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## Doing Business in Indian Country: Introduction to American Indian Law Concepts Affecting Taxation

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**Taxation  
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## Doing Business in Indian Country: Introduction to American Indian Law Concepts Affecting Taxation

Erik M. Jensen\*

*This article describes some of the issues that will affect whether national, state, and tribal governments can tax investors who do business, or who invest in doing business, within Indian country (a term generally meaning American Indian reservations, although it can be broader than that<sup>1</sup>).*

First, a caveat: Those looking for absolutely clear answers in American Indian law are likely to be frustrated. Indeed, much of what I say below is at least debatable, and some may think it's just wrong. Although some general principles can be stated, the analysis of a specific issue (e.g., can state *X* tax the income of non-Indian contractor *A* who does business with Indian tribe *C*?) is likely to be very particularistic, depending on such factors as treaty language (if a treaty is involved at all); relevant statutory, executive order, or regulatory language; the specific facts at issue; and the scope given to interpretational principles intended to resolve disputes (such as the Indian "canons of construction" described below). Moreover, most commentators agree that, both because of the particularistic analyses in the cases<sup>2</sup> and the ebbs-and-flows of judicial sympathy for tribal concerns,<sup>3</sup> the Supreme Court decisions do not come close to establishing a coherent body of law.

Nevertheless, despite the uncertainty at the (often wide) margins, one can find generally applicable principles about the tax liabilities a non-Indian investor might incur by doing business or investing in Indian country:

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<sup>1</sup> I use the terms "Indian country" and "reservation" interchangeably in this article without trying to spell out the potential differences between the two concepts.

<sup>2</sup> See, e.g., *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980) (noting "particularized inquiry into the nature of the state, federal, and tribal interests at stake" in doing preemption analysis).

<sup>3</sup> The consensus is that today's Supreme Court is much less friendly to tribal interests than has been the case for decades.

1. The non-Indian investor will generally be subject to otherwise applicable federal taxes, but there are some special benefits for investing in Indian country, such as accelerated depreciation rules directed at “qualified Indian reservation property”;<sup>4</sup>
2. He or she will probably be subject to tribal taxes, unless the tribe specifically exempts the investor from those taxes (a subject that therefore ought to be part of the negotiations between tribes and potential investors); and
3. He or she will probably (although not necessarily automatically) be subject to otherwise applicable state taxes.

In the following pages, I first discuss some general doctrines that pervade American Indian law and that may affect the powers of the various governments—national, state, and tribal—in Indian country: the federal plenary power doctrine, the significance of treaties between the United States and the tribes, and the Indian canons of construction. In Part II, I turn to tribal taxing powers, deriving from the tribes’ status as sovereigns, which should generally include the power to tax those doing business in Indian country. In Part III, I consider the doctrines potentially limiting state taxation of transactions occurring in Indian country, none of which (absent a clear expression of congressional intent) is likely to preclude a state from taxing nonmembers of a tribe. Finally, in Part IV, I provide a brief summary of the taxing powers of federal, state, and tribal governments as they apply not only to non-Indian investors, but also to tribal members and the tribes themselves.

## **I. Some Significant American Indian Law Doctrines**

In this part, I discuss some doctrines that affect, or could affect, taxing issues in Indian country: the federal plenary power doctrine, the continuing vitality of treaties entered into in the eighteenth and nineteenth centuries with the Indian tribes, and the Indian canons of construction.

### **A. Federal Plenary Power Doctrine**

Whatever the inherent, traditional powers of tribes within their own country (see the discussion of tribal sovereignty in Part II below), it is now generally accepted that the federal government has plenary power over the tribes, largely because of Congress’s constitutional power to regulate

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<sup>4</sup> IRC Section 168(j). The recovery period for such property is shortened (e.g., the period for 5-year property will be three years, Section 168(j)(2)), and the full depreciation deduction is available for both alternative minimum tax and regular tax purposes. Section 168(j)(3).

“Commerce ... with the Indian tribes.”<sup>5</sup> Subject only to limitations like due process, this power is so broad that it includes the power to abrogate treaties and, indeed, to terminate the federally recognized status of tribes—as long as it is done so clearly.<sup>6</sup>

The effect of the federal plenary power doctrine is that doing business in Indian country can take whatever form Congress thinks it should take. Congress could exempt on-reservation transactions, and the parties participating in those transactions, from federal taxation; it could provide that states have no power to tax any person doing business in Indian country or any transaction occurring there; it could take away the tribes’ otherwise sovereign power to impose taxes; it could impose whatever regulatory restrictions on doing business that it thinks appropriate; and so on.

