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Dual Taxation

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Anyone trying to figure out what federal, state, and tribal governments can tax in Indian country must examine a bewildering body of authority. Jurisdictional overlaps between state, local, and tribal governments can create tax disputes as governments seek to tax the same transactions. This overlapping state/tribal tax jurisdiction may result in dual or "double" taxation, a generally undesirable circumstance.[1] Dual taxation can also occur when federal and state governments impose individual income taxes on the same income, or when income earned and taxed in foreign countries is also taxed domestically. By taxing income or economic transactions at rates higher than what otherwise might be the case, dual taxation can affect investment and spending decisions and incentivize tax avoidance behavior.

"Preemption" occurs when federal law "preempts" state law. Preemption is an important component of federal, state, local, and tribal relationships and is at the heart of many of the tax disagreements between tribes and states. Dual taxation becomes more complicated when the governments involved are sovereign, as is the case for tribes.

The federalist system provides a framework for the US to have a sovereign-to-sovereign relationship with tribes. Tribes, however, still have similar functions to local governments, including providing local public goods. Having tribal tax revenues and business operations sufficient to pay for these public goods (e.g., social services, education, health care, housing) promotes economic growth, enhances self-sufficiency, and reduces tribal member dependence on the federal, state, and local safety net.[2]

Tax policy is one factor in investment decisions. Consumer spending decisions can be affected, on the margin, by tax rates especially in locations where tax rates vary across a border. The possibility of dual taxation can be a disincentive to nontribal

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investment in Indian country. However, very little empirical analysis has been done on the extent to which tax policy affects the incentives to invest and spend in Indian country. This paper presents a conceptual approach to analyzing how additional tax revenues might affect economic welfare. Further empirical economic analysis will be undertaken in subsequent papers.

A state's power to tax transactions in Indian country depends on who bears the tax's legal incidence, whether the tax infringes on tribal self-government, and whether federal law preempts the tax.[3] Economic incidence is the burden of taxation measured by the change in the resources available to any economic agent because of taxation. Economic incidence includes tax payments and price changes caused by the tax, and economic incidence does not always correspond to legal incidence. For example, the economic incidence of a corporate income tax is shared between capital and labor.

The most common argument behind extending the reach of state taxes or regulations is to "level the playing field" by imposing comparable taxes on similar transactions. For example, states often object to tax-free tribal sales of cigarettes to non-Indians. In economic terms, this is a form of "tax arbitrage" (i.e., exploiting different tax rates). In the context of federal Indian law, it is often characterized as "marketing the exemption."[4]

Multiple sovereigns tax the same activity in many contexts without raising preemption problems due to federal law preempting state and local laws. In American Indian law, federal "preemption" of state or local taxes can constrain a state's imposition of taxes. From the tribal perspective, the fact that not all state or local taxes are preempted may constrain tribes' ability to raise tax revenues and pay for local public goods.

This paper reviews the legal issues and key court decisions associated with taxation on reservations, then focuses on those issues in an economic context, and finally suggests how these tax disputes might be resolved via more consistent balancing of analysis and federal legislation that promoted state-tribal tax compacts.

Taxation on Reservations: The Legal Environment

This section will briefly review the legal environment with respect to taxation on reservations and some of the key court decisions that created it. The literature on taxation issues associated with reservations and American Indians is extensive, reflecting the many court decisions at the federal and state levels. There is tension between state and federal objectives, which is reflected in court decisions. There is uncertainty, inconsistency, and ambiguity across all the decisions, creating incentives to strategically design taxes at the state level. At the tribal level, inconsistency and ambiguity affect the investment environment on reservations and tribes' ability to raise revenues and fund public goods. The uncertainty and ambiguity create incentives for litigation at all levels. Table 1 in the Appendix summarizes information on some of the key court decisions.

At an elementary level, most legal issues have to do with how much states can tax economic activities on reservations (conducted by both tribal and nontribal members). Both tribes and states have an economic interest in these transactions. American Indian tribes are generally exempt from state taxation within their reservations unless Congress has indicated otherwise. However, outside the boundaries of their

reservations, American Indian tribes can be subject to taxation by states.[5] Many of the tax disputes derive from the federal laws that established Indian country, which generally preempt states' ability to tax tribal members, lands, and some activities.[6] While states cannot tax tribal members, tribes do have the power to tax property, individuals, and transactions within their territories. Tribal governments may have the power of taxation, but they are not taxed regardless of the extent to which their activities occur on- or off-reservation.[7]

Tribal corporations have the same tax status as American Indian tribes. Because federally recognized tribes are not taxable entities, they are exempt from United States income taxes.[8] In general, businesses owned and operated by tribes in Indian country, the personal property of tribes, and their members cannot be taxed by state and local governments.[9]

The Supreme Court has prevented states from taxing transactions where the tax's legal incidence was on a tribe or tribal members inside Indian country.[10] However, states may be able to tax transactions involving nonmembers of tribes within Indian country, depending on a preemption analysis that seeks to balance state, federal, and tribal interests.[11] This preemption analysis is called the "*Bracker* analysis" or "*Bracker* balancing test."[12]

Courts have struck down state taxes on nontribal members in Indian country, including state taxes on nonmember retailers' sales to tribes and tribal members. However, the courts have upheld state taxes on tribal cigarette sales to nonmembers, state severance taxes on oil and gas produced by nonmembers in Indian country, and other "state taxes on non-Indians doing business in Indian country."[13]

States are clearly limited in their authority over Indians and Indian country. However, in many cases state taxes have been allowed on economic transactions involving nontribal members on reservation lands. The outcome of balancing tribal and state interests is not predictable and could be linked to confusion about or (in some cases) the strategic ignoring of statutory versus economic incidence of taxation.[14] Courts have applied the balancing test and struck down some state taxes on nonmembers in Indian country while upholding others. The key issue in many Indian tax cases is where the legal incidence of a state tax falls. In general, a state or local government may not impose its taxes on an Indian tribe or its members in Indian country.[15]

State taxes are generally inapplicable to tribes, federally chartered tribal corporations, tribal property, and tribal members if the activity or property that would otherwise be taxed is within Indian country. However, there are some exceptions.[16]

One complication stems from the way some state taxes are administered. For instance, some taxes are imposed at the distributor or wholesaler level (e.g., excise taxes on cigarettes, tobacco products, alcoholic beverages, and highway fuels), which are typically non-Indian businesses located outside of Indian country.[17] However, part or all of the economic burden of the tax may still fall on tribes or American Indians who are immune from state tax.

