Natural Resources Journal

22 Nat Resources J. 3 *(Symposium on the Taxation of Natural Resources)*

Summer 1982

American Indian Tribal Taxation of Energy Resources

David Redhorse

Theodore Reynolds Smith

Recommended Citation

David Redhorse & Theodore R. Smith, *American Indian Tribal Taxation of Energy Resources*, 22 Nat. Resources J. 659 (1982).
Available at: https://digitalrepository.unm.edu/nrj/vol22/iss3/11

This Article is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in Natural Resources Journal by an authorized editor of UNM Digital Repository. For more information, please contact disc@unm.edu.

David Redhorse and Theodore Reynolds Smith*

American Indian Tribal Taxation of Energy Resources

American Indian tribes are a unique and often misunderstood entity in the scheme of American life. To many, they represent an anachronism to be viewed in a variety of romanticized fashions. To themselves, they are confronted with the reality of trying to exist in today's society as the sovereigns they once were. Over the past one hundred years there have been isolated incidents which yielded nominal windfall payments to small groups of Indians; however, most Indian people have not been able to take advantage of the windfalls which have arisen from energy development. Usually, the resources have been developed with only a nominal profit going to the tribe.

Tribal leaders have for some time been asking, how can we insulate ourselves from our burden of external dependency? The immediacy of this problem has become even more pronounced with the most recent round of government budget cuts. As a group, Indian people have been subjected to more severe cuts and, therefore, service reductions, than any other segment of American society. The outlook for the future is even more dismal.

With this backdrop, it is not surprising to see Indian leaders looking for options which will allow them to reduce their tribes' dependency upon the government and increase their level of self-sufficiency, nor to have tribes which are indeed legitimate governmental entities decide upon the normal governmental revenue source of taxation as one avenue toward self-sufficiency. The objective of this paper is to explore Indian tax initiatives, with particular emphasis on the taxation of energy resources.

Some tribes already have stopped asking whether they have the power to levy taxes; they have enacted severance taxes, a possessory tax, a business activity tax, and an environmental tax. Interest groups have contested these tribal actions, and have ushered tribes into court. The issue of taxation usually involves three parties, two of whom are the resource owners, and the producers. Resource owners fear that taxes may discourage operators so that resource owners subsequently would lose payments of bonuses, rents, and royalties. Producers fear that taxes would decrease their profit margins or make them less competitive in the market place. A third interested party is the state, because tribal taxation can mean loss of state revenues. However, the state's greater fear is that

*Council of Energy Resource Tribes, Englewood, Colorado

Indian tribes may preempt the field of taxation and make legitimate the notion of tribal sovereignty. To buffer attempts by these groups to invalidate a tribe's taxation program, tribes have acted with deliberation and reasonable discretion to devise valid programs.

TRIBAL GOVERNMENTAL PURPOSES

Indian tribes are engaged in the governance of geographic areas, as well as of the individuals who choose to live or work within those territories. Although the geographic areas that tribes govern may include many types of land holdings (tribal trust, allotted trust, fee simple, state, and federal), tribes as governments must decide on the best public policy goals for the area under their responsibility. Taxation can serve as a mechanism to achieve the tribe's public goals, whether the goals are a distribution of income, asset replacement, payment of development costs, rates of development, protection of the natural and social environment, or merely the raising of revenues to maintain a government.

Government Income

Taxes can provide the basic income to governments without which they cannot exist or provide services to their citizens. Often the sole reason for enacting a tax is to raise revenues for the maintenance and continuance of a government.

Distribution of Income

The minority of tribal members who hold oil and gas properties may be receiving financial returns under lease arrangements that include payments of bonuses, rents, and royalties. Because the majority remain without this income, a tribal government may decide that equity demands a better allocation of the income from the mineral resources, and may choose a tax to accomplish this objective.

