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# State-Tribal Tax Compacts: Stories Told and Untold

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# **State-Tribal Tax Compacts: Stories Told and Untold**

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## State-Tribal Tax Compacts: Stories Told and Untold

In the United States, intergovernmental agreements close the gap between concepts of sovereignty and the necessities of governance. They are used to give practical meaning to broad legal principles, to effectuate court decisions and legislative delegations of authority, and to clarify ambiguous laws. In some cases, agreements resolve disputes that would otherwise be mired in costly, protracted, and sometimes inconclusive litigation.<sup>1</sup>

### Introduction

Behind every state-tribal tax compact, there is a story. Most of these stories remain untold.<sup>2</sup> Compacts, which are agreements between sovereign governments, often help states and tribes settle or prevent disputes over overlapping tax jurisdiction.<sup>3</sup> Yet much about them is unknown. Only the final, signed agreements are preserved—and even those can be hard to find. In discussing compacts, scholars often focus on broad issues of important national concern.<sup>4</sup> Such work adds a lot of value, and helps inform federal, state, and tribal policymakers. But many questions remain. What are the ideal terms of a

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<sup>1</sup> David H. Getches, *Negotiated Sovereignty: Intergovernmental Agreements with American Indian Tribes as Models for Expanding Self-Government*, 1 REV. CONST. STUD. 120, 121 (1993).

<sup>2</sup> If a compact resulted after litigation and press coverage, the background information is more likely to be in the public record. *See, e.g.*, Mark J. Cowan, *Anatomy of a State/Tribal Tax Dispute: Legal Formalism, Shifting Incidence, Potatoes, and the Idaho Motor Fuel Tax*, 8 J. OF LEGAL TAX RESEARCH (2010) [hereinafter Cowan, *Anatomy*] (discussing the years of litigation and disputes between Idaho and tribes which culminated in state-tribal compacts on fuel taxes).

<sup>3</sup> Tribes and states may enter into a variety of compacts—over water rights, environmental issues, regulation, etc. This paper focuses specifically on compacts addressing tax issues. Some of the tax compacts, however, include agreements over regulatory issues. This is particularly true regarding compacts addressing tobacco and legalized cannabis.

<sup>4</sup> *See, e.g.*, ANNE F. BOXBERGER FLAHERTY, STATES, AMERICAN INDIAN NATIONS, AND INTERGOVERNMENTAL POLITICS: SOVEREIGNTY, CONFLICT, AND THE UNCERTAINTY OF TAXES (2018) (reviewing cigarette tax disputes, particularly in New York); Mark J. Cowan, *State-Tribal Compacts and the Taxation of Nonmembers*, 99 TAX NOTES STATE 679 (Feb. 15, 2021) (reviewing how tax compacts provide an opportunity for more fairness in Indian Country) [hereinafter Cowan, *State-Tribal Compacts*]; Mark J. Cowan, *Taxing Cannabis on the Reservation*, 57 AM. BUS. L.J. 567 (2020) (discussing how state-tribal compacts are being used in the nascent state-legalized recreational cannabis industry) [hereinafter Cowan, *Cannabis*]; Mark J. Cowan, *Double Taxation in Indian Country: Unpacking the Problem and Analyzing the Role of the Federal Government in Protecting Tribal Governmental Revenues*, 2 PITT. TAX REV. 93 (2005) (discussing, in general, how states and tribes might use compacts to resolve tax disputes and how the federal government might foster such agreements); Getches, *supra* note 1 (discussing compacting in the U.S. as a model for use in Canada). Occasionally, individual compacts—and the circumstances which led to them—are analyzed. *See, e.g.*, Cowan, *Anatomy*, *supra* note 2.

compact? What factors motivate state and tribal officials to enter into compact negotiations? How are the negotiations structured and what are some best practices? Have the compacts that have been in place for years been beneficial to the tribes and the states? How would a state or tribe seeking to negotiate a tax compact start the process? What resources are available to them? How have similar issues been addressed by other states and other tribes? What insights can state and tribal officials and their representatives who have successfully navigated the tax compact process provide? Knowing the answers to these questions, and the untold stories associated with them, would be instructive. This paper cannot answer these questions, given its limited scope and the dearth of available information. But this paper can get the process started. Specifically, this paper provides background information on the need for tax compacts in general; distills some initial lessons from a sampling of tax compacts across several states, tribes, and tax instruments; and suggests topics for further research. The conclusion is clear: more work needs to be done in the area—work that has the potential to inform the compacting process to the benefit of tribes, states, and those seeking to do business in Indian Country.

## **Background<sup>5</sup>**

Many factors stand in the way of clear, fair taxation in Indian Country. Among these are a unique, complex, uncertain, sometimes archaic, and often formalistic legal landscape that often spawns litigation; overlapping state and tribal jurisdictions with no formal coordination procedure between the sovereign governments involved; and, in

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<sup>5</sup> Some of the material in this section is adapted from Cowan, *State-Tribal Tax Compacts*, *supra* note 4.

many cases, longstanding mistrust or even enmity between the states and the tribes with reservations located within their borders.<sup>6</sup>

The specific issue that most tax compacts seek to address is the taxation of those who engage in business or transactions in Indian Country, but are not members of the tribe governing the reservation. For tax purposes, an individual is considered a “member” of a tribe if he/she is listed on the membership roll of the tribe controlling the reservation on which he/she resides or does business. All others, including non-Indians *and members of other Indian tribes*, are considered nonmembers for tax purposes.<sup>7</sup> As explained below, taxation of nonmembers is where state and tribal taxing jurisdiction overlaps. If not addressed, actual or potential dual state-tribal taxation of the on-reservation activities of nonmembers can hinder economic development in Indian Country, reduce the ability of tribes to exercise their sovereign rights of taxation, and exacerbate the pall that has long surrounded many state-tribal relations. (See box 1 for discussion of tribal sovereignty.)

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### **Box 1. Tribal Sovereignty**

Along with the federal government and the state governments, federally recognized Indian tribes are considered sovereign entities.<sup>8</sup> Under the Indian Commerce

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<sup>6</sup> For a thorough analysis and critique of the tax law in Indian Country, see Richard D. Pomp, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation*, 63 TAX LAW. 897 (2010).

<sup>7</sup> See, e.g., *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 161 (1980) (noting that members of tribes other than the tribe governing the reservation “stand on the same footing as non-Indians resident on the reservation”).

<sup>8</sup> Upon arriving in American, the European powers implicitly acknowledged tribal sovereignty by dealing with the tribes as they would other foreign governments and leaving the tribes to govern their own internal affairs. WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW* 76 (5th ed. 2009); see also COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 4.01 (Nell Jessup Newton, et al. eds. 2012) [hereinafter COHEN’S HANDBOOK].

Clause of the U.S. Constitution, the federal government has exclusive power over Indian affairs.<sup>9</sup> States may only exercise authority on tribal lands within their borders if federal law so provides. Thus, tribes and states are bound together *geographically* but not *politically*. From the outside, tribes may appear to operate much like local governments—such as cities, towns, or counties. But in contrast to tribes, local governments do not have sovereignty. Local governments only have the power (including taxing power) that has been delegated to them by the true sovereign—the state in which they are located.<sup>10</sup> The state has ultimate responsibility for local affairs, even though in practice it may allow a lot of autonomy and power to reside at the local level. Any state versus local dispute can ultimately be resolved using state power. Unlike local governments, tribes have inherent sovereignty over local affairs and do not owe their power to the state in which they are located.<sup>11</sup> States and tribes, as close neighbors, must work together on local issues. Yet neither has significant authority over the other. State-tribal disputes over local matters—like taxes—can only be resolved by state-tribal agreement or by the intervention of the federal government.

