Taxation on the Navajo Nation

Sutin, Thayer & Browne Navajo Law Conference
Albuquerque, New Mexico
November 16, 2018
Presenter

Raymond C. Etcitty, General Counsel
Navajo Nation Gaming Enterprise
Taxation Quotes

…but in this world nothing can be said to be certain, except death and taxes

Benjamin Franklin

The conclusion is, that there must be interwoven, in the frame of the government, a general power of taxation, in one shape or another.

Federalist No. 30, Concerning the General Power of Taxation (Alexander Hamilton)

The power of taxing people and their property is essential to the very existence of government.

James Madison

Taxes are what we pay for a civilized society.

Oliver Wendell Holmes Jr.

Taxes, after all, are dues that we pay for the privileges of membership in an organized society.

Franklin D. Roosevelt
Tribes and Taxes: What’s Happening Today

Tribes using their status to collect taxes to generate revenues

- Navajo Tax Commission
  - Office of the Navajo Tax Commission
- Kayenta Township

Tribes using their status to avoid taxes to generate revenues

- Tribes are marketing their tax exemption status
- Tribes are lessen impacts of state and federal taxes on tribe and tribal members by creating businesses within Indian lands
Elements of Taxation

Types of Taxes

- **Excise or Sales** (tax on activities)
- **Income** (tax on income)
- **Ad valorem** (tax on value, property)
- Others types: progressive, regressive, exportation, tolls, fees, etc.

Legal Incidence – who is legally responsible for paying the tax

- Excise taxes
  - Buyer
  - Seller
- Ad Valorem – owner

Economic burden - Who bears the burden of the tax; “pass through”

Nexus

- Connection between tax and what is taxed
Elements of Taxation (cont.)

Pyramiding of Taxation is when a general consumption or transaction tax (like a sales tax or the gross receipts tax) is charged on business inputs (business-to-business sales) and becomes embedded as part of the cost of the ultimate goods or services sold to the consumer.

Example: Natural resources taxes; or construction company buys engineering services which tax is charged.

- Cost of engineering services includes accounting services which is taxed.
- Cost of accounting services includes printing services which is taxed.
- Cost of the printing services includes business supplies which is taxed.
Elements of Taxation (cont.)

Multiple taxation arises when different governments tax the same transaction or activity or wealth. This occurs when governmental jurisdictions overlap each other. Examples:

- Income taxes (Federal Government and States)
- Fuel or gasoline taxes
- Tobacco taxes

Multiple taxation of a good or service within Indian country by a state government and tribal government known as “Dual Taxation.” Both governments will tax the non-member or non-member business - *Cotton Petroleum v. New Mexico*, 490 U.S. 163 (1989)
Governmental Authority to Tax

Federal Government (U.S. Constitution)
   Art. 1, Section 8
   16th Amendment
   Limitations
      Bill of Rights, takings, due process, etc.

State Governments
   State Constitutions
   U.S. Constitution (limitations)
      Commerce Clause
      Limitations (Bill of Rights, takings, due process, etc.)
Governmental Authority to Tax (cont.)

Navajo Nation and other Indian tribes (Sovereign authority)


Chief among the **powers of sovereignty** recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over member of the tribe and over non-members, so far as such non-members may accept privileges of trade, residence, etc., to which taxes may be attached as conditions. [Opinion of the Solicitor of the Department of the Interior, 55 I.D. 14, 46 (1934)]


The power to tax is an **essential attribute of Indian sovereignty** because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services. Id 137.
Navajo Nation and other Indian tribes (Sovereign authority)


The power does not derive solely from the Indian tribe’s power to exclude non-Indians from tribal lands. Instead, it derives from the tribe’s general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction. Id 137.
Governmental Authority to Tax (cont.)

Navajo Nation and other Indian tribes (Sovereign authority)

Recent Cases and Limitations:


*Montana Test*

*An exception to the general rule of tribal authority over non-members*


*Montana Test (the exception became the general rule)*

*“Gatekeeping Right”*


*Limited Merrion (taxation is an aspect of a sovereign government)*

*Reaffirm Montana and Strate (Montana Test)*
Governmental Authority to Tax (cont.)


Although we extracted from our precedents “the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe,” 450 U.S., at 565, we nonetheless noted in *Montana* two possible bases for tribal jurisdiction over non-Indian fee land. First, “[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements.” *Ibid.* Second, “[a] tribe may . . . exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Id.*, at 566.
Governmental Authority to Tax (cont.)


