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Tax Agreements Between the State of Minnesota and Tribal Governments: A Case Study

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Tax Agreements Between the State of Minnesota and Tribal Governments: A Case Study

Cynthia Bauerly¹

I. Introduction

In Minnesota, as in other states, the state and tribal governments have entered into tax agreements² to address unavoidable issues that arise from the intersection of state taxes and tribal sovereignty. Recognizing both the importance of sovereignty and the pragmatic issues of tax administration, tribal governments and the state began negotiating tax agreements in the late 1970s to ensure appropriate taxation and ease of administrability for both the state and tribal governments. The current agreements were negotiated starting in the mid-1990s and, while they have been amended several times, remain in effect. The agreements include four types of taxes and provide millions of dollars of tax revenues to tribal governments annually.

The State of Minnesota, through the Commissioner of the Minnesota Department of Revenue,³ and ten of the 11 tribal nations who share the same geography as the state, have current tax agreements. They include seven Anishinaabe Bands (Chippewa/Ojibwe) located in Northern Minnesota: the Fond du Lac Band of Lake Superior Chippewa; the Grand Portage Band of Lake Superior Chippewa; the Mille Lacs Band of Ojibwe; the White Earth Nation; the Bois Forte Band of Chippewa; the Leech Lake Band of Ojibwe; and the Red Lake Nation. And three of the four Dakota Sioux communities in the southern part of Minnesota: the Upper Sioux Community, the Lower Sioux Indian Community, the Shakopee-Mdewankanton Sioux Community.⁴

The agreements are grounded in the fact that tribes as sovereign nations have sovereign rights—as do state governments—over a wide range of taxing authority.⁵ Administratively,

however, there are real challenges with collection of and remitting tax on only the transactions that are subject to state tax. Sellers who collect sales tax for the state, for example, do not always have the resources or information to separate transactions subject to tax from those that are not. This situation becomes even more complicated when the seller is a tribal business that collects the state sales tax from non-tribal members on their transactions. In some cases, taxes (such as tobacco and motor fuel) are paid by the distributor, regardless of whether the ultimate purchaser is subject to tax or not.

Tax compacts can resolve these complications in a way that makes the overall tax system more administrable. Using sales tax as an example, the basic approach is this: the agreements provide that state sales tax is imposed on all transactions, regardless of the status of a purchaser who might otherwise not be subject to tax. That tax—in its entirety—is then remitted to the state by the seller. Finally, the State returns to the tribal government a refund of the sales tax that is estimated to be attributed to tribal member purchases. An additional payment representing fifty percent of the remaining sales tax revenue from non-member transactions from that seller is also shared with the tribal government, reflecting the right of the tribal government to levy taxes on both member and non-member transactions that occur on tribal reservations.

This article will focus on the agreements between Minnesota and tribal governments. It will not delve into the significant case law and scholarly work on this topic. Instead, focusing on the experience in Minnesota, it will describe the impetus and history of negotiating agreements; the component parts and key terms; implementation practices and challenges; and finally, perspectives on the success of the agreements and where opportunities exist.

II. History of initial agreements, 1970s–1990s

A. Impetus: *Bryan v. Itasca County*

The impetus in Minnesota for entering tax agreements between the State and tribal governments stemmed from the 1976 U.S. Supreme Court decision in *Bryan v. Itasca County*.⁶ Mr. Bryan was an enrolled member of the Minnesota Chippewa Tribe and lived in a mobile home on land held in trust on the Leech Lake reservation in Minnesota. Itasca County, which shares geography with the reservation in which the property was located, attempted to assess personal property tax liability on the home.⁷ Bryan sued the county and the state. State courts sided with the county and found the imposition of tax appropriate. The U.S. Supreme Court, however, held that the state (counties in Minnesota are subdivisions of the state) does not have power to tax a tribal member's home on reservation property.

The position of the county and state was that Public Law 280 provided the state with authority to impose tax on tribal members living on their reservations as a part of the law's effort to provide Minnesota and certain other states with law enforcement and judicial authority over certain tribal lands. After a lengthy review of legislative history, the Court determined instead that Public Law 280 was limited to law enforcement and judicial process where tribal law and order organizations did not exist in a reasonably satisfactory manner. Although the fact that tribal members were not subject to taxation were part of the House committee discussion leading to Public Law 280, nothing in the law itself removed the restrictions on the ability of a state to tax tribal members.

