

A desert landscape at sunset. A road with white lines leads from the bottom left towards the horizon. The sky is filled with colorful clouds in shades of orange, yellow, and purple. The ground is dry and covered with sparse, low-lying vegetation.

The Legal Space Between Tribes and States: Taxation Statutes and Agreements

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Tribal Taxation Authority

- “The power to tax is an essential attribute of Indian sovereignty, because it is a necessary instrument of self-government and territorial management.”
 - *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982).
- Tribes have the power to tax non-Indians doing business on Tribal lands, even absent their explicit consent.
 - *Id.* at 144.
- By contrast, Tribal civil regulatory authority over non-Indians is presumed lacking, absent a consensual relationship or threat to Tribal political integrity, economic security, or the health and welfare of the Tribe.
 - *Montana v. U.S.*, 450 U.S. 544, 565 (1981).

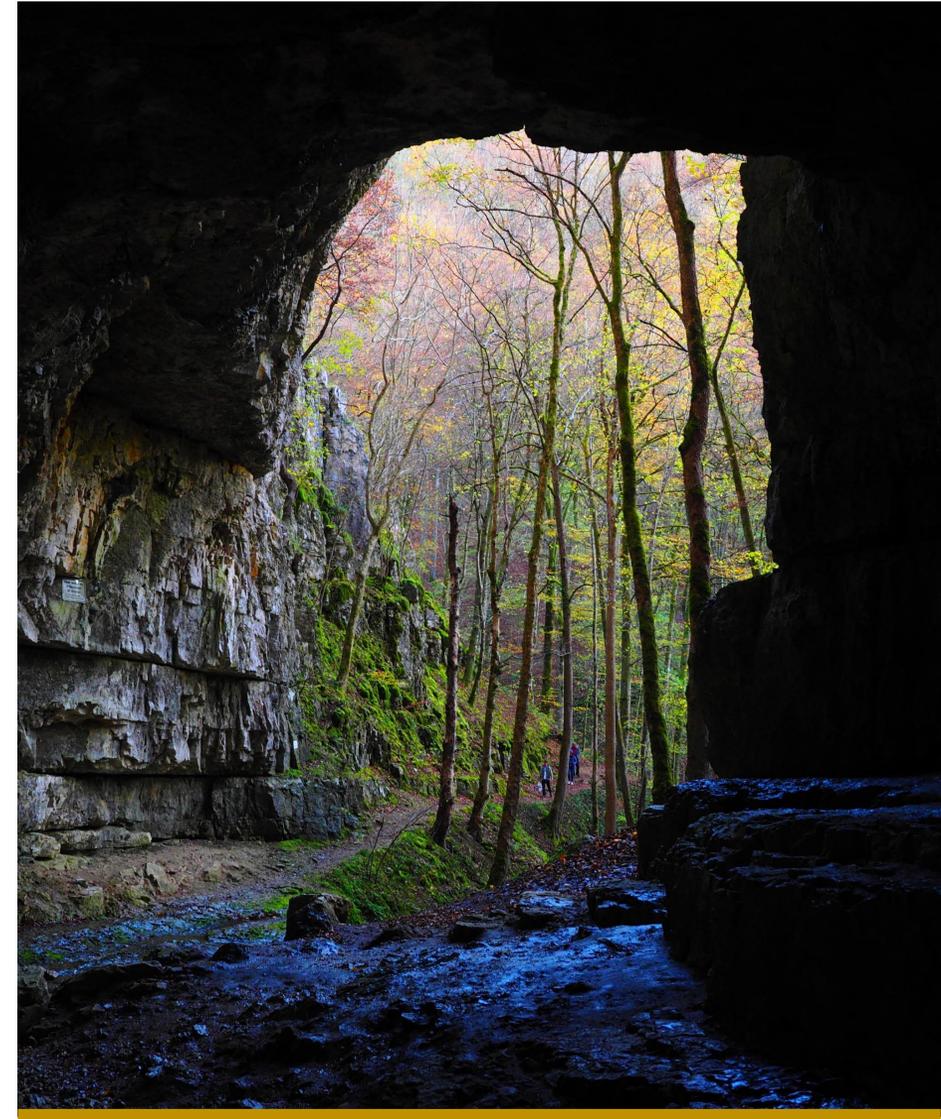
Federal Plenary Power Over Taxation on Tribal Lands:

(1) supplies the constitutional authority for federal taxation in Indian Country, and

- *Cherokee Tobacco v. Georgia*, 78 U.S. 616 (1870)