Asset Replacement

Taxes may be viewed as payments for the loss of the sovereign's resource wealth through extraction. The economic loss through depletion of nonrenewable resources can be minimized if tax revenues are reinvested in renewable assets. Companies and other investors receive both a return of their capital and a return on their investment. When their project is completed, they reinvest their money and maintain an income flow. The tribes have generally received a return on their capital—if one views the mineral resource as capital—but they have not recovered their capital so that it can be reinvested. A tax may be used to rectify this situation.

Payment of Development Costs

Energy resource developers rely heavily on available public services and goods during their development. Imported skilled workers present additional demands on schools, utilities, roads, and other community services. Western states and communities have attempted to emphasize the need for impact assistance, but the federal government has made it clear that aid will not be forthcoming. Therefore, tribes and other communities must look elsewhere for funds to provide these services. Tax revenues may be necessary to finance the construction of additional public service capacity.

Conservation or Acceleration

Forms of taxation can conserve the resources either by encouraging efficient development or discouraging development entirely. In many cases, companies have secured leases and then held them for long periods without proceeding with development when the tribe is in need of revenue. Certain forms of taxation may serve to accelerate development or provide revenue in lieu of development.

Maintenance of Environmental Quality

Even though a multitude of statutory provisions exists to protect the environment, tribes have been passive and unsure of their authority to protect their environment. The need for protection of their people's health and welfare can motivate tribal governments to encourage the use of advanced technology that protects the quality of their environment by setting fees or taxes on polluters and pollution.

TYPES OF TAXES AND THEIR EFFECTS

Taxes on natural resource production can be categorized into five types: property, severance, income, value-added, and special excise taxes. The following sections describe each tax and its potential effect on resource development.

Property Taxes

Property taxes are represented as assessments based upon estimates of ad valorem value. Estimates of value can be made in a number of different ways: capitalization of net income, market transaction of comparable property, and replacement cost. In addition, the fractional ownership represented by leases can be estimated and taxed separately. Other approaches are possible as well as the combination of any of these means.

Theoretically, property taxes can be used to manipulate the rate of exploitation of natural resources by varying the rates at which the tax is

assessed; however, there is a strong indication that the effect of a property tax on the capitalized value of the resource is to accelerate production. This is the result of an increase in the holding cost which must be absorbed by the resource owner who is generally the leaseholder. There is also the possibility that taxes on mine improvements may motivate the producer to shorten the life of the improvements and, hence, shorten the productive life of the mine.

The Navajo Tribe has taken the lead in implementing a property tax on energy resource leases.[1] This tax is termed the Navajo possessory interest tax. Determination of an assessed value of the resources requires a high degree of skill. Inherent in the assessment process is an estimate of future earnings from the production—and that estimate of the discounted sum of future net benefits received from the property tends to be extremely subjective.

Navajo's possessory interest tax can be classified as a property tax because the tax is levied on the full cash value of a developer's "possessory interests" in property located within the exterior boundaries of the Navajo Indian Reservation. By the tribe's legal definition, the developer's "possessory interests" includes:

> The value of a lease granted by the Navajo Nation. The tax is not on improvements but, rather, on the value of the lease site and underlying resources such as coal, oil, gas, and uranium.[2]

Two methods are set out to compute the value of the interests:

> *Fair Market Value Method.* The value of a possessory interest may be computed by comparing the interest to be valued with comparable interests (whether within or outside the Navajo Nation) which are sold by willing sellers to willing buyers, neither of whom are under a compulsion to act; or,
>
> *Present Value of Income to be Received.* The value of a possessory interest may be computed by capitalizing the value of the gross income from the property and subtracting it from the capitalized value of the reasonable expenses to be incurred. Such capitalization shall be done for the life of the possessory interest in question.[3]

Finally, the rate of tax is presently at 3% within the rate limitation set by the Tribal Council of not less than 1% nor greater than 10%, and is subject to annual review by the Navajo Tax Commission.[4] The Navajo Tribe enacted this tax in order to receive income and accelerate utilization of many idle leases on their land.