The Court went on to note that Public Law 280 expressly prohibits state courts from jurisdiction over cases that could result in "alienation, encumbrance, or taxation' of trust

property.”⁸ Accordingly, even if a state attempted to impose tax, there would be no state court venue to decide a controversy. This creates a practical barrier to the enforcement of any tax.

The *Bryan* decision took the next consistent step in a series of cases about the limits of state authority to impose certain taxes. Previous decisions of the U.S. Supreme Court made clear that states are precluded from imposing state taxes under certain circumstances, for example, on tribal members’ income earned on their reservation.⁹

B. Initial agreements: 1970s–1990s

Along with the decision in *Bryan*, the late 1970s also brought new economic activity on reservations in Minnesota largely resulting from the start of casino gaming and connected amenities. The increase in economic development resulted in new transactions by tribal members and nonmembers on reservations, only some of which were subject to state tax.

These factors led to the negotiation of the initial agreements between the State of Minnesota and tribal governments, which were in effect from the late 1970s to late 1990s. Our understanding of the initial agreements is limited by time and the absence of official documentation.

A primary goal of the agreements was to create a mechanism for disgorging the sales tax collected on transactions that occurred on tribal reservations where the purchaser was a tribal member. These transactions were not appropriately subject to state tax. Administratively, however, it was burdensome and complex for sellers to separate out transactions between customers at the point of sale or have individual tribal members seek refunds for the tax they paid. The state and tribal governments agreed that the state would issue refunds to tribal governments on behalf of their members. This approach was similar to models used in other states.

Although the initial agreements focused on sales taxes, over the course of the next decade and a half, additional agreements were entered to address other tax types. For example, for cigarette taxes, which are paid by the distributor to the state and passed along to the purchaser in the sale price, the state and tribal governments agreed to allocate 70 percent of tax revenue to the state and 30 percent to the tribal government for sales on reservations. For motor vehicle fuel taxes, agreements focused on refunding to tribal governments the tax that the governments themselves paid on fuel. Best available information indicates that by the early 1990s there were 30 to 35 agreements, each covering a different tax type, between the state and the 11 tribal governments.

It is fair to say the agreements did not receive much public or legislative notice until the early 1990s. As economic activity continued to increase and create additional potentially taxable transactions, however, legislative interest grew. In addition, the Department of Revenue recognized the practical challenges of managing the volume of agreements, in part because they did not contain consistent terms. For example, basic contract terms such as termination notice periods for the parties varied across the different tax type agreements with the same tribal government. It was time to revisit the agreements.

III. Current agreements: Negotiations and key components

A. Process of negotiation

In the mid 1990s, the Department of Revenue began discussing internally and with tribal governments a process for negotiating new agreements that would: cover all tax types for each tribal government; update elements such as the per capita amounts as new data became available; make consistent terms and approaches among agreements; and thus terminate and replace the

initial 30-plus agreements. Under the leadership of then-Commissioner Doris McClung, the department embarked upon negotiating the agreements that still are in place today.

After the department discussed negotiating new agreements with tribal governments, the process began with the government of Leech Lake Band of Ojibwe. Leech Lake's agreement became a template agreement for the other bands in the Minnesota Chippewa Tribe. In southern Minnesota, negotiation began between the Lower Sioux Indian Community and the state. Once a template was arrived upon it was shared with other Sioux communities. By 2000, the state and ten¹⁰ tribal governments had entered new agreements.

B. Key components

The agreements with each tribal government comprehensively addressed four tax types, refunds and sharing payments, payment schedules, and essential contract terms. They included many of the principles of the earlier agreements. The documents reflect and recognize that tribal sovereignty precludes imposition of state tax on certain transactions. Under the agreements, tribal governments agree that state tax will be imposed on otherwise excluded transactions, and that tribal governments will receive per capita refunds on behalf of their tribal members for those transactions. The agreements added a new concept—a *sharing payment*—which represents a portion of taxes paid by non-tribal members for purchases on the reservation. The sharing payment was introduced in recognition of the fact that both governments have jurisdiction over certain transactions and any corresponding revenue. For example, a non-tribal member purchase on a reservation is subject to state sales tax for covered goods or services. But the tribe may also impose tax upon that same transaction. The agreements provide that the state tax paid on these transactions will be shared half and half between the state and the tribal government.

The terms of the agreement provide for the state to pay refunds quarterly based upon the calculation in the agreement. Both parties to the agreement have additional obligations, including the tribal government's agreement that it will assist with tax collection from its members for state taxes owed by tribal members for taxes that are not covered by the agreement.¹¹ The agreements are silent and thus do not impose any limits on how tribal governments can spend funds paid under the agreement or their ability to impose taxes for tax types not covered by the agreement.