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<sup>9</sup> Under the Indian Commerce Clause, one of Congress’s enumerated powers is to “regulate Commerce . . . with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3. The U.S. Supreme Court has interpreted this clause as vesting exclusive power over the Indian tribes in the federal government. *See Cherokee Nation v. Georgia*, 30 U.S. 1, 19 (1831).

<sup>10</sup> Michael A. Pagano, “*The Third Rail*”: *Local Governments and Taxing Espresso*, 2003 ST. TAX TODAY 297-7, Oct. 27, 2003 (indicating that local governments, “as creatures of their states, exercise fiscal authority differently depending on what the state allows”).

<sup>11</sup> *See* CANBY, *supra* note 8, at 71.

[A] tribe is quite unlike a city or other subdivision of a state. When a question arises as to the power of a city to enact a particular regulation, there must be some showing that the state has conferred such power on the city; the state, not the city, is the sovereign body from which power must flow. A tribe, on the other hand, is its own source of power . . . the tribe is sovereign.

*Id.*

## *Taxation in Indian Country*

As sovereign governments, tribes have the power to impose taxes on their members and on nonmembers doing business within their jurisdiction.<sup>12</sup> States can also tax nonmembers within tribes' jurisdiction, using authority that is delimited by decisions of the U.S. Supreme Court. Under the Court's guidance, states are prohibited from taxing tribes and tribal members directly with regard to their on-reservation activities unless such taxation has been allowed by federal law.<sup>13</sup> Absent federal preemption of state taxation, however, a state is allowed to impose nondiscriminatory taxes on nonmembers doing business on Indian reservations located within the state's borders.<sup>14</sup>

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<sup>12</sup> *E.g.*, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (holding a tribe may impose, based on its inherent sovereign governmental powers, a severance tax on nonmember lessees extracting oil and gas from the reservation); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (upholding a tribal cigarette tax on nonmembers purchasing cigarettes on the reservation).

<sup>13</sup> *E.g.*, *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 453 (1995) (striking down a state fuel excise tax assessed on fuel sold by tribally owned stores and stating that a state tax will not stand if the legal incidence is directly on the tribe or a tribal member operating entirely on the reservation); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985) (striking down a state tax on royalties the Blackfeet tribe received from nonmember lessees of oil and gas properties on the reservation); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (striking down a state motor vehicle "privilege" tax assessed on tribal members); *Bryan v. Itasca County*, 426 U.S. 373 (1976) (striking down a state personal property tax on a mobile home owned by a tribal member because it was not explicitly authorized by federal law); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976) (striking down state cigarette and motor vehicle taxes where the legal incidence of the tax fell on a tribal member); *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 165 (1973) (ruling that Arizona may not impose its personal income tax on a tribal member working exclusively on the reservation).

States may, however, generally tax tribal members and tribes on their off-reservation activities. *See, e.g.* *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 462-64 (1995) (upholding a state income tax on tribal members who worked for an Indian tribe, but who lived off of the reservation); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (allowing the state of New Mexico to impose a gross receipts tax on a tribal ski resort operated outside of the tribe's reservation).

<sup>14</sup> *E.g.*, *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156-59 (1980) (upholding a state cigarette tax on nonmembers—even where the tribe imposed its own tax on such sales); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 483 (1976) (also upholding a state cigarette tax on nonmembers purchasing cigarettes on the reservation because the legal incidence of the tax fell upon the nonmember purchasers).

The ability of states to impose taxes in Indian Country turns on the legal incidence of the tax.<sup>15</sup> If the legal incidence is on the tribe or tribal members, taxation is prohibited.<sup>16</sup> If the legal incidence is on a nonmember, taxation is generally allowed—even if the *economic* incidence of the tax falls on the tribe or tribal members.<sup>17</sup> (See box 2 for discussion of tax incidence.)

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#### Box 2. Legal and economic incidence of a tax

The “incidence” of a tax refers to the “party on whom the burden of a tax falls.”<sup>18</sup> Policymakers normally distinguish the *legal incidence* of a tax from the *economic incidence* of a tax. The legal incidence of a tax falls on the party that is required, by the tax statute, to actually file a tax return and remit the tax to the government. If the party with legal incidence fails to do so, the government can impose civil or criminal penalties on that party and seize its assets. The economic incidence falls on the party that actually bears the burden of the tax. That is, the party that is worse off, economically, because of the tax. For example, the legal incidence of the federal corporate income tax falls on the corporation itself, while the economic incidence may fall on the corporation’s workers, customers, shareholders, or suppliers—depending on the ability of the corporation to pass on the cost of the tax to those parties. A corporation may, for example (and depending on

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<sup>15</sup> The legal incidence is usually clear: it is the party the tax statute specifies as being responsible for actually paying the tax to the government. If the tax is not paid, the government will attempt to collect the tax from the party with the legal incidence. In doing so, the government may impose penalties on that party and, if necessary, seize that party’s assets to satisfy the tax bill.

<sup>16</sup> See *supra* note 13.

<sup>17</sup> Because the ability to transfer the tax burden turns on market conditions, the law of supply and demand (including elasticity), contractual arrangements, and other factors, economic incidence can be difficult to measure.

<sup>18</sup> RICHARD WESTIN, WG&L TAX DICTIONARY 345 (2000).



what the market will bear), pass on the burden of the tax by paying workers less in wages, charging customers more for products and services, paying shareholders less in dividends, or paying vendors less for purchases. While legal incidence is a function of the taxing statute—and thus could easily be changed by lawmakers—economic incidence is a function of contractual arrangements and market realities. Thus, while it is generally clear who bears the legal incidence of a tax, it is often less clear who bears the economic incidence. The substantive effects of taxation on economic actors are a function of their economic, rather than legal, incidence. Thus, using legal incidence to set the boundaries of state taxing power in Indian Country is formalistic and ignores the economic impact of the tax on tribes and tribal members.

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The tax landscape just described is one in which both states and tribes have the power to tax the same nonmember transactions in Indian Country and in which the state's ability to tax is based on the formalistic (and less substantively relevant) notion of legal incidence. This creates the opportunity for tax systems that are unfair to either the state or the tribal government (not to mention taxpayers who may be subject to multiple taxation).

Such tax systems can violate the tax policy norm of horizontal equity—the principle that taxpayers in the same position should pay the same tax.<sup>19</sup> For example, a nonmember purchasing goods on a reservation could be asked to pay sales tax both to a state and to a tribal government, while a tribal member on the same reservation would only owe tax to the tribal government.

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<sup>19</sup> Applying traditional horizontal equity principles in this context is challenging, because there are multiple governments involved and no coordination mechanism among them.

