of payments in lieu of state taxes is less than the rate of state taxes on other sales of cigarettes . . . in order to allow such tribes or nations . . . to make sales of cigarettes . . . to tribal members free of state taxation.²⁰⁸

These compacts exempt all sales in Indian country from taxes levied pursuant to Oklahoma Statute title 68, section 301 et seq.²⁰⁹ However, this exemption is subject to the conditions that

- 1) A payment in lieu of state sales and excise taxes . . . shall be paid to the State . . . upon purchase of all cigarettes . . . intended for resale in Indian country by the tribes or nations . . . ;
- 2) All cigarettes . . . sold or held for sale to the public, without distinction between member and nonmember sales, shall bear a payment in lieu of tax stamp . . . ;
- 3) Records of all sales of cigarettes . . . to the tribes or nations . . . shall be kept by all wholesalers doing business in the State of Oklahoma and shall be made available for inspection by state officials on a timely basis.²¹⁰

Compacts and agreements have been implemented between the Tribes and Oklahoma to negotiate matters which mutually affect them.²¹¹ The tobacco tax compact system was implemented to address the “need to develop a method to properly allocate tax revenues between the State of Oklahoma and tribal governments.”²¹²

Conversely, if an Indian tribe or nation chooses not to enter into a compact with the state, section 349 of title 68 levies a seventy-five percent excise tax on the sale of cigarettes at a tribally owned or licensed store in lieu of state sales taxes.²¹³ However, if a tribe can show that sales of cigarettes to tribal members exceeded twenty-five percent

205. *Id.* at § 346(A)(2).

206. *Id.* at § 346(A)(3) (citing *Potawatomi*, 498 U.S. 505).

207. Okla. Stat. tit. 68, § 346(C).

208. *Id.* at § 346(B).

209. *Id.* at § 346(C).

210. *Id.* at §§ 346(C)(1)–(3).

211. See Oklahoma Indian Affairs Commission, *Compacts, Contracts & Agreements*, <http://www.state.ok.us/~oiac/tobacco.htm> (last accessed Sept. 15, 2005).

212. *Id.*

213. Okla. Stat. tit. 68, § 349(A).

of the tribally owned or licensed store's total sales of cigarettes, the amount of tax paid in excess of that twenty-five percent may be refunded.²¹⁴

In addition to the seventy-five percent excise tax levied on tribes that choose not to enter into a compact, the state requires the wholesalers supplying tribal retailers to affix a state tax stamp to every pack that is to be sold at the tribal retail store.²¹⁵ The tribal retailers "may only purchase, receive, stock, possess, sell or distribute stamped cigarettes."²¹⁶ Any cigarettes not stamped in accordance with the statutes are subject to seizure by any law enforcement officer of the state.²¹⁷ While tribal sovereign immunity bars the state from filing a cause of action against a tribe,²¹⁸ the statutes allow for any law enforcement officer of the state to stop any vehicle on a state road or highway to determine if these laws are being violated.²¹⁹

4. Property Tax

The Ad Valorem Tax Code begins at title 68, section 2801 in the Oklahoma Statutes.²²⁰ Article 1, section 3 of the Oklahoma Constitution expressly prohibits the taxation of property reserved by the United States for Indian Tribes,²²¹ but does not expressly convey whether the state is exempt from taxing any lands and other property outside of an Indian reservation that is owned or held by an Indian.

In *Baldwin v. Board of Tax-Roll Corrections of Oklahoma County*,²²² the Oklahoma Supreme Court held that owners of land leased by the federal government were not entitled to a property tax exemption.²²³ The Court acknowledged the phrase "reserved for its use"²²⁴ could conceivably include land leased by the federal government, but rejected the premise because the land was *leased*, not *reserved*, by the government.²²⁵

214. *Id.* at § 349(B).

215. *Id.* at § 350(A).

216. *Id.* at § 350(B).

217. *Id.* at § 351; *see also Colville*, 447 U.S. at 161–62.