C. Calculation of refunds and payments

The tax agreements cover four taxes imposed in Minnesota: sales and use taxes; tobacco products taxes; alcoholic beverage taxes; and motor fuels taxes. While the general approach for each tax is broadly the same, with the goal being to return to the tribal nation the portion of taxes that Minnesota is not otherwise entitled to tax (e.g., motor fuel taxes paid by tribal governments) and share revenue on certain transactions, there are distinctions in data choices and calculations as explained below.

Sales and use tax

The sales tax rate is set in Minnesota statute. It is currently 6.875 percent. In addition, some local governments are authorized by the legislature to impose local sales tax for certain purposes, most frequently transportation projects or community infrastructure. These taxes are on top of the state-wide tax. The tribes are generally not involved in setting the state or local government tax rate other than the ability to voice views in the legislative process if they so choose.

The first component of the sales tax payment under the agreement is the per capita refund, which is an estimate of the amount of tax paid by individuals residing on or adjacent to

the reservation. The per capita amount is intended to approximate the amount of tax paid by an individual tribal member. To update the calculation of the per capita sales tax in the new agreements, the department started with the average income of individuals in the county or counties in which tribal reservations are located. It then looked at the Minnesota Department of Revenue's Incidence Study.¹² Published by the department's Research Division, the study provides information about the amount of taxes paid in Minnesota by each income group. Relying on this data about how much an individual at the average county income level paid in state sales tax, the per capita amount was determined for that location and tribal reservation. Per capita amounts are then multiplied by the number of individual members residing on or adjacent to the reservation, resulting in a total payment made to the tribal government.

For several tribal governments, this approach worked reasonably well to approximate the tax revenue due to tribal governments. For others, because of significant casino revenue and distribution, the average county income was lower than the tribal member income. In those cases, the tribal government provided information about average member income that was used in place of average county income, resulting in higher total payments to tribal governments.

The second portion of the sales tax payment is the revenue sharing payment. The sharing payment for sales tax reflects two categories of transactions that are subject to taxation by both the state and tribal governments. The first consists of sales made on reservations to non-tribal members. The second consists of sales made off-reservation to tribal members that would have been subject to tribal use tax. In both cases, the state and tribal governments agreed to split tax revenue in half.

Other factors were taken into account as well. In particular, the nature of business on a reservation is important for understanding how much tax revenue is likely to be generated in

each of the above categories. For example, a reservation with hundreds of businesses would expect more transactions on the reservation (for which it could expect to receive a share of the proceeds) compared to a reservation with few businesses.¹³

Tobacco products, alcoholic beverages, and motor fuel taxes

The other three tax types covered by the agreement share qualities that allow for similar calculations under the agreements. For each, the state collects the tax from product distributors. The tax is passed along to the customer as part of the purchase price paid at the time of sale. To determine the approximation of tax for per capita calculations, statewide average income was used along with the Incidence Study's amount of tax paid for that type of tax. This amount is used to set per capita refunds and sharing payments.

For the motor fuels tax paid by tribal governments for use in their vehicles, that amount is refunded in full to the tribal government. Tribal governments provide the department with the amount of their purchases on a quarterly basis for refund payment.

D. Additional operational provisions

The agreements are comprehensive as to covered taxes and also contain operational provisions to ensure the principles behind the agreements would be met. For example, the agreements include provisions to recalculate the negotiated amounts over time using changes to the Consumer Price Index for the Minneapolis-St. Paul area. This ensures the amount of refunds stay current with prices without needing to renegotiate the dollar amounts in the agreements.

For similar reasons, the agreements provide that once each year, by July 1, tribal governments will update the population number of members who live on or adjacent to its reservation as the per capita number for calculations in the agreement. An outdated per capita number may not reflect growth in population and thus could reduce the amount of tax refunded

below its appropriate level. While the agreement states the number is to be submitted by July 1, in practice, the department will update the number at any time it receives such information from tribal governments.

Finally, other provisions are focused on enforcement-related matters. An example is tribal governments' agreement that only cigarettes with state tax stamps would be sold on their reservations. Tribal governments also agreed to assist the department with tax collection under certain circumstances.¹⁴

IV. Current agreements: Implementation and amendments

The parties have been operating under the agreements for two decades. As with any agreement or contract, parties have questions or issues from time to time. For the most part, the staff of the revenue department and tribal governments work together to answer each other's questions about payments, supply documentation (for motor fuel refunds, for example), and provide information for tribal and department leadership. There are occasions when questions or issues arise that require additional conversation between tribal and department leadership. These issues are handled on a case-by-case basis and frequently include a formal consultation where the department and tribal leadership meet to discuss perspectives and share information.

