The Power of Taxation in Indian Country

Transferring Indian Wealth to States and the U.S.

by

Rudolph C. Ryser

The United States government and the states of the United States want to tax Indian Country. In a further attempt to erode Indian governmental powers, absorb Indian peoples and extract greater wealth from Indian Country state governments and the U.S. government itself have expanded their efforts to establish their taxing jurisdiction into the heart of Indian communities.

No Indian Nation or Alaskan Native community has ever granted its consent to the United States or to individual states the right to impose taxes on economic activities inside its territorial boundaries. Yet, the U.S. government imposes its income tax on the earnings of individuals inside Indian Country. The U.S. government persists in its efforts to impose its income tax on individual Indian earnings from trust protected resources. The Lummi Nation has fought to resist this encroachment for six years. State governments press to impose their taxation schemes on retail sales, businesses, and wholesale activities, licenses and land.

What is wrong with states and the U.S. government imposing taxes inside Indian Country? The answer is simple and straight forward: No treaty between an Indian Nation or Native community and the United States specifically granted taxing power to the United States of America or any of her states. By not granting such power through such treaties or agreements, each nation reserved taxing power to itself. The reasoning cannot be explained more clearly. Absent explicit consent expressed in treaties or agreements, Indian Nations and Alaskan Native communities cannot be legitimately taxed by governments other than their own. If outside governments do exercise taxing jurisdiction inside Indian Country it is done as a result of an explicit agreement, or it is forcibly imposed without consent.

In the past twenty years, some Indian Nations have entered into "inter-local agreements" with state and county governments which provide for collection of outside-government taxes by Indian governments. The Pine Ridge government entered into a "Tax Collection Agreement" with the State of South Dakota. This agreement provides that the State of South Dakota returns 83% of the sales taxes collected by Indian retailers on Indian and non-Indian purchase to the Pine Ridge government. The Muckleshoot Indian Tribe entered into a similar "cigarette tax" agreement with the State of Washington. These are just a few of such agreements. These "modern agreements" are the exception rather than the rule. The basic reality remains, broad and explicit consent has not been granted by Indian Nations or Alaskan Native communities for outside governments to exercise taxing jurisdiction inside Indian Country.

Indian Country Pays $10 Billion Annually

Despite the absence of broad and explicit consent, the U.S. government's Internal Revenue Service seeks to impose "income taxes" on individual Indian earnings resulting from activities involving trust protected resources. The U.S. Internal Revenue Service collects income taxes from individuals working on Indian Reservations. This activity alone generates an estimated $400 million transfer of wealth from Indian Country to the United States treasury each year.

Despite the absence of consent, various State governments seek to expand their taxing jurisdiction into Indian Country. States impose taxes on non-Indians and Indians living inside Reservations. This activity generates an estimated $7.8 billion in annual receipts from Indian Country to State and local governments.

From three million people (both Indian and non-Indian) living on 116 million acres of Indian land, the U.S. government and state and local governments extract an estimated $10 billion in taxes each year. When this amount is added to the gross value of economic activity on Indian Reservations (estimated at $18.75 billion annually), Indian Nations contribute more than $28 billion to the U.S. economy and governments each year.

Indian Nations, contribute more each year to the U.S. economy than the combined economic output of 45 of the world's countries. Despite the enormous extraction of wealth from Indian Country, Indian and native peoples remain among the poorest of the poor - in many instances living at economic levels similar to many Third World countries.

The estimated actual revenues generated by Indian Country are small compared to what is actually possible. Indian Country has the potential of generating an estimated $84 billion annually. Since virtually all of the wealth currently generated by Indian Country leaves Indian reservations, little is actually available for reinvestment. Indian governments receive on the average less than one-half of one percent of tax revenues from economic activities on the reservations they govern. The bulk of their revenues come from grants and contracts from the United States government - estimated at about $180 million annually. Indian Nations, therefore, receive about six percent in return for revenues generated to the U.S. economy.