218. Okla. Stat. tit. 68, § 346(A)(2); *see also Potawatomi*, 498 U.S. at 507.

219. Okla. Stat. tit. 68, § 351(B); *see also Colville*, 447 U.S. at 161.

220. Okla. Stat. tit. 68, § 2801.

221. The Oklahoma Constitution, art. 1, § 3, provides:

The people inhabiting the State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States. Land belonging to citizens of the United States residing without the limits of the State shall never be taxed at a higher rate than the land belonging to residents thereof. No taxes shall be imposed by the State on lands or property belonging to or which may hereafter be purchased by the United States or reserved for its use.

222. 331 P.2d 412 (Okla. 1958).

223. *Id.* at 415.

224. *Id.*

225. *Id.*

IV. ANALYSIS

Uniformity of state laws simplifies the lives of businesses and individuals. Consistency is becoming more critical as new technology erodes geographical borders, and matters of law implicate more than one state. Any time a person enters a business transaction, makes a purchase or sale, or enters into a contract, it would be helpful to everyone involved to know the legal implications behind that action.

The income, sales, cigarette, and property tax statutes for New Mexico and Oklahoma are substantially similar in effect. The statutes of both states reflect the Supreme Court's holding in *McClanahan*, that Indian immunity from state taxation arises from federal policies, and in the absence of express congressional authorization, states lack the power to tax. However, there are some differences between the statutes in New Mexico and Oklahoma that cause some concern.

A. *Income Tax*

New Mexico expressly exempts member Indians living on the reservation whose income is derived solely from work performed on the reservation,²²⁶ while Oklahoma's statutes fail to mention this exemption for Indians. This exemption is well established in case law by the U.S. Supreme Court and in courts throughout the country.²²⁷ In addition, section 106(a) of the Buck Act states:

No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.²²⁸

Section 109 of the Buck Act reiterates that the Act does not authorize taxation of an "Indian not otherwise taxed."²²⁹ It is clear Congress has indicated that Indians living and working on reservations, which are considered federal areas, are not subject to state income taxes. However, Oklahoma has not codified this express exemption into its own laws.

B. *Sales Tax*

Similarly, the sales tax statutes in New Mexico expressly exempt the gross receipts from activities or transactions occurring in the sovereign territory of any Indian nation, tribe, or pueblo.²³⁰ Oklahoma again neglects to codify this exemption. Like the income

226. N.M. Stat. Ann. § 7-2-5.5 (2005).

227. See e.g. *Sac & Fox Nation*, 508 U.S. 114; *Colville*, 447 U.S. 134; *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976); *McClanahan*, 411 U.S. 164; *Mescalero Apache Tribe v. O'Cheskey*, 625 F.2d 967 (10th Cir. 1980).

228. 4 U.S.C. § 106(a) (2005).

229. *Id.* at § 109.

230. N.M. Stat. Ann. § 7-9-13.

tax exemption, the sales tax exemption is well established by case law.²³¹ As previously mentioned, section 106(a) of the Buck Act subjects all persons to sales taxes levied by the states,²³² and section 109 expressly exempts Indians from state imposition of sales taxes on the reservation.²³³ Again, it is clear Congress has shown the intent to exempt Indians on reservations from state sales taxes, and again, Oklahoma has not incorporated this explicit exemption into its laws. Incorporating Congress's express intent to exempt Indians on reservations from state sales taxes in state statutes would create uniformity and consistency between the state and federal government, as well as clarify and simplify the tax implications of sales to Indians on reservations.

C. Cigarette Tax

Oklahoma's laws regarding cigarette taxes are far superior to those of New Mexico. New Mexico exempts from its cigarette tax the sales of cigarettes to any member Indian "for use or sale on that reservation or pueblo grant."²³⁴ By doing this, New Mexico retains the right to collect its tax on cigarette sales on reservations to non-members and non-Indians, and this right is well established in case law.²³⁵ However, the State does not require by law or agreement that the reservation retailers keep records of taxable and nontaxable sales.

