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STATE TAXATION OF NON-INDIANS WHOM DO BUSINESS WITH INDIAN TRIBES: WHY SEVERAL RECENT NINTH CIRCUIT HOLDINGS REEMPHASIZE THE NEED FOR INDIAN TRIBES TO ENTER INTO TAXATION COMPACTS WITH THEIR RESPECTIVE STATE

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In an effort to generate funds for their Tribal governmental facilities and Tribal social services, Tribal governmental entities have engaged in numerous business ventures in recent years. [FN1] Business ventures engaged in by Tribes have included Tribal smoke shops, Tribal gas stations, Tribal hotels and restaurants, Tribal casinos, Tribal manufacturing plants and the operation of ***502** an airplane service. [FN2] However, with only a few exceptions, [FN3] Tribal business ventures have not generated substantial sums of money. [FN4] For instance, the Choctaw Nation currently operates seven Tribal travel plazas, eight smokeshops, four finishing plants, a trailer manufacturing plant, a Sherman tool manufacturing plant, four bingo facilities, two shopping centers, three day care centers, a home health care company, a construction company, an insurance company, and a ranch company. [FN5] Unfortunately, the Choctaw's business ventures only netted $6,781,812 for fiscal year 1997. [FN6]

Tribal nations have also used their taxing powers to raise additional revenues. [FN7] A Tribe may tax both member Indians and nonmembers. [FN8] Tribal members may encounter sales taxes, cigarette ***503** taxes, beverage taxes, beer taxes, and motor vehicle taxes. [FN9] Nonmembers may also encounter sales taxes, cigarette taxes, beverage taxes, beer taxes, and fuel taxes. [FN10] Tribal taxation of members and nonmembers generates a substantial sum of money for Tribal governments. For example, in fiscal year 1997, the Absentee Shawnee's general revenue taxes generated $944,495.94. [FN11] Taxation revenues such as these can in turn be used by Tribal governmental entities to support Tribal governmental facilities and Tribal social services.

Unfortunately, a recent string of decisions by the Ninth Circuit has the potential of drastically reducing the ability of Tribes to tax the income of nonmembers. [FN12] In all, these decisions make it easier for the state to concurrently tax nonmembers whom engage in business in Indian country. [FN13] By allowing concurrent taxation, the Ninth Circuit effectively reduces the amount of taxes a Tribal government can levy. For instance, assume that the state imposes a five percent tax on sales and a Tribe imposes a four percent tax on sales. If both impose their taxes on nonmembers whom purchase goods at a Tribal store, then the nonmember purchaser would be paying more for a good in Indian country than outside of Indian country. More than likely, if the Tribe retains the tax, nonmembers will not purchase goods at the Tribal store. Obviously, this hurts the overall profits of Tribally-run ***504** businesses. So, to ensure that Tribally-run businesses are successful and generate profits for the Tribe, the Tribe would have to eliminate its tax on the sale of goods to nonmembers. The elimination of the tax, however, also reduces the amount of taxation revenues available to the Tribe which in turn undermines the ability of Tribal governmental entities to support Tribal governmental facilities and Tribal governmental services. This article, after analyzing the Ninth Circuit's erroneous application of current legal standards, advocates that Tribes must compact with states in an effort to pre-set the levels of taxation which the Tribe and the state may imposeon nonmembers doing business in Indian country. [FN14]

Section II tersely examines Tribal sovereignty and federal policy as it has related to American Indian Tribes. Additionally, this section discusses Tribal governmental entities and some of their recent business ventures. Section III details the United States Supreme Court's decisions addressing the issue of concurrent Tribal and state tax jurisdiction over nonmembers whom do business with Tribal enterprises. Section IV explores the Ninth Circuit's treatment of concurrent Tribal and state tax jurisdiction over nonmembers whom do business with Tribal enterprises. In light of the Ninth Circuit's unfavorable holdings, section V advocates that Tribes must compact with their respective state to pre-set the level of taxation which the state and the Tribe may concurrently impose on nonmembers doing business in Indian country. Section VI concludes that Tribal governmental entities can better protect the competitiveness of their Tribal businesses and their tax base by compacting with their respective state to pre-set the level of taxation which the state and Tribe may concurrently impose on nonmembers doing business in

Indian country.

***505** I

Tribal Governmental Entities And Federal Indian Policy

Before European discovery of the new world, Indian Tribes existed as independent sovereign nations. [FN15] At the time of European discovery, approximately five million people, in more than 600 Tribes, inhabited what is now the United States. [FN16] Every Tribe "possessed its own language or dialect, its own set of beliefs and traditions, and its own form of government." [FN17] Before the birth of the United States, Tribal entities in the eastern half of the United States traded with and aligned the various European powers in the United States. [FN18] Each Tribal entity was treated as sovereign, distinct governmental entities. [FN19]

In colonial America, the British crown set general policies and the colonists were then free to manage those policies. [FN20] When the United States adopted the Constitution in 1789, the states delegated Congress the power to regulate commerce with the Indian Tribes. [FN21] In 1790, Congress enacted the Trade and Nonintercourse Act which forbade the sale of all land by any Indians within the United States to any person or state, unless done in a public treaty under United States authority. [FN22] Since 1790, Congress has continually enacted legislation designed to regulate Indian country. [FN23]

Even though the Constitution gave the federal government the ***506** sole power to regulate Indian affairs, state governments still tried to regulate relations with Indian Tribes within their states. [FN24] The United States Supreme Court, per Chief Justice Marshall, was called upon in Worcester v. Georgia [FN25] to define the relationship of Tribal self-government to corresponding powers of the federal and state governments. The Court held that all the power to regulate Indians and Indian affairs resided in the federal government and without federal permission, states could not act. [FN26] Further, the Court stated that Indian Tribes are sovereign entities with the inherent powers of self-government, [FN27] and these powers reside with the Tribal government unless Congress enacts legislation that takes such power away from the Tribes. [FN28] The Court's recognition of plenary power in Congress and residual Tribal sovereignty has consistently remained the controlling principle of Indian law. [FN29]

Federal policy throughout the nineteenth century focused on securing land for the burgeoning tide of immigrants seeking refuge in the newly formed country. Initially, Congress exercised it powers over eastern Indian Tribes when it passed the Indian Removal Act of 1830. [FN30] Under this policy, Indian Tribes residing east of the Mississippi River were removed to lands west of the ***507** Mississippi River. [FN31] Indian Tribal governments and Tribal peoples were severely affected by their removal; [FN32] however, these Tribes and their members were able to reestablish their Tribal governmental structures. [FN33] During the mid-1800s as more immigrants moved westward, the federal government placed many of the western Tribes on reservations. [FN34] When western Tribes were located to these smaller tracts of land, they suffered greatly and most of their members encountered severe poverty. [FN35]

In 1887, Congress initiated a period of forced assimilation of Indian nations when it enacted the 1887 General Allotment Act. [FN36] The General Allotment Act divided Tribal lands into individual forty, eighty, or 160 acre parcels and forced individual Tribal members to farm these lands. [FN37] The driving idea behind the policy was to force Tribal members to assimilate into white society as farmers and ranchers. [FN38] Lands that were undistributed ***508** were deemed surplus and sold to white settlers. [FN39]

The Allotment Era experiment was a disaster, and by 1934, John Collier, the Commissioner of Indian Affairs, realized that two-thirds of American Indians were drifting towards complete impoverishment. [FN40] Total Indian land holdings disintegrated from 138 million acres in 1887 to only forty-eight million acres in 1934. [FN41] Worse yet, twenty million of the remaining forty-eight million acres were desert or semi-desert and unusable. [FN42] Tribal governmental entities were also in total disarray as the Bureau of Indian Affairs (BIA), over the opposition of traditional Tribal government leaders, asserted its authority to appoint leaders for the Tribe. [FN43] Additionally, the BIA literally took charge of Indian life by establishing schools, health-care services, and law-enforcement services for the Tribes. [FN44]

The federal government recognized the instability within the Tribes and responded with the Indian Reorganization Act (IRA) of 1934. [FN45] The IRA established a new policy of acquiring lands solely for the benefit of the Tribes. [FN46] It authorized the Secretary of Interior to approve constitutions and corporate charters for newly

organized Tribes, and to facilitate this new policy, Congress protected the Tribes' fundamental rights of political liberty ***509** and local self-government. [FN47] In all, the IRA sought to incorporate the Tribal governmental entity, not the individual Indian, into society. [FN48]

The IRA withstood heavy criticism during the 1940s and 1950s as Congress reversed its decision to strengthen Tribal economic and political sovereignty. [FN49] During this period, Congress sought to terminate its governmental responsibilities to the Tribes and to allow local governments to exercise control over Indians within their domain. [FN50] However, this policy quickly fell out of favor, and in 1970, President Nixon announced that the federal government should encourage Tribes to attain levels of economic and political self-sufficiency. [FN51] Further, he encouraged Congress to pass legislation that would facilitate Tribal economic and political development. [FN52] Since President Nixon's pronouncement, the guiding federal policy has encompassed facilitating Tribal economic and political development. [FN53]

Shortly after President Nixon's statement, Congress began passing laws designed to facilitate Tribal economic and political development. For instance, Congress passed the Indian Self-Determination and Education Assistance Act of 1975 [FN54] to encourage Tribes to expand their education, health, and ***510** infrastructure programs through federal grants and contracts. [FN55] Under this Act, Tribes have been allowed to assume the administrative responsibility for programs that had been previously administered by the BIA. [FN56]

Tribal governmental entities also have the power to adjudicate claims in their own courts, [FN57] including Indian child welfare cases. [FN58] Additionally, Tribal governmental entities administer environmental programs, [FN59] build and maintain highways, [FN60] operate schools and hospitals, [FN61] and run numerous other governmental facilities. [FN62]

To fund these services, Tribes may obtain their monies through corporate business ventures, gaming enterprises, mineral leasing endeavors, and federal grants. To date, Indian Tribes have received a wealth of funding from the gaming industry. [FN63] Indeed, the gaming industry has generated an estimated six billion dollars ***511** a year for the one-third of the nation's 554 Tribes operating some form of gaming. [FN64] Tribes have also sought to raise revenues by leasing their lands out for mineral development. [FN65] For example, the Navajo Nation began leasing its lands for mineral development in the 1920s, and by the late 1950s, the Tribe was receiving in excess of thirty-three million dollars per year. [FN66] Finally, many Tribes have entered into other business ventures in an attempt to raise revenues. [FN67] Tribes have entered into some business ventures including operating hotels and restaurants, [FN68] running Tribal timber companies, [FN69] manufacturing furniture, [FN70] and operating an ***512** airplane service. [FN71]

Tribes have also used their taxing powers to raise additional revenues. [FN72] Tribal governmental entities' power to tax extends to Indians and nonmembers alike. [FN73] Tribes have historically not taxed Indians because of their own members' objection to taxes. [FN74] Today, however, Tribal members may encounter a variety of Tribal taxes. [FN75] For example, the Absentee Shawnee Tribe of Oklahoma tax oil and gas, [FN76] fuel, [FN77] motor vehicles, [FN78] beer, [FN79] ***513** employees, [FN80] bingo, [FN81] sales, [FN82] cigarettes, [FN83] smokeless cigarettes, [FN84] and beverages. [FN85] In fiscal year 1997, this general revenue taxation yielded the Tribe $944,495.94. [FN86] The Tribe also levies a Tribal health care tax on sales, beer, beverages, and cigarettes to generate revenues for health care. [FN87] In fiscal year 1997, this health care tax generated $74,896.06 for the Tribe. [FN88]

Tribes have not imposed general income taxes on their Tribal members due in large part to high level of poverty on most Tribal reservations. [FN89] Most Tribes and Tribal members have not encountered moderate or large scale economic success. [FN90] However, those few Tribes that have encountered large scale economic success have not taxed general incomes of Tribal members because the Tribe has obtained so much wealth that additional revenues are not needed. [FN91]

***514** States have sought to tax Indians on Indian reservations. However, the Supreme Court, in McClanahan v. Arizona Tax Commission, [FN92] held that the State of Arizona could not impose its state income tax on an Indian resident of the Navajo Reservation who was deriving her income from reservation sources. [FN93] Further, the McClanahan Court stated that if the subject matter is Indian and within the Indian reservation, then the state has no power and that power may only be obtained in a way specified by Congress. [FN94]

However, every Indian is subject to state taxation outside of Indian country. The Supreme Court, in Oklahoma

Tax Commission v. Chickasaw Nation, [FN95] reaffirmed this principle when it allowed states to tax the income of a Tribal member domiciled outside of Indian country even though the member's income was earned from Tribal employment in Indian country. [FN96] Additionally, the Supreme Court, in Mescalero Apache Tribe v. Jones, [FN97] also held that even an Indian Tribe could be subject to state taxation if the Tribe operates a business outside of Indian country. [FN98]

Tribes also tax nonmembers [FN99] doing business on Indian reservations. Such taxation is within an Indian nation's inherent right of self government. [FN100] For instance, any nonmembers doing business on the Absentee Shawnee lands will be taxed if they purchase beverages, cigarettes, beer, bingo cards, and/or fuel. [FN101]

***515** States have also attempted to tax nonmembers engaged in business in Indian country. Such taxation attempts have been challenged, and in assessing whether concurrent taxation should be allowed, the Supreme Court has stated that Tribal and state interests must be carefully weighed. [FN102] If concurrent taxation is allowed, then the state taxation affects the potential base taxable by Indians because both entities have concurrent jurisdiction over the tax base. [FN103] For instance, if a state imposes its state tax on nonmembers and the Tribe places a tax on nonmembers, nonmember Indians would be paying more in taxes for the services they received in Indian country and may be less likely to buy goods in Indian country which would in turn reduce the amount of taxes the Tribe would be able to collect. [FN104] Over the years, the Supreme Court has decided many cases regarding this issue, and the following section will detail some of the Court's landmark cases.