It is the possibility that Indian Country can and will generate many times the $28 billion annually that State governments and the U.S. government have begun to express strong interests in taxing Indian people and Indian resources. It is access to tribal resources and lands that makes increasing state demands for taxing jurisdiction in Indian Country so appealing.

Taxing Indians in Washington State

Since 1970, Indian Nations and the State of Washington have engaged in repeated conflicts over the question of state taxing jurisdiction inside Indian boundaries. While the states of Nebraska, California, Arizona and some twelve other states have also entered tax disputes with Indian Nations, we will look now more closely at the State of Washington/Indian Nations tax jurisdiction fight.

After seeing the economic successes of Indian Smoke Shops, grocery businesses and the potential for more businesses on Indian reservations in 1974, the State of Washington moved to establish an emergency tax rule aimed at imposing taxes on economic activities inside Indian reservations. It was called Rule 192.

Rule 192 was urged upon the Washington State Department of Revenue by the Washington State Attorney General's Office. The whole basis of the proposed rule was that: "[while] the state law does not set out what is included in the body of jurisdiction that is subject to petition by the tribes [for transfer of jurisdiction under PL 83-280]. The Department of Revenue asserts that the non-specified civil and criminal jurisdiction includes taxing jurisdiction."

At a Department of Revenue hearing on September 27, 1974, fourteen Indian government and U.S. government witnesses expressed opposition to Rule 192. Washington State Department of Revenue Director S.E. Tveden heard Colville Business Councilwoman Lucy Covington say, "The Colville Confederated Tribes will not pay taxes." Shoalwater Bay Tribal Chairman Earl Davis remarked, "First, you are infringing upon our sovereign rights and second, that we have our own constitution and by-laws and we tax ourselves on the Reservation."

Speaking as an attorney for the Lummi, Colville and Makah tribes, Robert Pirtle admonished the Revenue Director, saying, ". . . the Rule now says that all commerce on Indian Reservations will be taxed especially all commerce on any Reservation subject to PL 83-280 . . . ." He pointed out that this position was outside established interpretations of the U.S. law. Then Colville Chairman Eddie Palmanteer urged that Rule 192 "be revoked and that the rule be properly drafted to conform to federal-Indian law." Speaking for the United States government and representing the Regional Solicitor's Office in Portland, Oregon Arthur Biggs said, "... it is our position that the State of Washington does not have jurisdiction or authority to impose taxes with respect to Indians or Indian property within any Reservation in the state."

The Indian government and U.S. government positions were in unanimous opposition to proposed Rule 192. Though the Rule was virtually unenforceable, the State of Washington placed it in force in October 1974. As Washington State Attorney General Slade Gorton was later to observe, initiation of Rule 192 was important from the point of view of the State to force test court cases. Such cases did come at considerable expense and effort for both tribes and several states. Indian cigarettes were confiscated in transit by State Revenue officials. The State Attorney General railed at Indians and Indian governments saying, "Indians have an unfair economic advantage." and "Indians are Super-citizens."

Washington State's legal initiatives were supported by a broad-based political campaign to arouse public

support for "enforcing state taxation on Indian Reservations." By 1976, the new Washington Department of Revenue Director Mary Ellen McCaffree appeared as a witness before the American Indian Policy Review Commission on Federal, State & Tribal Jurisdiction in Yakima, Washington. McCaffree explained to the Task Force that while the State of Washington asserts the right to enforce its taxing jurisdiction on Indian Reservations, "asserting jurisdiction is one thing; actually collecting the revenue has proved to be quite a different matter." She affirmed that the State of Washington assertion was based on its interpretation of PL 83-280. She expressed the view that it was this law that permitted state taxing jurisdiction on PL 83-280 reservations.