If nothing else, Congress could make Indian country more attractive as a place for investment simply by clarifying the respective governments’ taxing powers. Unfortunately, that hasn’t happened. Some interpretational difficulties are inevitable with any complex body of law, of course—simplification can go only so far—but Congress could do a much better job of clarification than it has to this point.

## **B. Continuing Vitality of Treaties**

Many tribes, particularly western tribes, entered into treaties with the United States. (Treating with Indian tribes ended in 1871, primarily because the House of Representatives was jealous that treaty-making left the Senate with much greater power over Indian policy.) For the average person on the street, the very idea that these treaties have effect today is startling. When the treaties were signed, tribal members weren’t U.S. citizens and there was a clear sense that the United States was dealing with distinct nations. Now that the American Indians are U.S. citizens, however, these treaties have metamorphosed into agreements between the United States and groups (special though those groups may be) made up of American citizens.

As jurisprudentially peculiar as this situation is, the treaties continue to be honored, and treaty language often plays a central role in evaluating the limits of governmental power within Indian country. Unless Congress has acted clearly to abrogate a treaty with an American Indian tribe, that treaty has effect today.

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<sup>5</sup> U.S. Const. art. I, § 8, cl. 3.

<sup>6</sup> See, e.g., *U.S. v. Dion*, 476 U.S. 734, 738 (1986) (“We have required that Congress’s intention to abrogate Indian treaty rights be clear and plain.”); *Menominee Tribe of Indians v. U.S.*, 391 U.S. 404, 412 (1968) (holding that treaty rights survived termination of federal supervision absent clear evidence to the contrary).

Sometimes treaties contain specific limitations on taxing power, and sometimes they contain language (such as that restricting the power of nontribal governments within tribal lands) that could be interpreted as limiting national or state governments' power to tax. This is clearly an issue for which particularistic analysis is required, all dependent on the treaty language applicable to a tribe. In deciding what tax liabilities may arise from a particular investment, don't ignore any treaty!

### C. Indian Canons of Construction

Historically the so-called Indian canons of construction were important in interpreting ambiguous passages in treaties, statutes, and regulations. In general, the canons provide that doubtful expressions should be interpreted in favor of the tribes or, as appropriate, individual tribal members. The canons were developed to interpret treaty language, which is often abstract and contains many terms that aren't part of everyday discourse,<sup>7</sup> but the canons have been extended to statutory and regulatory interpretation as well.<sup>8</sup>

Thus, if there's doubt about the way a taxing statute should be interpreted in an Indian law context, it ought to be resolved in favor of tribal interests. That should mean, as a general matter, that the imposition of federal or state taxes on transactions within Indian country—taxes that might harm a tribe's economic position even if the taxes are nominally imposed on nontribal parties—ought to be disfavored. Because of its plenary power over Indian affairs, Congress could impose, or permit states to impose, taxes that have unhappy consequences for tribes, but, if Congress is going to do that, its intentions should be clear.

By resolving ambiguities in favor of tribes, the canons have been a powerful protection for tribal interests in the past. That protection seems to be lessening, however. The canons are still the "law," but how powerful they are today is a matter of doubt.<sup>9</sup>

<sup>7</sup> The idea was that Indian treaties were like contracts of adhesion and should be construed against the more powerful party, the United States. See *U.S. v. Winans*, 198 U.S. 371, 380 (1905) ("[W]e will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection . . . .'").

<sup>8</sup> See David H. Getches et al., *Cases and Materials on Federal Indian Law* 327-28 (4th ed., 1998).

<sup>9</sup> Occasionally the canons are totally ignored because a court doesn't know about them and isn't informed of their existence by the affected parties. In *Warbus*, 110 TC 279 (1998), for example, a special trial judge ignored the canons in interpreting Code section 7873, which generally exempts income from a "fishing rights-related activity." *Warbus*, a tribal member, had plausibly argued that discharge of indebtedness income from the foreclosure of a boat used in treaty-protected fishing was covered by the statute, and the canons should have been used to strengthen that argument. See Erik M. Jensen, "Ameri-

The current Supreme Court seems to disfavor the canons in questions of statutory interpretation. For example, in *Chickasaw Nation v. U.S.*,<sup>10</sup> decided in 2001, a majority of the Court treated the canons as little more than rules of convenience, and strained to find no ambiguity (and hence no role for the canons to play) in an inherently ambiguous situation. The effect was that the Court interpreted a statute that on its face made no sense in a way that subjected two tribes to federal wagering excise taxes.