II

State Taxation Of Nonmember Indians

On numerous occasions, the Supreme Court has addressed the issue of whether states can impose their taxes on nonmembers conducting business in Indian country. In analyzing these cases, the Supreme Court has articulated two independent means to thwart a state's ability to tax non-Indians whom do business in ***516** Indian country. [FN105] First, the state's asserted regulatory authority over Indian country and Tribal members may be preempted by federal law. [FN106] Second, the state's asserted regulatory authority may unlawfully infringe "on the right of the reservation Indians to make their own laws and to be ruled by them." [FN107] However, in the field of taxation, the Supreme Court has primarily invalidated state taxation of nonmember activities in Indian country under the doctrine of preemption. [FN108]

When employing the doctrine of preemption, the Supreme Court has evaluated the state tax in light of "a particularized inquiry into the nature of the state, federal, and Tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." [FN109] This inquiry must be viewed in light of traditional notions of Indian sovereignty and current congressional policies which promote Tribal self-government. [FN110] When assertions of state jurisdiction interfere with the operation of federal law or are incompatible with federal and Tribal interests reflected in federal law, then state law will be preempted unless the interests of the state are so great that their authority should be allowed. [FN111]

The Supreme Court has used the doctrine of preemption to invalidate state taxes that have been levied on the activities of nonmembers engaged in business activities while in Indian country. For example, in White Mountain Apache Tribe v. Bracker, [FN112] the Court invalidated an Arizona motor carrier license tax and its use fuel tax which had been applied to a nonmember logging ***517** company doing business on the reservation. [FN113]

In evaluating the issue, the Supreme Court noted that strong federal and Tribal interests were implicated by the comprehensive federal regulation of the harvesting of Indian timber. [FN114] Indeed, numerous federal statutes had been enacted requiring the Secretary of the Interior to approve all sales of timber, to determine the best interests of Indian owners before approving sales, and to promulgate detailed regulations governing the logging and sale of Indian timber in order to promote Tribal economic interests more effectively. [FN115] The Bracker Court concluded that the regulatory scheme imposed by the federal government was so pervasive that it precluded the additional burdens sought to be imposed in the case, and therefore, there was no room for the state's taxes in this comprehensive federal regulatory scheme. [FN116]

The Court further asserted that the imposition of state taxes would threaten federal policies that assured Indian Tribes the greatestbenefit possible from the harvest of their forests. [FN117] Indeed, if the tax had not been invalidated, the tax would have impinged on the profits received by the Tribe. [FN118] Finally, the Court asserted that the tax would have undermined the Secretary of Interior's ability to properly set fees and rates with respect to

timber sales. [FN119] On this point, the Court explained that the imposition of a state tax would have such an effect because it would have forced the Secretary of Interior to weigh additional state taxation factors when determining the amount of fees to be paid to nonmember contractors engaged in logging activities on Tribal land. [FN120]

In contrast, the state's only asserted interest in imposing the tax was to raise revenues for generalized purposes. [FN121] Further, the state did not claim that the tax was levied in connection with ***518** the logging activities. [FN122] Additionally, the state did not assert a legitimate regulatory purpose for taxing nonmember logging activities. [FN123] Indeed, the BIA even built and monitored the roads used by the nonmember contractor. [FN124] Consequently, the Court concluded that the state's interest in taxing the nonmember logging activities on White Mountain Apache reservation did not rise to the level of impinging federal and Tribal interests. [FN125]

In Ramah Navajo School Board, Inc. v. Bureau of Revenue, [FN126] the Supreme Court again invalidated a state's gross receipts tax which had been imposed on a nonmember construction company. [FN127] The nonmember contractor had been hired by a Tribal school board to construct a school for Indian children on the Tribe's reservation. [FN128]

In evaluating the validity of the tax, the Supreme Court found the existence of a comprehensive federal scheme. [FN129] In this instance, the federal government had enacted statutes governing the financing and construction of Indian educational institutions. [FN130] The Ramah Court determined that "[t]he direction and supervision provided by the Federal Government for the construction of Indian schools leave no room for the additional burden sought to be imposed by the State through its taxation . . . ." [FN131] Finally, the Court noted that the state's interest in taxing the nonmember contractor failed to either identify a valid regulatory purpose or to establish that the tax was levied to provide services to the Tribal school. [FN132]

The Supreme Court also affirmed a Ninth Circuit holding which had invalidated a state severance tax imposed on a nonmember coal lessee whom was conducting business in Indian country in Crow Tribe of Indians v. Montana. [FN133] In Crow Tribe, Montana imposed a thirty-three percent tax on nonmember coal ***519** miners conducting business in Indian country. [FN134] Between 1975 and 1982, the nonmember contractor paid Montana $53,800,000 in severance taxes and $8,100,000 in gross proceeds taxes. [FN135] The Crow Tribe of Indians brought suit against the state for the imposition of taxes on nonmember coal miners. [FN136] In evaluating preemptive factors, the court found that Congress had enacted the 1938 Mineral Leasing Act to govern leases on Indian lands. [FN137] This provision provided that any proceeds derived from mineral leasing should be used by Tribes to revitalize Tribal governments and promote Tribal economic development. [FN138] The Crow Tribe court invalidated the state tax because it frustrated Congressional policy by adversely impacting Tribal resource developmental activities and by ultimately reducing the amount of royalties received by the Tribe. [FN139]

However, the Court has not always allowed all nonmember contractors operating in Indian country to go untaxed. In these cases, the Court has determined that the Tribal interests asserted did not rise to the level of authorizing preemption of state taxes levied on nonmembers conducting business in Indian country. Indeed, in Cotton Petroleum Corp. v. New Mexico, [FN140] the Court upheld a state tax that had been levied on nonmember Indian oil and gas lessees whom were doing leasing in Indian country from wells located on the reservation. [FN141] The lessees contended that federal and Tribal interests arising under the 1938 Mineral Leasing Act were as great as those interests asserted in Bracker and Ramah. [FN142] However, the Cotton Petroleum Court distinguished these early precedents on the ground that in Cotton Petroleum the state had asserted a legitimate interest in collecting the tax. [FN143] Indeed, the Court discovered that the state had both regulated and provided substantial services to lessees in connection with ***520** the on- reservation drilling operations. [FN144] Additionally, the Court noted that the Tribe would not be burdened economically by the taxes because the Tribe could increase its own taxes without adversely affecting on-reservation oil and gas development. [FN145]

In Washington v. Confederated Tribes of the Colville Indian Reservation, [FN146] the Supreme Court also upheld a state tax that had been levied on nonmember tobacco purchasers. [FN147] In weighing the various preemption factors, the Colville Court found that there were not any overall comprehensive federal schemes or federal activities present in the Tribes marketing of cigarettes to nonmembers. [FN148] Further, the Court noted that these materials were not produced on Tribal land and that the Tribe had not participated in any meaningful way in their design. [FN149] In essence, the Tribes had only imported the cigarettes into Indian country where nonmembers could purchase them and then take them back off-reservation. [FN150] On this point, the Court stated:

It is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest. What the smokeshops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation. . . . While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of Tribal services. 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 ***521** recipient of state services. [FN151]

In light of this reasoning, the Court held that the state's interest in collecting revenues and in preventing tax loopholes was great enough to override federal and Tribal interests. [FN152]

The Supreme Court has not applied Colville to situations where the Tribe plays an active role in generating activities of value in Indian country. [FN153] The Court has reasoned that in such circumstances the Tribe gains a strong interest in operating those activities free from state interference and has distinguished those situations from Colville by noting that in Colville-type cases the Tribes simply allow the sale of items, such as cigarettes, to take place in Indian country. [FN154] In California v. Cabazon Band of Mission Indians, [FN155] the Court prevented California from applying its regulatory authority over bingo games conducted on a Tribal reservation. [FN156] The Cabazon Court specifically stated that the Tribes were not merely marketing an exemption from state gambling laws. [FN157] Instead, the Cabazon Court stated:

Here, however, the Tribes are not merely importing a product onto the reservation for immediate resale to non-Indians. They have built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide. The Tribes have a strong incentive to provide comfortable, clean, and attractive facilities and well-run games in order to increase attendance at the games . . . . [T]he Cabazon and Morongo Bands are generating value on the reservations through activities in which they have a substantial interest. [FN158]

Consequently, unlike in Colville, the state's interest in applying its regulation did not rise to the level of overriding the Tribal and federal interests involved. [FN159]

***522** III

The Ninth Circuit And Nonmember Taxation

A. Hoopa Valley Tribe v. Nevens

In Hoopa Valley Tribe v. Nevins, [FN160] the Ninth Circuit addressed a Bracker-like issue and was forced to evaluate Bracker in light of the Supreme Court's subsequent holdings in Colville, Cotton Petroleum, and Cabazon Band. [FN161] In Nevins, the Hoopa Valley Tribe had established a Tribal corporation, Hoopa Timber Corporation, in 1976 to generate revenues from Tribal timber resources. [FN162] The Tribe has since relied almost exclusively on revenues generated from their timber sources. [FN163] Tribal timber management has been provided by the BIA, and the BIA has additionally sold the Tribal timber to both private companies and the Hoopa Valley Timber Corporation under a competitive bidding process. [FN164] The state has subsequently imposed a timber yield tax on "private companies who purchase Tribal timber directly from the BIA and to private companies who buy from Hoopa Valley Timber Corp. or other Indian-owned firms." [FN165]

The Tribe brought suit contending that the tax violated preemption principles and that it also infringed on Tribal sovereignty. [FN166] The district court granted the Tribe partial summary judgment on the issue of preemption after determining that the federal government had enacted a pervasive federal regulatory scheme. [FN167] On appeal, California argued that its interest in asserting the tax outweighed the federal/Tribal interests at issue. [FN168]

California sought to distinguish Bracker by arguing that in Bracker the state imposed taxes on nonmembers that used reservation roads maintained by the BIA; whereas, in this case, the tax helped fund various services used by Tribal members. [FN169] Indeed, ***523** in this case, the state maintained the main highway through the reservation, the road also served several towns north of the reservation. [FN170] The state and Tribe shared the costs of local

law enforcement. [FN171] Further, the state, Tribe, and federal government shared the welfare and health care costs. [FN172] However, the state did not fund "fire protection, education, public utilities, subsidized housing, recreational, and economic development programs [nor] maintain[ed] 427 miles of local roads." [FN173]

After reviewing these factors, the Ninth Circuit determined that the state's interest in imposing the tax for general services did not outweigh the substantial federal/Tribal interests in harvesting timber on the reservation. [FN174] The court reasoned that both the Bracker and Ramah Courts had rejected similar arguments. [FN175] In Bracker, the Court asserted that a state's "'generalized interest in raising revenue is [not] in this context sufficient to permit its proposed intrusion into the federal regulatory scheme . . . ." ' [FN176] Likewise, the Ramah Court stated that the significant services the state provided to the Tribe did not justify the imposition of this tax because these taxes did not bear any relationship to the activity being taxed. [FN177] As a result, the Ninth Circuit rejected California's imposition of its timber yield tax because the tax failed to fund services that were directly related to harvesting Tribal timber. [FN178]

B. Gila River Indian Community v. Waddell (Gila I)

In Gila River Indian Community v. Waddell, [FN179] the Tribe constructed ***524** a lake and marina on its lands solely from using federal funds. [FN180] The Tribe, with supervision and assistance of BIA, sought to develop these facilities in a manner that would foster economic growth. [FN181] It chartered Sun Valley Marina Corporation and leased its lake property. [FN182] Sun Valley subleased four parcels of property along the lake to a nonmember partnership denoted as Firebird International Raceway. [FN183] Firebird built facilities and related infrastructure needed for motor and aquatic racing. [FN184] Under terms of the BIA-approved contract, all improvements by Firebird belonged entirely to the Tribe. [FN185] Additionally, Firebird paid the Tribe rent and a graduated percent of its gross receipts in excess of four million dollars. [FN186] Finally, the Tribe raised additional revenues by taxing all the tickets and concessions that Firebird sells. [FN187] Firebird subleased, with the approval of the Secretary of Interior, to a nonmember entity, Compton Terrace, for the construction and operation of a performing arts amphitheater. [FN188] Similar to the agreement with Firebird, all improvements belonged to the Tribe, the Tribe received a percentage of gross receipts for each performance, and the Tribe levied a sales tax on theater tickets, concessions, and souvenirs. [FN189]

Several years later, the state began assessing a five percent transaction privilege tax on Compton Terrace's ticket revenues and advised that it would also begin imposing this tax on Firebird. [FN190] As a result of the state's taxation, the Tribe brought suit seeking relief from state taxes which were levied on on-reservation events. [FN191] The district judge dismissed the suit for failure to state a claim. [FN192] On appeal, the Ninth Circuit reversed and remanded holding that the Tribe had stated a cognizable claim because the doctrine of federal preemption may have precluded the ***525** state from levying its taxes on nonmember Indians. [FN193]

The Ninth Circuit, following the reasoning of the Cabazon Court, first noted that the Gila River Indian Tribe had played "an active role in generating activities of value on [its] reservation [which] gives it a strong interest in maintaining those activities free from state interference and distinguishes its situation from that of Tribes which simply allow the sale of items such as cigarettes to take place on their reservations." [FN194] Next, the Ninth Circuit recognized that the federal government had played an active role in the development of these nonmember projects similar to the role that the government had played in Bracker and Ramah. [FN195] Finally, the Ninth Circuit acknowledged that the Tribe had distinguished the current case from Cotton Petroleum by alleging that the state had not provided substantial services in connection with the activity taxed and that the state had failed to assert regulatory authority over activities at either of these nonmember facilities. [FN196]