1. Navajo Tribal Council Res. CJA-13-78 (26 January 1978).
2. *Id.* at § 3(a).
3. *Id.* at § 5.
4. *Id.* at § 7.

Severance Taxes

The severance tax, which is applied at the time the resource is removed from the ground, is the most common form of energy resource taxation. Some other names for severance taxes are: production tax, resource tax, conservation tax, and privilege tax. Severance taxes are generally levied by simple methods (usually as a flat amount per unit or as a flat percentage of value), and these methods produce revenue with the least administrative expense. The basis for the taxes is either the quantity of mineral production or the value of mineral output and, therefore, the effects of the specific and ad valorem severance taxes are different. However, these "simple" taxes also have some complex effects on resource development.

The effect of a specific severance tax imposed on the unit amount of resource extracted will be to discriminate against low-grade ores and induce a rapid depletion of high-grade deposits. Moreover, this type of severance tax can slow the rate of physical depletion since current output could be decreased to lower total operating costs. An ad valorem severance tax imposed on the sales price of the resource may create less of a high grading effect; however, it may discourage the development of higher-cost resources and reduce total production.

Several energy resource owning tribes have chosen to levy severance taxes. The Blackfeet Tribe has severance, privilege, and resource taxes on oil and gas production on Blackfeet lands;[5] the Jicarilla Apache Tribe has its well-publicized ordinance to tax oil and gas production;[6] and the Crow Tribe has enacted a coal severance tax.[7] The Blackfeet taxation scheme parallels the state of Montana's taxation scheme. The Blackfeet severance tax is computed at the following rates:

> Two and one-tenth percent (2.1%) of the total gross value of that portion of all the petroleum and other mineral or crude oil produced by such person from each lease or unit in the calendar quarter, not in excess of an amount obtained by multiplying the number of producing wells on such lease or unit by 450 barrels.
>
> Two and sixty-five hundredths percent (2.65%) of the total gross value of that portion of all the production of such person from each lease or unit in each calendar quarter in excess of 450 barrels multiplied by the number of producing wells on such lease or unit; excluded is production of petroleum used in connection with development and operation.
>
> Two and sixty-five hundredths percent (2.65%) of the total gross

5. Blackfeet Tribal Council Res. 1076 (18 October 1976), *reaff'd.* (9 November 1976) provides for oil and gas production taxes.

6. Tribal Council Jicarilla Apache Tribe, Ordinance 77-0-02, as amended by Ordinance 77-0-195.

7. Crow Tribal Tax Code (1977).

> value of natural gas produced from each lease or unit; excluded is the gas used in development and production.

The Blackfeet privilege tax is levied for the purpose of providing funds for defraying the expenses of the operation and enforcement of the production taxes ordinance and expenses of the Blackfeet Tax Commission. Every operator and producer of oil and gas must pay an assessment not to exceed the amounts set forth in the following schedule on each barrel of crude petroleum originally produced, saved, and marketed or stored within the reservation or exported from the reservation. The assessment is on each 10,000 cubic feet of natural gas produced, saved, and marketed or stored within the reservation or exported therefrom:

> on which wells are producing an average of 25 barrels of crude petroleum per day or less, an assessment not to exceed $0.05 per barrel;
>
> on which wells are producing an average of more than 25 barrels of crude petroleum per day, an assessment not to exceed $0.10 per barrel; and
>
> on wells producing, saving, and marketing, storing, or exporting natural gas, the operators and producers shall pay an assessment not to exceed five mills per 10,000 cubic feet of natural gas where said gas is marketed for less than $0.15 per 1,000 cubic feet and an assessment not to exceed 10 mills per 10,000 cubic feet of natural gas where said gas is marketed for $0.15 or more per 1,000 cubic feet.

Before commencing the drilling of an oil or gas well or stratigraphic test well or core hole, every person shall secure from the Tax Commission a permit and shall pay to the Tax Commission the following amounts: for each well whose estimated depth is 3,500 feet or less, $25; from 3,501 feet to 7,000 feet, $75; from 7,001 feet and deeper, $150.