This overlap in tax regimes can in some cases injure state interests. Although legal incidence is easier to determine than economic incidence, the legal incidence is not always clear.<sup>20</sup> If the state (perhaps inadvertently) places the legal incidence on a tribe or tribal member, the tax will be ineffective in the sense that it cannot be legally collected. This would allow the tribe to either capture the nonmember revenue from the tax by imposing its own tax or market a tax exemption to nonmembers. For example, on-reservation gas stations might sell gas to nonmembers at a lower price than nearby off-reservation gas stations because of the tax advantage.

Sometimes, a state tax validly applies on the reservation, but the state is limited in its ability to enforce collection. This was the case in many states with cigarette taxes. Tribes and tribal members would use their exemption from state taxes to improperly sell cigarettes to nonmembers free of state tax locally or over the internet.<sup>21</sup>

Overlapping tax regimes can also injure tribal governments. Using legal incidence as the touchstone of taxation is formalistic, allowing states to effectively tax tribes and tribal members (i.e., to impose economic incidence on those taxpayers) by calibrating their tax statutes to place the legal incidence of a tax on nonmembers.<sup>22</sup> This reality often puts states in a superior position to tribes when it comes to taxing nonmembers—and can lead to double taxation. A tribe may impose a sales tax, for example, on on-reservation sales. A state may impose its own sales tax on on-reservation sales—provided the legal incidence is placed on the nonmember customer and not the tribal retailer. The possibility

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<sup>20</sup> See generally Cowan, *Anatomy*, *supra* note 2 (discussing cases where a court disagreed with a state over whether the legal incidence of a state tax fell on a tribe or tribal member).

<sup>21</sup> See, e.g., *Red Earth LLC v. U.S.*, 657 F.3d 138 (2d Cir. 2013) (reviewing constitutional challenges to the Prevent All Cigarette Trafficking Act of 2009).

<sup>22</sup> See *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 460 (1995) (noting that “if a State is unable to enforce a tax because the legal incidence of the impost is on Indians or Indian tribes, the State generally is free to amend its law to shift the tax’s legal incidence”).

of double taxation can have a chilling effect on nonmember investment in Indian Country, stifling economic development. For example, a nonmember company extracting oil on an Indian reservation may be subject to both state and tribal severance taxes.<sup>23</sup> If that same company had been operating outside of Indian Country, only the state tax would apply. All else being equal, the nonmember company would most likely choose to operate on non-Indian land before exploiting the resources within Indian Country. The tribe, of course, could forgo its own tax to avoid the double tax problem, but that would deny the tribe a revenue stream.<sup>24</sup>

Absent a revision in the Supreme Court's views on state-tribal tax matters, there are two primary ways that state-tribal tax conflicts could effectively be resolved: congressional intervention or the use of state-tribal compacts. Congress could use its plenary power over the tribes and its power over state taxes that implicate interstate commerce to develop a scheme to reconcile tribal and state claims to taxation of nonmembers in Indian Country. But, even if Congress had the desire to deal with this issue, it is unlikely it would be able to develop one set of rules that would fairly reconcile competing state and tribal claims to tax revenue in every case. Given the diversity of state-tribal relations, a national "one size fits all" rule is unlikely to yield satisfactory results in all cases. Thus, if Congress were to act, it should do so by providing a general framework that would facilitate compacting and allow states and tribes a great deal of discretion to address unique local issues.

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<sup>23</sup> See e.g., *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (upholding both state and tribal severance taxes on the production of oil and gas on reservation land by nonmembers).

<sup>24</sup> Whether this is fair might turn on whether it is the tribe who owns the business selling the taxed product. See *Pomp*, *supra* note 6, at 1220 (questioning "whether double taxation should be viewed as even existing when a tribe is simultaneously the taxing sovereign and the vendor of the taxed good" because in that case the label "tax" is just a formality with "no independent economic significance").

### *State-Tribal Tax Compacts: Advantages and Disadvantages*

In the absence of Congressional action, states and tribes can try to put aside their differences and negotiate tax compacts to avoid double taxation, provide certainty to taxpayers, and allocate tax revenue between the two governments. The provisions of tax compacts can vary greatly. Often, however, the tribe will agree to collect a tax on the reservation that equals the state tax charged off the reservation. This will prevent the reservation from becoming a tax haven—i.e., from becoming a business destination exclusively for tax reasons—and also eliminate the specter of double taxation. The state and the tribe will then agree how they will divide the revenue collected via the on-reservation tax.

Compacts are advantageous to both parties and the business community because they provide certainty in an otherwise confusing area of the law. With a compact, the state and the tribe are assured of a predictable revenue stream and the business community is assured that it will not be treated more harshly on the reservation than off it. Years of costly litigation are avoided or resolved. Moreover, taxes can be administratively difficult to collect, particularly for tribes with less fiscal capacity. If a compact allows the state to collect and then remit a portion of revenues to tribes, this may be mutually advantageous.

Compacts are not perfect. Both the state and the tribe must cede some control over policy decisions like the tax rate. In compacts, tribes often agree to impose (at least) the same taxes as the state. In that case, the tribes must follow the lead of the state as it tweaks its tax system in the future. In other cases, the tax rate is fixed for the duration of

the agreement—making agreement and consultation between the tribe and the state more likely.<sup>25</sup>

### **An Examination of Ten Compacts**

Understanding the advantages and disadvantages of tax compacts—and the best ways to implement them—is made easier by examining the range of existing tribal-state compacts. Below, specific compacts are described to give a better sense of that range.

Compacts can be hard to find. Some are available online, usually on state agency websites.<sup>26</sup> Other times, the actual document is not readily available but a summary of the terms is.<sup>27</sup> Surprisingly—in an era when nearly every piece of information is available on our phones—there appears to be no comprehensive database of state-tribal tax compacts.<sup>28</sup> In contrast, there are several commercial databases, like Thomson Reuters Checkpoint Edge and CCH IntelliConnect, which provide up-to-date information on constantly-changing federal and state tax laws. U.S. tax treaties are also available on these databases and, for free, on the [IRS website](#). The lack of “one-stop-shopping” for extant compacts is not just a barrier to researchers; it makes it more difficult for tribes and states seeking their own agreements to learn from other states and tribes and it makes

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<sup>25</sup> See the discussion of Compact 7, in Table 2, below.

<sup>26</sup> Links, if available, are provided for each of the compacts reviewed in this paper. See Table 2, below. Sometimes, the posted copies are scanned and thus their texts are not searchable without further accessibility adaptations.

<sup>27</sup> For example, Idaho rules about motor fuels on Indian reservations are summarized on the [Idaho State Tax Commission website](#), but the actual agreements do not appear to be posted online.

<sup>28</sup> The National Congress of American Indians has collected links to a variety of tax compacts, but many of the links are broken because states frequently update their websites. [National Congress of American Indians, Examples of Tribal Tax Codes, Tax Agreements & Other Resources](#). [The Federation of Tax Administrators](#) has compiled a list of state-tribal fuel tax agreements, but the data appears to only be available to members, and membership appears to be limited to state and federal tax officials. The list as of 2015 has been summarized in FLAHERTY, *supra* note 4, at 73. Inventories of tax compacts memorialized in scholarly books or articles can inform policymakers, but quickly become out of date as a practical guide for states, tribes, and businesses. The lack of easy access is not limited to tax compacts—other compacts and tribal laws can also be difficult to research.

it more difficult for businesses seeking to invest in Indian Country to research the tax landscape.<sup>29</sup>

Adding to the complexity is that generalizing in this area is difficult. Each state-tribal compact is unique—reflecting state laws and local issues. A state-tribal compact might address a specific tax (like the motor fuels tax) on a standalone basis, a specific tax in the context of a broader agreement on regulation of an activity (e.g., cannabis), or several taxes.