C. Cabazon Band of Mission Indians v. Wilson

In Cabazon Band of Mission Indians v. Wilson, [FN197] the Tribe conducts off-track betting on their reservation to raise additional Tribal revenue. [FN198] Gaming activities are regulated by the Indian Gaming and Regulatory Act of 1988 (IGRA). [FN199] Pursuant to the IGRA, the Tribe entered into a compact with California in order to legally operate its gaming facilities. [FN200] The Tribe subsequently contracted with Southern California Off Track Wagering, Inc. which is a quasi-governmental organization of racing associations formed under California law. [FN201] This group arranges for associations to broadcast signals to the Tribe's on-reservation off-track betting facilities. [FN202] The Tribe receives two and a third percent of ***526** money wagered at their off-track betting facilities. [FN203] The Tribe has contended that an additional amount of revenues should be distributed to them rather than remitted to the State of California. [FN204] Pursuant to California statutes governing the association's

activities, the association has to remit to California the license fee imposed under the statute. [FN205] The Tribe has asserted that the license fee placed on Indian facilities was prohibited under both the IGRA and the doctrine of federal preemption. [FN206] The district court granted summary judgment for the state. [FN207] On appeal, the Ninth Circuit held that the state tax was preempted. [FN208] In evaluating the effect of the tax on the Tribe, the court found that between March 1, 1990 and February 28, 1991 the Tribe received $217,386 and California received $292,075. [FN209] The Ninth Circuit first noted that such a large fee contravenes the purposes of the IGRA which was enacted to provide Tribes a source of revenue for facilitating Tribal economic and political self-development. [FN210] Next, the court noted that the state's licensing scheme also undermines Tribal interests because the Tribe, like the Tribe in Ramah, bears the actual burden of the fee. [FN211]

Moreover, the Ninth Circuit asserted that the Tribe had also invested significant monies and effort into constructing and operating waging facilities. [FN212] On this point, the Ninth Circuit rejected the lower court's finding that the activities were taxable because the Tribe's monies were "derived from live horse racing, an activity 'occurring outside the reservation and operated by non-Indian racing associations." ' [FN213] Instead, the Ninth Circuit, resting on the Supreme Court's California v. Cabazon Band of Mission Indians, contended that the entire value of the on- reservation activity does not have to come from within the reservation's borders and noted that "[i]t is sufficient that the [Tribes] have made a substantial investment in the gaming operations and ***527** are not merely serving as a conduit for the products of others." [FN214]

Finally, the Ninth Circuit found that the state's interest in collecting the license fee was relatively weak even though the state had established an extensive regulatory scheme for off-track betting and had expended funds to regulate this activity. [FN215] Additionally, the Ninth Circuit noted that the state was unable to "demonstrate a close relationship between the tax imposed on the on-reservation activity and the state interest asserted to justify such tax" because the state did not use the license fee revenues to fund services related to the regulation of off-track betting. [FN216] Finally, the Ninth Circuit discovered that all of the revenues collected from the fee were not earmarked for the Tribe, but were instead placed in the State General Fund. [FN217]

D. Salt River Pima-Maricopa Indian Community v. Arizona

In Salt River Pima-Maricopa Indian Community v. Arizona, [FN218] the Tribe had leased land within the reservation held in trust for individual allottees to a non-Indian land developer, Vestar Development Company. [FN219] The lease provided that the buildings would revert to the allottees at the end of the fifty-five year lease. [FN220] Additionally, the lease provided "that any taxes levied by [the Tribe] in combination with other applicable taxes will not exceed the total sales taxes in the nearby city of Scottsdale." [FN221] Finally, the allottees receive rents from the developer, and the Tribe acts as allottees' agent for payment of rent. [FN222]

Vestar Development Company built a mall and sublet mall spaces to various non-member businesses, including Circuit City, Clothestime, Cost Plus Imports, Denny's, J.C. Penney, McDonald's, Taco Bell, KFC, and Home Depot. [FN223] These businesses were all owned by nonmembers, and 99% of goods sold in the ***528** mall were produced off-reservation. [FN224] The Tribe did not share in the mall's profits or rents; however, the Tribe has exercised its rights to tax. [FN225] Indeed, the Tribe has levied a 1% sales tax, and has received revenues in excess of $100 million in 1992 and $200 million in 1993. [FN226]

The state has also levied a 5.5% tax on sales and a 4.5% tax on rent. [FN227] These taxes are collected by the state and then remitted to various subentities of the state. [FN228] Under the set state formula, .5% of sales taxes are remitted to Arizona cities, .8% of sales taxes are remitted to counties, .67% of rent taxes are remitted to cities, and .9% of rent taxes are remitted to counties. [FN229] The majority of services to the mall are provided by the Tribe. [FN230] For example, the Tribe provides police protection, conducts health and safety inspections, and enforces zoning regulations. [FN231] The Tribe and the City of Scottsdale provide fire protection. [FN232] Scottsdale levies a separate fee on the businesses for its services. [FN233] The only service that the state provides to the mall is the maintenance of the road which provides access to the mall. [FN234] Additionally, the state is constructing a new road along Tribal lands and has built an access ramp to the mall. [FN235]

The Tribe brought suit arguing that the state taxes interfered with its right to impose taxes. [FN236] Further, the Tribe asserted that it, and not the state, had provided services to the mall. [FN237] The district court entered summary judgment for the state, and the Ninth Circuit affirmed holding that the state tax was valid because the Tribe's activities did not contribute to the value of the goods sold and because Arizona provides most of the government services used by nonmember taxpayers. [FN238] The Ninth Circuit ***529** reasoned, following Colville,

that although the federal government has expressed an interest in assisting Tribes in their efforts to achieve economic self-sufficiency, such an interest, without more, does not defeat a state tax on nonmembers. [FN239] Indeed, the court noted that the Tribe has an interest in raising revenues, but that interest in raising revenues is weakest when goods are imported from off-reservation for sale. [FN240] Likewise, the State has an interest in raising revenues, and this interest is strongest when the tax is directed at off-reservation revenue and when the taxpayer is the recipient of government services. [FN241] As a result, the Ninth Circuit allowed the state to continue taxing nonmembers at the Tribe's mall, because the goods are sold to nonmembers by nonmembers and because the tax falls on nonmembers whom receive state services. [FN242]

E. Gila River Indian Community v. Waddell (Gila II)

In Gila River Indian Community v. Waddell (Gila II), [FN243] the Ninth Circuit once again addressed whether the state could levy sales taxes on entertainment events on the Gila River Indian Reservation. [FN244] After Gila I, the district court reexamined the issue and granted summary judgment in favor of the state. [FN245] The Ninth Circuit affirmed the district court's opinion and held that the state tax would neither interfere with the use and development of Tribal property nor interfere with any overarching federal leasing policies. [FN246]

The Tribe, relying on the Supreme Court's decision in California v. Cabazon Band of Mission Indians, argued that the tax levied by the state should be thwarted due to the active role the Tribe had played in generating activities of value on the reservation. [FN247] Indeed, the Tribe insisted that its interests in the case are ***530** significant because the "entertainment events at issue are performed and consumed entirely on the Reservation, and because the Tribe is actively involved in the production of the events." [FN248] The Tribe further argued that it constructed the facilities and that "it also continues actively to regulate and to monitor the property, enforcing Tribal ordinances concerned with water quality, pest control, sanitation, sewage disposal, and safety." [FN249]

The Ninth Circuit, however, distinguished the Tribes arguments from California v. Cabazon Band of Mission Indians by stating:

Although the Tribe has established some level of involvement, its assertions regarding its "active role in generating activities of value on the reservation" are unsupported by the record. There is no evidence to support the statement that the Tribe "works closely with [Compton Terrace & Firebird] to ensure that they provide high quality entertainment to the public." This assertion implies that the Tribe is involved in the business decisions regarding which groups will perform on the Reservation, when therecord reveals that the Tribe is not involved in any way in such deliberations. Neither Firebird nor Compton Terrace must obtain Community approval before staging events. The Tribe's "veto control" consists only of the availability to shut down events already scheduled at Firebird Lake and Compton Terrace when issues of public safety arise. The Tribe's role is limited to providing clean and safe facilities. [Additionally,] [d]espite the Tribe's contention to the contrary, neither Compton Terrace nor Firebird Raceway afford significant employment opportunities to members of the Tribe. There is nothing in the record to indicate that Firebird employed any Tribal members, nor that Compton Terrace employed more than six members at various times between 1985 and 1991. [FN250]

Further, the Tribe insisted that the tax imposed on entertainment events performed in Indian country was unrelated to any entertainment-related services the state provided the Tribe. [FN251] However, the Ninth Circuit asserted that the state provided a number of governmental functions to the Tribe. [FN252] First, the state provided law enforcement services to the Tribe which are necessary to provide traffic control services and criminal enforcement ***531** services. [FN253] Second, the state also exercised concurrent jurisdiction with the Tribe for liquor sales issues. [FN254] As a result, the Ninth Circuit found that the state's interests were sufficient to justify the imposition of its tax on the entertainment events. [FN255]

F. Yavapai-Prescott Indian Tribe v. Scott

In Yavapai-Prescott Indian Tribe v. Scott, [FN256] the Tribe had received a 1.1 million dollar grant from the U.S. Department of Housing and Urban Development (HUD) to construct a hotel. [FN257] The Tribe subsequently entered into an agreement with Prescott Convention Center (PCC) to build a hotel. [FN258] The Tribe loaned 1.1 million dollars to PCC, and PCC borrowed 8.5 million dollars from the Tribe through bonds issued by city of Prescott and guaranteed by a finance corporation. [FN259]

After construction of the hotel, PCC leased the building from the Tribe [FN260] and paid the Tribe two percent

annually, plus twenty percent of annual net cash flow, [FN261] thirty percent of net proceeds of assignment, $35,000 annually for rent plus one percent of gross revenue sales taxes, and one percent tax on gross revenue. [FN262] The hotel was five stories with 161 rooms and had a restaurant, an entertainment lounge, salon, health club, and 8000 square feet of convention facilities including a ballroom and break- out rooms. [FN263] Several years after the hotel opened, the Tribe subleased 2150 square feet of the hotel for gaming, and the Tribe received twenty-five percent of the gross receipts from gaming devices. [FN264]

In 1990, the state levied an assessment on PCC for the business transaction privilege taxes collected by PCC on room rentals, food, and beverage sales. [FN265] The Tribe brought suit, and the district ***532** court entered summary judgment for the Tribe reasoning that federal/Tribal interests outweighed any state interest. [FN266] The district court found that the small and destitute 143-member Tribe had a strong interest in economic development, that the federal government had enacted legislation, the Indian Gaming and Regulatory Act, that governed the casino, and that the Tribe had received a 1.1 million dollar development grant from HUD. [FN267]

The state appealed the district court's opinion, and the Ninth Circuit reversed. [FN268] The Ninth Circuit, in analyzing the case, first listed all the factors that weighed in favor of preemption, including: fee held in trust by the United States; Secretary of Interior approved all the leases; Tribe furnished site for the hotel; Tribe owned the facility; Tribe had residual interest in lease; Tribe/federal government funded eleven percent of the hotel; the Tribe operated slot machines and automated poker games on the property; and the income contributed to well-being of the Tribe. [FN269] Next, the Ninth Circuit listed all the factors that weighed against preemption, including: no evidence that Tribal members were employed by the hotel; bulk of funding for the hotel was non-Tribal; Tribal monitoring of food was minimal as the Tribe only checked on the food two to three times per year; Tribe already received a guaranteed one and a quarter percent of the hotel's gross revenues; the Tribe did not have active role in business of hotel; the state provided criminal law enforcement for such things as statute of frauds on checks and credit cards, and embezzlement; and the legal incidence of the tax fell on the seller (PCC). [FN270]

In light of these factors, the Ninth Circuit next evaluated the validity of the taxes levied on the food, beverages, and rooms. [FN271] The court first noted that the food and beverages tax was levied on nonmembers whom purchased goods from nonmembers. [FN272] Further, the court found that the Tribe had contributed virtually nothing to food and beverage sales. [FN273] In this respect, the court ***533** reasoned that this case was no different from Salt River, where two of the lessees were Taco Bell and Kentucky Fried Chicken and almost all of the goods they sold were not made on the reservation. [FN274] Consequently, the Ninth Circuit held that the state's taxes on beverages and food were not preempted by overriding federal/Tribal interests.

With respect to the room tax, the Ninth Circuit stated that under Salt River and Gila II, the Tribe "must have an 'active role' in the creation of the value taxed in order to establish preemption." [FN275] The Tribe argued that it provided the location for the hotel, the structures and facilities, some of the funding for the hotel, and even a gaming area. [FN276] However, the Ninth Circuit stated that the hotel did not employ Tribal members, that there was no active Tribal participation in the business, that the state provided substantial services to the business taxed, and that all sales were by nonmembers to nonmembers. [FN277] The court noted that these four factors were decisive enough to allow the state to continue levying its taxes in Salt River and Gila II. [FN278] Consequently, the Ninth Circuit concluded that in the present case the state's tax should not be preempted. [FN279]

IV

The Supreme Court, The Ninth Circuit, and Tribal-State Compacts

A. The Ninth Circuit and Supreme Court Precedent

When evaluating state taxation of nonmembers doing business in Indian country, the Supreme Court has established that a court must first determine whether the regulatory scheme imposed by the federal government is so pervasive that it precludes such state taxation schemes. [FN280] Next, a court must determine whether the Tribal interests involved are so extensive that it prevents the additional burdens sought to be imposed by the ***534** state. [FN281] If a court determines that federal/Tribal interests are great, then the state's taxation scheme will more than likely be preempted. [FN282] However, even if federal/Tribal interests are great, the state's interest in taxing the nonmembers conducting business in Indian country may be allowed to lie under two circumstances. First, if the state tax bears a relationship to the activity being taxed and the state provides services to the Tribe for such activity, then the state tax may be allowed to tax the nonmembers. [FN283] Second, if the state tax is levied on goods that

nonmembers are buying from the Tribe solely because such goods are exempt from state taxation and the Tribe does not play an active role in generating activities of value on its reservation, then the state tax may be allowed to tax the nonmembers. [FN284]