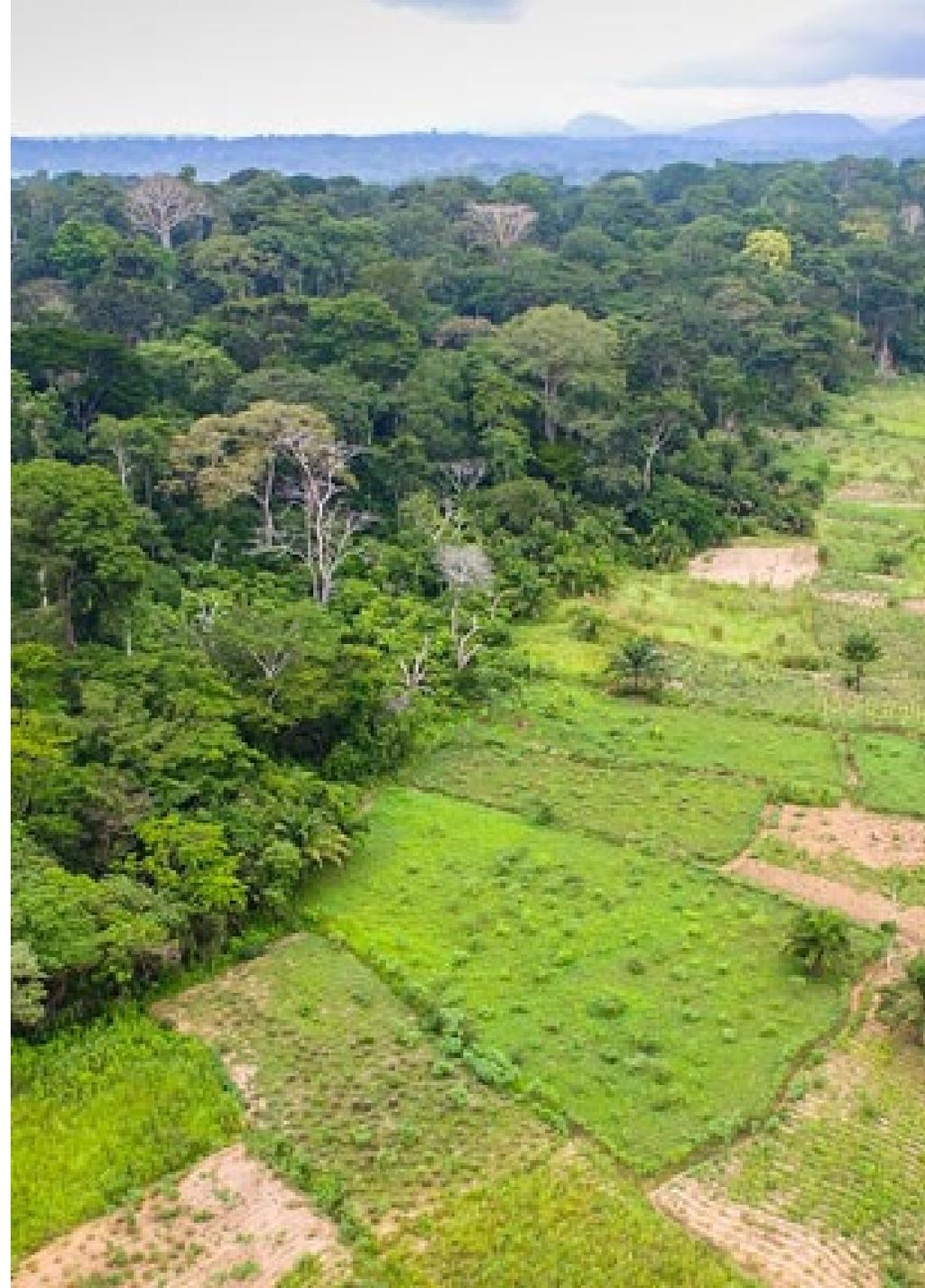
(2) gives Congress the exclusive authority to preempt, authorize, or allocate state and Tribal taxing powers.

- *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 170-71 (1973) (“State laws generally do not apply to Tribal Indians on an Indian reservation absent express authorization by Congress.”)