A. Payments

Based on the negotiated terms of the agreement, the Department of Revenue financial staff calculates the amount of the payments. Payments are made for each tax type covered by the agreement on a quarterly basis. As described previously, the calculations vary by tax type and payment type. In 2018, the agreements resulted in over \$32 million in payments to tribal governments in Minnesota.¹⁵

B. Significant amendments

As circumstances warrant, the state and tribal governments have negotiated and amended the agreements. The process for negotiating an amendment varies by the amendment and the tribal government. At times, however, the negotiation followed the pattern of the negotiation of the current agreements in the late 1990s, including frequently starting with one Chippewa tribe and one Sioux tribe to develop the amendment which was then shared with other tribes.

In 2005, the state enacted a Tobacco Use Health Impact Fee (HIF) on the sale of cigarettes.¹⁶ The HIF was paid by distributors and passed along in the consumer prices as is the case with other tobacco product taxes. As a result of the imposition of the HIF, transactions on tribal reservations were subject to this new fee. The agreements needed to be updated to reflect the HIF and the resulting additional revenue stream to the state of Minnesota, some of which was due to the tribal government under the principles of the agreement. The state and tribal governments entered an amendment to add the HIF to the per capita and sharing payments for tobacco products.

The most recent amendment to the agreements stems from the 2018 decision in *Wayfair v South Dakota*. In *Wayfair*, the U.S. Supreme Court upheld states' ability to impose tax on remote, i.e., on-line, sellers regardless of physical presence in the state.¹⁷ The decision expanded the base on which sales tax could be imposed in Minnesota.

A Tribal Counsel for the Leech Lake Band of Ojibwe was the first to raise with department legal staff the issue of how *Wayfair* could be addressed by the tax agreements. The department began considering the issue and relied upon the State of Minnesota's November 2018 Economic Forecast¹⁸ which projected additional revenue to the State of Minnesota attributed to the expanded sales tax authority.

In December of 2018, department leadership met with leadership of Leech Lake Band and discussed amending the agreement to reflect additional per capita payments to the tribal government to reflect the additional tax revenue from *Wayfair* implementation. As was the case in earlier negotiations, other bands of the Minnesota Chippewa Tribe were interested in the perspective of Leech Lake as they considered the amendment to their own agreements. Shortly after, the department began the conversation with the Lower Sioux Community. The department also had the opportunity to provide information and discuss the proposed amendments with the leaders of ten tribal governments at meetings of the Minnesota Indian Affairs Council in 2019.¹⁹ The parties have agreed to the amendment for each of the ten agreements.

V. Minnesota perspective: Success and opportunities

Over the course of two decades, the agreements in Minnesota have proven remarkably durable. While disagreements and concerns have been raised over time, none have resulted in either party terminating the agreements. When issues have arisen, the parties generally meet to discuss perspectives and resolve or avoid potential breaches or violations of the agreements. While the agreements have functioned well, there are, of course, areas to be improved upon. In addition, perspectives among tribal members and state and tribal leaders are neither uniform nor static when it comes to the agreements.

A. Success and opportunities: Data

Tribal-state tax compacts can be implemented in ways more consistent with their underlying principles if the data they rely upon is precise. One data-related issue is the source for population estimates. The population of tribal members living on or adjacent to the reservation is a key component of the calculation for the per capita refund. The agreements state that the

number comes from a Bureau of Indian Affairs (BIA) Report on Service Population and Labor Force.²⁰ That report, however, is no longer produced by BIA. Rather than re-open the agreements to make this technical update, the parties have been operating under the principle of the agreement that the population number will be updated annually to ensure appropriate amounts of refund to the tribal government. The data now comes from tribal governments directly rather than via the BIA report.

B. Success and opportunities: Keeping up with law and economic changes

The agreements reflect the circumstances surrounding their negotiation, including the state taxes imposed at the time. Changes in state law, by statute or court decision, require amendments which appropriately require negotiation between the parties. This can then delay refunds to tribal governments. For example, with the *Wayfair* amendment, it took several months, and in a few cases, longer to enter into the amendment. Regardless of when the amendment is signed, the department pays the additional per capita retroactively, dated to the implementation of *Wayfair* in Minnesota which was October 1, 2018.