Tribal immunity may make it difficult for states to collect taxes on transactions in Indian country where the tax burden falls on non-Indians. While the obligation

to collect falls on a tribal business, the legal immunity of the tribal business may make it hard to collect the taxes owed. For example, the Supreme Court has held that purchases by non-Indians from tribal businesses in Indian country are subject to sales tax. However, the tribe is immune from both lawsuits and most of the standard legal collection mechanisms used by the state to collect its taxes.

When a state seeks to tax the on-reservation activities of non-Indians, federal preemption is supposed to be determined by a fact-intensive inquiry, though the specifics of exactly what information should be collected and evaluated are not specified.[18] The *Bracker* test has been interpreted to require weighing the extent of federal regulation involved, the regulatory and revenue-raising interests of the tribes and states, and the provision of tribal or state services to the party the state seeks to tax.

The Tulalip case had little to no federal law governing the activity the state sought to tax.[19] In contrast, the Flandreau Santee Sioux case involved a state tax imposed on an activity subject to federal regulation.[20] The *Bracker* preemption analysis sometimes works out in favor of tribes; at other times, it works out in favor of states. State taxes on logging, gambling, and school construction have been preempted (*Bracker*, *Flandreau Santee Sioux*, and *Ramah* cases).[21] In other situations involving commercial leasing (Tulalip Tribes case) and mining (Cotton Petroleum case), state taxes have not been preempted.[22] As for economic development, the lack of certainty regarding preemption could create a disincentive for investment in Indian country.[23]

Tribal and State Tax Compacts

Tax compacts have been the primary mechanism for addressing dual taxation issues. More than 200 tribes have entered tax compacts with eighteen states.[24] Tax compacts can make the overall tax system more administrable and benefit both tribes and states. Compacts regarding sales taxes exemplify this benefit. Typically, state sales tax is imposed on all transactions regardless of whether a purchaser might otherwise be subject to tax. That tax revenue is then remitted to the state by the seller. The State refunds to the tribe the estimated sales tax revenues attributable to tribal member purchases. In some states, such as Minnesota, an additional payment representing a portion of the tax revenue associated with nonmember transactions may be shared with the tribal government. In Minnesota, 50 percent of the revenue associated with nonmember transactions is shared with the tribe.[25] This approach avoids forcing sellers to separate out transactions between customers at the point of sale or asking individual tribal members to seek refunds for the tax they paid. The revenue sharing also recognizes that both governments have jurisdiction over certain transactions and any corresponding revenue. Comprehensive data on tribal/state compacts is not readily available.[26]

It is true that sovereigns exercising their sovereign powers can breach agreements. However, this does not appear to have happened with respect to any of the existing tax compacts. Compacts are agreements voluntarily entered into between two parties and typically include renewal and termination provisions. Rather than breaching an agreement, it may be more likely that one of the parties may seek to change the terms of the agreement. From the perspective of a potential investor in Indian country, this

situation may not differ significantly from the situation where a state or local government can change tax rates and tax bases at its discretion.

Scholar Pippa Browde summarizes some of the components of compacts and points out that power imbalances may affect the terms of tax compacts, with states typically having more bargaining power. She also argues, with no empirical analysis, that compacts do not live up to their promise of resolving "juridical taxation" in a way that promotes the economic development activities and opportunities that tribes need.[27]

Balancing through an Economic Lens

Hedden-Nicely discusses how the Supreme Court in *Bracker* "only gave 'weight' to state assertions of authority that did not affect tribal sovereignty or jeopardize the rights of individual tribal members."[28] In cases such as the 1987 *California v. Cabazon Band of Mission Indians*, the Court introduced balancing when it found that the state regulatory authority over gaming had been preempted by federal law.[29] The court used the precedent of *Bracker* to support its holding that the state interest was sufficient to justify the assertion of state authority.[30,31] By 2005, the Supreme Court referred to the "*Bracker* interest-balancing test," which it stated was formulated "to address the 'difficult questio[n]'" that arises when "a state asserts authority over the conduct of non-Indians engaging in activity on the reservation."[32]

Economists typically characterize "balancing" as a type of "tradeoff" analysis. If an economist were asked to evaluate the desirability of a proposed action, she would probably begin by attempting to identify both the gains and losses associated with the action. If the gains exceed the losses, then supporting the action would seem appropriate.

Key issues in any tradeoff analysis involve specifying a baseline, identifying the options, comparing the options to the baseline based on measurable attributes, defining the region impacted, and, where possible, valuing in monetary terms the net benefits of each option. In the context of state tax preemption, evaluating the net economic gains is challenging because it is difficult to evaluate the extent of net benefits without knowing how the tax revenues would be spent. A comprehensive accounting would also subtract the dead-weight loss associated with the tax from the net benefits and evaluate the distribution and magnitude of any transfer payments.

Kelly S. Croman discusses several anecdotal examples of cases where economic activity on reservations appears to have positively affected the surrounding regional economy.[33] To the extent that this is the case, tax policy is only one potential factor in affecting the location of economic activity. Other potentially important factors, such as investment in public goods, are discussed below. It is also clear that in many locations, reservation economies contribute to the regional (and national) economy. This economic impact typically occurs through off-reservation spending by tribal governments and reservation businesses.

Tax Incidence

Before considering what balancing means, it is useful to note that the concept of tax incidence has often been misinterpreted by courts. There is a key distinction between

legal, or statutory, incidence, which falls on those legally obligated to submit tax payments to the government, and economic incidence, which falls on those who bear the burden of a tax. Consider sales tax: the statutory incidence of a sales tax falls on the retailer, but the consumer bears the economic incidence. An example of this would be sales taxes imposed by tribes where the statutory incidence falls on the tribe, but the economic incidence falls on the purchaser of the good.