1. The Ninth Circuit's First Three Decisions

When the Ninth Circuit initially addressed state taxation schemes that burdened nonmembers doing business in Indian country, it did so in light of prior Supreme Court precedent. For example, in Cabazon v. Wilson, the Ninth Circuit first evaluated the governing federal laws and found that the imposition of state taxes would have contravened the express purpose of the Indian Gaming and Regulatory Act. [FN285] Next, the court assessed the Tribal interests involved and determined that the Tribe had invested a significant amount of money, time, and effort into their business venture. [FN286] Finally, the court examined the state's interest. The court found that the state tax did not bear any relationship to the activity being taxed and that the Tribe was not merely marketing a tax exemption. [FN287] As a result, the court concluded that the state's interest in imposing a state-wide taxation scheme did not rise above the Tribal/federal interests involved. [FN288] Likewise, ***535** in Hoopa Valley Tribe v. Nevens, the court first determined that the imposition of state taxes would have contravened the express purposes of numerous federal timber policies. [FN289] Next, the court found that the Tribe had a very important interest in its timber industry. [FN290] Finally, the court noted that the state's tax did not bear any relationship to the activity being taxed. [FN291] Consequently, the court held that the state's interest in levying its tax on nonmembers did not rise above the federal/Tribal interests involved. [FN292] Finally, in Gila River Indian Community v. Waddell (Gila I), the Ninth Circuit found that the state's taxes may have contravened the federal government's important role in facilitating the development of a Tribal project and that the Tribe may have played an active role in generating these activities of value on its reservation. [FN293] Next, the court determined that the state had not provided substantial services in connection with the taxed activity and that the Tribe was not merely marketing a tax exemption. [FN294] As a result, the Ninth Circuit held that the Tribe had stated a cognizable preemption claim; therefore, the court reversed the district court's dismissal of the case and remanded the case back to the district court for a hearing on the issue. [FN295]

2. The Ninth Circuit's Last Three Decisions

In the first three cases the Ninth Circuit addressed, the courts adhered to established Supreme Court precedent. However, in the last three cases the Ninth Circuit reviewed, the courts abandoned the legal analysis employed by the Supreme Court, and instead, proceeded to allow the state to tax nonmembers doing business in Indian country if the court found that the state had provided any services to nonmembers outside of Indian country [FN296] or if the state had provided services to the Tribe. [FN297] The ***536** Ninth Circuit allowed the state tax to lie on nonmembers doing business in Indian country even if the state tax did not bear a relationship to the activity being taxed [FN298] and even if the Tribe had played an active role in generating activities of value on the reservation. [FN299]

For example, in Salt River Pima-Maricopa Indian Community v. Arizona, the Ninth Circuit allowed the state to levy its rent taxes on nonmembers whom operated businesses in Indian country and its sales taxes on nonmembers whom shopped at those business establishments. [FN300] The court allowed the state to levy the tax because the state provided most of the governmental services used by nonmembers and because the Tribe's activities did not contribute to the value of the goods sold. [FN301] Following Colville, the court reasoned that the federal government and the Tribe had an interest in raising revenues but that such an interest was not great enough to preempt the state's interest because the federal government's expressed interest was solely economic and because the goods the state taxed were imported from off- reservation. [FN302]

However, the Ninth Circuit failed to apply the Supreme Court's California v. Cabazon Band of Mission Indians decision to the Salt River Pima-Maricopa case. In California v. Cabazon, the Supreme Court determined that Colville would not be applied to situations where the Tribe has played an active role in generating activities of value on its reservation. [FN303] In Cabazon, the Court prevented the state from regulating bingo games conducted in Indian country because the Court found that:

[T]he Tribes are not merely importing a product onto the reservation for immediate resale to non-Indians. They have built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide. The Tribes have a strong incentive to provide comfortable, clean, and attractive facilities and well-run games in ***537** order to increase attendance at the games . . . . [FN304]

The Ninth Circuit sought to distinguish Cabazon by stating:

The mall earns its profits simply by importing non-Indian products onto the reservation for resale to non-Indians. The Community contributes relatively little to the value of the products and services sold at the mall; the businesses are managed and owned by non-Indians, and the Community does not participate in business decisions and does not share in the profits. Consequently, [this case is not] akin to cases in which state taxes are preempted because an Indian resource or service is being sold . . . . [FN305]

The Salt River Pima-Maricopa court maintained that the operation of the mall was similar to the operation of the smokeshops in Colville. [FN306] However, the Ninth Circuit's reasoning is flawed because Salt River Pima-Maricopa differs from Colville in several important ways. In Colville, nonmembers drove to various smokeshops to buy tax-exempt cigarettes, and their stay at those shops were very brief. [FN307] The Tribe had not invested any time or effort into their business establishments; rather, the Tribe was purely marketing its tax-exempted product. [FN308] Because the Tribe and the state were only fighting over revenue, the Colville court held that the state's interest in securing taxes from nonmembers whom it services was greater than the Tribe's interest in obtaining revenues. [FN309]

In Salt River Pima-Maricopa, the Tribe contracted with a nonmember enterprise to operate a shopping mall. [FN310] The Tribe, through its individual members, had provided a building site for the mall. [FN311] Additionally, the Tribe had provided a majority of the services to the mall including police protection, health and safety inspections, and zoning regulations. [FN312] The only service the Tribe had provided the mall regarded the maintenance of a road which allowed access to the mall. [FN313]

***538** Unlike Colville, nonmembers in the Salt River Pima-Maricopa case did not just quickly stop at the mall and purchase cigarettes distributed by nonmembers. Rather, nonmembers spent extended periods of time at the mall; and therefore, just as in Cabazon, the Tribe has a great interest in providing clean, comfortable, and attractive facilities to their patrons. Therefore, although the Tribe does import nonmembers' products onto the reservation to sell to nonmembers, the Tribe does contribute to the number of products and services sold at the mall by providing police protection, health and safety inspections, and zoning regulations. Additionally, unlike Colville, the mall is not marketing a tax exemption. [FN314] Indeed, the state does not allege such, and the court only stated that a tax exemption was possible if the Tribe sought to exploit it. [FN315] Consequently, the Salt River Pima-Maricopa court incorrectly determined that the case before it was more akin to Colville than to California v. Cabazon Band of Mission Indians.

In an effort to further distinguish Salt River Pima-Maricopa from Cabazon, the Ninth Circuit also asserted that the community did not participate in the business decisions. [FN316] However, the Supreme Court has never distinguished this point primarily because the Court has realized that Tribes do not necessarily have the expertise to manage complex business operations. For instance, in White Mountain Apache Tribe v. Bracker, the nonmember logging company provided the technical expertise needed to properly harvest timber on Indian lands. [FN317] Moreover, the Court did not require the nonmember logging company to employ Tribal members. [FN318] Likewise, in Cotton Petroleum v. New Mexico, the nonmember oil and gas lessee provided all the expertise in excavating the minerals. [FN319] Further, the Court did not require the nonmember lessee to employ Tribal members. [FN320] Thus, in light of previous Supreme Court reasoning, the Ninth Circuit's requirement that the Tribe participate in the business decisions is seemingly unfounded.

Additionally, the Salt River Pima-Maricopa court noted that ***539** the Tribe does not share in the profits. [FN321] Indeed, the individual allottees receive rents, and the Tribe acts as the allottees' agent for payment of rent. [FN322] Instead of receiving a share in the profits, the Tribe relies on obtaining their profits through taxation. Normally, a Tribe can generate revenues either through net profits received from Tribal businesses or through taxation. [FN323] Usually, the Tribe provides for receipt of net profits and then seeks to gain more revenue through their taxing power. However, here the Tribe has relied on their power of taxation to generate profits for the Tribe. In Cabazon, the Supreme Court noted that the Tribe had an interest in generating value on their reservation through activities in which they have a substantial interest. [FN324] The Court did not specify whether such proceeds had to come solely from the net profits of the business or whether such an interest could also arise if the Tribe sought to rely solely on revenues from taxation. In Salt River Pima-Maricopa, it could be argued that the Tribe has a greater interest in obtaining revenues from taxation; therefore, since the Tribe maintains an active role in regulating the mall the state's taxes should be more readily preempted. Consequently, the Ninth Circuit's assertion that the Tribe's

interest in preempting state taxation of nonmember Indians doing business at the mall or maintaining a business at the mall is not weakened by the fact that the Tribe does not receive any net profits from the mall.

Because the Tribe plays an active role in the maintenance of its business, the state cannot tax the activity under the Colville exception. The only other way the state could tax the activity is if the state provided services to the Tribal facility and if those activities were funded by revenues generated from those taxes. [FN325] Here, however, the Tribe provides almost every service to the mall. [FN326] The only service the state provides is the maintenance of the road providing access to the mall. [FN327] Further, the monies the state receives are deposited into a general fund for the state, cities, and counties to use. [FN328] Thus, these funds are not earmarked ***540** for road maintenance. [FN329] As a result, the state cannot tax the activity under the second exception.

In Gila River Indian Community v. Waddell (Gila II), the Ninth Circuit employed the same analysis it did in Salt River Pima-Maricopa. As in the previous case, the Ninth Circuit allowed the state to impose its sales tax on nonmembers engaging in business in Indian country. [FN330] In Gila II, the state imposed its entertainment tax on events that took place on the Gila Indian Reservation. [FN331] The court allowed the tax because it determined that the state provided governmental services to nonmembers and because the Tribe did not play an active role in generating activities of value on its reservation. [FN332]

However, the Ninth Circuit once again failed to apply California v. Cabazon Band of Mission Indians. In Gila II, the Ninth Circuit determined that the Tribe had not been active in generating values of activity on the reservation because the Tribe did not work closely with the nonmember business to ensure high quality of entertainment to the public and the nonmember business did not offer significant employment opportunities to Tribal members. [FN333] Neither of these factors employed by Gila II have ever been recognized as an exception to California v. Cabazon. On the contrary, the Supreme Court has recognized that Tribes may need to contract with more skilled nonmember enterprises to develop their resources. [FN334] Moreover, the Supreme Court has not required these Tribes to work closely with nonmember businesses nor have they required these nonmember businesses to employ Tribal members. [FN335] Thus, in light of previous Supreme Court decisions, the Gila II court's requirement that the Tribe needs to participate in business decisions and the business needs to employ Tribal members is unfounded.

Contrary to the Gila II court's holding, the Gila River Indian Tribe played a very active role in generating activities of value on the reservation. The Tribe constructed a lake and marina on its ***541** lands solely from federal funding and then leased the land to a nonmember developer. [FN336] All of the facilities built by the nonmember became the property of the Tribe. [FN337] Additionally, the nonmember developer paid the Tribe rent and a graduated percentage of its gross receipts. [FN338] Finally, the Tribe has continually regulated and monitored the property, and has enforced Tribal ordinances concerned with water quality, sanitation, pest control, sewage disposal, and safety. [FN339]

Unlike Colville, the Gila River Indian Tribe was not merely importing a product onto the reservation for immmediate resale. [FN340] Rather, like the Tribe in Cabazon, the Gila Indian Tribe had built modern facilities which provide recreational and ancillary services to their patrons. [FN341] Likewise, their patrons also spend extended periods of time on the reservation. [FN342] Consequently, the Tribe has a strong incentive to provide comfortable, clean, and attractive facilities free from state interference. [FN343]

Since the Tribe plays an active role in the maintenance of its business, the state can not tax the nonmember's activity under the Colville exception. If the state provides services to the Tribal facility and if those services are funded by a tax specifically levied on nonmembers on the reservation, then the state may still levy its taxes. [FN344] In this case, the state claims that it provides traffic control services, provides a forum for litigation between non-Indians, and exercises concurrent jurisdiction with the Tribe with respect to liquor sales. [FN345] However, the taxes the state levies on the Tribe are for general revenue purposes, [FN346] and the services that the state provides are not funded by a tax specifically levied on nonmembers on the reservation. [FN347] Finally, even if the state levied a tax to specifically fund these services, it is doubtful that ***542** these state services rise to the level to preempt the strong federal and Tribal interests that arise in this case.

In Yavapai-Prescott Indian Tribe v. Scott, the Ninth Circuit allowed the state to levy its business transaction privilege taxes on nonmember room rentals, food purchases, and beverage purchases. [FN348] The court allowed the state to levy its taxes on nonmembers because the Tribe was not actively participating in the operation of the business and because the state provided substantial services to the business. [FN349] However, the Ninth Circuit failed to apply the Supreme Court's California v. Cabazon Band of Mission Indians to the case. Indeed, one Ninth

Circuit judge in Yavapai-Prescott Indian Tribe recognized this error and respectfully dissented. [FN350]

In dissent, the Ninth Circuit judge first asserted that this case implicated two comprehensive federal regulatory schemes: the Indian Gaming and Regulatory Act which was passed to stimulate economic development and the HUD Development Grant which was designed to stimulate necessary economic recovery. [FN351] Next, the judge noted that the Tribe played an active role in generating activities of value on its reservation, and, like the Tribe in Cabazon v. Wilson, the Yavapai-Prescott Indian Tribe has a strong interest in maintaining those activities free from state interference. [FN352] Indeed, the Tribe made a one and one tenth million dollar investment in the hotel, receives various monies from the overall operation of the hotel and casino, and owns all of the physical structures associated with the hotel. [FN353]

Because the Tribe plays an active role in the maintenance of its business, the state can not tax non-Indians doing business on Indian lands under this exception. The Ninth Circuit, however, also claimed that the state provided services to the Tribe in connection with the levied taxes, but the dissenting judge asserted that in this case the state did not "provide the overwhelming 'majority' ***543** of services and [did] not provide services 'critical' to the Hotel's success." [FN354] Further, the Tribe has even reimbursed the state for most of its services, and the dissenting judge noted that the state's interest in taxing is extremely weak. [FN355] Interestingly enough, the majority opinion failed to mention that the state was reimbursed for their services to the Tribe. [FN356] Some of the services that the Tribe paid for included:

The Tribe pays the Yavapai County Sheriff for law enforcement services. The Tribe also pays the Central Yavapai Fire District for fire protection and emergency medical services to the Reservation. Although the Arizona Department of Transportation installed and maintains two traffic lights near the Hotel, the Bureau of Indian Affairs reimbursed the State for one-half the construction cost of the traffic lights and the Tribe pays for the electricity. The only services that Arizona provides at its own expense are educational services for the Tribe's children, health services to Tribe members, and liquor licensing to the Hotel. [FN357]

Finally, the dissenting judge noted that no portion of the privilege tax is specifically designated for Tribal purposes. [FN358] As a result, the dissenting judge argued that the state's interest in taxing was relatively weak, and at the same time, the Tribe's interest in having the tax preempted was strong; therefore, he maintained that the state should not have been allowed to impose its tax on food, beverages, and rooms that nonmembers had purchased while at the Yavapai-Prescott Indian Tribe's hotel. [FN359]

B. Taxation of NonMembers and Tribal State Compacts

1. Policy Reasons Weighing Against Taxation of NonMembers

The Supreme Court's decisions in Colville and Cotton Petroleum have been roundly criticized by numerous scholars because the allowance of dual taxation impairs Tribal governmental entities' ability to tax. [FN360] For instance, after the Supreme Court's decision in Colville, the State of Washington began imposing its ***544** state tax on all nonmembers whom purchased cigarettes on the reservation. The Tribe could impose its tax on nonmembers; however, if the Tribe did so, then nonmembers would be paying more for cigarettes on the reservation then off the reservation. Therefore, the Tribe lost its ability to gain revenues from taxation. Further, because the cigarettes on the reservation were the same price as cigarettes off the reservation, the Tribe's smokeshops lost their nonmembers' business, and as a result, the Tribe was forced to close all of its Tribally-run smokeshops because these shops were no longer generating revenues. [FN361]

Obviously, the closure of Tribal cigarette shops on the Colville reservation denied the Tribe the ability to raise revenue from these Tribal businesses and also foreclosed the Tribe's ability to raise additional revenues through its power of taxation. Such a reduction in funding can have a devastating effect on Tribes whom have been collecting tremendous sums of monies from these resources. Tribes use their business and taxation revenues to fund governmental activities and social services. [FN362] Without a reliable source of funding, the Tribe cannot operate social services, and the state is then forced to expend monies to operate such social services for Tribal members.

