

**STATE AND FEDERAL TAX POLICY: BUILDING
NEW MARKETS IN INDIAN COUNTRY**

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS

UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

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**STATE AND FEDERAL TAX POLICY: BUILDING
NEW MARKETS IN INDIAN COUNTRY**

THURSDAY, DECEMBER 8, 2011

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 3:40 p.m. in room 628, Dirksen Senate Office Building, Hon. Daniel K. Akaka, Chairman of the Committee, presiding.

**OPENING STATEMENT OF HON. DANIEL K. AKAKA,
U.S. SENATOR FROM HAWAII**

The CHAIRMAN. I call this meeting of the Committee on Indian Affairs to order.

Welcome to this oversight hearing on State and Federal Tax Policy: Building New Markets in Indian Country.

Before I proceed with my statement, I would like to ask Senator Franken for any comments.

**STATEMENT OF HON. AL FRANKEN,
U.S. SENATOR FROM MINNESOTA**

Senator FRANKEN. Thank you. I appreciate that, Mr. Chairman, first of all that you are holding this hearing, and I thank the Co-Chairman, and I thank you for allowing me to make a brief opening statement, because we have a great chairman here, Kevin Leecy of Bois Forte. I just want to be able to say a few words about this topic and about their Band and about the chairman.

As we continue to look for ways to support economic development in Indian Country, it is critical that we examine the role of State and Federal policy. When designed well, tax incentives can work to bring new businesses and jobs to low income communities, including to Indian Country. But overlapping, conflicting and unclear tax policies can stifle economic development. In short, bad tax policy can handcuff a Tribal government's ability to provide even the most basic services to their communities.

It is easy to become discouraged when talking about the many obstacles to economic development in Indian Country. That is why I think it is also important to look at the success stories. I want to thank Mr. Chairman for inviting Chairman Leecy from Bois Forte to testify today. As I mentioned during last week's hearing, I have visited Bois Forte and seen first-hand how economic development can transform a community.

In 1997, the Bois Forte Reservation Tribal Council assumed full responsibility for the delivery of all government programs and services to its 3,000 members. The Tribal Council has worked tirelessly to strengthen the region's economy and increase job opportunities for Band members, all while preserving a strong sense of community and respect for traditions.

Since first being elected chairman in 2004, Kevin Leecy has worked to diversify the Band's resources. In addition to the Fortune Bay Resort Casino and the Bois Forte Wild Rice Company, the Band now owns and operates a golf course, a radio station, convenience store, and a manufacturing company. The Band has also made numerous investments in education, housing, health care and infrastructure to serve the needs of the community.

Chairman Leecy, thank you for your leadership and for coming today. Unfortunately, as I told you before the business meeting, I am unable to stay for the hearing. But I want to thank both witnesses for being here, and I also will submit questions in writing for the record. And I really thank the Chairman for allowing me to make these opening remarks. Thank you.

The CHAIRMAN. Thank you very much, Senator Al Franken.

In these difficult economic times, there has been a lot of discussion about how to improve our Federal and State tax policies. Some tax policy has the potential not only to sustain local economies, but to help them grow into vibrant job creators. This is especially true for Tribal communities who have disproportionately found themselves suffering the worst in the American economy. For tribes, double digit unemployment has been the norm for generations, not the exception.

Today we will examine important Federal tax policies designed to promote economic development and drive job growth in Tribal communities. We will hear from Tribal witnesses today who have taken advantage of these Federal tax incentives and we will hear about tribes that use them to support their local economies. Some of those tax policies will expire at the end of this year if Congress does not act to extend them.

We also will hear today about the role of the State taxation on Tribal economic development. Many tribes find it difficult to attract capital, sell goods and grow other enterprises when States attempt to tax their economic activity. Our witnesses will highlight some of these challenges, but also identify solutions in working with States to ensure vibrant Tribal economies that support their own members as well as enrich the economies of their neighboring communities.

I look forward to hearing about the impact these policy issues have on our Tribal communities, as well as identifying promising practices in working with our State and Federal partners to remove barriers to Tribal economic development.

Senator Barrasso, any statement that you may have, you may proceed at this time.