Economic incidence and balancing are related because the balancing analysis should reflect the economic, not statutory, incidence of the tax. *Blackfeet* and *Cotton* dealt with taxes on minerals where the statutory incidence differed, but the economic incidence was on the tribes in both cases.[34] Economic incidence also depends on the elasticity of demand and supply for the goods or services. When the demand curve facing an individual producer for minerals is perfectly elastic (as would be the case for oil and gas because most individual producers cannot affect prices on the world market), and the tribes' supply curve for oil and gas is upward sloping, the economic incidence of a tax on mineral production would fall on the tribe.[35]

Nonmarket Values

Sovereignty

One factor that makes a balancing analysis particularly complicated is that preemption would likely strengthen tribal sovereignty, which is difficult to value in economic terms. Sovereignty can be considered a "public good" in economic terms. Public goods are nonrival and nonexcludable which implies that they are typically underprovided by private markets. Because sovereignty is not typically bought and sold in the market, the measurement of its economic value would need to employ nonmarket valuation approaches. When the market associates a dollar value with a good or service, it is a relatively straightforward task to estimate the value of changing the quantity of that good or service. With no price, however, a public good's economic value is more elusive.[36] While sovereignty itself may be difficult to value in economic terms, the flow of goods and services resulting from public goods funded by an enhanced ability to raise revenues could be valued in a straightforward manner because such goods and services are often associated with market values. Those values would not likely, however, capture the total value of enhanced tribal sovereignty.

A similar valuation challenge arises with efforts to value cultural resources. The characteristics of "cultural goods" that give rise to their value include aesthetic properties, spiritual significance, historic importance, and uniqueness, among others. Changes to tribal sovereignty clearly have an economic value, but such values are challenging to quantify and monetize, especially in a tribal context, where the market context that would typically be used to estimate values is likely less appropriate. While valuation can be challenging, it is not impossible. John Duffield et al. provide summaries of methods and examples of empirical studies that were conducted to estimate such values in the context of natural resource damage assessment on tribal lands.[37]

Public Infrastructure

If tribal tax revenues are used to finance public infrastructure projects that improve transportation, communications, education, or healthcare this may reduce the costs of production for private firms in some industries by reducing their expenditures on inputs and have spillover regional benefits. The effects could be termed "productivity shocks." The shocks can have supply-side effects in both primary and secondary markets through cost reductions; there may also be indirect effects on markets for consumption goods by reducing market prices. On the supply side such shocks would be producer surplus changes; on the consumer side, the shocks would be consumer surplus increases. The shocks could also result in indirect effects that would be like secondary market effects, which occur when a government policy influences prices in a primary market which in turn influences demand in secondary markets that sell goods that are complements or substitutes for the primary market.

Social Surplus and Productivity Shocks

Whether the change in social surplus[38] that results from the government-funded project can be measured by focusing on the market where the intervention takes place remains unclear. In cases where the markets that are indirectly affected are not distorted by market imperfections or government interventions, the social surplus can be approximated by the market where the intervention occurs. This basic situation of a supply-side productivity shock is illustrated in figure 1. For this simple analysis we are ignoring timing considerations. The supply curve shifts to the right due to a reduction in the marginal costs of providing the good (say due to infrastructure improvements). If prices remain constant, there is no change in consumer surplus. The change in producer surplus corresponds to the trapezoid *eabd*. This can be considered a gross change since the costs associated with the infrastructure project are not accounted for. That said, questions about the effects in other markets remain. Competitive pressures could result in firms paying lower prices on, for example, inputs shipped along a new road. This could cause the cost curves in the markets in which those firms sell their goods to shift downward and to the right. If prices fall in those markets, consumer surplus will increase.

A richer way to illustrate these economic concepts is through a two-region supply-and-demand model, which is presented solely to illustrate on a theoretical level how a productivity-improving infrastructure advancement can affect social welfare. Figure 2 shows a two-region model of supply and demand between a reservation and a nearby nontribal area that includes a productivity supply shock that shifts ES1 to ES2. The supply and demand functions in each region are S1, D1, S2, and D2. The center panel shows the excess supply and demand functions. Postshock, each region is better off. The quantity offered for trade in region 1 is the difference between the quantity producers supply and what consumers demand at prices higher than the equilibrium price. Price is equal in each region. Equilibrium is reached for region 2 at Pe2, qs2 and qd2 and for region 1 at Pe1, qs1, and qd1. With the productivity shock, consumer plus producer surplus increases in the center panel from *abc* to *aed*. The increase in consumer-plus-producer surplus represents an improvement in societal welfare.

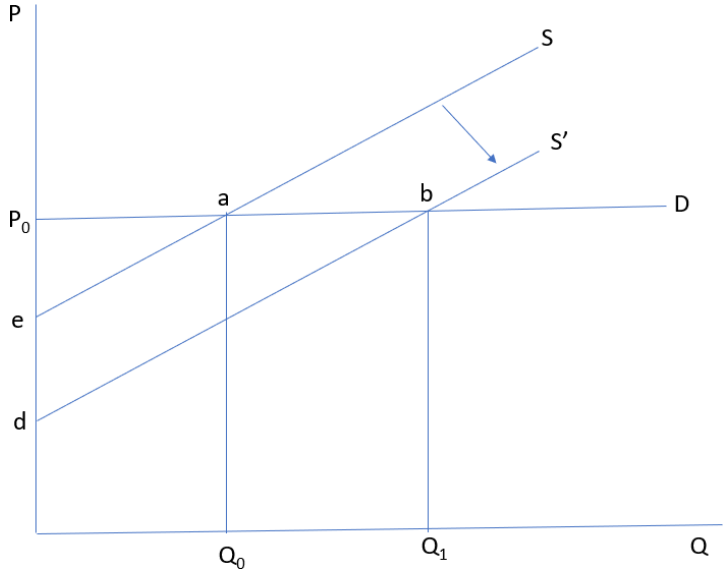

Fig. 1. *Producer surplus change with a productivity improvement*

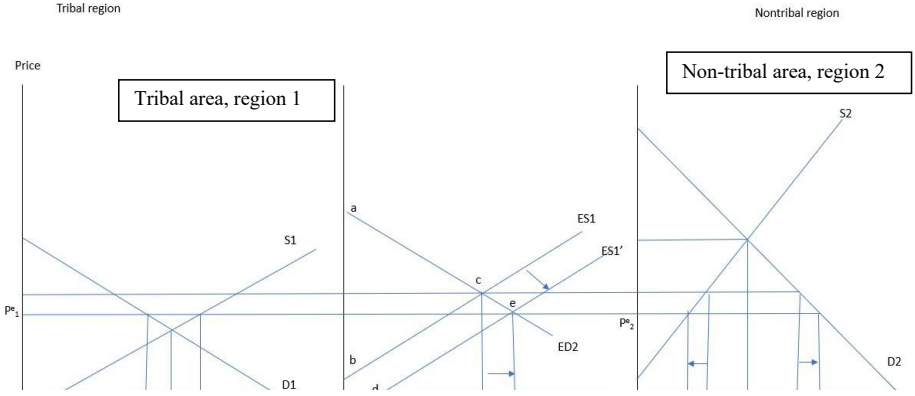

Fig. 2. *Two-region model*

Bracker Balancing in an Empirical Context

The conceptual-level analysis presented above clarifies the basic economics of the situation. However, in the context of *Bracker* balancing analysis it is critical to develop empirical estimates of the social surplus changes resulting from net benefits and changes in transfer payments accruing from spending on public goods financed by taxation associated with strengthened sovereignty. This analysis would require data collection that potentially could be undertaken in the context of an empirical analysis that could inform a balancing analysis.[39]