To improve the natural environment of the Blackfeet Reservation including but not limited to correcting any damages caused by past or present resource development and to rectify the damage, a resource indemnity trust tax on oil and gas was devised. The annual tax to be paid by a person engaged in or carrying on the business of extracting or producing oil or gas shall be $25 per well, together with an additional sum or amount computed on the gross value of product per well which may have been derived from the business work or operation within the Blackfeet Reservation during the calendar year immediately preceding. The annual tax is at the rate of 0.5% of the amount of gross value of product at the time of extraction from the ground, if in excess of $5,000.

The Jicarilla Apache Tribe also has enacted a severance tax. The Tribe expressed the opinion that it had the right to govern its people and re-

sources and that a tax was necessary to provide for the general welfare of their people.[8]

The Jicarilla severance tax is imposed on any oil and natural gas severed, saved, and removed from tribal lands as follows:

> *Due Date of Tax.* Such taxes shall become due at the time of severance and payable monthly as herein provided.[9]
>
> *Rate of Tax: Gas.* The severance tax set forth herein shall be at the rate of $.05 per million Btu of gas produced on the Jicarilla Apache Reservation and sold or transported off the Reservation.[10]
>
> *Rate of Tax: Oil.* The severance tax set forth herein shall be at the rate of $0.29 per barrel of crude oil or condensate as measured under the terms of this Ordinance, which is produced on the Jicarilla Apache Reservation and sold or transported off the Reservation.[11]

This Jicarilla ordinance developed into a crucial court case involving Indian taxation. In *Merrion v. Jicarilla Apache Tribe* and *Amoco Production Company and Marathon Oil Company*[12] the Court of Appeals for the Tenth Circuit considered questions of whether the Jicarilla Apache Tribe had the power to levy taxes, whether the Commerce Clause of the Constitution limited tribal power to tax, and whether Congress had preempted tribal taxation of tribal oil and gas production. The Court of Appeals reversed the lower court ruling, holding that the taxing power is an inherent attribute of tribal sovereignty that has not been divested by any treaty or Act of Congress, and therefore there was no Commerce Clause violation. On January 25, 1982, the U.S. Supreme Court upheld the ruling of the Court of Appeals clearly establishing the right of Indian tribes to tax.

The Crow Tribe has enacted a severance tax on coal produced from reservation mines.[13] The tribal tax is levied at a rate of 25% of the gross sale price per ton of coal extracted. The Crow Tribe has held the implementation of the tax in abeyance and has pursued an attempt to invalidate (1) the Montana severance tax based on the coal's heating quality and the greater of $0.12–$0.14 per ton, or 20%–30% of value for surface mined coal;[14] and (2) of the 45% gross proceeds from strip mines tax also imposed by Montana. Since the 1975 enactment of the severance tax and gross proceeds tax, Montana has extracted nearly $30 million in

---

8. Jicarilla Apache Tribal Council Ordinance, *supra* note 6.

9. *Id.* at § 1.

10. *Id.* at § 2.

11. *Id.* at § 3.

12. Merrion v. Jicarilla Apache Tribe, 50 U.S.L.W. 4169 (January 25, 1982), and Amoco Production Co. et al. v. Jicarilla Apache Tribe et al., 617 F.2d 537 (10th Cir. 1980); *cert* granted, argued 30 March 1981.

13. *Seeee* note 7, *supra.*

14. MONT. CODE ANN. § 15-35-101 (1981).

severance taxes and almost $4 million in gross proceeds taxes from the development of Crow coal. In the same period, the tribe received $9,540,506 from the development of its nonrenewable mineral estate.[15]

Montana allocates income from its severance tax to local county commissioners in an attempt to mitigate impacts arising from energy development. In an attempt to deal with some of the impacts arising on the Crow Reservation, the tribe requested status as a county commission but its request was denied by the state, thus creating what seems to be a significant inequity in the distribution of the funds originating from the Crow coal. Currently, the tribe's challenge to the Montana taxes is under consideration by the U.S. Court of Appeals for the Ninth Circuit.

Income Tax

At present, no tribe has levied an income tax. The most similar tax is the Navajo Tribe's Business Activity Tax. This tax, however, taxes the gross receipts that a business enjoys while doing business on the Navajo Reservation and it is categorized, thus, as value-added taxation.

