

Cigarette Taxes – New Mexico Case Study

AMERICAN INDIAN LAW CENTER TRANSITIONS TRIBAL LEADERSHIP
CONFERENCE

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State Tribal Tax Model

General Overview

New Mexico State-Tribal Tax Model

Collaboration
and
Cooperation

State of New Mexico and
Pueblos/Nations/Tribes* have
cooperated on tax policy matters since
early 1990s

New Mexico model has served as
foundation for how the State and
Tribes address tax matters

New Mexico model is exceptional in
comparison to other States

* Will be referred to collectively as “Tribes”

Cooperative Approach Avoids Dual Taxation

State and Tribes agreed that:



- Dual taxation depresses economic activity
- Dual taxation discourages businesses from locating on tribal lands
- NM Tribes, like any other government, rely on tax revenues for essential government services
- The State benefits from having strong economies, particularly since tribes and tribal businesses are often the main employer in remote areas
- The State benefits from strong tribal governments with resources for essential services

Cooperation and Collaboration Through Legislation and Agreements

- ❖ New Mexico Legislature and Tribes have addressed gross receipts, cigarettes, gasoline, and severance tax matters. Will be addressing internet sales tax.
- ❖ New Mexico Legislature has passed legislation that grants an exemption or deduction, or has passed legislation to authorize the State to enter into tax agreements with Tribes

Commitment by New Mexico and Tribes that:

- Recognizes tribal sovereignty over the Tribe's lands
- Tribal taxes will be primary on economic activity on tribal lands
- Taxation is based on activity on the Tribe's lands, not based on whether sale is to tribal member or non-member



Legislation vs. Litigation on Tax Issues

LEGISLATION



- + Recognition of tribal sovereignty and the government to government relationship
- + “Seat at the Table” for Tribes if done right
- + Negotiation and discussion of areas of concern
- + Long term historical legislative precedent
- + Creates positive approach for other State Tribal issues, including non-tax issues
- Concession on tax rate or percentages
- “Creature of State law” so always monitoring tax legislation and educating legislators

LITIGATION



- Takes contentious issue and makes it worse – adversarial in nature
 - Legalistic parsing of Federal Preemption analysis
 - Recurrent litigation – costly
 - No stability in tax policy
 - “All or nothing” approach
 - Can set bad precedent in area of Indian tax law
 - Creates friction for other State Tribal issues
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Support for New Mexico's "Tax Peace"

- Every NM Republican and Democrat Governor since 1995 has pledged their support for the dual taxation legislative fixes for the Severance, Cigarette, Gross Receipts and Gasoline Tax areas
- USDOT recognized NM's approach and fuel tax agreements as successfully addressing a contentious situation involving fuel taxation on tribal lands. USDOT recognized "the **larger success story of this arrangement** is that it has solved what seemed, for some time, to be an intractable issue for this state, for tribes, **many see this arrangement as a net positive because it has not only provided for tribal revenue, but also provided for "tax peace,"** thus allowing for attention to other issues and for **increased interest in economic development from outside companies on tribal lands."**
<https://www.fhwa.dot.gov/policyinformation/motorfuel/aismf/chap3.cfm>
- New Mexico Association of Commerce and Industry supports NM solution: "ACI **favors legislative action** to address situations in which double taxation of industry and/or multiple administration of taxes imposed by New Mexico and the Indian nations inhibits economic growth on tribal lands." (2017 Interim Policy Agenda, p. 39)

Good Tax Policy Benefits

Sound tax policy for both Tribes and the State should:

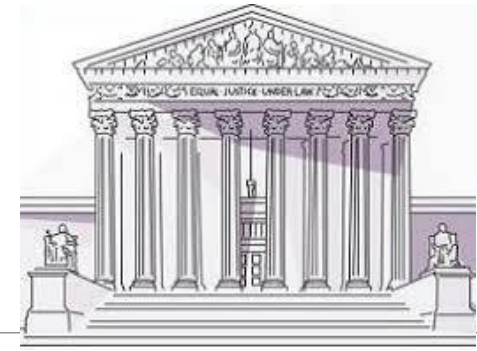
- Provide revenue for essential governmental services
- Support economic activity. For that the taxes need to:
 - Provide certainty to support long term investment and encourage sharing of tax information
 - Not overburden industry to point of killing the business
 - Avoid dual taxation
 - Be consistent with taxes across the jurisdictional line – tribal tax based on jurisdiction rather than consumer
- Generate more economic benefit (through sound tax deductions and exemptions) than the taxing jurisdiction gives away