This paper examines ten compacts encompassing eight states, seven tribes, and multiple tax types. Given the limited scope of this paper, and the difficulty of finding compacts, the ten compacts may not be a representative sample of existing compacts. But, given that the compacts collectively cover several states, tribes, and tax instruments, examining the provisions of these compacts is instructive.<sup>30</sup> The ten compacts are listed, and the critical portions (scope, dispute resolution procedures, acknowledgement of tribal sovereignty, allocations of tax revenue, and other interesting aspects) reviewed, in Table 2, below. Each is assigned a number (e.g., “Compact 1”) for ease of reference in the discussion which follows. Before reviewing each compact’s key terms, note that, like most legal agreements, compacts include common provisions. These common provisions,

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<sup>29</sup> Indeed, there is not even an accurate count of the number of state-tribal tax compacts. An authoritative, oft-cited source puts the number at over 200. COHEN’S HANDBOOK, *supra* note 8, at § 8.05. But that number is dated and uncertain. COHEN’S cites to testimony at a 1998 U.S. Senate hearing on legal reform in Indian Country, which in turn appears to reference a 1995 study by the Arizona Legislative Council. STARTED: STATE-TRIBAL APPROACHES REGARDING TAXATION & ECONOMIC DEVELOPMENT (1995) (on file with author). Some experts have speculated that tribal and state government officials, while recognizing the value of reaching agreements over taxes, may be reluctant to broadcast the specific terms of the compacts. The concern is that, in an atmosphere of mistrust, both tribal and state voters may view the compacts as giving away precious tax revenue to other government—hurting incumbent tribal and state politicians who negotiated the agreements. I am grateful to reviewers of an earlier draft of this paper for pointing this out. Despite these possible concerns, compacts are a matter of public record, and interested parties can access them if they make the effort.

<sup>30</sup> Also, several of the compacts are substantially similar to compacts that the state at issue entered into with other tribes.

which are informative but less critical than the compact-by-compact analysis in Table 2, are summarized in Table 1.

**Table 1: Common Provisions in State-Tribal Tax Compacts**

<p><b>Reference to enabling legislation.</b> Tax laws are normally produced by legislative bodies, so some delegation to the executive branch is a prerequisite to a state-tribal compact. These may be blanket delegations of authority or specific to a particular tax or situation. All ten compacts reviewed in Table 2, below, reference the statutory authority that the state legislature has granted to the governor or other executive agency to enter into the compact. All of the compacts except for Compacts 8, 9, and 10 reference tribal law which authorizes the leadership of the tribe to enter into the compact.</p>
<p><b>Sovereignty Acknowledgment.</b> Both parties expressly recognize the sovereignty of the other. This provision is discussed for each of the ten compacts in Table 2.</p>
<p><b>Statement of purpose.</b> For example, to avoid double taxation and ensure equal taxes on and off the reservation.</p>
<p><b>Definition of terms.</b></p>
<p><b>Tax Law Cites.</b> Reference to the state tax or other law at issue (e.g., sales tax, fuel).</p>
<p><b>Tax Allocations.</b> This is the core of the agreement and is discussed for each of the ten compacts in Table 2.</p>
<p><b>Audits.</b> Process for how each government can audit the records of the other to ensure compliance. The compact may designate who conducts an audit (e.g., the state tax authority or a CPA firm) and which government pays for the audit.</p>
<p><b>Confidentiality.</b> Confidentiality is waived for intergovernmental reporting or audits but each government agrees to keep the information collected from the other confidential to the extent allowed by law.</p>
<p><b>Dates and Duration.</b> Includes the effective date of the agreement and the term of the agreement (fixed period or indefinite).</p>
<p><b>Amendments.</b> Procedures for agreeing on amendments.</p>
<p><b>Termination.</b> Procedures for termination, including required notice periods.</p>
<p><b>Prior claims.</b> The compact may expressly address or exclude pre-compact tax revenue collected by other government. This may be the case if the compact was preceded by disagreements and litigation.</p>
<p><b>No Litigation.</b> The parties agree to refrain from litigation over taxing jurisdiction with respect to the tax at issue for the duration of the agreement.</p>
<p><b>Dispute Resolution.</b> The process and forum for disputes over the compact may be specified. This is discussed for each of the ten compacts in Table 2.</p>
<p><b>Nonwaiver of Rights.</b> The compact may specify that, by entering into the agreement, none of the parties are waiving their rights or enlarging or reducing their taxing power or sovereignty—except as specified in the agreement.</p>
<p><b>Exclusions.</b> The agreement may be limited to one particular tax (e.g., fuel tax).</p>
<p><b>Notice requirements.</b> If the tribe agrees to maintain a tax equal to the state tax, the state may be obliged to formally notify the tribe of a change in the tax law—to trigger</p>

the tribe adjusting their tax per the compact. A list of parties who should be notified (e.g, the tribal chair and the governor or head of a tax agency) is normally included.

**Table 2: Examination of Ten Compacts**

**Compact 1**

**Shoshone-Bannock Tribes-State of Idaho Motor Fuels Tax Agreement (2007)<sup>31</sup>**

*Scope:* Fuel Tax

*Dispute Resolution:* U.S. District Court

*Acknowledgement of Tribal Sovereignty:* The sovereign status of the tribe is not mentioned.

*Allocation:* The state tax does not apply on tribal lands. The tribe collects a tax equal to the state tax and the tribe keeps the proceeds.

*Other Comments:*

- The tribe agrees to spend the revenue from the tax on expenses normally funded by the state from motor fuels tax revenue. Such expenditures include the maintenance or construction of reservation roads or highways or adjacent land; reservation police, ambulance, and fire departments; or any other items the state would normally fund from motor fuels tax revenue.
- Some of the language was borrowed from Compact 4 (see below).
- The compact, and similar ones with other tribes in Idaho, was signed after six years of bitter dispute over which government could collect fuel taxes on Indian land. The dispute was contentious, involving litigation in the state and federal courts and multiple interventions by the legislature.<sup>32</sup>

<sup>31</sup> On file with author; does not appear to be available online. All dates are per the compact reviewed; some agreements may have been amended since the original compact was signed.

<sup>32</sup> For more detail on the Idaho fuel tax issue, see Cowan, *Anatomy*, *supra* note 2.



## **Compact 2**

### **Intergovernmental Agreement Between Arizona Department of Transportation and the Navajo Tax Commission (1999)**

***Scope:*** Fuel Tax

***Dispute Resolution:*** No specific procedure is provided. The parties will agree to the process for resolution of claims based on applicable laws. The process will include arbitration.

***Acknowledgement of Tribal Sovereignty:*** The sovereign status of the tribe is not mentioned, but the role of the tribe as a government is acknowledged.

***Allocation:*** The tribe collects its own tax at least equal to the state tax and remits approximately 4.5% of the tax collected at the state rate to the state (with adjustments for different types of fuel).