**STATEMENT OF HON. JOHN BARRASSO,
U.S. SENATOR FROM WYOMING**

Senator BARRASSO. Thank you very much, Mr. Chairman. I think you said it so very well, in the summary that you have just given, that I will keep my opening statement very brief so we can hear from our witnesses.

This Committee has been hearing from Indian Country for a long time about the effects of taxation on Indian reservations. The tax issues came up last Congress, when Senator Dorgan introduced his energy bill. And several tribes raised the issues again this year, Mr. Chairman, when you and I worked together on S. 1684, the energy bill that I introduced and you were gracious enough to co-sponsor.

So it is clearly an important economic development topic for the tribes, and it is one that we should look at very carefully. This oversight hearing will give Tribal representatives a formal stage to share their concerns with the Committee, and I thank you, Mr. Chairman, for making this all possible. Thank you.

The CHAIRMAN. Thank you very much. Are there any other Senators with opening statements? Senator Tester.

**STATEMENT OF HON. JON TESTER,
U.S. SENATOR FROM MONTANA**

Senator TESTER. Thank you, Mr. Chairman.

We just passed the SAVE Native American Women Act out of this Committee. That is dealing with violence on one level. Dealing with violence on another level is dealing with it economically. The fact is, when you have poverty and you have cycles of poverty, the prevalence of violence is much, much higher.

So what I would ask the witnesses for is what really works. We are at a time where we have to save some dough, but at the same time, we have to spend some money, too. So how do we spend it, and how do we spend it smartly to get the most bang for the buck in Indian Country? I can tell you, there are a lot of challenges out there. With challenges come opportunity and there is an incredible amount of opportunity, and there may be some things that we can do outside this bill, outside the tax code, that will also help. And we would appreciate those suggestions, too, at least from that perspective.

Thank you both for being here. I appreciate your time, and appreciate your willingness to come to Washington, D.C. I look forward to your testimony.

The CHAIRMAN. Thank you very much, Senator Tester.
Senator Udall?

**STATEMENT OF HON. TOM UDALL,
U.S. SENATOR FROM NEW MEXICO**

Senator UDALL. Thank you, Chairman Akaka, and once again, thank you for holding this hearing and focusing on this issue, which I think is important to all of the Native community.

As my colleagues have said, this is an important issue for all of us. I am pleased we are here today to raise awareness about the need for improving tax policy affecting Indian Country. This year, taxes have been a popular subject to talk about, and we have all

heard about possible tax code reform. Like you, I want to make sure in any piece of legislation that moves forward, it addresses the needs of Indian Country. It is not an area we can afford to ignore, and it deserves a place in every discussion.

In New Mexico, we are the most familiar with the New Markets Tax Credit Program. It has been a real success, and has in recent years made strides in reaching Native communities.

I would like to take a moment to highlight some of the recent awards that have gone to Tribal entities, like Isleta Pueblo Housing Authority, the Laguna Housing Development and Management Enterprise, and the San Juan Tribal Council. This program is making a real difference in the lives of Native Americans in New Mexico.

Please be assured that I will work with the Committee to do everything I can to make sure that we are including the tax provisions important to Indian Country, especially the NMTC, in any tax legislation.

With that, Chairman Akaka, I would yield back and look forward to hearing from the witnesses.

The CHAIRMAN. Thank you very much, Senator Udall.

With that, I welcome our witnesses. I appreciate that you have all traveled to be with us today and look forward to hearing your testimony on this very important matter.

I ask that you limit your oral testimony to five minutes. Your full written testimony will be included in the record.

Also, the record for this hearing will remain open for two weeks from today, so we welcome written comments from any interested parties. So thank you all for considering that.

I would like now to welcome our first panel, the Honorable Kevin Leecy, Chairman, Bois Forte Band of Chippewa Indians; and Mr. Peter Ortego, General Counsel of the Ute Mountain Ute Tribe. Chairman Leecy, please proceed with your remarks.

**STATEMENT HON. KEVIN W. LEECY, CHAIRMAN, BOIS FORTE
BAND OF CHIPPEWA INDIANS**

Mr. LEECY. Aloha. Good afternoon. I am Kevin Leecy, I am the Tribal Chairman of the Bois Forte Band of Chippewa in Northern Minnesota. I am pleased to provide testimony today on important issues that impact the ability of Indian tribes to finance development within their reservations.