The statutory provision at issue in *Chickasaw Nation*, part of the Indian Gaming Regulatory Act,<sup>11</sup> was a disaster, with two juxtaposed phrases that pointed in diametric directions.<sup>12</sup> To make an already bad situation worse, the legislative history was also of little help in discerning what, if anything, Congress had in mind about tribal tax liabilities. Critics of *Chickasaw Nation*, including this author, have argued that this was precisely the sort of situation—where the statutory text and history mandated no clearly right answer—that the canons were intended to address.<sup>13</sup> If the canons didn't apply in *Chickasaw Nation*, however—when the Court was interpreting a statute (IGRA) clearly intended to further tribal economic development—they might not matter at all anymore, at least when statutory interpretation (rather than treaty analysis) is at issue.

Following the Supreme Court's lead, lower courts have similarly cut back on the force of the canons. For example, in *Ramsey v. U.S.*,<sup>14</sup> decided in September 2002, the Ninth Circuit concluded that a tribal member wasn't exempt from federal highway-related taxes. The district court had determined that provisions in the treaty between the U.S. and the Yakama Nation reserved to the Yakama the right to travel the public highways without restriction and without being subject to licensing and other fees, and that was enough to preclude the federal taxes. The Ninth Circuit concluded, however, that “express exemptive language” was necessary to exempt a tribal member from a federal excise tax, and without the express language, it wouldn't defer to tribal interests.<sup>15</sup> Like the result in *Chickasaw Nation*—indeed, because *treaty* language was involved in *Ramsey*, this case actually goes beyond *Chickasaw Nation*—that conclusion basically turned the traditional understanding of the canons on its head.

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can Indian Law Meets the Internal Revenue Code: *Warbus v. Commissioner*”, 74 North Dakota Law Review 691 (1998), reprinted in 83 Tax Notes 105 (1999).

<sup>10</sup> 534 U.S. 84 (2001).

<sup>11</sup> 102 Stat. 2467–2486 (1988), 25 U.S.C. §§ 2701–2721.

<sup>12</sup> See 25 U.S.C. § 2719(d)(1).

<sup>13</sup> See, e.g., Erik M. Jensen, *Chickasaw Nation: Interpreting a Broken Statute*, 97 Tax Notes 1195 (2002).

<sup>14</sup> 302 F.3d 1074 (9th Cir. 2002).

<sup>15</sup> *Id.* at 1078.

The bottom line: The canons have not been explicitly repudiated by the Supreme Court, but it may well be that their time has come and gone.

## II. Inherent Tribal Sovereignty, Including the Power to Tax

In this part of the article I consider tribal power to tax transactions occurring within tribal territory.

It should ordinarily be the case that tribes can tax persons doing business in Indian country—even if the persons aren't members of the tribe—as long as the activities being taxed actually occur on tribal land.<sup>16</sup> Taxation is an inherent power of a sovereign; Congress has not exercised its plenary power to take that sovereign power away; and the power to tax ought not to be deemed “inconsistent with the tribes’ dependent status” (a concept used, for example, to conclude that tribes have no criminal jurisdiction over non-Indians<sup>17</sup>). An investor in Indian country is therefore likely to be subject to any applicable tribal taxes, unless the investor negotiates for an exemption from those taxes.

The tribes’ sovereign powers are attributable to the tribes’ traditional status as independent nations, before the European settlement of North America, but the concept of tribal sovereignty has never been interpreted to leave tribes with the power to impose only those taxes that were known in, say, 1787. Whether or not tribes traditionally imposed anything like a corporate income tax or a severance tax or a value added tax, the power to impose such a tax is inherent in the concept of sovereignty.<sup>18</sup> In short, the sovereign power to tax is not constrained by taxing conceptions of a particular historical time or place.