The Ninth Circuit's holdings in Salt River Pima-Maricopa, Gila II, and Yavapai-Prescott Indian Tribe also have the potential of denying Tribes the ability to gain revenues from taxation. In each case, the courts have failed to recognize that a healthy Tribal tax base would allow the Tribe to provide services to its members, services that the state would normally have to fund itself. Indeed, in the modern era of Tribal economic and political self-

development, Congress has encouraged Tribal governments to use their monies to provide services to Tribal members. [FN363] When Tribes have sufficient monetary funds, Tribes have sought to provide services such as education, transportation infrastructure, housing, and law enforcement. [FN364] Tribal revenues have never ***545** been plentiful enough to fund all of the Tribe's needs, and any federal funding Tribes receive has merely assisted some of their programs. [FN365] Yet, the state has continually exacerbated the problem by taxing nonmembers' businesses in Indian country, and the state has robbed revenues from the Tribe, revenues that the Tribe could have used to provide services to Tribal members. [FN366]

Additionally, many Tribes have objected to state taxes that are levied on nonmembers doing business in Indian country because Tribes contend that state governments already receive their fair share of taxes from Tribal members whom expend monies off-reservation. [FN367] Indeed, Tribes note that throughout the United States, state governments receive almost $246 million annually in tax revenues from Tribal members whom buy goods off-reservation and only expend $226 million annually on behalf of reservation residents. [FN368] Ironically, if state governments would not burden Tribal businesses with additional taxes, Tribal business ventures would gradually become more profitable and Tribal members would have more monies to expend off-reservation which would in turn raise the amount of tax revenues the state might receive from Indians. Under this scenario, the state would actually receive more tax revenues, and at the same time, the state would not have to spend additional monies on the reservation because the Tribe would be able to provide social services to their own members.

2. Tribal-State Compacts

In the field of taxation, Tribes and states began entering into cigarette compacts [FN369] denoting each entities' tax levels shortly after the Supreme Court's decision in Oklahoma Tax Commission v. Citizens Band of Potawotomi Indians. [FN370] In this case, the state brought suit against the Tribe for the Tribe's failure to remit cigarette ***546** taxes on nonmembers to the state. [FN371] The state brought suit to obtain these funds. [FN372] The Court asserted that the doctrine of Tribal sovereign immunity prevents a Tribe from being held liable in monetary terms for its failure to collect state taxes levied on nonmembers. [FN373] The Court acknowledged that its holding denied the state its most effective remedy for enforcement; however, the Court noted that the state had several other remedies one of which was that the state could enter into an agreement with the Tribes to adopt a mutually satisfactory regime for the collection of taxes. [FN374]

After this decision, many states began entering into cigarette compacts with Tribes. [FN375] Shortly thereafter, due to the Supreme Court's holding in Oklahoma Tax Commission v. Chickasaw Nation, [FN376] states and Tribes also began entering into gasoline compacts. In Chickasaw Nation, the Supreme Court held that the state could not directly tax an Indian gasoline seller, but rather had to impose a taxation scheme similar to permissible state cigarette taxation schemes. [FN377] As a result of this holding, states realized that they might encounter the same problem in collecting gasoline taxes as they had encountered in collecting cigarette taxes, and therefore, the states began entering into gasoline compacts with Tribes. [FN378] More than 200 Tribes in eighteen states have resolved their taxation disputes by entering into intergovernmental agreements. [FN379] Gasoline and cigarette compacts may establish the levels of taxation that the state and Tribe may impose as well as the method that the Tribe may follow when collecting taxes from nonmembers. [FN380] For instance, some states and Tribes have merely entered into agreements which have only provided for the exemption of Indian purchasers on reservations ***547** from cigarette or motor fuel taxes. [FN381] Likewise, other states and Tribes have entered into similar agreements whereby the Tribe adopts the same tax as the state, and the state receives all the sales attributable to nonmembers. [FN382] However, not all compacts have been unfavorable to Indian concerns. Indeed, two states have allowed Tribes to keep all the tax revenues they receive from on-reservation sales to both Indians or nonmembers as long as the Tribe imposes the same level of taxation as the state. [FN383] Similarly, four other states have exempted all on- reservation sales from state taxation. [FN384] Finally, compacts have also provided for criminal penalties; for instance, after signing a compact with the State of Oklahoma, the Cherokee Nation enacted a legislative provision which listed unlawful tobacco sale activities and penalties if such provisions were violated. [FN385]

Many Tribes may want to consider entering into compacts with their respective states, because of the Ninth Circuit's decisions in Salt River Pima- Maricopa, Gila II, and Yavapai-Prescott. When Tribes have entered into cigarette and gasoline contracts with their respective state, some of the agreements have been favorable to Tribes and others have not. This is primarily due to the fact that cigarette shops and gasoline stations have been ***548** viewed by the states as Tribal businesses that simply market a tax exemption. Tribal businesses such as the ones that the Ninth Circuit allowed the state to tax were not marketing exemptions, and in each of these cases, the Tribal entity

provided many services to the businesses and was actively involved in the regulation of the businesses. [FN386] Conversely, the state only provided a few incidental services to the Tribe. [FN387] Consequently, when states and Tribes negotiate under these circumstances, the Tribe should be able to negotiate a favorable tax revenue scheme.

For instance, the Salt River Pima-Maricopa Tribe could have negotiated a compact with the state providing for the state to be reimbursed for the services it had provided to the Tribal business. Under such a scheme, the Tribe could have either paid the state a set monetary sum or a set percentage of tax revenues from the Tribal business. [FN388] In Salt River Pima- Maricopa, the state levied a five and a half percent sales tax and a four and a half percent rent tax while the Tribe only levied a one percent sales tax. [FN389] For the Tribe, the tax raised revenue in excess of $100 million in 1992 and $200 million in 1993. [FN390] Conversely, in sales taxes alone, the state tax raised revenues in excess of $550 million in 1992 and one billion dollars in 1993. Yet, none of the monies the state collected were earmarked for any services it provided to the Tribal business. [FN391] Moreover, the Tribe provided the majority of the services to the mall it operated. Indeed, the Tribe provided ***549** zoning regulations, police protection, and health and safety inspections. [FN392] The Tribe and the City of Scottsdale provided fire protection to the mall, and Scottsdale levied a separate fee on the businesses for its services. [FN393] Finally, the state only provided for the maintenance of the road that yields access to the mall. [FN394] If the Tribe had entered into a compact with the state prior to the mall's opening, the Tribe could have explicitly agreed to pay the state a certain sum of money for road maintenance or a certain level of taxation revenues from the Tribal business to be used for road maintenance. This type of agreement would have compensated the state for its services while at the same time protected the Tribe's taxation base.

Compacting does not always result in the maximization of taxation revenues, but it does ensure a certain level of revenues. Indeed, under compacting schemes, Tribal governments will know approximately how much taxation revenue will be generated from their businesses, and therefore, Tribal governments will be afforded the opportunity to use this set level of revenues to build and maintain governmental facilities, hospitals, schools, and social services. In the converse, if the Tribe does not enter into a compact, the Tribal government risks losing all possible tax revenues. [FN395]

Conclusion

Taxation of nonmembers provides a solid revenue base for Tribal governmental entities. Such Tribal revenues are in turn used to support Tribal governmental facilities and Tribal social services. In essence, these revenues help Tribal governmental entities attain economic and political self-sufficiency. Tribes may also gain revenues from Tribal business ventures. However, outside of a few successful gaming ventures, most Tribal businesses have failed to gain profits sufficient enough to fully support Tribal governmental facilities and Tribal social services. [FN396] As a result, many Tribal governmental entities have funded various ***550** Tribal governmental facilities and Tribal social services through funds they have received from their tax base.

Unfortunately, the Ninth Circuit's tax decisions have the potential to drastically reduce the taxable income a Tribe could possibly receive from nonmembers, and in some circumstances, the Ninth Circuit's decisions have the potential to completely render a Tribe's taxing power over nonmembers useless. [FN397] To combat these potential reductions in tax revenue, Tribes must enter into Tribal-state compacts to assure that they receive some stable level of tax revenues from nonmembers. Without this assurance, Tribal governmental entities will be unable to support their respective Tribal governmental facilities and Tribal governmental social services.

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[FN1]. Since 1970, the federal government has encouraged Tribal economic and political self-sufficiency. Francis Paul Prucha, The Great Father 364-65 (abr. ed., 1986). This policy was first formulated by President Nixon. Id. Since then, numerous congressional bills have been enacted to protect and enhance Tribal economic and political self-sufficiency. See, e.g., Indian Self- Determination and Educational Assistance Act of 1975, 25 U.S.C. § 450a (1994) (providing for strengthening of Tribal control over local school districts that had been federally funded under educational assistance programs); Indian Child and Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (1994) (providing for maximum Tribal jurisdiction and the reduction of state jurisdiction in adoption or custody proceedings where the child is a member or could become a member of an Indian Tribe); Indian Gaming and Regulatory Act of 1988, 25 U.S.C. §§ 2701-2721 (1994) (providing for Tribes to have the opportunity to

potentially operate gaming establishments with those proceeds used to foster political and economic self-sufficiency). For more on this era, see infra notes 52-74 and accompanying text.

[FN2]. For more on Tribal business ventures, see infra notes 64-71 and accompanying text.

[FN3]. Only a few Tribes have encountered extreme wealth in the operation of their businesses. For instance, the 500-member Mashantucket Pequots in Ledyard, Connecticut generate over one billion dollars a year from their Foxwoods Casino and Resort. William Claiborne, Tribes' Big Step: From Casinos to Conglomerates, Washington Post, at A1, available in 1998 WL 16549836; see also Committee on Indian Affairs: Indian Gaming, May 12, 1998, (statement of U.S. Senator Joseph Lieberman), available in 1998 WL 11518168. In all, the casino industry has been the most profitable business ventures for Tribes. Indeed, the gaming industry generates an estimated six billion dollars a year for the one-third of the nation's 554 Tribes that operate some form of gaming. Claiborne, supra, at A1.

[FN4]. See infra notes 6-7 and accompanying text.

[FN5]. Annual Summary of Tribal Enterprises 31-Dec-97, Bishinik, February 1998, at 3 (Official Publication of the Choctaw Nation) (on file with author). Recently, the Tribe received a five million dollar contract to develop computerized statistics for the U.S. Agricultural Department and a fifteen million dollar contract to provide nurses and social workers to U.S. Air Force bases in Europe. Chris Casteel, Choctaws Win $5 Million USDA Project, Daily Okla., August 7, 1998, at A11; Choctaws Land New $15 Million Competitive Contract, Bishinik, October 1998, at 1 (on file with author).

[FN6]. Annual Summary, supra note 5. The Tribal businesses had $98,950,129 in gross revenue, but had $92,189,117 in expenses. Id. Of the $6,781,912 in net profit, $3,367,700 was made from Tribal bingo operations, $1,844,517 from Tribal smokeshops, and $1,214,805 from Tribal travel plazas. Id.

[FN7]. Taxation is one of the six inherent powers that Tribal governmental entities still possess. Kirke Kickingbird et al., Indian Sovereignty, reprinted in 6 Native Americans And The Law 1, 8-12 (John R. Wunder ed., 1996). The other five include: the power to determine form of government, the power to define conditions for membership, power to administer justice and enforce laws, the power to regulate domestic relations of its members, and the power to regulate property use. Id. For more on taxation as an inherent power of Tribal government, see infra notes 73-74 and accompanying text.

[FN8]. The Supreme Court has upheld a Tribe's sovereign power to tax nonmembers. See Washington v. Confederate Tribes of the Colville Reservation, 447 U.S. 134, 152 (1980) (Court upheld a Tribal cigarette tax levied on nonmembers); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982) (Court upheld a Tribal severance tax applied to non-Indian oil and gas lessees).

[FN9]. For example, the Absentee Shawnee Tribe taxes beverage use, smokeless tobacco, cigarettes, sales, bingo use, employees, beer, oil and gas, fuel, and motor vehicles. Tax News, Absentee Shawnee News, February 1998, at 3 (on file with author). In another example, the Sac and Fox Tribe taxes cigarettes, motor vehicles, sales, and oil and gas. Sac and Fox Tax Commission Revenue, Sac & Fox News, January 1998, at 9 (on file with author). For more on Tribal taxation, see infra notes 72-105 and accompanying text.

[FN10]. For instance, under the Absentee Shawnee and Sac and Fox tax codes, nonmembers may be subjected to all the taxes members are with the sole exception of motor vehicle taxes. For more on Tribal taxation, see infra notes 72-105 and accompanying text.

[FN11]. Tax Collections, Absentee Shawnee News, January 1998, at 3 (on file with author). For more on Tribal taxation, see infra notes 72-105 and accompanying text.