It is my understanding that the Committee is interested in hearing from Indian Country about Tribal experience with New Market Tax Credits and the tax incentives associated with accelerated depreciation and employment tax credits.

Bois Forte was able to access the New Market Tax Credits program at a time when it was absolutely necessary to find a source of affordable financing. In the summer of 2009, our Tribal government building was burned to the ground by arson. It was a total loss and there was no place for Tribal government to work. Because we needed to continue to provide the services to our Tribal citizens, we immediately began to search for ways to finance the new Tribal government building.

We decided that the New Market Tax Credit program promised to be a vital part of that financing. We used a loan from another

Tribe, grants and our own resources to put the New Market Tax Credit program in place. As a result, we were able to plan, design and construct the new building in one year. We moved into our new Tribal government and community services center in August of 2010.

Some observations of the New Market Tax Credit program, number one, is we could not have financed the projected without it. Two, although it is a complex process, both in financial structure and in terms of ongoing compliance, the fees were less than 2 percent of the overall project, and it was an affordable way to finance the project.

Number three, the program reduced the cost of borrowing for a project that some lenders have usually considered to be too high of a risk and short on collateral, because it was located on Tribal trust land within the reservation.

I urge Congress to reauthorize the New Markets Tax Credit program so that it remains accessible to Indian tribes throughout the Country. My reasons for supporting an extension include: New Market Tax is a program that has worked in Indian Country. For many tribes, they are just now learning about it. For example, Bois Forte hosted a delegation from the Red Lake Nation this summer and made a presentation on how it worked for us. In addition, the Fond du Lac Band of Lake Superior Chippewa followed our example of New Market success to finance a natural resources building.

I foresee great opportunities in Indian Country if this program continues to be available.

The New Market Tax program does not need to be reformed to continue to be successful in Indian Country. It will succeed because tribes are now in a better position to use this program.

This Committee can help make the New Markets program even more successful if it encourages Executive Branch agencies to use this program to make their dollars go further. I believe that some agencies have the legal authority to re-lend into New Market structure, but have been reluctant to do so, simply because it is new to them. But if there is no statute or regulation that prevents participation by an agency, I hope they will embrace the possibilities presented by New Markets Tax Credits.

The New Markets program is vital in Indian Country because more traditional lenders shy away from loans on trust land. When a lender knows that it cannot foreclose and sell the property in the event of default, the risk goes up and so do interest rates. Our experience was that the New Markets program provided the flexibility investors needed to make the project possible on trust land.

Finally, I believe that the accelerated depreciation and employment tax credits should also be extended by Congress. Although we have not had specific instances at Bois Forte in which employers have taken advantage of those programs, entities that consider locating on reservations always ask for a list of advantages of doing business on the reservation. The existence of those programs may just make the difference for a new or expanding business and tip the scale in our favor.

In short, we need to make every effort to develop reservation economies and those tools should include to continue to be available. So again, we support and wish to see that continued.

Thank you very much.
 [The prepared statement of Mr. Leecy follows:]

PREPARED STATEMENT OF HON. KEVIN W. LEECY, CHAIRMAN, BOIS FORTE BAND OF
 CHIPPEWA INDIANS

Good afternoon. I am pleased to provide testimony today on important issues that impact the ability of Indian tribes to finance development within their Reservations. It is my understanding that the Committee is interested in hearing from Indian country about tribal experience with New Markets Tax Credits and the tax incentives associated with accelerated depreciation and employment tax credits.

Bois Forte was able to access the New Markets Tax Credit program at a time when it was absolutely necessary to find a source of affordable financing. In the summer of 2009 our tribal government building was destroyed in a fire set by an arsonist. It was a total loss and there was no place for tribal government to work. Because we needed to continue to provide services, we immediately began to search for ways to finance a new tribal government facility. We decided that the New Markets Tax Credit program promised to be a vital part of the financing.

We used a loan from another Tribe, grants, and our own resources to put the New Markets Program in place. As a result, we were able to plan, design and construct the new building in about a year. We moved into our new Tribal Government and Community Services Center in August of 2010.