We therefore do not read Merrion to exempt taxation from Montana’s general rule that Indian tribes lack civil authority over nonmembers on non-Indian fee land. Accordingly, as in Strate, we apply Montana straight up. Because Congress has not authorized the Navajo Nation’s hotel occupancy tax through treaty or statute, and because the incidence of the tax falls upon nonmembers on non-Indian fee land, it is incumbent upon the Navajo Nation to establish the existence of one of Montana’s exceptions.
Navajo Nation Taxes

Navajo Nation

Possessory Interest Tax (1978)
Business Activity Tax (1978)
Oil & Gas Severance Tax (1985)
Hotel Occupancy Tax (1992)
Tobacco Product Tax (1995)
Fuel Excise Tax (1999)
Sales Tax (2001)
Junk Food Tax (2014)
Alcohol Tax (2016)

*** No Navajo Nation Use Tax***
Possessory Interest Tax (PIT)

A tax on the value of a possessory interest granted by the Navajo Nation.

Possessory interests are leases (coal, oil, gas), and rights-of-way.

Common appraisal methods are used to place a market value, then multiplied by a taxable value, and a tax rate of 3% is then applied to that value.

Possessory interests with a value less than $100,000 are not taxed.

The PIT is assessed annually on August 1st, with one-half of the payment due November 1 and the other May 1.
Business Activity Tax

A tax on the net source gains (gross receipts less deductions) from the sale of Navajo goods or services, with the legal incidence on the seller.

Navajo goods and services are all goods produced, processed, or extracted, and all services performed within the Navajo Nation.

The taxable source gains are calculated by taking the gross receipts from the sale of such goods or services and subtracting out certain deductions.

The BAT was largely replaced by the Sales Tax.

The net source gains are then taxed at 5%.
Oil & Gas Severance Tax

A tax on the removal of oil and/or gas from any lands located within the Nation.

The first purchaser of the product is responsible for filing and paying the tax, although the owner remains secondarily liable.

The tax rate is 4%.

Monthly returns are due 45 days after the end of the month.
Hotel Occupancy Tax

A tax on the amount paid for the rental of a room. The legal incidence is the person paying for the room. The hotel is responsibility for collecting the tax, filing forms and paying the tax.

8% tax on all rooms rented.

Navajo Nation employees and delegates on business are exempt.

HOT is reported quarterly with returns due 90 days after the quarter.

Discount of 1% if taxpayer files and pays early.
Tobacco Product Tax

The tax on the sale of tobacco products within the Nation.

Tax rate is per pack of cigarettes, with the rate for cigars and smokeless tobacco calculated slightly differently.

Tax is collected at the distributor level. Licenses are issued to distributors and retailers.

Monthly returns due 45 days after the end of the month.
Fuel Excise Tax

The tax is imposed when fuel is imported within the Nation. The tax is 18¢ per gallon.

The tax is administered similar to state fuel taxes. Refiners, Distributors, Carriers and Retailers all provide reports. Distributors file fuel manifests, which specify the delivery of fuel. Distributors file and pay the tax on a monthly basis.

Discount of 0.5% of gallons reported if timely filed and paid.

The revenues are dedicated to Navajo Nation roads.
Navajo Sales Tax

Tax rate is 6%

The tax, which will replace parts of the BAT, is similar to state gross receipts taxes. The tax is imposed on all sales of goods or services within the Nation, with the legal incidence on the seller. Certain categories of sales are exempt.

The tax revenue are dedicated to government development fund, Judicial/Public Safety Facilities, Scholarship Fund, Economic Development Fund, NTUA, and General Fund.
Junk Food Tax

Tax rate is 2%

The tax is upon all minimal-to-no-nutritional value food item(s) sold.

The tax revenue are dedicated to Community Wellness Development Projects.
Alcohol Tax

Tax rate is 2%

The tax is upon alcohol products.

The tax revenue are dedicated to the Division of Public Safety.
Uniform Tax Administration Statute

These codes and regulations provide the essentials components of the tax program. They provides definitions, due dates, audit ability, calculation of tax, interest and penalties, statute of limitations, appeal process, etc. They also provides the appeal procedures.
Navajo Tax Commission

Plan of Operation, 2 N.N.C. §3351.

Five Member Commission
  Appointed by President
  Confirmed by Naabik’iyáti’ Committee

Members:
  Loretta Largo
  Pearline Kirk
  Mark Graham
  Shana Barehand
Office of the Navajo Tax Commission

Administration Department
This department provides administrative and support services for the office
Comprised of Executive Director and Support staff (Receptionists, Secretary, etc.)