As with almost all issues in American Indian law, however, this statement of tribal taxing power may need some qualification. In section II.A., I discuss whether tribal taxing power might be lessened if (1) the taxpayer is not a member of the tribe, or (2) the taxed activity takes place on nontribal land within reservation boundaries. And in section II.B., I consider the extent to which tribes may use the taxing power to change the “rules of the game” that investors might have assumed would govern their activities in Indian country.

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<sup>16</sup> But see *infra* notes 20-24 and accompanying text (discussing *Atkinson Trading* and noting that three Supreme Court justices seem to think tribes may not be able to tax nonmembers at all).

<sup>17</sup> See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

<sup>18</sup> See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 894, 907 (1982) (upholding, among other things, tribal power to impose a severance tax on mineral lessees already engaged in activities on reservation) (“[S]overeign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign’s jurisdiction, and will remain intact unless surrendered in unmistakable terms.”).



### A. Members vs. Nonmembers and Tribal Land vs. Nontribal Land

A tribe's sovereign powers are greatest when the tribe is dealing with its own members, and a tribe can unquestionably tax those members. Can it also tax nonmembers doing business on a reservation? As I argued above, the answer ought to be Yes—that, because of their sovereign status, tribes have a great deal of scope to tax persons doing business within Indian country. Maybe a tribe would want to exempt those persons from taxation so as to stimulate economic activity, but, under traditional notions of tribal sovereignty, it should have the power to tax the persons if it wishes to do so.

But the extent of tribal power over nonmembers may depend on whether the activities being taxed take place on Indian or non-Indian land. Many reservations are “checkerboard” in nature, with blocks of non-Indian land interspersed with tribal land.<sup>19</sup> The non-Indian land is still considered part of the reservation, and it is still technically part of Indian country, but, under recent Supreme Court cases, tribal power is substantially diminished over that land.

In *Atkinson Trading Co. v. Shirley*,<sup>20</sup> for example, the Court in 2001 held that the Navajo Nation could not impose a hotel tax on guests at a hotel located on fee simple land within the reservation boundaries. Picking up on the 1981 decision in *Montana v. U.S.*,<sup>21</sup> the Court stated that the Navajo Nation's power to tax nonmembers “reaches no further than tribal land,”<sup>22</sup> unless the power to tax relates to “consensual relationships” between the tribe and the nonmember, or the power over nonmembers is necessary to deal with “conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”<sup>23</sup>

The *Montana* “consensual relationships” exception ordinarily ought to cover taxation associated with doing business in Indian country; indeed, taxation is specifically mentioned in the *Montana* opinion's discussion of “consensual relationships.” Thus, most instances of investment in Indian country are likely to be subject to tribal taxation (absent an agreement to the contrary), even if the activities actually occur on fee simple land.

This is another area in flux, however. Three concurring justices in *Atkinson Trading* went much further than the facts of the case required,

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<sup>19</sup> Several “allotment” acts in the late nineteenth and early twentieth centuries led to much traditional tribal land passing out of Indian hands.

<sup>20</sup> 532 U.S. 645 (2001).

<sup>21</sup> 450 U.S. 544, 566 (1981) (rejecting tribal power to regulate hunting and fishing on fee simple land within a reservation boundary).

<sup>22</sup> *Atkinson Trading Co.*, 532 U.S. at 653.

<sup>23</sup> *Montana*, 450 U.S. at 566.



stating that the general principle derived from *Montana* is that “the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.”<sup>24</sup> Tribal power to tax *anyone* other than tribal members as an element of tribal sovereignty may thus be a disappearing notion in Washington judicial circles.

### **B. Can a Tribe Impose New Taxes After a Deal Has Been Negotiated?**

As I suggested above, investors doing business in Indian country ordinarily ought to be treated as having entered into a consensual relationship with the tribe so that, absent a contrary agreement, the tribal power to tax should be conceded. But suppose the tribe later imposes a new tax. Will those already engaged in on-reservation activities be subject to the tax? The answer is Maybe, and it’s therefore important to get the ground rules decided explicitly ahead of time.

In *Merrion v. Jicarilla Apache Tribe*,<sup>25</sup> the Supreme Court in 1982 considered the validity of a tribal severance tax that fell on non-Indian lessees of tribal oil and gas lands. The leases, which had been approved by the Bureau of Indian Affairs, set out the terms of the arrangement, with no mention of the possibility of a tribal tax. Indeed, the tribal constitution in effect at the time the leases were entered into defined no tribal power to tax.