***Other Comments:***

- The agreement was between agencies of the two governments, rather than the heads of each government.
- Although the timeline of negotiations is unknown, the compact appears to predate the tribe's enactment of its own tax by a few months. This would indicate that the tribe, seeking to enact its own tax to improve infrastructure on its reservation, had proactively consulted with the state.
- The tribe has the largest reservation in the U.S.—most of which is located in Arizona. Presumably this means that the tribe and the state frequently work together on common issues.
- While there are many examples of a state having similar compacts with multiple tribes, this is a rare example of a tribe having similar compacts with multiple states (see Compact 3, below).

### **Compact 3**

#### **Intergovernmental Agreement Between State Tax Commission of Utah and the Office of the Navajo Tax Commission (2000)**

**Scope:** Fuel Tax

**Dispute Resolution:** No specific procedure is provided. The parties will agree to the process for resolution of claims based on applicable laws. No mention is made of arbitration.

**Acknowledgement of Tribal Sovereignty:** The sovereign status of the tribe is not mentioned, but the role of the tribe as a government and a federally-recognized tribe is acknowledged.

**Allocation:** Taxpayers (generally distributors) pay the tribal tax of 18 cents per gallon and pay the state 6.5 cents per gallon (the state tax rate of 24.5 cents per gallon less the tax paid to the tribe).

**Other Comments:**

- The agreement was between agencies of the two governments, rather than the heads of each government.
- Although the timeline of negotiations is unknown, the compact appears to be signed within a year of the tribe's enactment of its own tax. This would indicate that the tribe, seeking to enact its own tax to improve infrastructure on its reservation, had proactively consulted with the state.
- The tribe has the largest reservation in the U.S.—most of which is located in Arizona but also extends into Utah and New Mexico. It appears that the tribe set its tax rate equal to Arizona's tax rate (see Compact 2) and then accommodated Utah by allowing them to collect the difference between its tax and the tribe's.
- The compact notes that the Governor of Utah and the President of the Navajo Nation will meet annually to discuss infrastructure issues.

Note: While there are many examples of a state having similar compacts with multiple tribes, this is a rare example of a tribe having similar compacts with multiple states (see Compact 2, above).

#### **Compact 4**

#### **Blackfeet Nation-Montana Gasoline Tax Agreement (2005)**

**Scope:** Fuel Tax

**Dispute Resolution:** U.S. District Court. If that court lacks jurisdiction, state district court.

**Acknowledgement of Tribal Sovereignty:** The sovereign status of the tribe is not mentioned, except indirectly by noting that it is waiving its sovereign immunity for the limited purposes of enforcing the compact. (The state does likewise.)

**Allocation:** Only one tax applies on the reservation. The tribe agrees to impose a tax equal to the state tax. The state collects the tax on the reservation and remits to the tribe the tax collected on sales to tribal members living on the reservation (based on a formula = the per capita tax x the number of enrolled members living on the reservation less a 1% administration fee).

**Other Comments:**

- The amount of revenue going to the tribe is based on the amount of tax estimated collected from tribal members. As noted earlier, the state cannot tax tribal members directly under current law anyway. It thus appears that the tribe is only getting revenue from sales to its own resident members; the state is taking the tax revenue collected from nonresidents. The latter may well be substantial as the reservation is located near Glacier National Park—a major tourist destination. Whether the agreement shortchanges the tribe, however, would depend in part on which government—state or tribal—maintains the road infrastructure which serves the reservation.
- Revenue allocations of this kind might raise political issues within tribes. If the compact had required the state to not collect the tax from tribal members, then the tax savings would have accrued to the individual tribal members. As the compact is written, however, the state collects the tax from tribal members and remits them to the tribal government. In substance, the tribal government is taxing tribal members. Arrangements like this might raise political concerns in certain tribes—where the tribal members might want to directly benefit from the tax exemption instead of indirectly benefiting from the extra revenue going to the tribal government under the compact.<sup>33</sup>
- Montana maintains an [archive of its state-tribal tax agreements](#).

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<sup>33</sup> I am grateful to reviewers of an earlier draft of this article for pointing this out.

### **Compact 5**

#### **[Blackfeet Nation – Montana Tobacco Tax Agreement \(2005\)](#)**

**Scope:** Tobacco Tax

**Dispute Resolution:** U.S. District Court. If that court lacks jurisdiction, state district court.

**Acknowledgement of Tribal Sovereignty:** The sovereign status of the tribe is not mentioned, except indirectly by noting that it is waiving its sovereign immunity for the limited purposes of enforcing the compact. (The state does likewise.)

**Allocation:** Only one tax applies on the reservation. The tribe agrees to impose a tobacco tax equal to the state tax. The state collects the tax on the reservation and remits to the tribe the tax collected on sales to tribal members living on the reservation (based on a formula = 150% x per capita tax collected x number of enrolled members living on the reservation)

**Other Comments:**

- The amount of revenue allocated to the tribe, like in Compact 4, is based on the estimated tax paid by resident members—but is more generous (allocating 150% rather than 100%).
- Montana maintains an [archive of its state-tribal tax agreements](#).

### **Compact 6**

#### **[Fort Peck Tribes and State of Montana Oil and Natural Gas Production Tax Agreement \(2008\)](#)**

**Scope:** Severance Tax

**Dispute Resolution:** Non-binding mediation. If that fails, jurisdiction will be determined by Montana law.

**Acknowledgement of Tribal Sovereignty:** The sovereign status of the tribe is emphasized, as is the government-to-government relationship between the tribe and the state.

**Allocation:** The tribe imposes a tax equal to the state tax; the state collects the tax on the reservation and then pays the tribe 50% of the amount collected on the reservation. (only applies to post-compact production agreements).

**Other Comments:**

- Montana maintains an [archive of its state-tribal tax agreements](#).

## **Compact 7**

### **Compact Between the Three Affiliated Tribes and the State of North Dakota Regarding Oil and Gas Production and Extraction Taxes within the Fort Berthold Indian Reservation (2019)**

**Scope:** Severance Tax

**Dispute Resolution:** U.S. District Court

**Acknowledgement of Tribal Sovereignty:** The sovereign status of the tribe is emphasized, including a statement that the tribe has “full inherent sovereign powers of a government.”

**Allocation:** The state and the tribe agree to a tax rate that will not change during the term of the compact. The state collects the tax and remits 80% of the proceeds to the tribe on trust lands and 20% on non-trust lands. (Trust lands are lands where the federal government holds title in trust for the tribe or a tribal member.)

#### **Other Comments:**

- The tribe must report to the state that it is using at least 10% of its revenues from the tax on investments in “essential infrastructure,” which is left undefined.
- By agreeing to a fixed tax rate, the agreement ensures certainty for oil producers and ensures that the tribe will not, absent amendment, be forced to change its tax to mirror a change in a state tax. (See Compact 8 for where this is a possibility).
- Even if the agreement is terminated, it will remain in effect for the life the well that was drilled during the term of the agreement.

## Compact 8

### [Marijuana Compact Between the Suquamish Tribe and the State of Washington \(2015\)](#)

**Scope:** Cannabis sales regulation—including taxes.

**Dispute Resolution:** First, the parties agree to meet and confer. If that process fails, the dispute goes to mediation and then arbitration.

**Acknowledgement of Tribal Sovereignty:** The sovereign status of the tribe is emphasized, including a statement that the tribe has “full inherent sovereign powers of a government.”