Value-Added Tax

The Navajo Tribe has devised a value-added tax in the form of the Business Activity Tax.[16] The tax is intended to allow the Navajo people to share in the benefits of those economic activities that originate on the Navajo Reservation. The tax is assessed on the net dollar value contributed by a business to the output of economic goods and services on the Navajo Reservation in the form of "Navajo Source Gains." Navajo Source Gains are the gross receipts from the sale of Navajo goods and services either within or outside the reservation, minus deductions for allowable costs of goods acquired which includes Navajo labor.[17]

While there is limited business activity on the Navajo Reservation, there are some large-scale activities taking place. A $100,000 exemption results in most of the burden of this tax falling on mining activity and the two large power plants located within the Navajo Reservation near Page, Arizona, and Fruitland, New Mexico.

Special Excise Tax

These taxes are usually imposed on businesses for the privilege of engaging in economic activity within a governmental jurisdiction. Another purpose these taxes serve is exemplified by the Sulfur Emissions Charge

15. Brief of Appellant, The Crow Tribe of Indians v. State of Montana, No. 79-4321 (9th Cir. 1981).
16. Navajo Tribal Council Res. CAP-36-78 (28 April 1978).
17. *Id.* at § 3(b).

which has been enacted by the Navajo Tribe.[18] The Navajo Tribe had determined that emissions of sulfur and other materials from the two coal-fired electric-generating plants located on the reservation posed a serious threat to the health of its citizens and to the natural environment. To encourage the installation of devices to reduce the emission of pollutants, the Navajo Tribe passed a Sulfur Emissions Charge on the amount of sulfur emitted by projects within the reservation.

The rate structure developed by the Navajo Tribe is as follows:

Calendar quarters beginning on	*Fee (per pound)*
1 January 1978	$0.15
1 January 1979	0.30
1 January 1980	0.45
1 January 1981	0.60
1 January 1982	0.75

The fee imposed does not apply to the first 250,000 pounds of sulfur discharged each quarter by a given person.[19] Progress on the Sulfur Emissions Charge has been delayed along with the other Navajo taxes due to challenges in court. In *Salt River Project v. Navajo Tribe*, the tribe won and the decision is now on appeal.[20]

IMPLEMENTATION OF TRIBAL TAXING POWERS

While Indian tribes have asserted taxing powers, many question this power. Indian tribes that have levied taxes have faced legal challenges to their taxation on the ground that they have no authority or power to tax and that the taxes are not constitutionally valid. Yet, the taxing power of a government cannot be disputed. Felix S. Cohen supports the power of an Indian tribe to raise revenue through taxation:

> One of the powers essential to the maintenance of any government is the power to levy taxes. That this power is an inherent attribute of tribal sovereignty, which continues unless withdrawn or limited by treaty or by act of Congress, is a proposition which has never been successfully disputed.[21]

The foundations of Indian tribal power to tax have been well documented in numerous articles and were quickly addressed in *Merrion*[22] (by

18. Navajo Tribal Council Res. CJN-45-77 (8 June 1977), as amended (15 September 1977). (Codified 24 NAVAJO TRIBAL CODES §§ 1-5 (1978)).

19. *Id.* at § 5.

20. Salt River Project Agricultural Improvement & Power District et al. v. Navajo Tribe of Indians et al. (D. AZ. 1978).

21. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 142 (1942) (republished by the University of New Mexico Press (1974)).