Some observations of the New Markets Tax Credit program:

1. We could not have financed the project without it.
2. Although it is a complex process both in financial structure and in terms of on-going compliance, the fees were less than 2 percent of the overall project and it was an affordable way to finance the project.
3. The program reduced the cost of borrowing for a project that some lenders have usually considered to be high on risk and short on collateral because it was located on tribal trust land within the Reservation.

I urge the Congress to re-authorize the New Markets Tax Credit program so that it remains accessible to Indian tribes throughout the country. My reasons for supporting an extension include:

- New Markets is a program that has proven to work in Indian country, but many tribes are just now learning about it. For example, Bois Forte hosted a delegation from the Red Lake Nation this summer and made a presentation on how it worked for us. In addition, the Fond duLac Band followed our example of New Markets success to finance a natural resources building. I foresee great opportunities in Indian country if the program is available.
- The New Markets program does not need to be reformed to continue to be successful in Indian country. It will succeed because Tribes are now in a better position to use the program.
- This Committee can help make the New Markets program even more successful if it encourages Executive Branch agencies to use this program to make their dollars go further. I believe that some agencies have the legal authority to lend into the New Markets structure but have been reluctant to do so simply because it is new to them. But if there is no statute or regulation that prevents participation by an agency, I hope they will embrace the possibilities presented by New Markets.
- The New Markets program is vital in Indian country because more traditional lenders shy away from loans on trust land. When a lender knows that it cannot foreclose and sell the property in the event of default, risk goes up and so do interest rates. Our experience was that the New Markets program provided the flexibility investors needed to make the project possible on trust land.

Finally, I believe that the accelerated depreciation and employment tax credits should also be extended by Congress. Although we have not had specific instances on our Reservation in which employers have taken advantage of those programs, entities that consider locating on reservations always ask for a list of advantages of doing business on the reservation. The existence of those programs may just make the difference for a new or expanding business and tip the scale in our favor. In short, we need to make every effort to develop reservation economies and those tools should continue to be available.

The CHAIRMAN. Thank you very much, Mr. Leecy.

Mr. Ortego, will you please proceed with your remarks?

**STATEMENT OF PETER ORTEGO, GENERAL COUNSEL, UTE
MOUNTAIN UTE TRIBE**

Mr. ORTEGO. Thank you, Mr. Chairman, Committee members. It is an honor to be invited to speak here today. Thank you.

This topic is very important to the Ute Mountain Ute Tribe. I am here primarily today to talk about the effect of State taxation on the Ute Mountain Ute Tribe. Ute Mountain Ute Tribe is located in Colorado, New Mexico and in Utah. It is over 500,000 acres of land. We have 2,000 Tribal members. We are the largest employer in Montezuma County.

And what we have seen is that as the Tribe benefits and the Tribe seeks access to resources and seeks economic development, so does the community around us see that benefit. And so when there is a burden on us, and we cannot operate as effectively as we would like, that is a burden that ends up affecting our entire community, not just the Indian community, but the non-Indian community as well.

In New Mexico, our lands are not occupied by a person who lives there, but we do have oil and gas operations in New Mexico. The Tribe itself has a severance tax that it applies to oil and gas being severed from the lands. So does the State of New Mexico. So the Tribe in 1992, confronted with this dual taxation, passed a resolution stating that if the Tribe could eliminate the State severance taxes, then the Tribe's severance tax would be increased by a proportionate amount. What amount that would be would be determined at the time, but we reserved the right to increase it to the full extent of the State taxation.

In 2009, the Ute Mountain Ute Tribe sued the State of New Mexico in Federal court, and we were seeking relief from those taxes. The trial court agreed with the Tribe. The trial court stated that the taxes, that the benefit that the Tribe received was de minimis from State activities, that the off-reservation services that the State provides to the oil and gas operators, the non-Indian oil and gas operators, is significant; however, it does not justify the taxation.

We also argued with that court that the regulatory structure for oil and gas on the reservation is comprehensive. Between the Bureau of Land Management, the Bureau of Indian Affairs, and the Tribe's regulations, there is no need for the State to regulate oil and gas on the reservation. And the court agreed.