Courts have not provided any specific guidance on how the balancing required by *Bracker* should be done, and this lack of guidance has led to inconsistency.[40] A standard set of criteria for conducting the balancing analysis would create greater certainty and comparability. Standardizing the analysis would involve the use of consistent methodological approaches to valuing benefits and costs, displaying distributional impacts, and treating issues involving streams of costs and benefits that accrue over time. Results of such an analysis would be comparable across analyses and geographic areas, and over time. As discussed below, federal templates for doing a comprehensive and consistent balancing analysis exist already.

In the context of *Bracker* balancing, greater certainty about the consistency, scope, magnitude, and content of the analysis would promote economic development both on and off reservations and would likely mitigate the issue of state taxes being preempted on one case and not the other. A more consistent approach to such analysis could have potentially resulted in a larger number of state taxes being preempted. For example, the taxes identified in table 1 as "not preempted" could have all potentially been preempted if the balancing analysis had been done in a consistent manner that focused on the net economic impacts on tribes.

Elements of an Economic Analysis for a New Balancing Test

The federal government currently has several sets of guidance for conducting economic analysis. The purpose of such guidance is to increase consistency and comparability across analyses. These guidelines include the Office of Management and Budget's OMB Circular A-4, Executive Order 12866, and the Principles and Requirements for Federal Investments in Water Resources.[41]

Federal agencies are required to conduct a regulatory impact, or benefit-cost, analysis following the guidance in EO 12866 and Circular A-4. Similarly, federal agencies undertaking water resource investments must analyze those projects following the guidance in the Principles and Requirements. It is notable that EO 12866, Circular A-4, and the Principles and Requirements address approaches for quantifying and monetizing nonmarket benefits as well as addressing distributional issues.

The components of a *Bracker* balancing analysis would generally mirror the existing federal guidelines for conducting economic analysis. However, in the *Bracker* balancing context some additional considerations should be addressed:

Definition of the affected region. The magnitude of the economic impact is influenced by the definition of the geographic area affected, as well as how these

impacts are stated. A basic guideline of economic impact analysis is that the larger the economic region, the larger the absolute impacts and the smaller the relative (percentage) impacts. This highlights that the regional delineation must be defined appropriately for the policy purpose for which it is being used and that all numbers should be presented in both an absolute and a relative sense. Thus, the analysis should identify the "total" area affected, as well as the tribal and nontribal subregions.

Identifying relevant data:

a. **Socioeconomic data.** Identification of a defined set of the socioeconomic data for the affected region, broken out by tribal versus nontribal areas.
b. **Tax data.** Annual data on tax revenues collected, in both tribal and nontribal areas as well as estimates of revenue changes with and without the tax changes under consideration. This would include information on tax incidence and price effects.

Federal interest. The nature and extent of the role and interest of the federal government in the activities potentially affected by the tax should be defined in a consistent manner. The federal interest is clearly along the lines of promoting sovereignty and economic development of tribes.

Regional economy. An analysis of the tribal and regional economy to evaluate the welfare effects of potential tax changes. This component of the analysis would characterize (in terms of output, employment, and so forth) the regional economy, the tribal economy, and how they are linked together.

Transfers. A complete analysis would identify and estimate the magnitude of any transfer payments. Transfer payments are a shift in resources from one party to another. An example would be a regulation that generates a gain for one group and equal magnitude loss for another group. For a balancing analysis, tax revenues would be considered a transfer payment. However, the stream of net benefits that might accrue from spending the tax revenues are not transfers.

Distributional analysis. In the context of benefit-cost analysis, there is a long tradition of distributional analysis, which can involve weighting the benefits received by different groups. Distributional analysis should help promote fairness and equity by identifying economic effects on different groups. This type of analysis requires that a set of weights be identified and then applied to the monetary benefits received by different groups. In a *Bracker* analysis, this might be particularly important given the generally lower incomes on reservations. The purpose of this would be to promote fairness and equity.

Examples of Other Federal Balancing Analyses

A systematic balancing analysis could be somewhat akin to National Environmental Policy Act (NEPA) compliance, which requires federal agencies to disclose impacts of their actions in a standardized format through a public process.[42] A "lead agency" is required to determine the scope of the federal action. During the scoping process the lead agency must (1) identify and invite the participation of affected parties, including federal, state, or local agencies or Indian tribes, proponents of the actions, and other interested persons; (2) identify significant issues to be analyzed in depth

in the environmental impact statement (EIS); (3) identify and eliminate issues that are not significant or have been covered by prior environmental review from detailed study; (4) allocate assignments for preparing the EIS to relevant agencies; and (5) identify other environmental review and consultation requirements so that analyses and studies required under other federal, state, local, or tribal laws may be prepared concurrently, rather than sequentially, with the EIS.[43]

The Endangered Species Act (ESA) embodies a moral imperative to protect species. However, it also provides an example of balancing (or tradeoff) analysis in the process for potentially exempting development projects that have received a jeopardy opinion if a Cabinet-level "endangered species committee" decides the benefits of the project clearly outweigh the benefits of conserving a species.[44] The ESA exemption process also is not a perfect match for *Bracker* balancing, but it shows that a systematic process could be designed to balance tribal, federal, and state interests.[45]

Conclusions

Dual taxation frequently occurs in the United States and internationally. Agreements or treaties between contracting parties to establish tax rates, define the tax base, handle tax administration, and allocate revenues commonly function to solve the problem of dual taxation. Currently, a case-by-case approach drives the analysis of taxation issues in Indian country. This case-by-case approach creates uncertainty for tribes, states, and non-Indians seeking to do business in Indian country.