**Allocation:** The state tax does not apply on the reservation. The tribe imposes a tax at least equal to the state tax and keeps all of the revenue. The tribe may, but is not required to, tax sales of cannabis to the tribe, its affiliates, members of the tribe or their businesses; cannabis grown, produced, or processed on the reservation; and sales of medical cannabis.

#### **Other Comments:**

- The tribe must spend the revenue collected on essential governmental services, which is broadly defined as “including, but not limited to, administration, public facilities, fire, police, health, education, elder care, social services, sewer, water, environmental and land use, transportation, utility services, community development, and economic development.”
- Compact 8 was the first state-tribal cannabis compact, and was entered into only three years after the state legalized recreational cannabis. The industry was new and operated in an uncertain legal environment. Cannabis remained illegal under federal law, which was of concern to tribes that worked with the federal government on various programs.
- The state has since entered into compacts with other tribes and now provides a [compact template](#) and a [compact workflow example](#). Notably, the compact template, unlike Compact 8, does not limit tribes to spending cannabis tax revenue on “essential governmental services.”
- Nevada, another state that has legalized recreational use of cannabis, copied Washington’s enabling legislation and entered into similar cannabis compacts with tribes located within the state.<sup>34</sup> Nevada maintains [an archive of its cannabis compacts](#).
- Washington’s relationship with tribes was clouded by decades of disagreement over fishing rights. The state and 26 tribes signed the [Centennial Accord](#) in 1989 to open lines of communication (like an annual meeting between the governor and tribal leaders), express respect for the sovereignty of the tribes, and improve state-tribal government-to-government relationships.<sup>35</sup>

<sup>34</sup> See Cowan, *Cannabis*, *supra* note 4, at 909.

<sup>35</sup> For more on the Centennial Accord (and the related Millennium Agreement), see FLAHERTY, *supra* note 4, at 174-78,

## **Compact 9**

### **Compact Related to Cigarette and Tobacco Sales and Taxation [between the State of Kansas and the Iowa Tribe of Kansas and Nebraska] (2016)**

***Scope:*** Tobacco sales regulation—including taxes

***Dispute Resolution:*** Proceeds in steps as needed until resolved: Negotiation, then arbitration, then U.S. District Court.

***Acknowledgement of Tribal Sovereignty:*** The sovereign status of the tribe is noted, along with the recognition that the tribe “has responsibilities and needs similar to those of state governments.”

***Allocation:*** The tribe imposes the tax and keeps the revenue on sales the tribe makes; the state agrees to forgo the tax on reservation sales; the tribe must comply with detailed stamping requirements to ensure no evasion and must maintain a tax at a minimum level.

***Other Comments:***

- Although executed in 2016, the compact refers to the tobacco companies’ 1998 master settlement. As part of that settlement, Kansas agreed to ensure tobacco laws were diligently enforced, including in Indian Country. The compact may have been driven more by regulation/compliance than by taxes. The tribe, in helping the state enforce the regulations, would incur substantial costs—which may explain what appears to be a tribe-favorable revenue allocation.

## **Compact 10**

### **Michigan's Combined Generic Tax Agreement** (2018)

Note: Compact 10 is not an actual operating compact. It is a nonbinding model agreement used to draft substantially similar tax compacts between the State of Michigan and an Indian tribe. Actual agreements were executed at different times and may have been subsequently amended.

**Scope:** Broad—covers most common taxes, including:

- Sales Tax
- Use Tax
- Motor Fuels Tax
- Income Tax
- Tobacco Tax
- Business Taxes (Michigan's various, unique versions of business income taxes)

**Dispute Resolution:** Negotiation. If unsuccessful, arbitration and then U.S. District Court.

**Acknowledgement of Tribal Sovereignty:** The sovereign status of the tribe is noted.

**Allocation:** Varies by tax:

- Sales tax: 2/3 of revenue to the tribe and 1/3 of revenue to the state on the first \$5,000,000 of gross receipts; 50%/50% revenue sharing after that.
- Income Tax: As with multistate enterprises, apportionment applies. A business doing business in Michigan and on the reservation will apportion income to Michigan by taking sales in the state (excluding sales in Indian country) over sales everywhere times apportionable income.
- Fuel and Tobacco: Only addresses how much fuel and tobacco the tribe can purchase tax free. Presumably all revenue goes to the state.

**Other Comments:**

- Calls for an annual summit between the tribal and state officials to “foster a continuing relationship and maintain communication on issues as they arise.”
- Appears to be the only compacting system that is comprehensive—covering most common taxes—rather than one tax in isolation.
- Although the most detailed of the ten examined compacts, outside of the sales tax revenue allocation it seems to simply solidify current law.
- The tribe is required to report to the state any income earned by professional performer at one of its venues.
- Michigan maintains [an archive of its state-tribal tax compacts](#).



## Lessons Learned

The background material and the ten compacts distilled above reveal the following insights.

### *Acknowledgement of Tribal Sovereignty is Paramount*

Only half of the compacts reviewed (Compacts 6-10) had explicit language acknowledging the sovereign status of the tribe. This seems odd, because scholars have clearly established that tribes place a premium on sovereignty:

State actors must recognize that for Native nations, the primary issue is sovereignty, and all parties must work to establish recognition and respect. Unless the various actors can see the issue in similar terms and as one in which there can be mutual gains instead of as a zero-sum game, the odds of long-term cooperation seem very slim.<sup>36</sup>

Tribes take their sovereignty seriously because of its fragility. With the federal government in charge of Indian affairs, notions of sovereignty could change along with shifts in federal Indian policy.<sup>37</sup> Over the years, the federal government experimented with assimilation, termination, and (starting in the 1960s through today) self-determination and self-governance.<sup>38</sup> Because of the changes in federal policy over the years and the relatively recent embrace of self-determination, state officials don't always appreciate the sovereign status of tribes. Historically, many state officials viewed tribes as ethnic associations rather than sovereign governments.<sup>39</sup> Where sovereignty is fragile, it must be constantly acknowledged.

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<sup>36</sup> FLAHERTY, *supra* note 4, at 166.

<sup>37</sup> For a tragic example, *see generally* CLAUDIO SAUNT, UNWORTHY REPUBLIC: THE DISPOSSESSION OF NATIVE AMERICANS AND THE ROAD TO INDIAN TERRITORY (2020) (examining the history of the forced removal of the Creek, Cherokee, and other tribes from the East).

<sup>38</sup> *See* COHEN'S HANDBOOK, *supra* note 8, at §1.

<sup>39</sup> FLAHERTY, *supra* note 4, at 60.

It is not clear, given the importance of tribal sovereignty, why Compacts 1-5 fail to acknowledge it. It could be a bad sign of the state of state-tribal relations (as may be the case with Compact 1). Or it could be a good one. In the case of Compacts 2 and 3, the Navajo Nation—given its size and sophisticated government—may not have been as concerned with the sovereignty issue given their long-standing relationships with Arizona and Utah. This is speculation, of course. In most cases, it is critical for state officials to explicitly acknowledge tribal sovereignty in word, deed, and in compacts.