McCaffree told the hearing panel that the State risked loosing sizable revenues if Indian Reservations were held to be exempt from state taxation. Following this reasoning, McCaffree said:

> *If Congress intentionally and formally were to fulfill the federal government's financial obligations to Indian people through exempting Indians from state taxing jurisdiction, the tax loss would represent a serious gap in state revenues. Such a program would require a federal subsidy to those states, such as Washington, which do experience a substantial lose.*

McCaffree offered a further caveat which she said creates a situation where the off-reservation, non-Indian retailer "begins to feel the pinch." Turning to her subject of "equal importance," McCaffree expressed her concern that the "real threat such a policy of tax immunity forecasts for the fundamental base of economic activity - fair competition on the market." In other words, the State of Washington (indeed any State government) argued that it was anti-free enterprise, anti- competition to permit Indian Nations to be exempt from State taxation. "Exemption from state and local property tax liability on restricted and trust lands within the exterior boundaries of the reservation and any immunity from excise tax application place Washington Indian retailers in a preferred position with respect to their non-Indian competitors."

The Washington State Revenue Director emphasized an additional point as an argument for state tax jurisdiction in Indian Country. "The thrust of our position," the Director told the Task Force, "is that the benefits deriving or occurring to the Indian people (from tax exempt status) are not commensurate in dollars with the revenue loss being suffered by the state." As a supplement to this argument the Director suggested that state services to Indian people also demanded payment of taxes from inside Indian Country.

The crux of state complaints about the inability of state governments to fully tax Indian Country was in 1976: Unfair economic competition and the "loss of revenues." The American Indian Policy Review Commission responded to these concerns by noting that there aren't any exact figures

> *for the total costs incurred by States and local governments for the delivery of services to reservations Indians; or for the amount of taxes contributed when such Indians or their tribes do pay State or local taxes, or for funds received by States or local governments from Federal sources as a result of having Indian lands, resources of people within their relative taxing or service areas.*

The basis for complaints by state officials to the Joint Congressional Commission in 1976 was not defined. State officials were seeking to enforce state taxation on Indian Reservations without basing their arguments in any factual information. In addition, the State took no legal or political actions against the U.S. Defense Department over the loss of revenues, or any other non-Indian tax-exempt facilities or properties within State boundaries.

By September 29, 1976 the Director of Washington State Department of Revenue had re-thought the arguments submitted to the American Indian Policy Review Commission just eight months earlier. Director McCaffree presented the American Indian Policy Review Commission with new testimony under the title Indian Taxing Jurisdiction Questions for the Western States. Representing the policy views of the States of Washington, California, Colorado, Idaho, Montana, Oregon, Utah, Arizona, Nevada, and Wyoming the new

testimony presented a new list of problems experienced by states:

1. The commingling of Indian and non-Indian persons within the reservation boundaries, and concerns for Constitutional rights of non-tribal members on the reservation.
2. The "checkerboarding" of trust and fee land status and Indian/non-Indian land ownership within reservation boundaries.
3. Present and potential tax-free economic enterprise taking place within reservation boundaries.

The States refined their concerns, but found that recent U.S. Court decisions had rendered those concerns moot. The issue of "checkerboarding" and state definitions of Indian Reservations were set aside by the U.S. Supreme Court decision in Moe v. Kootenai. The Court held ". . . absent of future Congressional action, the boundaries of Indian reservations are not diminished by passage of the land from trust to fee status, and the established reservation boundaries recognized by the U.S. Department of Interior must also be recognized by state governments . . . ."

Finding that the practice of connecting state taxation to particular classes of lands within Reservations was in error, the States now conceded the possibility that the assertion of taxing powers must be connected to non-Indians and their concern over "unfair economic competition." From this perspective, State officials began to argue that Indian sales to non-Indians should be taxed by the state. Such a practice would keep intact two of the States' three concerns.