Cigarette Taxes in New Mexico



Cigarette Taxation Backdrop – *Colville* Cigarette Tax Case



U.S. Supreme Court case of ***Washington v. Confederated Tribes of the Colville Indian Reservation***, 447 U.S. 134 (1980) changed landscape for tribal taxation, and the collection of State cigarette taxes on cigarette sales on tribal lands.

State of Washington sought to impose various state taxes and other laws to transactions and activities occurring on Indian reservations. Tribes challenged these efforts.

The U.S. Supreme Court held:

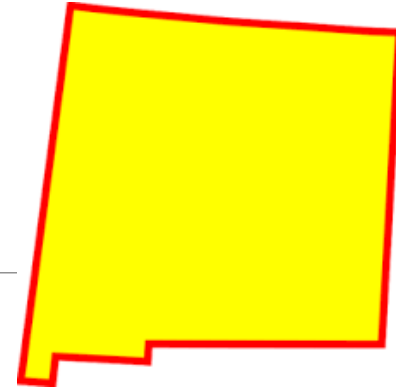
- The imposition of **Washington's cigarette and sales taxes** on on-reservation purchases by nonmembers is **valid**.
- The **Tribes have the power to impose their cigarette taxes on nonmember purchases**, since the power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a **fundamental attribute of sovereignty** which the tribes retain unless divested of it by federal law or necessary implication of their dependent status.

Colville Cigarette Tax Case (cont'd)



- There was **no direct conflict between the state taxes and the Tribes' cigarette tax ordinances so as to warrant invalidation of the state taxes** on grounds of preemption or violation of the principle of tribal self-government.
- The **State may validly require, as a minimal burden, the tribal smokeshops to affix tax stamps purchased from the State** to individual packages of cigarettes prior to the time of sale to nonmembers of the Tribe. *Cf. Moe v. Salish & Kootenai Tribes*, [425 U. S. 463](#).
- The **State's interest in taxing nontribal purchasers outweighs any tribal interest** that may exist in preventing the State from imposing its taxes.
- The **State's interest** in enforcing its taxes is **sufficient to justify its seizure of unstamped cigarettes as contraband if the Tribes do not cooperate in collecting the taxes.**

History of Cigarette Tax in NM



- ❖ The State of New Mexico had treated tribal smoke shops as exempt from the State's cigarette and tobacco taxes for over 30 years.
- ❖ In 1981, in response to the *Colville* ruling, the Legislature offered bill that would have imposed state cigarette taxes on sales to non-Indians. The bill was rejected.
- ❖ In 1992, the Legislature amended the cigarette tax statute to officially recognize the tribal smoke shop exemption.
- ❖ In 2009 the Legislature adopted a similar amendment of the tobacco products tax.

History of Cigarette Tax in NM (cont'd)

- ❖ Under this long-standing New Mexico law, cigarettes sold to Tribes, Tribe-owned businesses, and enrolled Tribal members licensed by Tribal government for use or sale on the Tribe's land were exempt from the State's cigarette tax.
- ❖ Similarly, tobacco products sold to Tribes, Tribe-owned businesses, and enrolled Tribal members licensed by Tribal government for distribution on the Tribe's land are exempt from the tobacco products tax.
- ❖ **These exemptions have helped create successful economic development on Tribal land.** The benefit is not simply from the sale of cigarettes and tobacco products, but also, from the sale of other goods and services at Tribally-owned convenience centers and other retail establishments.