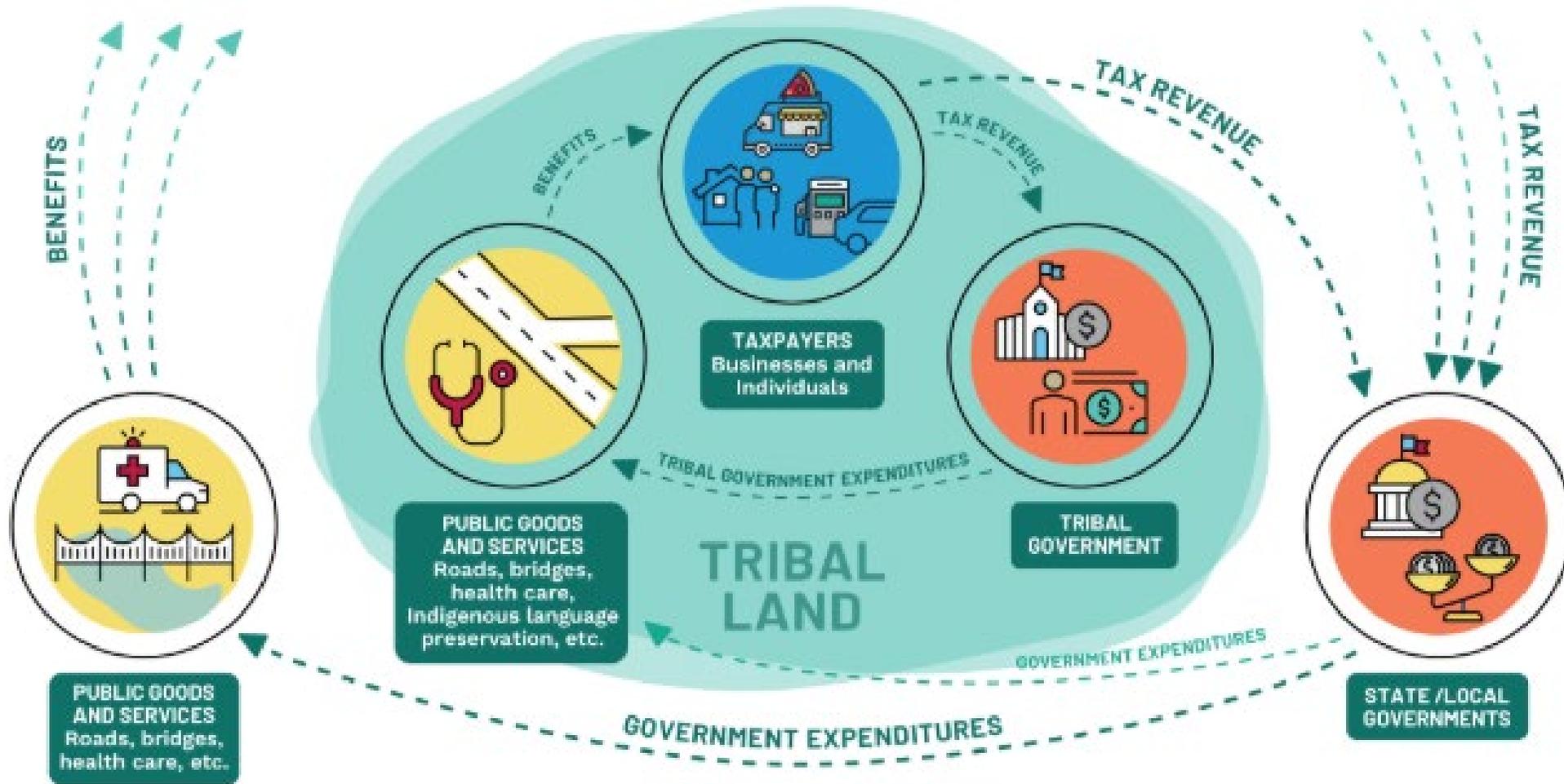


State Taxation Authority on Tribal Lands

- Generally lacking over Tribes and Indians, but
 - Possible over non-Indians. Must **balance**
 - Federal interests (statutes, regulations, trust responsibilities)
 - Tribal sovereignty interests
 - State interests (services provided, regulatory role)
- White Mountain Apache v. Bracker*, 488 U.S. 136 (1980)
- State tax can be concurrent with Tribe
 - *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989)



Flow of tribal tax revenue under dual taxation



But There is Also Uncertainty

- The preemption analysis under *Bracker* is fraught.
- Courts have struck down taxes on non-member retailers' sales to Tribes and Tribal members
- But courts have also upheld taxes on
 - Tribal cigarette sales to non-members,
 - State severance taxes on oil and gas produced by non-members in Indian country
 - And other comparable taxes

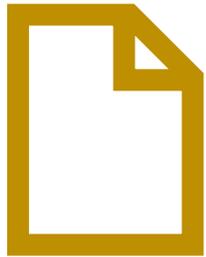




Leading us to Compacting...