Tribes and states could solve issues of dual taxation by working collaboratively to enter tax compacts, then negotiate tax revenue allocations and administrative responsibility. Making comprehensive data on state-tribal tax compacts readily available would aid in understanding the scope and magnitude of such agreements and provide examples for tribes and states. To promote the establishment of additional compacts, Congress could explicitly provide for the creation of such compacts, as it did with the Indian Gaming Regulatory Act.

The *Bracker* balancing analysis would create more certainty if conducted systematically with standardized criteria, which could include (1) definition of the affected region; (2) identification of the socioeconomic data for the affected region, broken out by tribal versus nontribal areas; (3) collecting time series data on the existing annual levels of tax revenues collected, both tribal and nontribal and with and without the tax changes; (4) defining in a consistent manner the nature and extent of the role and interest of the federal government in the activities potentially affected by the tax; (5) an analysis of the economic incidence of the tax and price effects; and (6) an analysis of the tribal and regional economy to evaluate the welfare effects of potential tax changes.

Alternatively, federal legislation could resolve the dual taxation problem, but since *Cotton Petroleum* was decided in 1989, Congress has not addressed it. Some states have responded to the problem of dual taxation by exempting tribal sales from state sales taxes; adjusting state tax rates so the total tax imposed by the tribe and state does not exceed the state rate; and providing credits or partial refunds for taxes collected on sales in Indian country.

A federal legislative solution would establish source rules that might allow tribal taxes to preempt state taxes and would require conformity with state tax bases and rates, clarify administration issues to minimize administrative costs, and require data collection and disclosure of tax revenues by source. If state taxes are not preempted, federal legislation could at least clarify how tribal, federal, and state interests should be balanced.

Appendix

Table 1. *Selected Key Court Cases Involving Taxation in Indian country*

Case	Year	Court	Type of tax	Preempted
Agua Caliente v. Riverside County	1971	Circuit Court	Possessory interest tax	Not preempted
Mescalero Apache Tribe v. Jones, 411 U.S. 145	1973	Supreme Court	Gross receipts tax on tribal income earned outside a reservation; real property tax on the off-reservation property where the business was located	Not preempted
Washington v. Confederated Tribes and Bands of the Colville Indian Reservation, 447 U.S. 134	1980	Supreme Court	Cigarette tax	Not preempted
White Mountain Apache v. Bracker	1980	Supreme Court	Motor carrier license tax and fuel tax	Preempted
Ramah Navajo School Board Inc. v. New Mexico Bureau of Revenue	1982	Supreme Court	Gross receipts tax on non-Indian construction company	Preempted
Montana v. Blackfeet Tribe of Indians	1985	Supreme Court	Tax on tribal oil and gas royalties	Preempted
Cotton Petroleum Corporation v. New Mexico	1989	Supreme Court	Oil and gas severance; tax; oil and gas conservation tax; oil and gas emergency school tax; oil and gas ad valorem production tax; oil and gas production equipment ad valorem tax	Not preempted
Salt River Pima-Maricopa Indian Community v. Waddell, 50 F.3d 734	1995	Circuit Court	Sales tax	Not preempted
Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95	2005	Supreme Court	Fuel tax	Not preempted
Ute Mountain Ute Tribe v. Rodriguez, 660 F.3d 1177 (10th Circuit)	2011	Circuit Court	Oil and gas severance; tax; oil and gas conservation tax; oil and gas emergency school tax; oil and gas ad valorem production tax; oil and gas production equipment ad valorem tax	Not preempted
Tulalip Tribes v. Washington, 349 F.Supp.3d 1046 (W.D. Wash.)	2018	District Court	Retail sales and use; business and occupation; personal property	Not preempted
Flandreau Santee Sioux Tribe v. Terwilliger	2020	Circuit Court	Excise tax on general contractors	Preempted

1. *Mescalero Apache Tribe v. Jones* (1973)[46,47]—*Mescalero* involved a ski resort operated by the Mescalero Apache Tribe on off-reservation land leased from the federal government. The court upheld a gross receipts tax levied by New Mexico on tribal income earned outside the reservation. Balancing tribal, federal, and state interests was unnecessary because the tribal business was not on reservation land and was treated similarly to any other non-Indian enterprise. The court stated, "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state."[48]
2. *Washington v. Confederated Tribes and Bands of the Colville Indian Reservation* (1980)[49]—The Supreme Court held that although state taxation of non-members can affect tribal revenues directly or indirectly, a negative effect on tribal revenue is not enough, by itself, to result in preemption. In this case, the court found that a state "does not infringe the right of reservation Indians to make their own laws and be ruled by them merely because the result of imposing its taxes will be to deprive the tribes of revenues which they currently are receiving."[50] The Supreme Court also held that tribes could not "market the [tax] exemption."[51] The court relied on this doctrine in later cases. This doctrine has some exceptions, namely that "tribes may 'market the exemption' if they can prove that they have added value to a product from the reservation or created some 'reservation-based value.'"[52]
3. *White Mountain Apache v. Bracker* (1980)[53]—The White Mountain Apache Tribe and Pinetop Logging Company, a non-Indian business, filed for a refund of a motor carrier license tax and fuel taxes paid for logging activities conducted solely on tribal land. They argued that the taxes were preempted by federal law and interfered with tribal self-governance. The court found that the state could not tax a non-Indian logging company for using roads built by the tribe and federal government on Indian lands. The court based its decision on a finding that the tax would harm the tribe's purpose of earning logging revenues. This case established the "balancing test" for determining whether a tribal tax imposed on non-tribal members is legal. The balancing test mandated by a preemption analysis requires weighing federal and tribal interests (including tribal sovereignty) against state interests.
4. *Ramah Navajo School Board Inc. v. Bureau of Revenue of New Mexico* (1982)[54]—The Supreme Court found that the state could not tax the gross receipts received by a non-Indian construction company, which built an on-reservation school that was paid for by the tribal school board. The court found that (1) the federal regulation of construction and financing of Indian schools was comprehensive (with a "detailed regulatory scheme governing the construction of autonomous Indian educational facilities"[55]); (2) federal law encouraged tribal self-sufficiency in education; (3) the economic incidence of the tax was on the tribe; (4) paying the tax could affect the tribe's ability to fund tribal schools; (5) the state provided no services on the reservation to the Indian school children or the non-Indian taxpayer.