History of Cigarette Tax in NM (cont'd)

❖ State Cigarette Tax rate has been stable for relatively long periods of time with increases coming years apart:

- 12¢ per pack from 1968 to 1986
- 15¢ per pack from 1987 to 1993
- 21¢ per pack from 1994 to 2003
- 91¢ per pack from 2004 to 2009
- \$1.66 per pack from 2010 to 2018
- \$2.00 per pack beginning July 1, 2019



❖ As the State cigarette tax increases, the price advantage of tax-exempt tribal smoke shops increases. This “**price advantage**” may increase the statewide cigarette market share for tribal smoke shops and raises concerns that tribes are getting “too much of the market,” have an unfair advantage, and defeat the purpose of reducing smoking through higher cigarette prices.

History of Cigarette Tax in NM (cont'd)

❖ Various events can effect/threaten tribal cigarette tax structure:

- Politics
- State budget shortfalls
- Market competition
- Pressure from “Big Tobacco”
- Health and anti-smoking interests



❖ 2008 – 2009 Events That Threatened Cigarette Tax Exemption

- Severe State budget shortfall
- Big Tobacco pressure re Master Settlement Agreement (MSA)
- Political pressure to eliminate tribal cigarette tax exemption
- Governor Richardson’s Budget Balancing Task Force

2009 Cigarette Tax Change



Proposed legislation:

- Eliminate tribal cigarette exemption completely
- Eliminate tribal cigarette exemption for sales to nonmembers and provide distribution to tribal members – the AZ model

Attorney General proposal:

- Tax compacting like other states

Compromise solution between State and Tribes:

- State increases tax rate from 91¢ to \$1.66 per pack
- State tax is not imposed on cigarettes sold on tribal lands provided the Tribes impose tribal tax of 75¢ per pack. Tribes retain 100% of the tribal tax
- Use of tax credit stamps for all cigarette packs sold on tribal lands
- Maintains 91¢ price differential between sales on tribal lands and sales off of tribal lands
- Applies to all sales on tribal lands, regardless of whether purchaser is tribal member or nonmember

2019 Cigarette Tax Change



❖ Effective July 1, 2019:

- Increase State cigarette tax from \$1.66 to \$2.00 per pack
- No impact to tribal cigarette exemption
- No requirement that Tribes increase tribal tax – no change to definition of “qualifying tribal tax” where the 75¢ tribal tax per pack requirement is contained

❖ Recent Concerns:

- Increases price differential between on and off-reservation sales from 91¢ to \$1.25 per pack
- Raises concerns about tribal smoke shop market advantage
- Pushes sales to tribal locations; defeats smoking reduction efforts and reduces state tax revenue used for smoking cessation and other health programs
- Could impact other favorable state-tribal taxes

Considerations for Tribes



Option 1:

- Do nothing and keep current 75¢ per pack tribal tax in place
- Keep the \$1.25 price differential and wait until NM Legislature acts.
- Politically risky.

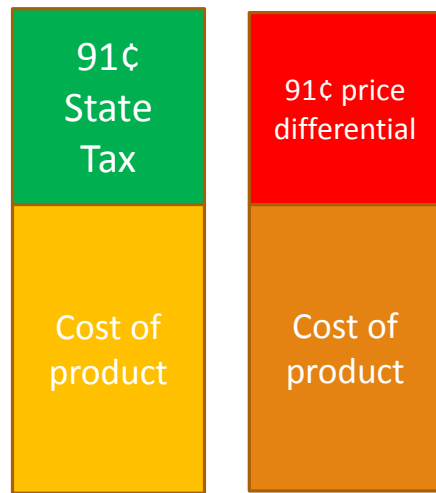
Option 2:

- Increase tribal tax rate from 75¢ to 1.09 per pack.
- Maintains the 91¢ differential between sales on tribal lands and sales off-tribal lands.
- Proactive approach.
- Most politically sound.