When the tribe imposed the severance tax, the lessees challenged it, in effect arguing that the tribe had changed the terms of the commercial deal and that the tribe had lost the power to tax the mining activities when it leased the lands. The Court rejected that argument. Whatever the tribe had agreed to in its capacity as commercial actor, it hadn’t waived its powers as a *sovereign*:

[P]etitioners and the dissent confuse the Tribe’s role as commercial partner with its role as sovereign. This confusion relegates the powers of sovereignty to the bargaining process undertaken in each of the sovereign’s commercial agreements. It is one thing to find that the Tribe has agreed to sell the right to use the land and take from it valuable minerals; it is quite another to find that the Tribe has abandoned its sovereign powers simply because it has not expressly reserved them through a contract.<sup>26</sup>

And later in the opinion the Court said:

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<sup>24</sup> *Atkinson Trading Co.*, 532 U.S. at 659-60 (Souter, J., concurring) (quoting *Montana*, 450 U.S. at 565).

<sup>25</sup> 455 U.S. 130 (1982).

<sup>26</sup> *Id.* at 145-46.

[S]overeign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and *will remain intact unless surrendered in unmistakable terms*.<sup>27</sup>

Since the Court has cut back on the scope of the canons of construction,<sup>28</sup> and has also recently spoken of sovereignty as if it related only to tribal power over tribal members,<sup>29</sup> it may be that *Merrion* no longer reflects the Court's views. But the case is still on the books. It therefore behooves a potential investor in Indian country—someone whose investment is based on the assumption that he, she, or it won't be subject to tribal taxation—to make sure that understanding is reflected “unmistakably” in the agreements with the relevant tribe.<sup>30</sup> *Merrion* suggests that a tribe can waive its otherwise available sovereign powers—it can agree, for example, not to impose an otherwise generally applicable tax on particular parties—but a waiver isn't going to be inferred.

### **III. Limitations on State Power to Tax Within Indian Country**

I now turn to the power of a state to tax transactions within Indian country.

Two doctrines have developed to determine limitations on state power in these circumstances: federal preemption and infringement of tribal self-government. As a result of these doctrines, it is fairly clear that states will not be able to tax tribal members or the tribe itself for on-reservation activities, but it is likely that a state's power to tax nonmembers doing business within Indian country will be unaffected.

#### **A. General Principle: States Can Tax Nonmembers for On-Reservation Activity**

State power, including the power to tax, may be limited within Indian country if either the exercise of state power is preempted by federal law,<sup>31</sup> or the exercise would “infringe on the right of the Indians to govern themselves.”<sup>32</sup> The preemption and infringement tests are related but independent. Either test by itself, said the Supreme Court, “can be a sufficient

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<sup>27</sup> Id. at 148 (emphasis added).

<sup>28</sup> See supra Part I.C.

<sup>29</sup> See supra Part II.A.

<sup>30</sup> Of course, it is also in the tribes' long-term economic interests to make any understanding “unmistakable,” and thereby to make Indian country more attractive to investors.

<sup>31</sup> See, e.g., *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973).

<sup>32</sup> *Williams v. Lee*, 358 U.S. 217, 223 (1959).

basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members.”<sup>33</sup>

When first developed, preemption analysis required an examination of the pervasiveness of federal regulatory control—the more pervasive the federal involvement, the greater the likelihood that state power would be preempted—but it has evolved into a balancing test: weighing federal and tribal interests, on the one hand, against state interests on the other. The second test, the infringement test, has been phrased as follows: “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.”<sup>34</sup>

A classic preemption case is *McClanahan v. Arizona State Tax Commission*,<sup>35</sup> where the Supreme Court concluded in 1973, after a detailed analysis of relevant treaties, statutes, and case law, that Arizona’s power to tax the income of a Navajo Nation member earned within reservation boundaries had been preempted. With a tribal member involved in on-reservation activity, federal and tribal interests almost automatically trump state interests.