The State of New Mexico appealed that to the Tenth Circuit of Appeals, and the Tenth Circuit Court of Appeals reversed. They found that the services were not de minimis, that the off-reservation services that the State provides lend value to our resource. And in fact, the court went so far basically as to state that the only way a Tribe really can avoid State taxation is if it does all of it itself, if we did not use any off-reservation resources.

And that simply is not tenable to the Tribe, it is not tenable to the operators who work with us. What we would rather see is that the State and the tribes work together. We know that what we do on the reservation impacts the States, and we know that what the States do off our reservation impacts us on the reservation.

So rather than us being forced to have a disadvantage because our operators both have to pay our tax and the State tax, something which they don't have to do off the reservation, we need to work with the States to come up with solutions as to how to resolve these issues, not to force us to have to have taxation on the reservation.

The Tribe paid, in State taxes, three quarters of a million dollars. And that is what the Tribe paid, that is in payroll and cigarette taxes. We also have some fee lands where we pay property taxes. So we give a benefit to the State and we feel like we don't receive enough benefit back. And we can't tax operations that happen on the State, and we don't think they should be able to tax operations that happen on the reservation. And by working together, I think we can continue to see this benefit.

About a year and a half ago, two years ago, the Tribe had a meeting with the local governments in Montezuma County. It was the first time we had ever had that meeting. Out of that came an economic development association, which is working with the Tribe and the communities off the reservation. And we are seeing some benefit now. We are starting to see that the area is becoming more attractive and that we can work together to bring economic development to the Indians and the non-Indians.

So thank you for this opportunity today. These topics you are addressing are very important and I appreciate the hard work that you do. Thank you.

[The prepared statement of Mr. Ortego follows:]

PREPARED STATEMENT OF PETER ORTEGO, GENERAL COUNSEL, UTE MOUNTAIN UTE TRIBE

Mr. Chairman and Committee members, thank you for the opportunity to testify in regards to state and federal taxation in Indian country and its effects on tribal economic development. My name is Peter Ortego and I am the General Counsel for the Ute Mountain Ute Tribe. I reside in Lewis, Colorado, about thirty miles North of Towaoc, Colorado, the governmental seat for the Tribe. My testimony today is limited to the facts and circumstances as they relate to the Ute Mountain Ute Tribe, as this is where my experience lies, but I believe there are sufficient similarities between tribes so that these comments could apply to numerous tribes.

The Ute Mountain Ute Reservation consists of over 500,000 acres located in Colorado, Utah, and New Mexico. The Tribe has just over 2,000 members, most of whom reside on the Reservation either in Towaoc, Colorado, or White Mesa, Utah. No person resides within the New Mexico portion of the Reservation.

According to the United States Census for 2000, the average annual income of an adult living on the Reservation was \$8,159. By comparison, income for residents of San Juan County, New Mexico, where the New Mexico portion of the Reservation is located was \$14,282 and \$17,261 for residents of the State of New Mexico. Income for residents of Montezuma County, Colorado, where Towaoc is located, was \$17,003 and \$24,049 for residents of the State of Colorado.

The Tribe distributes \$2,000 per year to each Tribal member (slightly more for elders). The distributions are made out of funds generated from oil and gas royalty and tax revenues. Additional financial benefits are paid to Tribal members under the general welfare doctrine. No gaming revenues are distributed to Tribal members on a per capita basis and all funds derived from economic development activities are used for governmental purposes and to defray the costs of government services.

The Tribe has obtained funds from the settlement of water claims and uses these funds for economic development and resource enhancement. One fund is specifically restricted to economic development and the other is restricted to resource enhancement. The Tribe currently uses interest earned from the economic development fund for its economic development projects and has never spent any portion of the principal, to the best of my knowledge.

The Tribe is engaged in numerous economic activities. The Tribe has a casino and hotel, a construction company, a farm and ranch enterprise, a pottery store, a guided tour service, and two travel centers. The Tribe also earns significant revenue from oil and gas operations in both Colorado and New Mexico. The Tribe is venturing into renewable energy and has several commercial scale projects under review, including a closed loop pump back storage project that is currently pursuing a FERC permit.