5. *Montana v. Blackfeet Tribe of Indians* (1985)[56]—The Blackfeet Tribe challenged the imposition of Montana state taxes on the tribe's mineral royalty interests in oil and gas produced under the authority of the Indian Mineral Leasing Act of 1938.[57] The Supreme Court prohibited Montana from taxing Indian tribes' royalty interests and noted that the tribe's exemption from state taxes could be lifted only by Congress.
6. *Cotton Petroleum Corporation v. New Mexico* (1989)[58]—The Supreme Court held that the state's tax, unlike the tax in *Montana v. Blackfeet*, was not preempted by federal law, as it was not a tax on any tribe.[59] This decision allowed states to tax non-Indians extracting resources on Indian lands. This has created double taxation in some states, with both the state and the tribe imposing taxes on extracted minerals.
7. *Wagnon v. Prairie Band Potawatomi Nation* (2005)[60]—Kansas imposed a fuel tax on fuel delivered to a tribe-owned gas station. The fuel distributor paid the tax on its initial receipt of fuel and passed along the cost of the tax to the tribe. Because the legal incidence of the tax fell on the non-Indian fuel distributor who was operating off-reservation, the court held that balancing federal, tribal, and state interests was unnecessary, even though the economic incidence of the tax fell on the tribe. This case set up a two-part test: (1) whether the legal incidence falls on a tribe or its members within Indian country; and (2) whether the tax is assessed on or off tribal land.
8. *Tulalip Tribes v. Washington* (2018)[61] (retail sales and use; business and occupation; and personal property)—The Tulalip Tribes developed a commercial retail center that included the Tulalip Casino and Tulalip Resort, other retailers, restaurants, and an outlet mall. This commercial center bordered a major interstate highway and attracted customers from outside the reservation. The State of Washington and Snohomish County collected an 8.9 percent sales tax from non-Indian retailers. The tribe believed the sales tax should be preempted because the tax infringed on tribal sovereignty. The district court allowed the general state taxes of the non-Indian retailers within Tulalip's commercial center after a balancing analysis that considered tribal economic development as one of the balancing factors. The federal government provided substantial funding to support the development. However, the court did not view the state taxes on sales, business, and property as interfering with tribal economic development because the taxes did not reduce the lease payments the tribe would continue to collect from the businesses. The court recognized that the taxes were paid by non-Indian customers on non-Indian goods. Preempting the state sales tax would require the tribe to have an "active role" in creating value in the property being taxed. The court dismissed the tribe's argument that, because of the imposition of the taxes, the tribe could not collect its own sales tax. The tribes' argument presumed that if the tribe imposed its sales taxes in addition to the state tax, the goods would be subject to double taxation, creating a disincentive for customers to shop on the reservation.
9. The court viewed the tribe's inability to impose its tax as an indirect and insubstantial impact. The state taxes were not preempted even though the tribe provided

services such as law enforcement, fire protection, medical services, utilities, and road maintenance to the businesses and patrons at the commercial center.[62] In spite of this court decision, in January, 2020, the Tulalip Tribe and Washington state established a tax-sharing compact, which is a way to ameliorate dual taxation and share tax revenues between tribes and states.

10. *Flandreau Santee Sioux Tribe v. Terwilliger* (2020)[63] —The tribe sued South Dakota's secretary of revenue and governor over the state's excise tax imposed on general contractors. The federal district court undertook a *Bracker* analysis and found that the state's tax was preempted. The court considered whether the tax was preempted under federal law and unlawfully impaired the tribe's sovereignty. The court relied on *California v. Cabazon Band of Mission Indians*,[64] where the Supreme Court held that California's gambling regulations were preempted by the Indian Gaming Regulatory Act (IGRA), and on *Ramah Navajo School Board*, where the Supreme Court held New Mexico's state gross receipts tax was preempted by federal regulation of Indian educational institutions.[65] The court noted that IGRA limited a tribe's ability to construct and maintain gambling facilities and required federal oversight to ensure the protection of the environment, public health, and safety. As in *Ramah Navajo School Board*, the court held that the state's excise tax undermines the objectives of IGRA because the tax was passed on to the tribe and reduced its ability to profit from the gambling operation.[66] The court also pointed out that the state did not provide "substantial services" to the tribe or the contractor, because the excise tax revenue was deposited in the state's general fund to fund various services. The court also found that the tribe's interest in economic development through the casino operation outweighed the state's interest in raising revenue.[67]
11. *Agua Caliente Band of Mission Indians v. County of Riverside* (1971)[68] and *Agua Caliente Band of Cahuilla Indians v. Riverside County*[69]—This pre-*Bracker* case was originally decided in 1971, but additional litigation continued through 2019. The unpublished 2019 case involved California's ability to impose a possessory interest tax (PIT) on non-Indian lessees of Indian trust lands on the Agua Caliente reservation. The court considered the congressional intent regarding Indian law, the PIT's legal incidence, and the indirect economic effect of the PIT on the tribe and tribal members. The court found that this tax was permissible because the state provided substantial services to the lands in question.[70]
12. *Salt River Pima-Maricopa Indian Community v. State of Arizona* (1995)[71] —In this case, the Court of Appeals affirmed a District Court decision in favor of the state's collection of taxes on sales and rentals by non-Indian businesses to non-Indian customers at the Pavilions at Talking Stick Shopping Center, located in Scottsdale, Arizona, on reservation land. The Ninth Circuit approached the sales tax in Salt River similarly to the way the Supreme Court had approached other "smoke shop" cases. In 1980, the Supreme Court in *Colville* concluded that the tribe's sale of cigarettes to non-Indians was not preempted because the state's taxes were "reasonably designed to prevent the tribes from marketing their tax exemption to non-members who do not receive significant tribal services and who would

otherwise purchase their cigarettes outside the reservations."[72] The Ninth Circuit found that the state's tax was not preempted because "the goods and services sold are non-Indian, and the legal incidence of Arizona's taxes falls on non-Indians."[73]

13. *Ute Mountain Ute Tribe v. Rodriguez* (2011)[74] —The five New Mexico taxes that were the subject of this case were the same taxes challenged in *Cotton Petroleum*,[75] in which the taxes were upheld. The court applied similar reasoning as *Cotton*, undertook a *Bracker* balancing analysis, and found that the state taxes were not preempted.