Legal Department
This department handles all legal issues of the Office, which includes provides legal advice, handling tax cases and appeals, etc.
Comprises of Tax Attorney (in-house)
This in-house tax attorney works very closely with the Department of Justice.
Office of the Navajo Tax Commission (cont.)

Accounting Department

This department is responsible for maintaining records and information on the taxes, and maintaining the office budget.
This department is comprised of Accountants

Compliance Department

This department is responsible for enforcing voluntary taxpayer compliance through office and desk audits, taxpayer education, and monitoring taxpayer filings
This department is comprised of Tax Compliance Officers
Office of the Navajo Tax Commission (cont.)

**Audit Department**

This department performs field audit examinations of taxpayer financial documents.

This department is comprised of Tax Auditors.

**Valuation Department**

This department is responsible for determining the taxable value under the Possessory Interest Tax.

This department is comprised of Minerals Assessment/Specialist.
## FY 2007 - 2017 Tax Revenue Collections

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Income Tax</td>
<td>31,457.21</td>
<td>31,556.36</td>
<td>33,084.04</td>
<td>29,194.52</td>
<td>32,757.64</td>
<td>36,595.38</td>
<td>38,311.82</td>
<td>35,141.25</td>
<td>34,944.32</td>
<td>29,615.79</td>
</tr>
<tr>
<td>Business Activity</td>
<td>13,287.56</td>
<td>11,748.20</td>
<td>14,087.19</td>
<td>7,785.31</td>
<td>9,050.65</td>
<td>7,658.05</td>
<td>8,240.43</td>
<td>6,524.60</td>
<td>7,758.90</td>
<td>5,310.27</td>
</tr>
<tr>
<td>Oil &amp; Gas Severance</td>
<td>2,025.09</td>
<td>10,855.09</td>
<td>10,884.05</td>
<td>8,624.10</td>
<td>7,510.38</td>
<td>9,987.28</td>
<td>9,793.52</td>
<td>9,275.44</td>
<td>10,049.74</td>
<td>6,616.92</td>
</tr>
<tr>
<td>Tobacco Products</td>
<td>155,143</td>
<td>236,277.55</td>
<td>341,980</td>
<td>144,525</td>
<td>215,121</td>
<td>365,682</td>
<td>678,512</td>
<td>530,580</td>
<td>391,415</td>
<td>227,074</td>
</tr>
<tr>
<td>Sales - Non-Retail</td>
<td>33,923.91</td>
<td>19,157.88</td>
<td>23,195.90</td>
<td>21,470.34</td>
<td>28,303.59</td>
<td>30,983.70</td>
<td>29,999.90</td>
<td>35,658.52</td>
<td>40,364.65</td>
<td>45,948.26</td>
</tr>
<tr>
<td>Hotel Occupancy</td>
<td>1,079.90</td>
<td>1,134.96</td>
<td>1,925.05</td>
<td>1,513.94</td>
<td>1,831.89</td>
<td>1,456.14</td>
<td>1,835.93</td>
<td>1,800.94</td>
<td>1,938.70</td>
<td>1,444.99</td>
</tr>
<tr>
<td>Fuel Excise</td>
<td>329,850.09</td>
<td>33,807.37</td>
<td>33,392.54</td>
<td>33,953.81</td>
<td>14,732.52</td>
<td>14,605.64</td>
<td>13,941.43</td>
<td>12,534.37</td>
<td>12,987.79</td>
<td>12,515.71</td>
</tr>
<tr>
<td>Sales - Retail</td>
<td>3,976.02</td>
<td>7,426.87</td>
<td>6,798.03</td>
<td>7,581.17</td>
<td>7,927.18</td>
<td>7,699.41</td>
<td>8,045.30</td>
<td>10,350.39</td>
<td>10,320.72</td>
<td>10,642.21</td>
</tr>
<tr>
<td>Junk Food</td>
<td>0.00</td>
<td>0.00</td>
<td>0.00</td>
<td>0.00</td>
<td>0.00</td>
<td>0.00</td>
<td>0.00</td>
<td>0.00</td>
<td>0.00</td>
<td>0.00</td>
</tr>
<tr>
<td>Alcohol</td>
<td>0.00</td>
<td>0.00</td>
<td>0.00</td>
<td>0.00</td>
<td>0.00</td>
<td>0.00</td>
<td>0.00</td>
<td>0.00</td>
<td>0.00</td>
<td>0.00</td>
</tr>
<tr>
<td>Total</td>
<td>84,903.57</td>
<td>93,941.49</td>
<td>97,882.03</td>
<td>99,134.71</td>
<td>104,931.91</td>
<td>109,039.90</td>
<td>110,532.94</td>
<td>110,577.93</td>
<td>113,253.70</td>
<td>112,830.19</td>
</tr>
</tbody>
</table>