[FN12]. See Salt River Pima-Maricopa Indian Community v. Arizona, 50 F.3d 734 (9th Cir. 1995); Gila River Indian Community v. Waddell, 91 F.3d 1232 (9th Cir. 1996) (Gila II); and Yavapai-Prescott Indian Tribe v. Scott, 117 F.3d 1107 (9th Cir. 1997), cert. denied, 522 U.S. 1076 (1998).

[FN13]. For more on the Ninth Circuit's decisions, see infra section IV. Indian country in the civil context has repetitively been defined as Indian reservation land, dependent Indian communities, and non-extinguished Indian

allotments. See, e.g., Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114, 126 (1993).

[FN14]. For example, if the state imposes a five percent tax on sales and the Tribe imposes a four percent tax on sales, then the Tribe and the state may compact to set a fixed rate of taxation on nonmembers. Under a compact, the state and Tribe could agree to set a five percent taxation rate on nonmembers with the state receiving two and a half percent and the Tribe receiving two and a half percent. This compact would at least enable a Tribe to operate its businesses competitively with off-reservation businesses while at the same time allowing the Tribe to collect a certain level of taxation revenues. For more on Tribal-state compacts, see infra notes 369-388 and accompanying text.

[FN15]. See, e.g., Sharon O'Brien, American Indian Tribal Governments 14-33 (1989).

[FN16]. Id. at 14.

[FN17]. Id. These governments ranged from highly centralized (Creek Nation) to highly decentralized (Yakima Nation). Id. at 14-33.

[FN18]. Id. at 37-48.

[FN19]. Id.

[FN20]. Id. at 42-48.

[FN21]. U.S. Const. art. I., § 8, cl. 3 (Indian Commerce Clause). As early as 1754, Ben Franklin had advocated that control over Indian affairs should be centralized. O'Brien, supra note 15, at 42-48. Under the Articles of Confederation, article IX vested the Continental Congress with the power to regulate trade and manage affairs with Indians, not members of any states, and states had residual authority over Indian affairs within their own states. Robert N. Clinton et al., American Indian Law 141 (3d ed. 1991). After the Revolutionary War, the new government attempted to regulate Indian affairs; however, it encountered resistance from New York, North Carolina, and Georgia when it sought to establish boundary lines with various Tribes. Id.

[FN22]. Act of July 22, 1790, ch. 33, 1 Stat. 329, 329-32.

[FN23]. For example, see supra note 1 and infra notes 31-57 and accompanying text.

[FN24]. For instance, in 1828 and 1829, Georgia passed two laws appropriating lands belonging to the Cherokee Nation. Clinton, supra note 21, at 145. Alabama, Mississippi, and Tennessee also passed statutes regulating Indian nations (Creeks, Choctaws, and Cherokees) within their states. Id.

[FN25]. 31 U.S. (6 Pet.) 515 (1832).

[FN26]. Id. at 561.

[FN27]. Id. These inherent powers of Tribal governmental sovereignty are not delegated from Congress, but rather are powers that originated from the original sovereignty of Indian Tribes. Kickingbird, supra note 7, at 7-8. This sovereignty predates Europe's discovery of the new world. Id.

[FN28]. Congress' power to enact legislation is very broad. See, e.g., United States v. Kagama, 118 U.S. 375 (1886) (Supreme Court held that Congress had the power to enact legislation which gave federal courts jurisdiction over a number of major crimes in Indian country); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (Supreme Court held that Congress could abrogate an Indian treaty because its power over Tribes was absolute).

[FN29]. See, e.g., White Mountain Apache v. Bracker, 448 U.S. 136, 142- 43 (1980). The Bracker Court recognized that Congress has a broad power to regulate Tribal affairs under the Indian Commerce Clause. Id. at 142 (citing U.S. Const. art. I, § 8, cl. 3 (Indian Commerce Clause)). Moreover, state regulatory authority over the Tribes may be thwarted in one of two ways. First, state law may be preempted by federal law. Id. at 143. Second, state law may not infringe on Tribal sovereignty. Id.

[FN30]. Removal Act, 4 Stat. 411 (1830).

[FN31]. See, e.g., Angie Debo, A History of the Indians of the United States 117-49 (1970).

[FN32]. Tribal peoples were forced to leave their homelands and walk between 1,200 and 1,500 miles westward. Numerous tragic stories have been noted about these long journeys westward. For instance, in 1836 and 1837 approximately 20,000 Creeks made the 1,200 mile trip to Indian territory under military guard. O'Brien, supra note 15, at 123. Between 3,500 to 7,000 Tribal members were buried along the way. Id.

[FN33]. Id. at 124. For instance, the Creeks reestablished forty-five of their towns which continued to operate as their basic unit of government. Id. Each town was governed by four to forty-five legislators. Id. The Creek Nation established a Tribal council which was composed of representatives from the towns. Id. The Tribal council passed the laws that governed the Nation, subject to final approval by the Chief. Id. Agriculture was the primary source for Tribal revenue, and within ten years after removal, Creek farmers were producing surplus crops. Id. Indeed, in 1846, the Creek Nation even exported 100,000 bushels of corn to Ireland. Id.

The Creeks also established schools, and their Tribal members posted higher literacy rates than their surrounding white neighbors. Id. Creek members also read books and newspapers in their own language using the Cherokee syllabary invented by Sequoyah. Id.

[FN34]. Debo, supra note 31, at 284-98.

[FN35]. For instance, the Cheyenne River Sioux, which were only receiving half of the food rations the United States government had promised them, suffered from malnutrition and poor living conditions. O'Brien, supra note 15, at 147. Diseases such as measles and whopping cough killed hundreds of children. Id. In all, the Cheyenne River Sioux were completely demoralized. Id.

[FN36]. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. § 331 (1887)).

[FN37]. Id. For a detailed discussion of the allotment era, see Frederick E. Hoxie, A Final Promise: The Campaign to Assimilate the Indians, 1880-1920 (1984).

[FN38]. See John W. Ragsdale, Jr., The Movement To Assimilate The American Indians: A Jurisprudential Study, 57 UMKC L. Rev. 399, 399-400 (1989).

[FN39]. See, e.g., Terry L. Anderson, Sovereign Nations Or Reservations? 117 (1995).

[FN40]. Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the Committee on Indian Affairs, House of Representatives, 73rd Congress 15 (1934).

[FN41]. Id.

[FN42]. Id.

[FN43]. O'Brien, supra note 15, at 76. For example, in discussing the effect of the allotment era on the Creek Nation, O'Brien stated:

The United States, through the BIA, remained steadfast in its determination to control and eventually destroy [the Creek] government. Beginning in 1907 the nation could no longer elect its own head of government but was forced to accept the Bureau's choice. Bureau officials also refused to allow vacant council seats to be filled by election. These federal actions were patently illegal and denied the nation's inherent rights of sovereignty.

The Senate Select Committee on Indian Affairs visited the Five Civilized Tribes in the 1930s, finding mere starvation the rule in many of the full- blood communities and an illiteracy rate of 25 to 30 percent--much higher than it had been under the Tribal school system. The [Creeks] had been dispossessed of all of their original lands except for 1 acre that remained in Tribal hands and 100,000 acres in individual allotments.

Id. at 131-132.

[FN44]. Id. at 76.

[FN45]. See Act of Sept 1, 1937, Ch. 198, 52 Stat. 347 (codified as amended at 25 U.S.C. § 461 (1934)).

[FN46]. Id.

[FN47]. Id.

[FN48]. See, e.g., Richard J. Ansson, Jr., The Navajo Nation's Aneth Extension and the Utah Navajo Trust Fund: Who Should Govern the Fund After Years Of Misuse?, 14 T.M. Cooley L. Rev. 555, 564 (1997).

[FN49]. See generally Charles F. Wilkinson & Eric R. Biggs, The Evolution of the Termination Policy, 5 Am. Indian L. Rev. 139 (1977).

[FN50]. Indian Tribes As Sovereign Governments - A Sourcebook On Federal- Tribal History, Law, and Policy 12-14 (Richard Trudell ed., 1991). Congress terminated a handful of Tribes and rancheros under House Concurrent Resolution 108. Id. at 12-13. The vast majority of these Tribes have since been rerecognized by the federal government. Id. Further, after Congress passed Public Law 280, five states were allowed to exercise judicial control over resident Indians, and Tribal autonomy in these states was seriously eroded. Id. at 13-14. The Supreme Court narrowly interpreted Public Law 280 when it held that the law did not authorize the state to regulate or tax Indians in Indian country. Bryan v. Itasca County, 426 U.S. 373, 388 (1976).

[FN51]. Emma R. Gross, The Origins of Self-Determination Ideology and Constitutional Sovereignty, reprinted in 6 Native Americans And The Law, supra note 7, at 129.

[FN52]. Id.

[FN53]. For instance in 1994, the Justice Department stated that the "Department is committed to strengthening and assisting Indian Tribal governments in their development and to promoting Indian self-governance." Janet Reno, A Federal Commitment to Tribal Justice Systems, 79 Judicature 113 (1995).

[FN54]. 25 U.S.C. § 450a (1994).

[FN55]. Id.

[FN56]. Id.

[FN57]. The ability to adjudicate claims in one's own court is an inherent attribute of sovereignty. See Kickingbird, supra note 7, at 3.

[FN58]. The Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (1994). For a great discussion on the Indian Child Welfare Act, see B.J. Jones, The Indian Child Welfare Act Handbook (1995).

[FN59]. Many Tribes have created their own environmental protection agencies and have facilitated laws in an attempt to regulate pollution sources within Indian country. Conference of Western Attorneys General, American Indian Law Deskbook 264 (1993). Tribes also use their environmental protection agencies to provide environmental and health services for impoverished Tribal members. For instance, the Choctaw Nation Office of Environmental Health and Engineering was recently awarded three grants, totaling $1,305,000, to construct portable water and approved sewer systems for qualified Indian homes. Assistance with water and sewer improvements available, Bishinik, September 1998, at 1 (on file with author). Finally, the Environmental Protection Agency (EPA) has allowed Tribes to assume partial responsibility for programs that are implemented within Indian country. American Indian Law Deskbook, supra note 59, at 264.

[FN60]. Many Tribes receive funding for the construction of highways under the Federal Highway Administration. This Administration has been authorized to establish a coordinated program for highways on federal lands, including forest highways, public-lands highways, park roads, parkways, and Indian Reservation roads. 23 U.S.C. § 204 (1994).

[FN61]. Tribes may operate head start facilities, primary educational facilities, secondary educational facilities, and higher educational facilities. See Indian Self-Determination and Educational Assistance Act of 1975, 25 U.S.C. § 450a (1994).

[FN62]. For a thorough discussion of Tribal governmental entities and the services these governments provide, see Howard Meredith, Modern American Indian Tribal Government and Politics (1993).

[FN63]. The Indian Gaming and Regulatory Act, which was passed in 1988, provided that the proceeds from Indian gaming would be used to foster political and economic self-sufficiency. 25 U.S.C. §§ 2701-2721 (1994).

[FN64]. Claiborne, supra note 3, at A1. The six billion dollar figure, however, can be somewhat misleading. Two gaming Tribes, the Oneidas of Wisconsin and the Mashantucket Pequots of Connecticut, probably account for almost two billion dollars of the six billion dollar figure. The vast majority of other Tribes generate needed monies from their gaming endeavors, but their overall success in monetary terms has been minimal. For instance in fiscal year 1997, the Choctaw Nation netted almost three and a half million dollars from their gaming operations. Annual Summary of Tribal Enterprises 31-Dec-97, supra note 5, at 3. In all, the Choctaw Nation received approximately forty- six and a half million dollars in gross revenue and had approximately forty- three million dollars in expenses. Id.

[FN65]. Congress first authorized mineral leasing on Indian lands in the Mineral Leasing Act of 1891. 25 U.S.C. § 397 (1994). Almost forty years later, Congress passed the Indian Mineral Leasing Act of 1938 which provided that royalties received from mineral leases on Indian lands should be used by Tribes to achieve Tribal economic and political self-sufficiency. 25 U.S.C. § 3969 (1994). For more on Tribal mineral leasing, see, e.g., Judith V. Royster, Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources, 29 Tulsa L.J. 541, 558-571 (1994).

[FN66]. Mary Shepardson, Development of Navajo Tribal Government, in 10 Handbook of North American Indians 624, 625, 631 (Alfonso Ortiz ed., 1983). Between 1960 and 1990, the Navajo Nation's Aneth Extension, a 52,000 acre tract of land in southeastern Utah that was added to the Navajo Reservation in 1933, has produced oil and gas royalties that have amounted to over $150 million. See Ansson, supra note 48, at 558-59, 593-95.

[FN67]. Tribal governments engage in business ventures through Tribal governments, Tribal enterprises, Tribal government corporations, and through other entities. Michael O'Connell, Business Transactions With Tribal Governments in Arizona, 34 Ariz. Att'y 27 (1998). Tribal governments, in their capacity as governmental entities, are empowered to engage in business transactions. Id. Tribal enterprises are a "broad class of entities which conduct Tribal business as instrumentalities, agencies or departments of Tribal government but which have not been established as a Tribal corporation, authority or other separate legal entity with an independent board of directors. Id. Tribal governments, like the United States, may establish Tribal government corporations such as Tribal housing and utility authorities. Id. Finally, Tribal governments may establish corporations which would allow the newly formed entity to engage in business transactions. Id. at 28.

[FN68]. See, e.g., Yavapai-Prescott Indian Tribe v. Scott, 117 F.3d 1107 (9th Cir. 1997), cert. denied, 522 U.S. 1076 (1998). The Yavapai-Prescott Tribe in 1989 constructed a hotel and a restaurant to serve as the nation's primary source of income. Id. at 1108.

[FN69]. See, e.g., Hoopa Valley Tribe v. Nevins, 881 F.2d 657 (9th Cir. 1989). The Hoopa Valley Tribe established the Hoopa Timber Corp. in 1976 to process timber logged on the reservation and sell it to off-reservation companies. Id. at 658.

[FN70]. The Yakima Nation's Mount Adams Furniture Company manufactures recliners, rockers, love seats, and sleepers. O'Brien, supra note 15, at 194. This company is highly successful, and some of the furniture it manufactures is sold by Sears. Id.