Since sovereignty includes the right to tax, and the right to spend, it is not surprising that only Compacts 1, 7, and 8 designated how the tribe could spend the proceeds it gets from the tax. The tribe in each case was ceding some freedom of action when it agreed to these terms. The spending restrictions in Compact 1 likely made sense. The tax at issue was a motor fuels tax, which traditionally has been used by governments to fund road improvements. If the tribe is allowed to keep the revenue from the tax on on-reservation sales, it should spend the money as the state would—on roads. Compact 7's restrictions seem weak (only spending of 10% of the revenue is restricted). Compact 8's restrictions seem impotent. As noted above, the tribes agreed to spend the cannabis taxes it collects on "essential governmental services," which was so broadly defined in the agreement that it is hard to think of any tribal expense that would not fit into that category. The use of this largely meaningless requirement calls tribal sovereignty into question with no real purpose. It is telling, therefore, that Washington removed the spending restrictions in subsequent compacts.<sup>40</sup>

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<sup>40</sup> As noted above, Washington's cannabis compact template does not include the spending restrictions that are in Compact 8.

### *Some Taxes Make More Appearances in Compacts Than Others*

Most tax compacts deal with transactional taxes like motor fuels taxes (Compacts 1-4 and 10), severance taxes (Compacts 6 and 7), tobacco taxes (Compacts 5, 9, and 10) or cannabis taxes (Compact 8). This makes sense, to some extent, since these are often the tax instruments that tribes use. But some tribes also use sales taxes; yet it is difficult to find agreements (except for Compact 10) that embrace sales taxes.<sup>41</sup> While it is unclear why there are not more sales tax compacts, there are two possible reasons. First, it could be that the sales taxes are less important to the tribe than the others or the tribe might accept state sales taxation in lieu of tribal sales taxation for other reasons. For example, it appears that in Connecticut there is no general agreement on sales taxes—but instead a state interpretation (that appears to be unilateral but the tribes in the state may have been consulted) simply applies current law (noted above) in detail.<sup>42</sup> Two tribes in the state have detailed gaming compacts with the state, which the tribes and the state may wish to remain undisturbed.<sup>43</sup> In any case, *the lack of a compact* might be just as telling as the presence of one, in that it could indicate both parties satisfaction with the status quo. Second, it could be that more sales tax compacts exist, but have not been made readily available online.<sup>44</sup> As noted earlier, compacts in general are hard to find.

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<sup>41</sup> Few tribes use income taxes, which makes state-tribal overlap rarer in that space—which would explain the dearth of compacts addressing income taxes.

<sup>42</sup> [Connecticut Department of Revenue Services Ruling 2002-3.](#)

<sup>43</sup> Gaming Compacts are governed by the Indian Gaming Regulatory Act, which requires states to negotiate gaming compacts with tribes in good faith. In negotiating with tribes, states are not allowed to force the tribe to accept state taxation. *See* 25 U.S.C. § 2710(d)(7)(B)(iii)(II) (directing courts to “consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith”). A state can, however, negotiate for the tribe to impose its tribal taxes on transactions that are comparable to state taxes on similar transactions taking place off the reservation. 25 U.S.C. § 2710(d)(3)(C)(iv).

<sup>44</sup> I am grateful to reviewers of an earlier draft of the paper, who pointed out that they were involved in negotiations over sales tax compacts that have not been posted online.

### ***You Can't Tell if a Compact is "Fair" By Reading It***

With the exception of the few compacts which designate how tribes may spend tax revenue (discussed above), compacts deal with tax collection and allocation between the state and the tribe. Since compacts primarily address taxation, but not spending, it is not easy to determine if any given compact is fair just by reading it. Compacts that allow the tribes to keep the revenue (e.g., Compacts 1 and 8) or split the revenue (e.g., Compacts 5, 6, and 10) may appear to be more favorable to the tribes than those compacts which give the state most of the proceeds. But to assess fairness of the tax allocation, one must also know who is paying the bills for tax-funded infrastructure and services. And that is a local issue that is not easy to identify or uniform in result across all states and tribes. Both tribes and states need to finance their operations and both provide services (roads, schools, a court system, etc.) that benefit nonmembers operating in Indian Country. Fairness would dictate that the government providing the services should get much or all of the revenue. Here there is great variety. There are 574 federally-recognized tribes in the United States, each with its own culture, traditions, history, government, economic status, and relationship with the state in which it is located.<sup>45</sup> Each state-tribe relationship is unique—with the state providing some services and the tribe providing others. A revenue allocation that is fair in one state-tribal context may be unfair in another.

In many cases, both the tribe and the state have valid claims to tax revenue from nonmember activity taking place on Indian reservations. As noted earlier, the Supreme

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<sup>45</sup> See *Frequently Asked Questions*, U.S. DEP'T OF THE INTERIOR, INDIAN AFF., <https://www.bia.gov/frequently-asked-questions>; *About Tribes*, NAT'L CONG. OF AMERICAN INDIANS, <http://www.ncai.org/about-tribes>.

Court has implicitly acknowledged this by largely refusing to prioritize one government's assertion of tax jurisdiction over the other's; often allowing both the state tax and tribal tax to stand.

### ***Open Lines of Communication Are Necessary, But not Sufficient***

Compacts 2 and 3 were signed close in time to the tribe's enactment of a fuel tax. Compact 8 was negotiated within 3 years of the state legalizing recreational cannabis. In these cases, it is clear that there were open lines of communication that helped the state and the tribes agree rather than litigate. For Compacts 2 and 3, it could be that the states were used to working with the Navajo Nation—given the size of its reservation and its sophisticated government institutions.<sup>46</sup> (Compact 3 even calls for an annual meeting between state and tribal officials). For Compact 8, the Centennial Accord, and the open lines of communication it established, may have been a factor in facilitating agreement. Economies change, taxes change, and new agreements may be needed or old ones updated. Having a formal, permanent line of communication between a state government and tribal governments can help resolve issues in a timely manner. Recall that, without effort on the part of tribes and states, there is no formal mechanism to reconcile tribal and state needs—since their relationship is geographic, rather than political. But ongoing communication between the tribes and the states seems a necessary prerequisite to compacts that prevent, rather than come after, contentious litigation. Unfortunately,

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<sup>46</sup> Scholars have opined that is easier for a state with a large Native population but few tribes (Arizona) to establish enduring relationships with tribes than a state with a low Native population but many tribes (California). FLAHERTY, *supra* note 4, at 123-24.

communication is not always sufficient. Compact 1, for example, was executed only after one of the most contentious state-tribal disputes in recent memory. This was despite the fact Idaho had long had a Council on Indian Affairs, consisting of representatives of the governor, the legislature, and each tribe in the state.<sup>47</sup> The Compact 1 backstory shows that not only must there be an open line of communication in form, but also one in substance; one where there is an acknowledgement of tribal sovereignty and mutual respect.

### ***Best Practices are Elusive***

As noted earlier, compacts are hard to find. And even when they are found, important context for compacts is often missing. The text of compacts is helpful in providing guidance to governments and nonmembers doing business in Indian Country. But it provides little guidance to other states and tribes seeking to negotiate a compact in the fairest and most efficient manner. The same aspects that make tax compacts useful in settling state-tribal jurisdiction make them an elusive guide for others. Although subfederal tax structures tend to be somewhat similar across jurisdictions, state-tribal relationships vary greatly. Even in the internet age, local issues don't get national press, and state-tribal disputes, with rare exceptions, are local issues. Yet lessons learned in one locality may be useful in another facing similar problems. Those lessons might not be apparent from the text of a completed compact. Rather, those lessons likely could be found in the stories behind the compacts—the ones that led to the compact being negotiated in the first place. It can be hard to determine best practices based on existing compacts since what is fair for one state-tribal compact may be unfair for another. As in

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<sup>47</sup> Idaho Code § 67-4004-4007. Many states have formal state-tribal offices. See FLAHERTY, *supra* note 4, at Appendix 1.

many cases of legal drafting, using an existing compact to create a new one in another time and place may not work. Language that makes sense in a tribal agreement in Michigan may be ill-advised if used in a tribal compact with Idaho—perhaps because the factors which led to the Michigan compact were far different.