### FY 2007 - 2017 Tax Revenue Collections

- **FY 2007**: $84,903,576
- **FY 2008**: $93,941,490
- **FY 2009**: $97,882,038
- **FY 2010**: $99,134,712
- **FY 2011**: $104,931,911
- **FY 2012**: $109,039,900
- **FY 2013**: $110,532,942
- **FY 2014**: $110,577,935
- **FY 2015**: $113,253,701
- **FY 2016**: $112,830,189
- **FY 2017**: $106,973,960
Kayenta Tax Ordinances

Hotel Occupancy Tax
  Tax upon buyer; Owner collects and remits
  Tax rate is 8%
  Effective October 1, 2011

Business Sales Tax
  Tax upon purchaser
  Tax rate is 6% (tax increased from 5%, June 1, 2018)
  Effective January 19, 1996
Model Tax Ordinance (Navajo Chapters)

Chapters have attempted to impose chapter taxes, but were unsuccessful for failure to comply with:

Local Governance Act, 26 N.N.C. §103(E)(8):

E. Chapters may adopt the following ordinances pursuant to §2001 of this Act.

... 8. Local taxes, pursuant to a local tax code developed by the Navajo Tax Commission and approved by the Navajo Nation Council.

Tuba City Sales Tax??
Federal Taxes

Federal Income Tax
  Individuals
  Companies
Federal Excise Taxes
  Fuel
  Tobacco
  Alcohol
  Health Care Related (Affordable Care Act)
  Airline Tickets
  Variety of commodities and services
Arizona Taxes within Navajo Nation

Transaction Privilege Tax
Income Tax
Property Tax
Fuel Excise Tax
Tobacco Luxury Tax
Liquor Luxury Tax
Use Tax
Other Taxes
New Mexico Taxes within Navajo Nation

Gross Receipts Tax & Compensating Tax

Income Tax

Tobacco Product Tax and Cigarette Tax

Oil & Gas Industry (Oil and Gas Conservation Tax, Oil and Gas Emergency School Tax, Oil and Gas Ad Valorum Production Tax, Natural Gas Producers Tax, Oil and Gas Equipment Ad Valorum Tax, Resources Excise Taxes, Severance Tax, Oil and Gas Production Tax)

Other Taxes
Utah Taxes within Navajo Nation

Sales Tax & Use Tax
Income Tax
Property Tax
Motor and Special Fuel Tax
Cigarette and Tobacco Tax
Beer Tax
Severance Tax (Oil, Gas and Mining)
Other taxes
Federal Preemption

Sales/Gross Receipt Tax - Sales to Indian tribes, are exempt from state taxes if the transaction takes place on Indian lands.

State Income Tax - Indian members (Navajos) are exempt from state income tax, if:
- The income derived within member’s Indian Reservation (Navajo lands); and
- The member (Navajo) resides on the Indian reservation (Navajo lands)

**NOTE:** States are also limited by U.S. Constitution, Commerce Clause BUT see South Dakota vs. Wayfair, ___ U.S. ___ (2018)
Nontaxable Transaction/Exemption Certificate

The seller obtains a certificate from state taxation department. Certificate allows seller to deduct those gross receipts when determining taxable gross receipts.

Navajo Nation government and entities are not obtaining state forms.

This means buyer is able to purchase goods or service free from gross receipt tax that is normally passed on to buyer.

Certificate is kept in in business files:
- Arizona (Form 500)
- New Mexico (Type 9)
- Utah (TC-721G)
Resolving “Dual Taxation”

Tribal tax credits

State tax credits

Tribal State Intergovernmental Agreements (See NM-Tribal Agreements)

Federal intervention (Federal Traders Statute, federal preemption, etc.)

NM/Tribal Tax Sharing Agreements

The Tax Sharing Agreements provide that if a pueblo, tribe or nation grants a 25% credit against its tax and meets other specified conditions, the state grants a 75% credit against state and local gross receipts tax due from taxpayers who are subject to both taxes (Section 7-9-88.1 NMSA 1978). The taxpayers therefore pay the same tax as they would under state and local taxes alone – dual taxation is eliminated. Tribal taxes apply only to businesses operating on land owned by a tribe or held by the United States in trust for the tribe.