Notes

1. Dual taxation commonly occurs within countries or regions with multiple levels of government. Dual taxation in the United States is common. It typically results from state sales taxes. Sales tax is complicated in the United States because there are thousands of different taxing jurisdictions in which dual taxation could be present. In addition to the differing rules among states, cities, and counties often also have distinct rules. The many differing rules can increase tax compliance costs and potentially have incentive effects. The economic implications of dual taxation caused by overlapping federal, state, and local taxes are similar to those caused by overlapping tribal and state taxes. Broadly speaking, American Indians do not have to collect or pay sales tax on their own reservations, except if their tribe collects sales tax. Sales tax compliance is not identical on all tribal lands.

2. *See* Anthony Broadman, *Know Your Enemy: Local Taxation and Tax Agreements in Indian country*, AM. INDIAN L.J., p. 7 (2012).

3. The statutory burden of a tax does not describe who really bears the tax. The side of the market on which the tax is imposed is irrelevant to the distribution of the tax burdens. Parties with inelastic supply or demand bear taxes; parties with elastic supply or demand avoid them.

4. John Fredricks III, "State Regulation in Indian Country: The Supreme Court's Marketing Exemptions Concept, a Judicial Sword through the Heart of Tribal Self-Determination," *Montana Law Review* 50, pp. 49, 51 (1989).

5. *Worcester v. State of Georgia*, 31 U.S. 515 (1832); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, p. 153 (1980) [quoting Powers of Indian Tribes, 55 I.D., pp. 14, 46 (1934)].

6. Mary Davis, "American Indians, Indian Tribes, and State Government," *Minnesota House Research Department*, p. 85 (2023).

7. This notion is similar to the United States not taxing foreign countries.

8. The tax exemption applies regardless of whether the income-producing activities are commercial or noncommercial or are conducted on or off the reservation. Tribal corporations organized under Section 17 of the Indian Reorganization Act of 1934 share the same tax status as an American Indian tribe. They, too, aren't taxed on income from activities carried on within the boundaries of a reservation. *See* Joint Committee on Taxation, Description of the Tax Provisions of Public Law 116-136, the Coronavirus Aid, Relief, and Economic Security ("CARES") Act (JCX-12R-20), April 23, 2020.

9. *See*, for example, *Bryan v. Itasca County, Minnesota*, 426 U.S. 373 (1976); *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976), and *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114 (1993).

10. *Id*. This has included all manner of state and local taxes: income taxes, real property taxes, personal property taxes, sales taxes, transaction taxes, vendor taxes, use taxes, mineral royalty taxes, and hunting and fishing license fees.

11. *State and Federal Tax Policy: Building New Markets in Indian Country, Oversight Hearing Before the Senate Committee on Indian Affairs,* 112th Congress (2011) (statement of Steven J. Gunn, attorney and professor of law, Washington University in Saint Louis).

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

13. Judith Royster, "Decontextualizing Federal Indian Law," *Tulsa Law Journal* 34 no. 2, pp. 329, 336 (1999).

14. W. McClure and T. E. McClure, "Rebalancing Bracker Forty Years Later," *American Indian Law Journal* 9 no. 2, p. 333 (2021).

15. *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, pp. 458–59 (1995).

16. In cases such as *County of Yakima v. Confederated Tribes* and *Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992) and *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), courts have permitted state taxation of tribal land in special circumstances.

17. Davis, *supra* note 6.

18. Mishell B. Kneeland, "State Taxation of On-Reservation Purchases by Non-Indians," *The Tax Lawyer* 48, pp. 883–96 (1995).

19. 349 F. Supp. 3d 1046 (W.D. Wash.).

20. 496 F. Supp. 3d 1307 (D.S.D.).

21. 448 U.S. 136; 496 F. Supp. 3d 1307 (D.S.D.); 458 U. S. 832.

22. 349 F. Supp. 3d 1046 (W.D. Wash.); 490 U. S. 163.

23. See the Appendix for cases, pre- and post-*Bracker*, that have yielded decisions for and against preemption.

24. Susan Johnson *et. al.*, "Government to Government Models of Cooperation between States and Tribes," *National Conference of State Legislatures* (Second Edition, 2009), p. 67. In many ways, tax treaties are similar to tax compacts. Tax treaties are international agreements that facilitate international trade and investment by lowering tax barriers to the international flow of goods and services. Lower overall taxation encourages trade and investment. Tax treaties typically allocate taxing authority over specified types of income to the treaty partners. Once a treaty has allocated taxing authority to a treaty partner, the domestic tax laws of that partner govern the ultimate tax treatment. Treaty partners can assert the right to tax residents as well as nonresidents who earn an income within the state. Treaties also provide certainty and predictability so taxpayers can arrange their affairs. Most countries have domestic laws governing international transactions that provide at least some relief from double taxation, but jurisdictional overlaps remain.

25. Minnesota's sales tax agreements also account for an estimate of the tax revenue associated with sales made off-reservation to tribal members that would have been subject to tribal use tax. *See* Davis *supra* note 5, p. 85; Cynthia Bauerly, "Tax Agreements between the State of Minnesota and Tribal Governments," *Center for Indian Country Development Policy Discussion Paper Series* 2021-01 (2021).

26. Detailed information on ten such compacts can be found in Mark J. Cowan, "State-Tribal Tax Compacts: Stories Told and Untold," *Center for Indian Country Development Policy Discussion Paper Series* 2021-01 (2021).

27. Pippa Browde points out that "compacting has downsides for tribal governments, in that tribes may come to the table with unequal bargaining power relative to the state, leading the tribe to 'surrender more rights' than it would in an equal negotiation." *See* Pippa Browde, "Sacrificing Sovereignty: How Tribal-State Tax Compacts Impact Economic Development in Indian Country," *UC Hastings Law Journal* 74 no. 1 (2022).

28. Dylan R. Hedden-Nicely, "Bringing Bracker into Balance: Recentering Tribal Treaty Rights as a Bar to State Civil Authority Within Tribal Homelands," in progress draft submitted in 2022 to the Antonin Scalia Law School at the George Mason University Law and Economics Center Research

Roundtable on the Law and Economics of Tribal Sovereignty, quoting *Bracker*, 448 U.S., pp. 144–45 (citing Lee, 358 U.S., p. 219).

29. The court stated that "the sole interest asserted by the state to justify the imposition of its bingo laws on the tribes is in preventing the infiltration of the tribal games by organized crime" and rejected this reasoning (480 U.S. 202, p. 220).

30. David H. Getches, "Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law," *California Law Review* 84, p. 1573 (1996).

31. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, p. 110 (2005), quoting *Bracker*, 448 U.S., pp. 144–45.

32. *Id*.