McCaffree and here colleagues in the nine other western states urged the American Indian Policy Review Commission to adopt these recommendations:

1. *States are without power to impose state taxes with respect to on-reservation economic transactions and activities of enrolled Indians of that reservation, the legal incidence of which is upon such Indians. However, states may require Indian retailers to share, collect and remit to the state excise taxes levied upon non-Indian purchasers within the exterior boundaries of the Indian reservation.*
2. *For purposes of application of these principles the term "Indian reservation" means all lands within the exterior boundaries of a federally-recognized Indian reservation.*
3. *The term "Indian" means a person duly enrolled upon the membership rolls of the tribe upon whose reservation the economic transaction or activity occurs and who is domiciled upon such reservation.*
3. *States are authorized to use their general administrative and tax enforcement powers in furtherance of state collection of taxes lawfully to be remitted by Indians to the state, and further states are authorized to commence any state initiated tax enforcement litigation in either federal or state courts.*

The basic meaning of these policy recommendations from the western states is that they wanted the U.S. Congress to legitimize State taxation jurisdiction on Indian Reservations, and permit that jurisdiction to be imposed on the basis of race. The state's asserted tax jurisdiction would be imposed where non- Indians engaged in economic activity. The American Indian Policy Review Commission rejected these suggestions, and, instead sent the U.S. Congress six recommendations which said that states should not exercise taxation powers inside Indian Country. Indeed, the Commission (in its 1977 final report) urged not only curbs on state encroachments into Indian governmental spheres, but it urged that the U.S. government itself withdraw from imposing various taxes inside Indian Country.

Within a month after submitting western states recommendations to the American Indian Policy Review Commission, the State of Washington published proposed revisions in its Rule 192. These revisions incorporated the four recommendations and eliminated the Rule's original legal rational - imposing taxation in

Indian Country on the basis of PL 83-280. The Washington Department of Revenue called a hearing on November 8, 1976 and set November 10, 1976 as the date when the new Rule 192 would be amended and adopted.

The new draft Rule 192 contained still many provisions which Indian governments rejected. The new Rule 192 exempted retail sales to Indians inside Indian Reservations from State taxation, but imposed State taxation on the same kind of sales to non- Indians - even if the sale was concluded on a Reservation. Washington's Revenue Department sought to impose on Indian businesses and non-Indian businesses inside Indian Reservations the responsibility for maintaining records of their transactions. Indian vehicles operating outside of a Reservation would be sited for a use tax. Cigarette sales were to be regulated by a State tax stamp and non-Indian businesses would be responsible for paying the state a business and occupation tax - even though the business wholly takes place inside a Reservation.

Indian Governments Reject 192

In the statement issued to the Washington State Department of Revenue by Indian governments ("Statement of the Indian Tribes of the State of Washington on Proposed Rule 192" November 8, 1976), Indian officials expressed unanimous opposition to both "the proposed Rule 192 and the continued efforts of the State to impose its tax scheme upon our sovereign Indian nations." The inter-tribal statement further asserted "we will not permit the State to undermine the established principle of tribal sovereignty and jurisdiction or the principle of tribal self- determination . . . ." The Indian governments expressly opposed Washington State's rule provision which would make Indian governments responsible for collecting state taxes on transactions involving non-Indians.

On November 12, 1976 the Washington Department of Revenue adopted WAC 458-20-192 (Rule 192) entitled "Indians, Indian Reservations," thus setting the stage for another twelve years of confrontation, confiscations and political and legal disputes. By December 12, 1976 the Washington State Department of Revenue released a directive to retailers across the state. This directive advised that Rule 192 would not "apply to cigarette and tobacco products business by Indian tribes or Indians" on twelve Reservations. Retailers were also advised that Rule 192 provisions requiring Indian retailers to collect sales taxes "are not in effect" on eight Reservations. As a result of this revision, cigarette and retail sales transactions on Quileute, Quinault, Shoalwater, Skokomish, Squaxin Island, Chehalis, Nisqually and Muckleshoot would no longer be affected by Rule 192. The State of Washington ended up with a Rule, but no policy on its assertion of taxation jurisdiction on Indian Reservations.

The consequence of this action was that the State of Washington arbitrarily asserted its taxation claims through confiscations and periodic strikes on Indian retailers. Indian governments and individual Indian retailers continued to resist. The "Taxation Controversy" remained unresolved.