Section 9-11-12.1 NMSA 1978 authorizes the Department to enter into agreements with the following pueblos, tribes or nations to collect any gross receipts tax they impose:
NM/Tribal Tax Sharing Agreements (cont.)

Acoma Pueblo
Cochiti Pueblo
Isleta Pueblo
Jemez Pueblo
Laguna Pueblo
Nambe Pueblo
Picuris Pueblo
Pojoaque Pueblo
Sandia Pueblo
San Felipe Pueblo
San Ildefonso Pueblo
Ohkay Owingeh Pueblo (formerly San Juan Pueblo)

Santa Ana Pueblo
Santa Clara Pueblo
Kewa Pueblo (formerly Santo Domingo Pueblo)
Taos Pueblo
Tesuque Pueblo
Zia Pueblo
Zuni Pueblo
The 19 New Mexico Pueblos acting collectively
Jicarilla Apache Nation
Mescalero Apache Tribe
Navajo Nation-State Tax Agreements

AZ Tobacco Tax - State tax credit and Intergovernmental Agreement (IGA)
AZ Fuel Excise Tax – IGA
AZ Transaction Privilege Tax/Navajo HOT and BAT – IGA
NM Fuel Excise Tax – State tax credit and IGA
NM Corporate Income Tax/Navajo BAT – Reciprocal state corporate tax credit against BAT
NM Gross Receipt Tax and Severance Tax/Navajo BAT – Reciprocal state tax credits and Navajo BAT credits for coal extraction
Texas Fuel Tax - IGA
Utah Gasoline Tax – State tax credit and IGA
Utah Sales Tax on Lodging – State tax credit and IGA
California Fuel Tax – IGA
Navajo Nation-owned Entities

Note: Instead of resolving “Dual Taxation” and other limitations, the Navajo Nation appears to create Navajo Nation-owned entities:

- Navajo Times Publishing, Inc.
- Navajo Tribal Utility Authority
- Navajo Housing Authority
- Navajo Agricultural Products Industry
- Navajo Engineering and Construction Authority
- Navajo Arts & Crafts Enterprise
- Diné College
- Navajo Technical University
Navajo Nation-owned Entities (cont.)

Navajo Nation Hospitality Enterprises
Navajo Nation Shopping Center, Inc.
Native Broadcast Enterprises
Navajo Nation Oil & Gas Co.
Diné Development Corporation
Navajo Nation Gaming Enterprise
Navajo Transitional Energy Company
Naat’áanii Development Corporation
South Dakota vs. Wayfair, ___ U.S. ___ (2018)

South Dakota amended sales tax to collected taxes on out-of-state online retailers. Issue: Do businesses have to collect state sales taxes on online transactions?

In 5-4 split, the Court held that physical presence is no longer required for a state to impose sales tax on retailers. This expressly overturned Quill Corp. v. North Dakota, in which the Court ruled remote sellers would have to collect state sales taxes only if they had a physical presence in a state, like a warehouse or office.

Potential Impacts: States and tribes will be able to require retailers to collect state sales taxes on transactions, regardless of physical presence. Billions of dollars in additional taxes for retailers and for governments collecting the taxes.
Current and Pending Tax Cases


Citizen Potawatomi Nation v. Oklahoma, 881 F.3d 1226 (10th Cir. 2018), cert. pending


Seminole Tribe of Florida v. Leon Biegalski, U.S. Court of Appeals for the Eleventh Circuit, No. 18-12094

Flandreau Santee Sioux Tribe v. Andy Gerlach et al., U.S.D.C. South Dakota, Southern Division, No. 14-4171
Future of Taxes within Navajo Nation

Application of *South Dakota vs. Wayfair, ___ U.S. ___* (2018) among states and tribes
  Internet taxes

Closure of Navajo Generating Station and Kayenta Mine

Development of Chapter and Township taxes
  Coordination of Navajo taxes throughout Navajo Nation

Resolution of “Dual Taxation”
  Federal intervention
  Further Intergovernmental Agreements

Income Tax/Payroll Tax?

Re-examine Navajo taxes upon groceries
Links to Taxes within the Navajo Nation

Navajo Nation taxes - http://www.tax.navajo-nsn.gov/
Arizona taxes - https://azdor.gov/
New Mexico taxes - http://www.tax.newmexico.gov/
Utah taxes - https://tax.utah.gov/