[FN71]. The Yakima Nation's Executive Aircraft Company owns and leases several aircraft including twenty-six helicopters. Id. The company provides "airplane rentals, air ambulance service, aircraft maintenance, and a cessna pilot-training program." Id.

[FN72]. The Supreme Court has recognized a Tribe's sovereign power to tax both members and nonmembers. See Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152 (1980); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982).

[FN73]. Id.

[FN74]. William C. Canby, American Indian Law 261 (3rd ed. 1998).

[FN75]. For instance, the Sac & Fox Tribe of Oklahoma taxes tobacco stamps, motor vehicles, sales, and oil & gas. Sac and Fox Tax Commission Revenue, Sac & Fox News, June 1998, at 9. During a one month period starting on April 20, 1998 and lasting through May 21, 1998 the Tribe collected $44,902.35 in taxes. Id. The Tribe collected $35,860.80 in tobacco taxes, $2,311.75 in motor vehicle taxes, $4,987.09 in sales taxes, and $1,669.71 in oil and gas taxes. Id.

Tobacco, sales, and oil and gas taxes may have been levied on both Tribal members and on nonmembers. For more on taxation of nonmembers, see infra notes 106-160 and accompanying text. Motor vehicle taxes, on the other hand, are collected from Tribal members who house their vehicles in Indian country. The issuance of Tribal plates is an inherent attribute of Tribal governmental sovereignty. See, e.g., Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976), Washington v. Confederated Tribes of the Colville Reservation, 447 U.S.134 (1980), and Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993). The United States Supreme Court has preempted state legislation that seeks to tax vehicles within Indian country when that Tribe has issued Tribal plates to its members. Id. Several courts have also recognized that states must recognize Tribal tags. State v. Wakole, 959 P.2d 882 (Kan. 1998); Queets Band of Indians v. Washington, 765 F.2d 1399 (9th Cir. 1985); Red Lake Band of Chippewa Indians v. State, 248 N.W.2d 722 (Minn. 1976).

[FN76]. Tax Collections, supra note 11, at 3. For fiscal year 1997, the Tribe collected $34,768.12 in oil and gas taxes. Id. These taxes could be collected from both member Indian lessees and nonmember lessees.

[FN77]. For fiscal year 1997, the Tribe collected $13,487.74 in fuel taxes. Id. These taxes may have been collected from both member and nonmember lessees.

[FN78]. For fiscal year 1997, the Tribe collected $49,065.00 in motor vehicle taxes. Id. These taxes have been collected from Tribal members who house their vehicles in Indian country. See id.

[FN79]. For fiscal year 1997, the Tribe collected $7,388.91 in beer taxes. Tax Collections, supra note 11, at 3. These taxes may have been collected from both members and nonmembers who purchased beer.

[FN80]. For fiscal year 1997, the Tribe collected $43,455.19 in employee taxes. Id. These taxes may have been collected from both members and nonmembers who work as employees within Indian country.

[FN81]. For fiscal year 1997, the Tribe collected $431,869.38 in bingo taxes. Id. These taxes may have been collected from both members and nonmembers who play bingo.

[FN82]. For fiscal year 1997, the Tribe collected $35,759.26 in sales taxes. Id. These taxes may have been collected from both members and nonmembers.

[FN83]. For fiscal year 1997, the Tribe collected $287,481.49 in cigarette sales taxes. Id. These taxes may have been collected from both members and nonmembers.

[FN84]. For fiscal year 1997, the Tribe collected $17,450.09 in smokeless sales taxes. Id. These taxes may have been collected from both members and nonmembers.

[FN85]. For fiscal year 1997, the Tribe collected $21,736.06 in beverage taxes. Id. These taxes may have been collected from both members and nonmembers.

[FN86]. Id.

[FN87]. Id. The Tribe placed an additional two percent tax on sales, a five percent tax on beer, a one-tenth percent tax on beverages, and a one one- hundredth percent tax on cigarettes to provide additional monies for health care. Id. For fiscal year 1997, the Tribe collected $10,945.95 in sales taxes, $7,289.93 in beer taxes, $21,736.06 in beverage taxes, and $34,880.29 in cigarette taxes. Id. These taxes may have been collected from both members and nonmembers.

[FN88]. Id.

[FN89]. Tribal reservations have severely high poverty and unemployment rates. See, e.g., Frank Pommersheim, Economic Development in Indian Country: What Are The Questions?, 12 Am. Indian L. Rev. 195 (1984); Seth H. Row, Tribal Sovereignty and Economic Development on the Reservation, 4 Geo. J. on Fighting Poverty 227 (1996).

[FN90]. See supra note 6 and 64.

[FN91]. See supra note 3.

[FN92]. 411 U.S. 164 (1973).

[FN93]. The Court reiterated McClanahan in Oklahoma Tax Commission v. Sac & Fox Nation, 508 U.S. 114 (1993). The Court stated absent congressional direction to the contrary, it must be presumed that a state does not have jurisdiction to tax members who live and work in Indian country, whether particular territory consists of a formal, informal reservation allotted land, or dependent Indian communities. Id. at 123.

[FN94]. McClanahan, 411 U.S. at 173.

[FN95]. 515 U.S. 450 (1995).

[FN96]. Id. at 462-66.

[FN97]. 411 U.S. 145 (1973).

[FN98]. Id. at 147-48.

[FN99]. The Supreme Court, in Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980), stated that nonmembers buying cigarettes on the Indian reservation could be subjected to state taxation. Id. at 161. First, the Court found that no congressional acts had exempted nonmembers from taxation. Id. Second, the Court reasoned that taxation of nonmembers did not impede the principles of Tribal self-government because nonmembers were not constituents of the Tribe. Id. The Court reaffirmed this holding in Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 512-13 (1991).

[FN100]. See Colville, 447 U.S. at 152; Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982).

[FN101]. Tax Collections, supra note 11, at 3. Collection of cigarette and fuel taxes is now regulated by a compact between the state of Oklahoma and the Absentee Shawnee Nation. For more on compacts, see infra notes 369-387 and accompanying text.

Any nonmember oil and gas lessee may be taxed as well. For more on taxation of nonmember oil and gas lessees, see infra notes 140-145 and accompanying text.

[FN102]. See, e.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980). For more on the Supreme Court's treatment of state taxation of nonmember Indians, see infra Section III.

[FN103]. See supra notes 12-14 and accompanying text. Sole taxation jurisdiction for a governmental entity is very important. As this author has previously noted:

When a government wants to exert its taxing power, it must be able to do so without excessive interference from other governments. If another governmental entity can defeat its taxing power on legal grounds, then that government's taxing power will be useless. Accordingly, since the supply of taxable wealth is limited, there is always tension between government jurisdictions over which has the greater legal right to tax the wealth.

Richard J. Ansson, Jr., Protecting Tribal Sovereignty: Why States Should Not Be Able To Tax Contractors Hired By The BIA To Construct Reservation Projects For Tribes: Blaze Construction Co. v. New Mexico Taxation And Revenue Department: A Case Study, 20 Am. Indian L. Rev. 459 (1995-96).

[FN104]. See supra notes 12-14 and accompanying text.

[FN105]. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980).

[FN106]. Id. Congressional authority to preempt state intrusion into Indian country arises from Congress' broad power to regulate Tribal affairs under the Indian Commerce Clause, Art. 1, sec. 8, cl. 3.

[FN107]. Bracker, 448 U.S. at 142. The semi-independent position of Indian Tribes within the United States has given rise to another barrier to state intrusion over nonmembers doing business within Indian country. Id.
The Court also noted that these two independent barriers are related because Tribal self-government is dependent on and is subject to the broad powers of Congress. Id. at 143.

[FN108]. An argument could be made for using the second test to strike down any type of state taxation levied against nonmembers that conduct business in Indian country. However, such an argument is outside the scope of this paper.

[FN109]. Bracker, 448 U.S. at 145.

[FN110]. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334-35 (1983).

[FN111]. Id. at 334. See also Ramah Navajo Sch. Bd. v. New Mexico, 458 U.S. 832, 837-38 (1982); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 176-77 (1989).

[FN112]. 448 U.S. 136 (1980).

[FN113]. Id. at 152-53.

[FN114]. Id. at 146-49.

[FN115]. Id. at 145-47.

[FN116]. Id. at 148.

[FN117]. Id.

[FN118]. Id. at 149. Between November 1971 and May 1976, the nonmember contractor paid $19,114.59 in fuel taxes and $14,701.42 in motor carrier license taxes. Id. at 140 n.5. The majority of the Tribe's monies were attributable to timber operations. Id. at 138 n.2. For example, in 1973, the Tribe received $1,667,091, $1,508,713 of which was attributable to timber operations. Id.

[FN119]. Id. at 149.

[FN120]. Id. at 150.

[FN121]. Id.

[FN122]. Id.

[FN123]. Id.

[FN124]. Id. at 148-49. These roads were open to public use, and were maintained, administered, and funded by the federal government and the Tribe. Id.

[FN125]. Id. at 150.

[FN126]. 458 U.S. 832 (1982).

[FN127]. Id. at 846-47.

[FN128]. Id. at 835. The BIA approved all contracts. Id.

[FN129]. Id. at 839-40.

[FN130]. Id.

[FN131]. Id. at 841-42.

[FN132]. Id. at 845.

[FN133]. 819 F.2d 895 (9th Cir. 1987), aff'd, 484 U.S. 997 (1988).

[FN134]. Id. at 897.

[FN135]. Id.

[FN136]. Id. at 896.

[FN137]. Id. at 898.

[FN138]. Id.

[FN139]. Id. at 903. The court noted that the states may have had interest in taxing the coal due to services provided to the Tribe, but found that the taxes were not narrowly tailored to achieve such interests. Id. at 902.

[FN140]. 490 U.S. 163 (1989).

[FN141]. Id. at 187.

[FN142]. Id. at 183-84.

[FN143]. Id. at 184-86.

[FN144]. Id. at 185. The district court had found that "from 1981 through 1985 New Mexico provided its operations with services costing $89,384, but argues that the cost of these services is disproportionate to the $2,293,953 in taxes the State collected from Cotton." Id.

[FN145]. Id.

[FN146]. 447 U.S. 134 (1980).

[FN147]. Id. at 157-59. See also Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976).

[FN148]. Colville, 447 U.S. at 155. The Tribe advanced that the Indian Reorganization Act of 1934, the Indian Financing Act of 1974, and the Indian Self-Determination Act of 1975 evidenced a concern by Congress to protect a Tribe's right to economic self-development. Id. However, the Supreme Court held that none of these acts go "so far as to grant Tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses in a State." Id.

[FN149]. Id. at 155-57.

[FN150]. Id.

[FN151]. Id.

[FN152]. Id. at 157-59.

[FN153]. See California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

[FN154]. Id. at 219-20.

[FN155]. 480 U.S. 202 (1987).

[FN156]. Id. at 221-22. In Indian law, the power to tax and the power to regulate are treated similarly. Canby, supra note 74, at 243.

[FN157]. Cabazon, 480 U.S. at 219-20.

[FN158]. Id.

[FN159]. Id. at 221-22.

[FN160]. 881 F.2d 657 (9th Cir. 1989).

[FN161]. See infra Section III.

[FN162]. Nevens, 881 F.2d at 658.

[FN163]. Id. The Tribe relies on the timber industry because of the remoteness of the reservation and the destruction of fish resources in the Klamath-Trinity river system. Id.

[FN164]. Id.

[FN165]. Id.

[FN166]. Id. at 659.

[FN167]. Id. The court did not address whether the tax was invalid because it infringed on Tribal sovereignty. Id.

[FN168]. Id.

[FN169]. Id. at 660.

[FN170]. Id. at 658.

[FN171]. Id.

[FN172]. Id.

[FN173]. Id. The Tribe and BIA have funded these services. Id.

[FN174]. Id. at 660.

[FN175]. Id. at 660-61.

[FN176]. Id.

[FN177]. Id. The court also noted that the Ninth Circuit's Crow Tribe decision had maintained that "showing that the tax serves legitimate state interests, such as raising revenues for services used by Tribal residents and others is not enough. [Instead], [t]o be valid, the California tax must bear some relationship to the activity being taxed." Id. The court added that Cotton Petroleum was consistent with this principle even though the holding allowed for dual taxation. Id. at 660. The Cotton Petroleum Court allowed dual taxation because the state had regulated the oil and gas activities affected by the tax and because the imposition of the state tax had not imposed asubstantial burden on the Tribe. Id.

[FN178]. Id. at 661.

[FN179]. Gila River Indian Community v. Waddell, 967 F.2d 1404 (9th Cir. 1992).

[FN180]. Id. at 1406.

[FN181]. Id.

[FN182]. Id.

[FN183]. Id.

[FN184]. Id.

[FN185]. Id.

[FN186]. Id.

[FN187]. Id. at 1406-07.

[FN188]. Id. at 1407.

[FN189]. Id.

[FN190]. Id.

[FN191]. Id.

[FN192]. Id.

[FN193]. Id. at 1412.

[FN194]. Id. at 1410.

[FN195]. Id. at 1411.

[FN196]. Id. at 1411-12.

[FN197]. Cabazon Band of Mission Indians v. Wilson, 37 F.3d 430 (9th Cir. 1994), cert. denied, 118 S. Ct. 2319 (1998).

[FN198]. Id. at 432.

[FN199]. Id.

[FN200]. Id. Indian gaming is divided into three classes. Id. Off-track betting is considered a Class III gaming operation. Id. Under the IGRA, a Tribe must enter into a compact with its respective state before it can engage in class III gaming activities. Id.

[FN201]. Id.

[FN202]. Id.

[FN203]. Id.

[FN204]. Id.

[FN205]. Id. The fee comprises a percentage of the wages placed. Id.

[FN206]. Id.

[FN207]. Id.

[FN208]. Id. at 435.

[FN209]. Id. at 433. Another Tribe had received $318,743 in royalty proceeds, and the state had received $440,175 in license fees. Id.

[FN210]. Id. at 433-34.

[FN211]. Id. at 434.

[FN212]. Id. at 435.

[FN213]. Id.

