


MEMORANDUM

To: State-Tribal Interim Relations Committee
From: Andrew Huff 
Chief Legal Counsel, Governor Bullock
Re: State-Tribal Revenue Sharing
Date: October 18, 2015

I have been asked to provide some brief background for the committee on the purpose and history of state-tribal revenue sharing in Montana.¹ The taxation of business activity on reservations has in the past been a source of tension and litigation between tribal and state governments. However, modern state-tribal tax agreements have resolved much of the previous legal uncertainty and economic disarray caused by competing and conflicting state and tribal taxation frameworks. Rather than costly and prolonged litigation – and the resultant problems for private business development on reservations – tribes and states now enter into tax agreements. These agreements generally assist in the administration of taxes and prevent the double taxation of certain economic transactions over which both a tribe and state have taxation authority.

I. Legal Background

Tribes, as governments, possess authority to levy taxes within their jurisdictional sphere. Tribal power to tax economic activity derives from their general governing authority to control economic activity on reservations and defray the cost of providing government services. See, e.g., Merrion, et al. v. Jicarila Apache Tribe, et al., 45 U.S. 130, 137 (1982). This means tribal governments may tax their own members, and in certain instances non-members as well, on the reservation. At the same time, states have historically asserted the authority to tax certain persons and transactions within reservation boundaries. Although state taxation authority does not generally apply to tribal members or tribal government operations within reservations, the federal courts have at times upheld the application of state taxes to non-member persons and businesses within reservation boundaries. See, e.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989). State taxation of non-member persons or businesses within a reservation is permissible if the tax is not preempted by federal law and if it does not infringe on the right of reservation Indians to make their own laws and be ruled by them. Williams v. Lee, 358 U.S. 217 (1959); Bracker, 448 U.S. at 142-143.

¹ This memorandum does not constitute legal advice and is by no means an exhaustive survey of the law in this complex area.

Relying on these general rules, the federal courts have assessed the application of various state taxes within reservations. The outcome of these court decisions depends entirely upon the specific facts of each case. For example, in the case of non-Indian oil producers operating on Indian lands in New Mexico, the Supreme Court held that both the state and the tribe may impose their respective taxes (double taxation). Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989). On the other hand, in White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), the Supreme Court struck down a state tax imposed on the fuel used by a non-Indian logging company operating on a reservation in Arizona. The different outcome in the two cases is due to the different facts underlying each case. In Bracker, the Court was more concerned that the state tax would interfere with pervasive federal regulation of tribal timber harvesting operations. Therefore, depending on the facts of the particular tax at issue, one or both governments may be able to impose a tax, in some instances on Indians and in some instances on non-Indians.

II. The Montana State-Tribal Cooperative Agreements Act

Because of the increasing complexity of jurisdictional questions within reservations, the State of Montana passed the State-Tribal Cooperative Agreements Act in 1981. The Act authorizes the state and tribal governments to enter into cooperative agreements for the provision of services on reservations and for other reasons, including law enforcement cross-deputization. The Act, as originally passed in 1981, contained no provisions specific to tax agreements. HB 25, Ch. 309, L. 1981. The language of the bill, however, was broad enough to encompass tax agreements, and the legislative history of the bill indicates that taxes were contemplated as an area covered by the bill.

By the 1990's there were multiple U.S. Supreme Court decisions involving taxation of motor fuel, alcohol, cigarettes, and oil and gas on Indian reservations. The complexity and fact-specific analyses in these cases led to significant legal and economic uncertainties. The potential for double state and tribal taxation meant many businesses would not take the risk of locating in Indian Country. These legal uncertainties compounded the difficulty of encouraging private sector growth on the reservations. Further, in 1991 the U.S. Supreme Court held that tribal sovereign immunity barred the state of Oklahoma from suing a Tribe to enforce collection of state cigarette taxes on tribal sales to non-Indians. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991). Another layer of complexity was thus added to the legal considerations concerning taxation on reservations. The U.S. Supreme Court, in its 1991 Oklahoma Tax Commission decision, suggested a non-litigious path out of the thicket: "States may . . . enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax." 498 U.S. at 514.

The 1993 state legislature took the Supreme Court up on its suggestion of cooperative tax agreements, amending the State-Tribal Cooperative Agreements to explicitly provide for such agreements. Both the Montana Departments of Revenue and Justice supported amendment of the Act to explicitly authorize tax agreements and revenue sharing. Testimony of DOR and DOJ before the Senate Taxation Committee, March 18, 1993. As stated in the Act, “It is the goal of the legislature to prevent the possibility of dual taxation by governments while promoting state, local, and tribal economic development.” § 18-11-101 (3), Mont. Code Ann. The Act allows a public agency to enter into an agreement with a tribal government to “assess and collect or refund any tax or license or permit fee lawfully imposed by the state or a public agency and a tribal government and to share or refund the revenue from the assessment and collection.” § 18-11-103 (1)(b), Mont. Code Ann.

III. Current Taxation Agreements

At present, all of the federally recognized tribes in Montana have various tax agreements with the state. These agreements cover tobacco, alcohol, motor fuel and in one instance oil and natural gas taxes. Under these agreements the Tribes receive a per capita share of the statewide taxes generated annually. The amount is determined by multiplying the number of enrolled tribal members living on a reservation by the per capita tax receipts statewide for each tax. The Tribes certify to the state their enrollment numbers annually. Distributions are made quarterly. The Montana Department of Transportation administers the motor fuel tax agreements. The Montana Department of Revenue administers all other tax agreements.

The state-tribal tax agreements have worked very well. Since their inception, there has been no litigation between tribes and the state regarding the taxes under agreement; the tribes receive revenues from taxes they have legal authority to impose; and businesses have the legal certainty they need to establish operations on reservations that are not disadvantaged by double taxation.