By contrast, Oklahoma statutes expressly allow the Governor to enter into tobacco compacts with tribes in order to protect the interests of both parties.²³⁶ The first of these compacts was entered into in 1992 by former Governor David Walters.²³⁷ During Governor Walters's tenure, a total of twelve of the thirty-nine federally recognized tribes in Oklahoma entered into tobacco compacts.²³⁸ Under these compacts, the "tribes [agreed to] remit 25 percent of their tobacco tax collections to the state."²³⁹ The compacts would have automatically renewed after ten years had the tribes not been notified in December 2002 that the State would not be renewing them.²⁴⁰

Governor Frank Keating was elected in 1994 and during his eight-year tenure he negotiated twenty-two additional compacts.²⁴¹ The termination dates on the twelve compacts entered into by Governor Walters were set to expire toward the end of Governor Keating's tenure in 2002.²⁴² Keating, desiring to revise the compacts to increase the amount the tribes paid the state in lieu of state sales taxes, terminated these

231. See e.g. *Milhelm Attea*, 512 U.S. 61; *Potawatomi*, 498 U.S. 505; *Colville*, 447 U.S. 134; *Rodey, Dickason, Sloan, Akin & Robb*, 759 P.2d 186.

232. 4 U.S.C. § 106(a).

233. *Id.* at § 109.

234. N.M. Stat. Ann. § 7-12-4.

235. See e.g. *Milhelm Attea*, 512 U.S. 61; *Potawatomi*, 498 U.S. 505; *Colville*, 447 U.S. 134.

236. Okla. Stat. tit. 68, § 346(C).

237. Oklahoma Indian Affairs Commission, *supra* n. 211, at <http://www.state.ok.us/~oiac/tobacco.htm>; see also State of Oklahoma, *Oklahoma Governors since Statehood*, <http://www.gov.ok.gov/govlist.htm> (last accessed Oct. 28, 2005).

238. Oklahoma Indian Affairs Commission, *supra* n. 211, at <http://www.state.ok.us/~oiac/tobacco.htm>.

239. Shaun Schafer, *Compacts Upset Tribes*, *Tulsa World* A7 (May 28, 2003).

240. *Id.*

241. Oklahoma Indian Affairs Commission, *supra* n. 211, at <http://www.state.ok.us/~oiac/tobacco.htm>.

242. Schafer, *supra* n. 239.

twelve compacts in December 2002, his last month in office.²⁴³ However, several days later, Governor Keating temporarily extended the compacts.²⁴⁴

Governor Brad Henry was sworn into the Governor's office in January 2003.²⁴⁵ In May 2003, Governor Henry again amended the compacts with the original twelve tribes to allow for a temporary extension so negotiations could be held.²⁴⁶ Between October 2003 and June 2004, Governor Henry successfully renegotiated eleven of the twelve original compacts, and entered into a new compact with a tribe that had not previously had one.²⁴⁷ Under the terms of the new and renegotiated compacts, the tribes still agree to pay twenty-five percent of their tobacco tax collections to the state.²⁴⁸ However, in anticipation of a future state cigarette tax increase, under the new compacts tribes agree to pay fifty percent on the increased amount of the tax levy.²⁴⁹ "For example, if the [cigarette] tax jumps from 23 cents to 50 cents, the 50 percent would only apply to the 27-cent difference. The 25 percent levy would remain in effect for the first 23 cents."²⁵⁰

Oklahoma's statutes also take tribes that choose not to enter into a compact with the state into account. As expressly authorized by the Supreme Court in *Colville*,²⁵¹ the statutes regulate the sale of cigarettes to tribes and tribal retailers through requiring wholesalers to affix stamps to the cigarettes,²⁵² and provide for a method of enforcement by allowing law enforcement officers to stop and inspect any shipments en route to the reservations.²⁵³

In sum, Oklahoma's cigarette tax statutes are extremely comprehensive, and the implementation of tax compacts with the tribes addresses the revenue interests of both the tribes and state. Both parties benefit by entering into these compacts. In contrast, New Mexico's tax laws are lacking in many of those respects. The U.S. Supreme Court has clearly authorized ways for states to collect the taxes they are entitled to, and New Mexico would greatly benefit by reviewing and considering the cigarette tax laws of Oklahoma.

D. Property Tax

Property tax is an area where both New Mexico and Oklahoma statutes are truly lacking. The exemption of reservation land from property taxation in both states is

243. *Id.*; see also Will Chavez, *Tribes, State Sign New Tobacco Compact*, 28 Cherokee Phoenix 2 (Jan. 2004).