Similarly, economic trends change over time and tribal governments have approached the department about how the agreement may be affected if the tribe starts a new business venture. These conversations happen every few years and have largely been resolved at early stages. One issue that has continued to receive attention, and is a source of the most discussion, is the sale of tribal cigarettes. The agreements provide that only cigarettes with a state tax stamp on them will be sold on reservations (or anywhere in Minnesota). Distributors of tribal cigarettes (which may have a tribal tax stamp on them) have attempted to sell cigarettes in Minnesota. After lengthy consultation, all parties have agreed to abide by the terms of the agreement that only cigarettes with state tax stamps will be sold in Minnesota.

C. Success and opportunities: Communication and transparency

It is also the case that state and tribal governments, as institutions, change over time as personnel and leadership change. The existence of the agreements and how they function is not always well known, which creates a challenge for state-tribal relations. And, while there is always more that could be done, the past decade has seen significant improvements in communication, transparency, and commitment to state-tribal relations.

Parties to the state-tribal tax agreements increasingly understand the value of improving policies and procedures while being intentional about educating their personnel about state-tribal relations and the tax agreements. This ensures that all state and tribal personnel who work on implementation of the agreement, from payment calculation and frequency to questions about tribal government fuel taxes, are well versed in tribal sovereignty and the agreements.

During the course of the consultations, the state becomes aware of tribal members and tribal leaders' questions about the agreements. Some individuals raise questions about whether they represent the best economic choice for the tribe. Some tribal members raise questions about why the refund payments should be made to their government as opposed to refund payments to individual members who paid the tax in the first instance. Some tribal members have raised questions about whether the calculations are appropriate given current purchasing trends and options. Others note that the agreements provide tribal governments with a significant stream of revenue to provide important services to their members, while also avoiding the administrative challenges of seeking tax refunds for individual members.

The department, on behalf of the state, can always discuss the particulars of the agreement (including sources of data and details of calculations) and negotiate changes to the agreement. Other questions, including about the appropriateness of the agreements' basic

principle of disgorging tax refunds to the tribal government, are important and complex questions for tribal members and their governments.

¹ The author is the former Commissioner of the Minnesota Department of Revenue. The views and information contained in this article are the author's and based on her role as negotiator for the state as a party to the agreements. The author thanks the personnel at the department and the many tribal government leaders, officials, and personnel with whom she worked over six years on the agreements and state-tribal relations more broadly. Those relationships, personally and professionally, are grounded in admiration, appreciation, and respect.

² In some states, these agreements are referred to as compacts. The documents in Minnesota are titled "Tax Agreement."

³ M.S. 270C.19

⁴ There is not a current agreement between the State and the Prairie Island Mdwakanton Dakota Community. An agreement existed prior to the late 1990s.

⁵ See Mark Cowan's 2021 discussion paper for the CICD, "[State-Tribal Tax Compacts: Stories Told and Untold.](#)"

⁶ 426 U.S. 373 (1976).

⁷ 426 U.S. at 375.

⁸ 391, quoting P. L. 4 (b)

⁹ See, e.g., McClellan 411 U.S. 164, 178; *Moe v. Salish and Kootenai tribes*, 425 US 463, 1976 (state tax on motor vehicles owned by tribal members living on the reservation).

¹⁰ *See supra*, note iv.

¹¹ For example, income tax is not covered by the agreement.

¹² <https://www.revenue.state.mn.us/tax-incidence-studies>.

¹³ At the time of negotiation, the Red Lake Nation Reservation was closed to non-tribal members. That agreement does not include a per capita payment for sales tax or motor fuel tax reflecting the absence of transactions on which tax was imposed on the reservation.

¹⁴ There is no information that the department has ever asked a tribal government to assist with enforcement under this provision of the agreement.

¹⁵ Minnesota House Research Guidebook, American Indians, Indian Tribes, and State Government, Table 7, at 80. (Department of Revenue data) www.house.mn/hrd.

¹⁶ M.S. 256.9658.

¹⁷ 138 S. Ct. 2080 (2018).

¹⁸ MMB

¹⁹ The Minnesota Indian Affairs Council is led by representatives of ten of the 11 tribal nations that share boundaries with the state of Minnesota. The mission of council is to protect the sovereignty of the 11 Minnesota tribes and to ensure the well-being of American Indian citizens throughout the state of Minnesota.

²⁰ Also referenced in M.S. 270C.19