[FN214]. Id. In California v. Cabazon Mission Indians, the Supreme Court reasoned that the Tribe was not "merely importing a product onto the reservation [ ] for immediate resale to non-Indians." Id. (citing Cabazon, 480 U.S. 202, 219 (1987)).

[FN215]. Id. at 435.

[FN216]. Id.

[FN217]. Id.

[FN218]. 50 F.3d 734 (9th Cir. 1995).

[FN219]. Id. at 735. The Secretary of Interior approved the lease. Id.

[FN220]. Id.

[FN221]. Id.

[FN222]. Id.

[FN223]. Id.

[FN224]. Id.

[FN225]. Id.

[FN226]. Id.

[FN227]. Id.

[FN228]. Id.

[FN229]. Id.

[FN230]. Id.

[FN231]. Id. Vestar provided the mall with sewage and water facilities. Id. Electricity is purchased from a state utility plant. Id.

[FN232]. Id.

[FN233]. Id.

[FN234]. Id.

[FN235]. Id.

[FN236]. Id.

[FN237]. Id. at 735-36.

[FN238]. Id. at 738.

[FN239]. Id. at 737.

[FN240]. Id.

[FN241]. Id.

[FN242]. Id. at 737-38. The Ninth Circuit also noted that in this case if the court invalidated the state taxes, the Tribe would have the ability to market a tax exemption for large discount chains. Id. at 738.

[FN243]. Gila River Indian Community v. Waddell, 91 F.3d 1232 (9th Cir. 1996).

[FN244]. Id. at 1234.

[FN245]. Id.

[FN246]. Id. at 1237. The Ninth Circuit relied on Salt River in rejecting "the argument that leasing statutes required preemption of the Arizona tax on retail sales and rents received from subtenants." Id.

[FN247]. Id. at 1237-38.

[FN248]. Id.

[FN249]. Id. at 1238.

[FN250]. Id.

[FN251]. Id.

[FN252]. Id.

[FN253]. Id. at 1238-39.

[FN254]. Id.

[FN255]. Id.

[FN256]. Yavapai-Prescott Indian Tribe v. Scott, 117 F.3d 1107 (9th Cir. 1997), cert. denied, 118 S. Ct. 853 (1998).

[FN257]. Id. at 1108.

[FN258]. Id.

[FN259]. Id.

[FN260]. The Tribe held title to the building. Id.

[FN261]. Annual cash flow was defined as all income less operating expenses, franchise fees, debt service, and replacement services. Id.

[FN262]. Id.

[FN263]. Id.

[FN264]. Id. at 1109.

[FN265]. Id.

[FN266]. Id.

[FN267]. Id. at 1113.

[FN268]. Id. at 1112-13.

[FN269]. Id. at 1111.

[FN270]. Id. at 1111-12.

[FN271]. Id. at 1112.

[FN272]. Id.

[FN273]. Id.

[FN274]. Id.

[FN275]. Id.

[FN276]. Id.

[FN277]. Id.

[FN278]. Id.

[FN279]. Id.

[FN280]. See, e.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 148 (1980); Ramah Navajo Sch. Bd. v. New Mexico, 458 U.S. 832, 839-40 (1982).

[FN281]. See California v. Cabazon Band of Mission Indians, 480 U.S. 202, 219-20 (1987).

[FN282]. See, e.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980); Ramah Navajo Sch. Bd. v. Bureau of Revenue of N.M., 458 U.S. 832, 841-42 (1982).

[FN283]. See Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 184-86 (1989).

[FN284]. See Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 155-59 (1980); California v. Cabazon Band of Mission Indians, 480 U.S. 202, 219-22 (1987).

[FN285]. Cabazon Band of Mission Indians v. Wilson, 37 F.3d 430, 433-34 (9th Cir. 1993), cert. denied, 524 U.S. 926 (1998).

[FN286]. Id. at 435.

[FN287]. Id.

[FN288]. Id.

[FN289]. Hoopa Valley Tribe v. Nevins, 881 F.2d 657, 660-61 (9th Cir. 1989).

[FN290]. Id.

[FN291]. Id.

[FN292]. Id.

[FN293]. Gila River Indian Community v. Waddell (Gila I), 967 F.2d 1404, 1410-13 (9th Cir. 1992).

[FN294]. Id. at 1410-13.

[FN295]. Id. at 1413.

[FN296]. See Gila River Indian Community v. Waddell (Gila II), 91 F.3d 1232, 1238-39 (9th Cir. 1996); Salt River Pima-Maricopa Indian Community v. Arizona, 50 F.3d 734, 738 (9th Cir. 1995).

[FN297]. Gila II, 91 F.3d at 1238-39; Yavapai-Prescott Indian Tribe v. Scott, 117 F.3d 1107, 1111-12 (9th Cir. 1997), cert. denied, 118 S. Ct. 853 (1998).

[FN298]. See Salt River Pima-Maricopa, 50 F.3d at 738; Gila II, 91 F.3d at 1238-39; Yavapai-Prescott, 117 F.3d at 1111-12.

[FN299]. See Salt River Pima-Maricopa, 50 F.3d at 738; Gila II, 91 F.3d at 1237-38; Yavapai-Prescott, 117 F.3d at 1112.

[FN300]. Salt River Pima-Maricopa, 50 F.3d at 735.

[FN301]. Id. at 738.

[FN302]. Id. at 737.

[FN303]. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 214-222 (1987).

[FN304]. Id. at 219.

[FN305]. Salt River Pima-Maricopa, 50 F.3d at 738.

[FN306]. Id.

[FN307]. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 155-57 (1980).

[FN308]. Id.

[FN309]. Id.

[FN310]. Salt River Pima-Maricopa, 50 F.3d at 735.

[FN311]. Id.

[FN312]. Id.

[FN313]. Id.

[FN314]. Id. at 738.

[FN315]. Id.

[FN316]. Id.

[FN317]. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 147-49 (1980).

[FN318]. See id.

[FN319]. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 168-69 (1989).

[FN320]. See id.

[FN321]. Salt River Pima-Maricopa, 50 F.3d at 735.

[FN322]. Id.

[FN323]. See supra notes 1-11 and accompanying text.

[FN324]. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 220 (1987).

[FN325]. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 184-86 (1989).

[FN326]. Salt River Pima-Maricopa, 50 F.3d at 735.

[FN327]. Id.

[FN328]. Id.

[FN329]. Id.

[FN330]. Gila River Indian Community v. Waddell (Gila II), 91 F.3d 1232, 1237 (9th Cir. 1996).

[FN331]. Id. at 1234.

[FN332]. Id. at 1238-39.

[FN333]. Id. at 1238.

[FN334]. See, e.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 147-49 (1980); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 168-69 (1989). See supra notes 318-321 and accompanying text.

[FN335]. Id.

[FN336]. Gila River Indian Community v. Waddell (Gila I), 967 F.2d1404, 1406 (9th Cir. 1992).

[FN337]. Id.

[FN338]. Id.

[FN339]. Gila River Indian Community v. Waddell (Gila II), 91 F.3d 1232, 1238 (9th Cir. 1996).

[FN340]. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 219-20 (1987).

[FN341]. Id.

[FN342]. Id.

[FN343]. Id.

[FN344]. Cotton Petroleum Corp. v. New Mexico, 480 U.S. 202, 220 (1987).

[FN345]. Gila II, 91 F.3d at 1238-39.

[FN346]. Gila River Indian Community v. Waddell (Gila I), 967 F.2d 1404, 1409 (9th Cir. 1992).

[FN347]. Id. See Cotton Petroleum, 480 U.S. at 220.

[FN348]. Yavapai-Prescott Indian Tribe v. Scott, 117 F.3d 1107, 1109 (9th Cir. 1997), cert. denied, 118 S. Ct. 853 (1998).

[FN349]. Id. at 1112.

[FN350]. Id. at 1113.

[FN351]. Id.

[FN352]. Id. at 1114.

[FN353]. Id. The dissenting judge also noted that the Tribe's small size makes its interest in economic development even more important. Id. Further, he noted that the Tribe needed to engage outside developers because without them "it would be difficult, if not impossible, for the Tribe to engage in any meaningful economic development." Id. at 1114-15.

[FN354]. Id. at 1116 (citing Cabazon v. Wilson, 37 F.3d at 435).

[FN355]. Id.

[FN356]. Id.

[FN357]. Id.

[FN358]. Id. at 1117.

[FN359]. Id. at 1116-17.

[FN360]. See, e.g., Charley Carpenter, Note, Preempting Indian Preemption: Cotton Petroleum Corp. v. New Mexico, 39 Cath. U. L. Rev. 639 (1990); Kristina Bogardus, Note, Court Picks New Test in Cotton Petroleum, 30 Nat. Resources J. 919 (1990); Katherine B. Crawford, State Authority to Tax Non-Indian Oil and Gas Production on Reservations: Cotton Petroleum Corp. v. New Mexico, 2 Utah L. Rev. 495 (1989).

[FN361]. Telephone Interview with Preston Van Camp, Colville Tribal Attorney (Oct. 16, 1998).

[FN362]. See supra notes 51-89 and accompanying text.

[FN363]. See supra notes 58-95 and accompanying text.

[FN364]. Testimony of W. Ron Allen, President National Congress of American Indians Before the United States House of Representative Committee on Resources, June 24, 1998, available in 1998 WL 12761933.

[FN365]. Id.

[FN366]. Id.

[FN367]. Id.

[FN368]. Id.

[FN369]. States and Tribes enter into compacts with each other to create regimes under which each entity can work with the other to solve mutual problems. American Indian Law Deskbook, supra note 59, at 383. Tribes and states have entered into a variety of compacts on a variety of subjects. Id. For instance, these entities have entered into compacts to solve environmental issues, resource conservation issues, taxation issues, law enforcement issues, and water rights issues. Id. at 387-92.

[FN370]. Oklahoma Tax Comm'n v. Citizen Band of Potawotomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991).

[FN371]. Id. at 507-08.

[FN372]. Id.

[FN373]. Id. at 513-14.

[FN374]. Id. The Court also recognized that the state may have other remedies including holding individual agents or officers liable for the damages, collecting the tax from cigarette wholesalers, and seeking appropriate legislation from Congress. Id.

[FN375]. See, e.g., Oklahoma Indian Nations Agreements, Compacts, & Contracts in Sovereignty Symposium XI 428 (1998).

[FN376]. Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995).

[FN377]. Id. at 462.

[FN378]. See, e.g., Oklahoma Indian Nations Agreements, Compacts, & Contracts, supra note 375.

[FN379]. See, e.g., Testimony of W. Ron Allen, supra note 364.

[FN380]. Id.

[FN381]. Id. For instance, Utah has an agreement with the Ute Tribe exempting Tribal members from state cigarette and motor fuel taxes. Id. Likewise, Wisconsin exempts all Tribal members from state motor fuel taxes, and Wyoming exempts all Tribal members from state cigarette taxes. Id. Finally, Michigan, Montana, and Washington have reached the same result "by agreeing with Tribes to an allocation of the product to be taxed--usually tax free cigarettes--to on-reservation retailers, set by a per capita consumption formula reflecting the number of Indians (or Tribal members) residing on the Reservation." Id.

[FN382]. Id. For example, Minnesota has such agreements with all Indian Tribes in regard to cigarettes and with numerous Indian Tribes in regard to gasoline and liquor sales. Id. Additionally, North Dakota, Wisconsin, and Oregon have reached cigarette agreements with Tribes in their states. Id. Finally, South Dakota has reached agreements with four Tribes in regard to cigarettes, contractors excise, and sales and use taxes. Id.

[FN383]. Id. Indeed, Nevada and Louisiana have adopted this favorable tax scheme. Id. Under these agreements, the Tribes may "levy a tax equal to the state tax--on sales of cigarettes and motor fuels in Louisiana, for sales, use and cigarette taxes in Nevada--but where the Tribe keeps all tax revenues." Id.

[FN384]. Id. If the Tribe imposes a tax on cigarettes, New Mexico and Mississippi have agreed not to impose their state taxes. Id. Likewise, Florida allows the Seminole Tribe to impose and collect their own taxes on cigarettes, and the state does not impose their taxes on cigarettes. Id. Finally, New York's executive branch has recently declared that it will not collect cigarette or gasoline taxes from sales in Indian country. Id.

[FN385]. See, e.g., Cherokee Nation Code, ch. 5, §§ 81-82 (1995).

[FN386]. See supra notes 218-280 and accompanying text.

[FN387]. See supra notes 218-280 and accompanying text.

[FN388]. Such a compacting scheme would also prevent the state from receiving a windfall in revenues from any tax it levied on nonmember businesses even if the state provided services to the Tribe in connection with the taxed activity. For instance, in Cotton Petroleum, the nonmember lessee paid the state of New Mexico $2,293,953 in taxes while receiving only $89,384 in state services between 1981-1985. Cotton Petroleum Corp. v. New Mexico, 745 P.2d 1170, 1173 (N.M. Ct. App. 1987), cert. quashed, 745 P.2d 1159 (N.M. 1987), affirmed, 490 U.S. 163 (1989). Likewise, during this same period, all nonmember oil and gas lessees paid the state $47,483,306 while only receiving $10,704,748 in services. Id. The nonmember oil and gas lessee argued that New Mexico received an unlawful windfall and should be forced to only impose its tax in return for the governmental functions it provides to those bearing the burden of the tax. Id. The Supreme Court rejected this argument holding that the state provides services to these nonmember oil and gas lessees off the reservation and there is no constitutional obligation that the taxpayer must receive benefits equaling his tax obligation. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 189-90 (1989).

[FN389]. Salt River Pima-Maricopa Indian Community v. Arizona, 50 F.3d 734, 735 (9th Cir. 1995).

[FN390]. Id.

[FN391]. Id.

[FN392]. Id.

[FN393]. Id.

[FN394]. Id.

[FN395]. See supra notes 361-62 and accompanying text.

[FN396]. Instead of turning huge profits, Tribal industries have employed many Tribal members. In essence, Tribal business ventures have been viewed by Tribes as a way in which Tribal members can obtain employment. See supra notes 4-12 and accompanying text.

[FN397]. See supra notes 361-362 and accompanying text.