The result is generally different, however, when the state taxes at issue are imposed on non-Indians. Taxing non-Indians is unlikely to be viewed as an infringement on tribal power, and the likelihood that the federal regulatory structure is pervasive enough, or the federal and tribal interests strong enough, to preclude taxation of nonmembers is small. For example, the Court has upheld state taxes on on-reservation sales of cigarettes to nonmembers of tribes, and it made no difference in the result that a tribe had its own taxing scheme in place as well.<sup>36</sup>

## **B. Legal Incidence versus Economic Incidence**

The cigarette tax cases also stand for the proposition that state taxes may be imposed on nonmembers, even if the economic effect on the tribes may be catastrophic. In *Washington v. Confederated Tribes of the Colville In-*

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<sup>33</sup> *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).

<sup>34</sup> *Williams v. Lee*, 358 U.S. at 220.

<sup>35</sup> 411 U.S. 164 (1973).

<sup>36</sup> See *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). States may have problems in enforcing taxes imposed on on-reservation sales, but such problems weren’t considered to disable the state taxing power. Some of the enforcement problems are discussed in *Department of Taxation & Finance v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994), a case upholding a New York regulatory scheme on wholesalers (involving record-keeping requirements and quantity limitations) who sell untaxed cigarettes to reservation Indians.

*dian Reservation*,<sup>37</sup> for example, the Court in 1980 upheld a state tax on reservation sales to nonmembers even though it was unquestionably the case that enforcement of the tax would dry up sales to nonmembers (which depended on an exemption from taxation for competitive advantage) and cost the tribes substantial revenue.

Cases such as *Colville* have distinguished between the *economic* incidence of a tax (i.e., who really bears the economic burden) and the *legal* incidence (i.e., who under state law has the legal obligation to pay the tax), with *legal* incidence generally being the dispositive factor. A state can't impose a tax on a tribe or on a tribal member for on-reservation activities, but, as long as the state statute doesn't provide that it's the tribe or tribal members being taxed, the tax is likely to be upheld—even if the economic effects on the tribe are disastrous.<sup>38</sup>

Deferring to legal incidence may be formalism at its worst, but the Court has understood the consequences of its rulings. Indeed, the Court has recognized that if a state stupidly characterizes the legal incidence of a tax as falling on a tribe, thus making the tax invalid, all the state needs to do is rewrite the statute to redefine the tax's legal incidence.<sup>39</sup>

Having said that it's legal rather than economic incidence that controls, I should note that there is a suggestion in *White Mountain Apache Tribe v. Bracker*,<sup>40</sup> decided in 1980, that economic incidence isn't altogether irrelevant: it might be a factor pointing in the direction of federal preemption of a state tax. In *White Mountain Apache*, the tribe contracted with non-Indian companies to perform logging services on the reservation. The legal incidence of a motor vehicle license tax (effectively a gross receipts tax on carriers) fell on the logging companies, but the tribe contractually agreed to reimburse the companies for the tax. The Court ultimately concluded that federal regulation of logging in Indian country was so pervasive that the state tax was preempted, but the Court also suggested that the economic incidence of the tax (that is, that the tribe bore the economic burden) was a factor to be taken into account in the preemption analysis.<sup>41</sup>

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<sup>37</sup> 447 U.S. 134 (1980).

<sup>38</sup> One possible exception: there were hints in the cigarette tax cases that, if the taxed activity is distinctly Indian, or is more clearly attributable to value added on the reservation than was true with the sale of cigarettes, the tribal interest in resisting state taxation may have been sufficient to trump the state interest. See, e.g., *Colville*, 447 U.S. at 155 (“It is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest.”).

<sup>39</sup> See *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 460 (1995) (“the State generally is free to amend its law to shift the tax's legal incidence”). States are presumably less free to rewrite the laws of economics.

<sup>40</sup> 448 U.S. 136 (1980).

<sup>41</sup> See *id.* at 151 n.15.

Thus the question: If a tribe enters into an arrangement with a non-Indian contractor under which the tribe is contractually obligated to pay any tax liability of the contractor—so that the economic burden of a state tax would fall on the tribe—does that limit the state’s taxing power? And the answer again: Maybe. At a minimum, shifting the economic burden makes it more likely that the tax will be preempted. It helps, but it may not be dispositive.

#### **IV. General Understandings About Taxation Within Indian Country**

In this final part of the article, I provide a primer on some of the basic rules dealing with taxation in Indian country.