33. Kelly S. Croman and Jonathan B. Taylor, "Why Beggar Thy Indian Neighbor? The Case for Primacy in Taxation in Indian Country," Native Nations Institute and the Harvard Project on American Indian Economic Development, Joint Occasional Papers on Native Affairs JOPNA 2016-1 (2016).

34. *Cotton Petroleum Corp. v. New Mexico*, 490 U. S. 163, 183–87 (1989); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759.

35. A perfectly elastic demand curve is horizontal. Supply curves are typically upward sloping to the right. In this setting, the incidence of a tax would fall on the producer.

36. See Jonathan Gruber, *Public Finance and Public Policy* (Fifth Edition, 2016) for a basic discussion of the economic issues associated with public goods.

37. John Duffield, Chris Neher, and David Patterson, "Estimating Compensation Ratios for Tribal Resources within a Habitat Equivalency Framework," *Ecological Economics* 179 (2021); John W. Duffield, Chris Neher, and David A. Patterson, "Natural Resource Valuation with a Tribal Perspective: A Case Study of the Penobscot Nation," *Applied Economics* 51, no. 22, pp. 2377–89 (2019).

38. Social surplus is the net benefit to society which can be expressed as *change in social surplus = total societal benefits – total societal costs*. A. Boardman, D. Greenberg, A. Vining, and D. Weimer, *Cost-Benefit Analysis Concepts and Practice* (Fifth Edition) (Cambridge University Press, 2018), 59–65.

39. A Bracker balancing analysis has been interpreted to require "balancing" the extent of federal regulation and control, the regulatory and revenue-raising interests of the tribes and states, and the provision of state or tribal services" to the party the state seeks to tax; Felix Cohen, *Cohen's Handbook of Federal Indian Law* (2012 Edition) (LexisNexis, 2012), 707.

40. In cases before and after *Bracker*, the balancing analysis has yielded decisions for and against preemption: in *Cotton Petroleum Corporation v. New Mexico*, 490 U.S. 163, pp. 183–87 (1989), the state was permitted to impose a severance tax on a non-Indian company that leased tribal land for oil and gas production; in *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 154–59 (1980), the state was permitted to tax non-Indians' purchases of cigarettes from on-reservation tribal retailers; in *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, pp. 481–83 (1976), the state was permitted to tax non-Indians' purchases. Other cases have resulted in decisions that preempted state taxes: in *Ramah Navajo School Board Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, pp. 843–46 (1982), for example, a state was prohibited from imposing a gross receipts tax on a non-Indian contractor constructing an on-reservation tribal school.

41. https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf; https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf.

42. U.S.C. 4321 et seq. (2020). NEPA requires federal agencies to identify and evaluate impacts of "major federal actions significantly affecting the quality of the human environment." *Id*. §4332 (2)(C).

43. 40 C.F.R. § 1501.7 (2017).).

44. Endangered Species Act; P.L. 93-205, 87 Stat. 884, 16 U.S.C. §§1531–1544. (s.f.).

45. *Id*. at §1536 (h)(B). Exemptions to the Endangered Species Act may be granted if the Endangered Species Committee deems that four threshold criteria have been reached based on a report from the secretary of the interior, the hearing record, and other testimony or evidence that it may receive: (1) there are no reasonable or prudent alternatives to the agency action; (2) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its habitat, and such action is in the public interest; (3) the action is of regional or national significance; and (4) the agency has not made any irreversible or irretrievable commitment of resources. For an exemption to be granted, all four of the criteria must be satisfied. As required by the act, following a determination that all threshold criteria are met, the secretary of the interior must hold a formal hearing on the application for exemption. In addition, if the Endangered Species Committee decides to grant an exemption, it must also establish "such reasonable mitigation and enhancement measures, including but not limited to live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects."

46. 411 U.S. 145 (1973).

47. 411 U.S. 145 (1973).

48. *Id*., p. 148.

49. 447 U.S. 134.

50. *Id*., p. 136.

51. The court held that "what these smoke shops offer the customers, and what is not available elsewhere, is solely an exemption from state taxation. The tribes assert the power to create such exemptions by imposing their own taxes or otherwise earning revenues by participating in the reservation enterprises. If this assertion were accepted, the tribes could impose a nominal tax and open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts and drawing customers from surrounding areas. We do not believe that principles of federal Indian law, whether stated in terms of preemption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere." *Id*., p. 155.

52. Matthew Fletcher, "In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue," *North Dakota Law Review* 80, pp. 759, 789 (2004).

53. 448 U.S. 136.

54. 458 U. S. 832.

55. *Id*., p. 841.

56. 471 U.S. 759.

57. 25 U.S.C.S. § 396a et seq.

58. 490 U.S. 163, 109.

59. *Montana* and *Cotton* dealt with the distribution between the state and tribe of economic rents from mineral extraction on tribal land. New Mexico's tax was levied on non-Indian mineral extraction companies that were operating on reservation land. Montana's tax was levied on the tribe. However, in the long run the economic effects of the taxes would be identical whether the tax is on the extraction company or on the tribe.

60. 546 U.S. 95.

61. 349 F. Supp. 3d 1046, 1048 (W.D. Wash.).

62. The interests of the state that were at least partially funded by tax revenues included education, social and health services, and worker safety.

63. 496 F. Supp. 3d 1307 (D.S.D.).

64. 480 U.S. 202 (1987).

65. *Ramah* 458 U. S. 832, pp. 843–46 (1982).

66. The fact that federal regulation of Indian education was comprehensive and did not involve the state meant that the state could not impose its gross receipts tax on the non-Indian contractor building a school on a tribe's reservation. The tribe argued that the excise tax revenue could have been used to purchase additional slot machines which would have generated an annual revenue stream for the tribe.

67. *Terwilliger*, 496 F. Supp. 3d 1307, p. 1322 (D.S.D.).

68. 442 F.2d 1184.

69. No. 17-56003 (Ninth Circuit, January 28, 2019) (case text).

70. The argument that a tax on non-Indians operating on Indian land could not be preempted without express congressional intent was rejected by *Bracker*.

71. 50 F.3d 734 (Ninth Circuit).

72. 447 U.S. 134, p. 157.

73. *Salt River Pima-Maricopa Indian Community*, 50 F.3d 734, p. 737 (Ninth Circuit).

74. 660 F.3d 1177 (Tenth Circuit).

75. 490 U.S. 163, p. 109.