### **Suggestions for Further Research**

The above initial lessons, drawn from the background literature and an examination of ten compacts, must be validated and extended by further research if they are to inform and foster economic development in Indian Country.

#### ***Find the Compacts***

As a starting point, there must be an inventory taken of existing tax compacts. As noted above, compacts are hard to find. In the modern era, where nearly all law has been codified, analyzed, can be updated in near real-time, and is available in a few keystrokes, this is unacceptable. Although valiant efforts have been made in the past,<sup>48</sup> a more formal effort to gather and maintain a database of tax compacts is needed. This should not be a one-off scholarly article that would quickly become outdated. Instead, an organization would need to commit to gathering, posting, and updating a searchable database of tax compacts. A substantial effort may be involved—as many states would need to be contacted directly to access agreements (like Compact 1) that are in force but not posted

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<sup>48</sup> See *supra* note 28.

online.<sup>49</sup> In addition, government officials, for political reasons, might be reluctant to have compacts readily available to anyone who is interested.<sup>50</sup> But overcoming these efforts would be worth it. Having all the compacts in one location would have two immediate benefits. First, tribes and states would have access to a broader range of examples to use in crafting their own tax compacts. As noted earlier, using the limited examples currently available might be ill-advised given how diverse local issues can be. More examples would reveal that diversity. Second, businesses thinking of investing in Indian Country could use the database to determine the taxes they would pay. Knowing a compact is in place, and knowing its terms, provides certainty. And certainty should help facilitate investment.

Ideally, the database should be curated and maintained by a trusted organization that would provide free access. But, given that businesses would find the database useful as well, there may be a commercial opportunity here. A for-profit tax database like Checkpoint or a non-profit tax service like Tax Notes might, in partnership with tribes or tribal groups, develop a compact database that would be useful to practitioners, attorneys, and researchers alike.<sup>51</sup>

### ***Find the Stories Behind the Compacts***

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<sup>49</sup> In addition, there should be some investigation into why compacts don't exist when it comes to particular taxes. A state official might be asked why there is a motor fuels tax compact but no sales tax compact. Prior to making such an inquiry, the tax law of the tribe and the state at issue should be researched. If both governments don't impose the same tax, there would be no need for a compact. (Although a tribe might have avoided a tax imposed by the state for fear of the stifling effect of double taxation—something that a compact might ameliorate.)

<sup>50</sup> See *supra* note 29. Nonetheless, compacts are a matter of public record and should be available for public inspection.

<sup>51</sup> If a commercial entity is involved, they might be allowed to sell access to businesses while providing the service free to tribes, states, and researchers.



Once an inventory of compacts is completed, an effort must be made to find the stories behind the compacts. While a database would have immediate benefits, more information is needed. As noted earlier, the words of a compact don't tell the whole story. They don't reveal the answer to many of the questions posed in the introduction. What are the ideal terms of a compact? What factors motivate state and tribal officials to enter into compact negotiations? How are the negotiations structured and what are some best practices? Have the compacts that have been in place for years been beneficial to the tribes and the states? How would a state or tribe seeking to negotiate a tax compact start the process? What resources are available to them? How have similar issues been addressed by other states and other tribes? What insights can state and tribal officials and their representatives who have successfully navigated the tax compact process provide?

The answer to these questions can perhaps be found by getting the compact backstories from those who were involved in the issues that prompted them or the negotiations that lead to them. A conference on the theme of state-tribal tax compacts (or even state-tribal compacts in general)—where actual negotiators from states and tribes are invited to speak—would be instructive and indicate whether further research would be fruitful. If this line of research looks promising, surveys might be used to gather information from tribal and state officials, perhaps followed by formal interviews with key figures. This may well be a project suited to anthropologists, historians, political scientists, or other scholars who focus on tribal issues. Any project of this sort must be detailed enough to provide guidance while being general enough to avoid violating

attorney-client confidentiality. Of course, researchers must also be cognizant of any political issues that may make officials reluctant to participate.<sup>52</sup>

### ***Do Post-Implementation Reviews: Regards or Regrets?***

Many compacts have been in place for years. Are they working? Are tribes and states happy with the outcomes? Is each government better off than they would have been in the absence of the compact? Have there been any snags? In hindsight, should other provisions have been included?<sup>53</sup> Surveys of tribal and state officials might help answer these questions. In addition, researchers (likely economists) might develop objective measures (if data are available) to determine how much benefit or cost resulted from a compact. Such work, if feasible (and if the results back up the extant scholarship), could help show states and tribes that compacts are not zero-sum games—but rather offer tangible, mutual benefits.

Taxes reach into nearly every aspect of life. Research on how state and tribal governments and their citizens and members view taxes and try to reconcile overlapping tax jurisdictions would no doubt be illuminating.

### **Conclusion**

Tax compacts between states and tribes are not perfect, but they have the potential to resolve issues in a fair manner while providing much-needed certainty to those doing business in Indian Country. That doesn't mean negotiating compacts is always easy,

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<sup>52</sup> See *supra* note 29.

<sup>53</sup> An example might be provisions for the state to assist the tribe in using revenue allocated to the tribe to secure bond issuances or other financing. Tax revenue is often used to support bond issuances used to finance the construction of long-lived assets (like a courthouse). In securing financing, tribal revenue from compacts may not be viewed the same as tribal revenue from taxes imposed directly by the tribe. If a compact, like Compact 7, calls for the state to collect the tax on the reservation and then remit a percentage to the tribe, the state might be able to help the tribe show prospective bondholders that the percentage payment is equivalent to taxes collected directly by the tribe. Doing so could help provide certainty and spur more investment. I am grateful to reviewers of an earlier draft of this paper for pointing this out.

feasible, or perfect. And that doesn't mean that the benefits from compacting obviate tribal or state political concerns. Still, when seeking a mutually beneficial solution to a dispute over overlapping tax jurisdictions, you are more likely to find it in the conference room than in the courtroom. The problem, as this paper has shown, is that we don't know enough about what went on in the conference room. In most cases, we only know the final product—the compact itself (assuming we can find it). While the ten compacts examined here have revealed some initial lessons and told some important stories, they have also shown that there are many unanswered questions, and untold stories. Answering those questions by telling those stories may well help facilitate more state-tribal tax compacts that are fair, provide certainty, and help foster economic development in Indian Country.

Striving for better compacting, despite the political risks, might help in other areas as well. Taxation is but one area of possible contention between tribes and states. Tax disputes often exist in the context of years of state-tribal distrust and enmity created by a variety of non-tax issues. Making a good faith effort to resolve tax issues via government-to-government compacts won't magically change enmity to amity, but it could allow states and tribes to develop more trust—and that might, over time, lead to more trust in other areas as well.