##### **A. Federal Taxation**

Absent treaty language or express statutory language to the contrary, tribal members are subject to federal taxes of general application, such as the income tax.<sup>42</sup> However, the Internal Revenue Code does contain some specific provisions exempting certain sorts of income, such as that from fishing-rights related activities, from taxation.<sup>43</sup>

In general, nonmembers of a tribe who do business within Indian country and who are subject to U.S. taxation will be subject to federal taxes just as they would be for transactions entered into elsewhere. The Code includes specific incentives, however, like accelerated depreciation, for investment in Indian country.<sup>44</sup>

The tribes themselves, and tribal corporations formed under the Indian Reorganization Act, are exempt from federal income taxation.<sup>45</sup> This exemption may make it possible to structure transactions so as to economically transfer the benefits of the tribal exemption to non-Indian investors.

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<sup>42</sup> See *Squire v. Capoeman*, 351 U.S. 1 (1956).

<sup>43</sup> See, e.g., Section 7873 (excluding from gross income “income derived ... by a member of an Indian tribe directly or through a qualified Indian entity, or ... by a qualified Indian entity ... from a fishing rights-related activity of such tribe”).

<sup>44</sup> See, e.g., Section 168(j) (special accelerated depreciation rules for “property on Indian reservations”).

<sup>45</sup> The reasons for this aren’t “altogether clear.” Scott A. Taylor, *An Introduction and Overview of Taxation and Indian Gaming*, 29 *Ariz. St. L.J.* 251, 252 (1997). See Rev. Rul. 94-16, 1994-1 CB 19 (“Neither an unincorporated Indian tribe nor a corporation organized under section 17 of the Indian Reorganization Act of 1934 is subject to federal income tax on its income, regardless of the location of the activities that produced the income.”). But see *id.* (“[A] corporation organized by an Indian tribe under state law is subject to federal income tax on its income, regardless of the location of the activities that produced the income.”).

Although the tribes are exempt from income taxation, they may be subject to federal excise taxes, as *Chickasaw Nation v. U.S.*,<sup>46</sup> dealing with federal wagering taxes, shows.<sup>47</sup> But there is no generally applicable principle at work here. Some excise taxes clearly apply to Indian tribes, some don't, and some have uncertain application to the tribes.

### **B. State Taxation**

State taxes are generally inapplicable to tribes, tribal property, and tribal members as long as the activities or property being taxed is within Indian country.<sup>48</sup> But states can generally tax non-Indians doing business on reservations, and states can tax tribal members, and maybe the tribes themselves, on income from transactions outside Indian country.<sup>49</sup>

I noted above (in Part III.B.) the question whether the economic incidence of a state tax has any relevance in determining the effect of the tax within Indian country. Apparently the economic incidence isn't decisive by itself, but, in a case in which the argument for federal preemption of a state tax is otherwise marginal, a conclusion that the economic incidence falls on a tribe may tip the balance in favor of preemption. Thus, if an agreement between a tribe and a non-Indian contractor makes the tribe bear the economic burden of any state taxes imposed on the contractor, it's possible that, if other factors point toward preemption as well, the state tax will be preempted.<sup>50</sup>

### **C. Tribal Taxation**

As discussed in Part II, because of their inherent sovereign powers, tribes should ordinarily be able to tax transactions, and those investing in transactions, within Indian country. There should be absolutely no doubt about tribal power over any tribal members who are investors. In general, tribes should also be able to tax non-Indian investors who have effectively entered into "consensual relationships" with the tribes to do business. How-

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<sup>46</sup> 534 U.S. 84 (2001).

<sup>47</sup> See supra Part I.C.

<sup>48</sup> See, e.g., *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973) (holding that state income tax on tribal member's income earned on-reservation was preempted).

<sup>49</sup> See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

<sup>50</sup> In contrast, a state tax on private persons who contracted with the federal government to do road improvement in Indian country was held not to be preempted by federal law. See *Arizona Department of Revenue v. Blaze Construction Co.*, 526 U.S. 32 (1999). The balancing of federal and tribal interests against state interests in such a case is different than if the contract had been entered into with the tribes themselves (and approved by the appropriate federal officials).

ever, the Supreme Court seems to be increasingly reluctant to accept tribal power, including taxing power, over nonmembers who conduct activities on fee simple land within reservation boundaries. And three members of the Court do not see the tribes as having any significant power over nonmembers, apparently even if the activities to be taxed occur on what is unquestionably tribal land.

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