244. Associated Press, *The Daily Ardmoreite*, *Tribes Receive Extension for Compacts*, http://www.ardmoreite.com/stories/120502/new_compact_extension.shtml (Dec. 5, 2002).

245. State of Oklahoma, *Governor Brad Henry*, http://www.governor.state.ok.us/gov_henry.php (last accessed Oct. 10, 2005).

246. Associated Press, *supra* n. 244, at http://www.ardmoreite.com/stories/120502/new_compact_extension.shtml.

247. Oklahoma Indian Affairs Commission, *supra* n. 211, at <http://www.state.ok.us/~oiac/tobacco.htm>.

248. State of Oklahoma, *supra* n. 245, at http://www.governor.state.ok.us/display_article.php?article_id=205&article_type=0 (Oct. 10, 2003).

249. *Id.*

250. *Id.*

251. 447 U.S. at 159-61.

252. See Okla. Stat. tit. 68, § 350(A).

253. *Id.* at § 351(B).

contained in the Constitution of each state. New Mexico expressly reserves the right to tax Indian-owned land outside of a reservation,²⁵⁴ but Oklahoma does not.

As previously emphasized in the discussion of *McClanahan*, state laws do not apply to Indians on Indian reservations unless Congress expressly authorizes their application.²⁵⁵

It follows that Indians and Indian property on an Indian reservation are not subject to state taxation except by virtue of express authority conferred upon the state by act of Congress. Conversely Indian property outside of an Indian reservation is subject to state taxation unless congressional authority for a claim of tax exemption can be found.²⁵⁶

Four common arguments are used by courts to support tribal exemption from state property taxation: (1) the federal instrumentality doctrine, (2) express exemption in a state's enabling act or other federal statutes, (3) express waiver provided in state constitutions, and (4) express exemption in state statutes.²⁵⁷ The latter three arguments are self-explanatory; the federal instrumentality doctrine is based on the notion that the function of the federal government is to protect tribal governments, and states are preempted from imposing a tax that would interfere with the function of the federal government.²⁵⁸

In *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*,²⁵⁹ Yakima County imposed an ad valorem tax on real property and an excise tax on the sale of real property, in accordance with Washington law.²⁶⁰ The county initiated foreclosure proceedings on property belonging to the Yakima Nation and its members due to their failure to pay past due ad valorem and excise taxes.²⁶¹ Yakima Nation's primary argument was that "federal law prohibited these taxes on fee-patented lands held by the Tribe or its members."²⁶²

The U.S. Supreme Court has previously held states are without power to tax reservation lands, and reservation Indians, without express congressional authority.²⁶³ The Court has also traditionally refused to recognize congressional authorization of state taxation of reservation lands or Indians unless the congressional intent is "unmistakably clear."²⁶⁴ Taking these considerations into effect, Yakima County argued that section 6 of the General Allotment Act²⁶⁵ gave the county express authority to tax the fee lands.²⁶⁶ Section 6 of the Act states:

254. See *supra* n. 166–67 and accompanying text.

255. *McClanahan*, 411 U.S. at 171; see also *supra* nn. 26–30.

256. Cohen, *supra* n. 5, at 254.

257. *Id.*

258. *Id.* at 254–55.

259. 502 U.S. 251 (1992).

260. *Id.* at 256.

261. *Id.*

262. *Id.*

263. *Id.* at 257.

264. *Mont. v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985).

265. 25 U.S.C. § 349 (1988).

266. *Yakima*, 502 U.S. at 258–59.

“At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, . . . then each and every allottee shall have the benefit of *and be subject to* the laws, both civil and criminal, of the State or Territory in which they may reside *Provided*, That the Secretary of the Interior may, . . . whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, *and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed.*”²⁶⁷

The Supreme Court accepted the county’s argument, and held that “by specifically mentioning immunity from land taxation”²⁶⁸ Congress proclaimed its intent to permit state taxation.²⁶⁹

Yakima Nation next argued “state jurisdiction over reservation fee land is manifestly inconsistent with the policies of Indian self-determination and self-governance.”²⁷⁰ The Supreme Court responded:

This seems to us a great exaggeration. . . . [T]he mere power to assess and collect a tax on certain real estate is not [significantly disruptive of tribal self-government]. In any case, these policy objections do not belong in this forum. If the Yakima Nation believes that the objectives of the Indian Reorganization Act are too much obstructed by the clearly retained remnant of an earlier policy, it must make that argument to Congress. Judges “are not at liberty to pick and choose among congressional enactments, and when two [or more] statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”²⁷¹

The Court proceeded to decide the two separate taxation issues, namely whether Yakima County could impose an ad valorem tax on Indian-owned reservation land held in fee, and whether the County could levy an excise tax on the sale of those lands.²⁷² For the ad valorem tax, the Court determined the tax places a “burden on the property alone.”²⁷³ In addition, the Court found “[l]iability for the ad valorem tax flows exclusively from ownership of realty on the annual date of assessment.”²⁷⁴ Accordingly, the Court held the ad valorem tax prima facie valid because it was “‘taxation of . . . land’” within the meaning of the General Allotment Act.²⁷⁵

In regard to the excise tax, the Court determined that the General Allotment Act permitted the imposition of a tax on land, not on sales of land.²⁷⁶ The Court stated: “Because it is eminently reasonable to interpret that language as not including a tax upon the sale of real estate, our cases require us to apply that interpretation for the benefit of the Tribe. Accordingly, Yakima County’s excise tax on sales of land cannot be sustained.”²⁷⁷

267. *Id.* at 258 n. 1 (quoting 25 U.S.C. § 349) (emphasis in original).

268. *Id.* at 259.

269. *Id.*

270. *Id.* at 265.

271. *Yakima*, 502 U.S. at 265–66 (quoting *Mancari*, 417 U.S. at 551).

272. *Id.* at 266.

273. *Id.*

274. *Id.*

275. *Id.* (quoting 25 U.S.C. § 349).

276. *Yakima*, 502 U.S. at 268–69.

277. *Id.* at 269–70.

Six years later in *Cass County v. Leech Lake Band of Chippewa Indians*,²⁷⁸ the Supreme Court extended the holding in *Yakima* “to any alienable lands held by a tribe, not just those that passed out of trust under legislation expressly stating that the lands would be taxable.”²⁷⁹

As one commentator writes:

In *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, the Supreme Court conferred to the states the power necessary to diminish the tribal land base. By allowing the states to impose an ad valorem tax on fee-patented lands owned by Indians and to further permit foreclosure on such parcels, the Court has given states the power to diminish the tribal land base and thereby contribute to the dissolution of what remains of tribal sovereignty and integrity.²⁸⁰

This is especially important in light of the already diminishing jurisdiction of tribes in Indian country. New legislation is needed from Congress to stop the Supreme Court from its steady pattern of stripping Indians of their jurisdiction and sovereign lands.

V. CONCLUSION

For the sake of clarity and uniformity, Oklahoma needs to codify the income and sales tax exemptions for Indians residing and working on reservations. This would greatly simplify matters for Indians and non-Indians, members and non-members, and employers and employees, and it would relieve some of the burden on the state legislature and court system.

In addition, New Mexico needs to expand its cigarette tax provisions. It would be greatly beneficial for both the state and tribes in that the revenue interests of both parties would be addressed and taken into account. Oklahoma’s cigarette tax statutes and tobacco compacts between the state and tribes are good models to follow.

Finally, while both Oklahoma and New Mexico provide for the exemption of reservation trust land from their property tax in their state constitutions, it is time for Congress to stop the Supreme Court from continuing to strip away tribal jurisdiction and sovereignty. In light of the *Yakima* case, once title to land held in trust by the federal government for the tribes is transferred in fee to the tribes or their members, the land becomes fair game for the states to tax and take away through foreclosure for failure to pay the tax.²⁸¹

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278. 524 U.S. 103 (1998).

279. Getches, Wilkinson & Williams, Jr., *supra* n. 14, at 592; *see Cass County*, 524 U.S. at 115.

280. Christopher A. Karns, *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation: State Taxation as a Means of Diminishing the Tribal Land Base*, 42 Am. U. L. Rev. 1213, 1243 (1993) (footnote omitted).

281. *See* 502 U.S. at 269–70.

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