22. Merrion v. Jicarilla Apache Tribe, *supra* note 12.

reference to previous Indian tax cases, such as *Barta v. Oglala Sioux Tribe,*[23] *Iron Crow v. Oglala Sioux Tribe,*[24] and *Morris v. Hitchcock).*[25] The court continues and upholds these cases as dispositive of the question whether tribes can tax. Current legal interest focuses on Indian taxes and the Commerce Clause questions. Usually taxes implemented by local governments are limited by the commerce clause of the U.S. Constitution. The standard to judge the validity of local taxes has been articulated in *Complete Auto Transit v. Brady,*[26] Under the interstate Commerce Clause, a *state* may not impose a tax that affects commerce unless the tax "is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state."[27] The Court of Appeals in *Merrion v. Jicarilla*[28] had lightly applied this standard. The Supreme Court ruled that the Jicarilla severance tax does not violate the "negative implications" of the Commerce Clause and therefore removed it as an issue in Indian resource taxation. It was concluded:

> Courts are final arbiters under the Commerce Clause only when Congress has not acted. Here, Congress has affirmatively acted by providing a series of federal checkpoints that must be cleared before a tribal tax can take effect, and in this case the severance tax was enacted in accordance with this congressional scheme.
>
> Even if judicial scrutiny under the Commerce Clause were necessary, the challenged tax would survive such scrutiny. The tax does not discriminate against interstate commerce since it is imposed on minerals either sold on the reservation or transported off the reservation before sale. And the exemption for minerals received by the Tribe as inkind payments on the leases and used for tribal purposes merely avoids the administrative make-work that would ensue if the Tribe taxed the minerals that it, as a commercial partner, received in royalty payments, and thus cannot be deemed a discriminatory preference for local commerce.[29]

A further issue in the *Merrion* case was whether the tribal tax is a multiple burden on interstate commerce. The lower court had ruled that, because New Mexico imposed numerous taxes, the additional tribal tax created the multiple burden. The Court of Appeals applied the principle

23. Barta et al. v. Oglala Sioux Tribe, Pine Ridge Reservation, South Dakota, et al., 146 F. Supp. 917 (W.O.S.D. 1956), *aff'd.* 259 F.2d 553 (8th Cir. 1958), *cert denied,* 358 U.S. 932 (1959).
24. Iron Crow v. Oglala Sioux Tribe, Pine Ridge Reservation, South Dakota, 231 F.2d 89 (8th Cir. 1956).
25. Morris v. Hitchcock, 194 U.S. 384 (1904).
26. Complete Auto Transit v. Brady, 430 U.S. 244 (1977).
27. *Id.*
28. Merrion v. Jicarilla Apache Tribe, *supra* note 12.
29. *Id.*

that every state (or government) may impose a tax with equal right on commerce. The Court concluded that there is no threat of multiple burden. This was upheld by the Supreme Court; however, the Court did not address the right of New Mexico to tax and whether that taxation is exclusive. This issue will have to wait for a final decision on *The Crow Tribe of Indians v. State of Montana.*[30]

If the tribes are forced to defend their programs, they need to follow those cases where states have successfully defended state taxes. State taxes have been declared legal if the state based its tax on the actual governmental cost associated with the activity, the aesthetic and other damages not compensated by the actual costs, and the replacement value of the nonrenewable resource being depleted. Furthermore, the facts that the states can provide an orderly, civilized society and exist for the common good have been the basis for their buying of revenue taxes. Again, there appears to be no reason why a tribe cannot establish a clear record upon which it can base its tax. An accounting of the various costs would substantiate the validity of a tribal tax.

The following list outlines those areas in which tribes can document the costs they must incur from energy development and which justify the need for revenue-generating programs, including the levying of taxes.

> Special costs associated with resource development incurred by the tribal government. Levied taxes need to be related to providing: environmental monitoring; highway construction; labor and employment monitoring; and impact costs on schools, hospitals, police and fire protection, water and sewage, and other necessary social services.
>
> Public damages in terms of present and future loss of aesthetic value. Precision in quantifying damages is almost impossible, but an attempt to assign costs should be made to determine the cost of: reclamation, disposal of mine wastes, diminished air quality, health hazards, and hazardous waste spills.
>
> Future costs anticipated for preserving te land base for other future uses such as monitoring programs.
>
> Costs of other economic opportunities which the present production activity has delayed. Determination of these costs should focus on actual losses, such as holding an oil and gas lease for speculation without development.
>
> Loss of resource wealth due to extraction. The economic need for a replacement of the natural resource or asset by another asset is a factor in assigning a cost to the tribe.
>
> General costs to conduct basic public services including the operation of a government. This also includes the establishment of trust

30. Crow Tribe of Indians v. State of Montana, 650 F.2d 1104, 1112 (9th Cir. 1981).

funds so that future generations can enjoy the advantages of maintaining a government.