- Both states and Tribes are incentivized to negotiate around *Bracker*.
- But what have they negotiated?
- We know taxation compacts exist, but outside anecdotal references, we don't have a comprehensive sense of what they say.

The Research: Looking for the On-the-Ground Reality



Publicly available compacts



Public information requests
for other compacts



State legislative action

A	B	C	D	E	F	G	H	I	J	K	L	M	N	
1	Compact Name/ID	State	Compacting Tribe	Effective Date	Industry	Introductory Terms	Acknowledgment of Tribal Sovereignty	Purpose to avoid litigation?	Reference to pre-agreement State/Tribal laws?	Authority Citation	Other Noteworthy Goals/Purposes	Tax Administration	Exemptions	Tribal Rate Agreements
2					Cigarettes, Sales and Use, Excise, etc.		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	BS- Both cite to statutes/ordinances			TO- Only Tribal members/entities exempt from state taxation RT- All taxation on the reservation is exempted from state tax	ES- Must be equal to State tax MS- Must be equal or greater than
3							<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>					
4							<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>					
5							<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				QN- Quota of good exempted, based on amount of good QR- Quota of value of good exempted, refunding an amount	NL- No limitation NT- No Tribal tax (State collects th
6							<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>				QRO- Option of quota system or refund system	SL- Specific Limitation
7	Cigarette and Tobacco Products Excise Tax Agreement Between the State of Alaska, Department of Revenue and the Metlakatla Indian Community	Alaska	Metlakatla Indian Community	01/01/1999	Tobacco Products		<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	No direct authority citation	Administrative burden		QR- formula based on Alaska per capita consumption x tribal population x adjustment factor for higher Native consumption rates TORIT- Sales of tangible personal property to Tribe/Entities/RTMs are exempt if property is purchased on and exclusively used within Tribal lands. There are a few specific total exemptions targeting Tribal gaming operations, such as exemptions for rental rooms, vehicles used for transportation to gaming facilities, and restaurant food and beverage sales at "casino operations". There is a general refund (for state taxes on general personal non-commercial property purchases) to RTMs for sales taxes calculated under a formula of their income (modified by many factors) x 15% x 6%. Amendments have added clarification for when transfer of property from an RTM to a non RTM would trigger State sales/use taxes, and allowing a buffer period for a building to become a personal residence for the construction tax breaks to apply. Also acknowledges that personal property purchased for exercising a treaty fishing right is exempt from state taxation regardless of where purchased.	NL
8	Tax Agreement Between the Bay Mills Indian Community and the State of Michigan	Michigan	Bay Mills Indian Community	04/01/2003	Sales and Use tax		<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	State cites statute, Tribe does not cite a source of authority			MS- Tribe has the option of collect taxes, or if they implement their own as state taxes, state tax is exempt revenue is shared.	
9	Tax Agreement Between the Bay Mills Indian Community and the State of Michigan	Michigan	Bay Mills Indian Community	04/01/2003	Motor Fuels		<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	State cites statute, Tribe does not cite a source of authority			QRO- Tribe can elect either a quota system where they may purchase an annual amount of State-tax free motor fuels to sell on Tribal lands, or a refund system where tribal retailers can request refunds for pre-paid state taxes.	SL- Quantity of goods available to determined by mutual consent of t adjusted annually. For the quota is not purchase more than 15% of th a given month.

1	A	B	C	D	E	F	G	H	I
1	ft	Link	Statute	Text	Cigarette Provisions	Income Tax provisions	Education	Notes	Type
2	Alabama	https://	§ 40-25-70. Refund of tobacco taxes.						
3	Alaska	https://	§ 43.98.015. Taxation under P.L. 92-203						
4	Alaska	https://	49 U.S.C.A. § 1620 Taxation						
5	Alaska	https://	§ 43.50.680. Possession of unstamped cigarettes						
6	Alaska	https://	§ 43.50.105. Restrictions on shipping or transporting cigarettes						
7	Alaska	https://	§ 43.77.045. Fisheries resource landing tax education credit						
8	Alaska	https://	§ 43.75.018. Fisheries business education credit						
9	Alaska	https://	§ 43.05.018. Mining business education credit						
10	Arizona	https://	§ 5-601. Gambling on Indian reservations; tribal-state compacts; tribal-state compact fund						
11	Arizona	https://	§ 42-3308. Agreements between the department and tribal tax authorities; definition						

Relevance?

- Tribal law is growing while SCOTUS is embracing more state encroachment.
- So much of Tribal sovereignty depends on what we understand as normative.