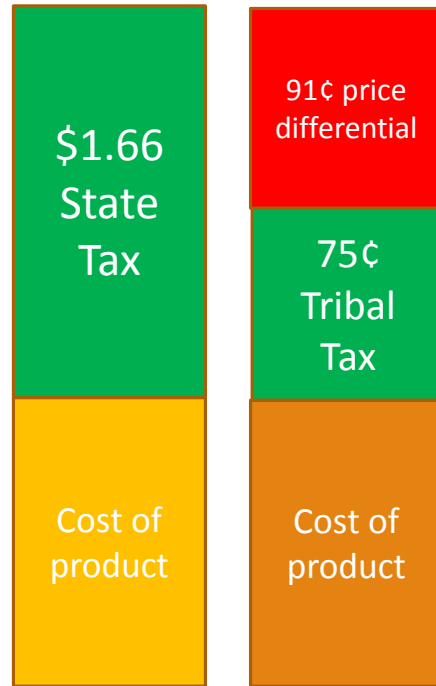
Option 3:

- Increase tribal tax rate from 75¢ to another rate that is less than \$1.09 per pack to lessen the price differential between sales on tribal lands and sales off-tribal lands.
- Slight risk if tax increase isn't enough.

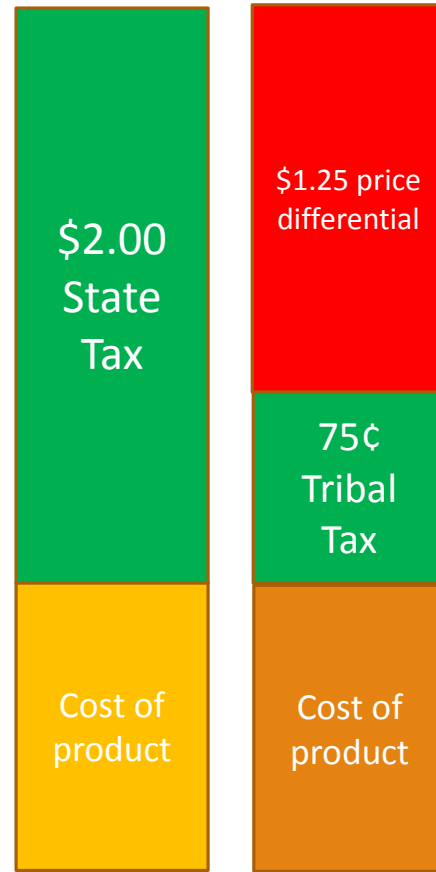
- Off Res Cigarettes
- Tribal Cigarettes



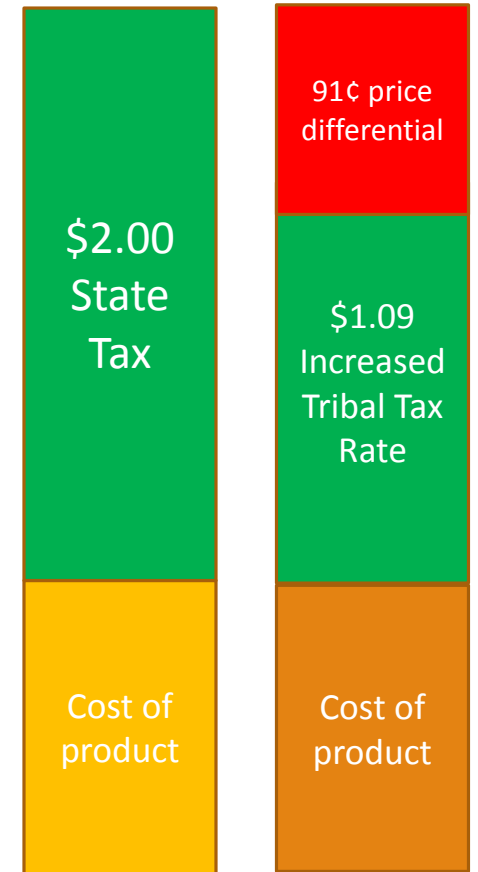
Tax Structure with 91¢ Price Differential



Tax Credit Stamp Amendment



2019 State Tax Amendment



Option to increase tribal tax to keep price differential

Tribal Cigarette Tax Rate Status

As of today:

- Some Tribes have increased their tribal cigarette tax to \$1.09 to maintain the 91¢ price differential
- Some Tribes have increased their cigarette tax to more than \$1.09 so that the price differential between on-res and off-res sales is less than the 91¢
- Other Tribes have not taken any action on their tribal cigarette tax of 75¢



QUESTIONS