If the tribes have successfully defended their natural resource taxes, then they must address the economic implications of those taxes. Any tribal tax would create another tier of taxation and add costs for resource developers and producers; thus, Indian lands would incur more costs to develop than the surrounding non-Indian lands.

Producers have attempted to invalidate these added costs by suing tribal governments and implying that tribes do not have the power to levy taxes. However, possibly these efforts were misdirected; in situations where states have taxed Indian land resources, it may be that the states actually lacked the power to tax. For example, in *Merrion*,[31] the court raised the question of whether the state of New Mexico had the right to tax and whether that taxation was exclusive. But the court did not address the question because the state was not a party to the suit. Other cases in which state powers have been questioned include the Blackfeet Tribe's case against Montana[32] and the Crow Tribe's complaint against Montana.[33]

It is presumed that Congress has permitted states to levy taxes on certain kinds of Indian lands.[34] Tribes have maintained that statute 25 U.S.C. §398(c) has been repealed by implication and cite subsequent statutes. Notwithstanding this statute, tribes are pursuing the notion of tribal preemption to invalidate state taxation.[35] Producers also should entertain this direction. Indeed, certain principles could exclude state taxation.

Interference with tribal interest is one argument used and, coupled with the policy of Indian self-government and the Indian Reorganization Act, tribes may be successful. But a careful reading of 25 U.S.C. §358 also may be sufficient. That statute makes reference to lands subject to 25 U.S.C. §397, which have been "bought and paid for."[36] Broadly interpreted, this phrase may include all Indian lands,[37] but federal Indian policies have changed since that early interpretation of 1896.

---

31. Merrion v. Jicarilla Apache Tribe, *supra* note 12.

32. Blackfeet Tribe of Indians v. State of Montana, 507 F. Supp. 466 (Dist. Ct. 1981). Case now pending before 9th Circ. as *Blackfeet Tribe v. Groff.*

33. Crow Tribe of Indians v. State of Montana, *supra* note 30.

34. 25 U.S.C. §398(c) (1976).

35. In *Merrion*, the court entered the argument that Congress had preempted Indian tribes' power to tax natural resources, but found that the intent of this was to benefit Indian tribes. Thus, there was no preemption. *Merrion* at 547.

36. 25 U.S.C. §397 (1976).

37. Annotation to 25 U.S.C. §397 states that the words "bought and paid for" are not a limitation to only such lands as have been actually paid for in cash, or to those which have been patented, and the title to which has been actually parted with by the United States; but they include all lands which have been purchased by the Indians, either by the payment of money, or by exchange, or by the surrender of possession of other property. Strawberry Valley Cattle Co. v. Chipman, 13 Utah 454, 45 P 348 (1896).

Tribes also need to address the problem that states have legitimate governmental interest to raise revenue. This interest may adversely affect tribes because, when both tribes and states levy a tax, the dual taxation may serve as an economic barrier to potential customers. *Colville*[38] states that such a taxing scheme is not contrary to the noninterference principle.

> The state also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services. . . . Washington's taxes are reasonably designed to prevent the tribes from marketing their tax exemption to nonmembers who do not receive significant tribal services and who would otherwise purchase their cigarettes outside the reservations.[39]

SUMMARY

Whether a tribe can tax is now but old rhetoric. How to tax has become the more crucial question. Tribes must develop taxing schemes that are reasonable and competitive. How public services are linked to taxation, as well as who are the recipients of those services, is weighed heavily in considering whether other taxing entities interfere with tribal governments. The *Merrion* Decision serves as a milestone in Indian taxation; however, the decision itself pointed to possible pitfalls unless tribes judiciously exercise judgment in their use of the power to tax.

---

38. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980); *reh. denied*, 448 U.S. 911 (1980).

39. *Id.*