Toward Inter-Governmental Coexistence

No power is more basic to the sovereignty of a government than its power to tax. Taxation, like the power to raise an army, is the most intrusive governmental power in the lives of individuals. Because of this obvious fact, taxation arouses strong reactions - it touches every aspect of people's social, economic and political lives. Without taxation, though, a government cannot perform the functions it is established to perform: Redistribute wealth, provide for the well-being of the ill, and destitute; provide for the common defense, and provide for peace and order.

Tribal governments, the Federal government and each of the State governments exercise taxing powers. The U.S. Consitution specifically provides ways to determine the extent and limitation of taxing powers for those governments within the U.S. Federal System. Only the Federal, State, County and Municipal governments are embraced by the Federal System. Indian governments, on the-other-hand, are not members of the Federal System. Though geographically surrounded by the U.S. and various states, Indian nations are like politically distinct islands surrounded by a sea of land - they are outside the U.S. Federal System.

What does this mean for the exercise of taxing powers? The extent of a government's taxing powers is determined by the limits of jurisdiction and the limits of boundaries. Treaties and agreements between Indian

nations and the United States limit U.S. government and state government taxing jurisdiction - Indians have not consented to the extension of U.S. and state jurisdictions into Indian government jurisdictions. Boundaries limit the exercise of taxation. When an individual travels from one county to another, a boundary is crossed - the taxing jurisdiction changes. When an individual travels from one state into another state, a boundary is crossed - the taxing jurisdiction changes. When an individual travels from a state into an Indian Reservation, a boundary is crossed and the taxing jurisdiction changes too.

The U.S. Constitution, and the federal system of governments it created, seeks to guarantee the permanent existence of states, counties and cities. It is used to ensure the integrity of boundaries and governmental jurisdictions. Neither the U.S. Constitution nor the Federal System guarantee the permanence of Indian nations, the integrity of their boundaries or their governmental jurisdictions. Indian nations must look to Treaties, agreements and self-imposed restraints by states and the U.S. to guarantee their permanence. Indian nations must rely on effective government to government relations with their neighbors to either confirm restraints or force restraints. Obviously, in the tax jurisdiction arena, Indian nations have not been wholly successful.

While taxation is the primary method for supporting governmental functions, it is also the primary method for defining the effectiveness of the economy. When State governments develop and initiate tax policies within their boundaries, they influence the economic prosperity or economic decline of the state. Similarly, when the United States government initiates tax policies within its boundaries, it seeks to influence economic activities generally and within the states. U.S. taxing policies influence interest rates, the availability of lending capital, the extent and kinds of business investments, and the kinds of business activities. As we saw earlier, both State and U.S. government taxation policies inside Indian Country are mainly aimed at the collection of taxes, controlling labor and extraction of raw materials for the benefit of both the State and U.S. economies. Indian government tax policies are aimed at building an internal economy, but the magnet effect of State and U.S. taxation defeats Indian government efforts.

At the current rate States and the U.S. government are encroaching on Tribal government taxation jurisdictions, Indian nations will be wholly under the taxing authority of various states within a generation. One of the primary attributes of tribal sovereignty will have been wiped out. Indian nations will have been absorbed into the states.

Such a possibility is contrary to stated Indian nation aspirations, and contrary to U.S. government treaty commitments. Since there is no real protection of Indian nation sovereignty in the U.S. Constitution, and the U.S. Federal System works to defeat the aspirations of Indian nations, Indian governments must redouble their efforts to formalize a system of government to government relations which will establish formal and enforceable restraints on States and the U.S. government. A web of inter-governmental agreements and treaties aimed at clarifying tribal/state and federal taxing jurisdictions is now essential to protect Indian nations. Indian governments must seek negotiations with the U.S. government and various state governments to secure long term commitments on the restraint of outside government taxation. Only through such government to government negotiations can Indian nations ensure the preservation of their soverign powers and their permanence coexisting with the States and the United States of America.