The Tribe is the largest employer in Montezuma County and owns several ranches in the State of Colorado. The Tribe asserts Indian preference in employment, provides free employment training to its members, and provides financial literacy education to employees and members.

The Tribe does not impose very many taxes; there is a severance tax and possessory interest tax imposed on oil and gas extraction, and there is a hotel tax that is charged to patrons of the hotel. The Tribe imposes fees for some services provided to its members, and charges non-members for access permits, rights-of-way, and leases over trust and non-trust properties.

The Tribe pays numerous state and federal taxes, as well. The Tribe pays state fuel, excise, cigarette, property, and employment taxes and federal excise and employment taxes. The Tribe also pays for unemployment insurance and workman's compensation insurance.

In fiscal year 2011, the Tribe's travel centers paid \$561,570 in federal fuel-related taxes and \$588,626 in state fuel-related taxes (Utah and Colorado). The Tribe's travel centers and casino paid \$67,895 in state cigarette taxes.

I believe one of the best ways to understand and appreciate the impact of state taxes on Tribal economic development is to review the lawsuit that the Tribe filed in federal court in 2009 against the Treasurer for the State of New Mexico alleging that the state has no authority to collect taxes and impose regulations on oil and gas activities that occur within the boundaries of the Reservation. The basis of the Tribe's claim is that the taxes impose a significant economic burden on the Tribe, and, in light of the fact that the Tribe and its members receive no direct services from the state of New Mexico on the Reservation, the state has no justification to impose the taxes.

The Tribe was successful in the District Court and received a judgment in its favor. (See *Ute Mountain Ute Tribe v. Homans*, 775 F.Supp.2d 1259 (D.N.M. 2009).) The District Court made specific findings that were uncontested by the state and concluded that the services provided by the state to the Tribe and its members are *de minimis* and that the imposition of the taxes creates an economic burden to the Tribe. The Court found that in 2007, the total revenue earned by the Tribe was \$16,052,092 with \$4,426,741 being distributed to Tribal members on a per capita basis generated from oil and gas taxes and royalties, primarily from the New Mexico portion of the Reservation. Notably, in the same year, according to the Court's estimates, the state received approximately more than \$1,300,000 in revenues from taxes imposed on on-Reservation oil and gas activities.

In 1992, the Ute Mountain Ute Tribal Council passed a resolution stating that if state taxes imposed on oil and gas activities within the Reservation were reduced or eliminated, then the Tribal taxes imposed on the same activities would be increased by the amount that the state taxes were reduced. In 2007, this would have resulted in an increase in Tribal oil and gas revenues of approximately \$1,300,000. This would mean that \$650 could be distributed per capita to each Tribal member, increasing the average income of Tribal members by 8 percent using 2000 Census income levels. The District Court found that if the state taxes were reduced or eliminated, the Tribe could exercise one of several alternatives, including amending the 1992 resolution to impose a lesser tax or no tax at all, and the result would be that oil and gas production on the Reservation would be more attractive to potential operators than it is with the burden of the state taxes.

The State of New Mexico appealed the decision of the District Court to the Tenth Circuit Court of Appeals. Unfortunately for the Tribe, the Tenth Circuit did not agree with the findings of the District Court and reversed the ruling. (See *Ute Mountain Ute Tribe v. Rodriguez*, 660 F.3d 1177 (N.M. 2011).) The Tenth Circuit found that the District Court was wrong to find that the taxes created an economic burden to the Tribe because the Tribe did not subsume the cost of the taxes by reimbursing the operators for the tax. Also, the Tenth Circuit found that off-reservation services provided by the state—such as roads and processing facilities—were sufficient to justify the on-Reservation taxes, even though the state already imposes separate taxes on oil and gas operators for those off-reservation services. Finally, and the most problematic for the Tribe, is that, under the Tenth Circuit holdings, the only way for the Tribe to conduct oil and gas activities on its Reservation without the burden of state taxes being imposed on its non-Indian operators is for the

Tribe to provide *all services* related to the production, regulation, and processing of oil and gas extracted from the Reservation. Although the Tribe may someday be able to provide such extensive services, it cannot do so now and the continued imposition of the state taxes hinder the Tribe's ability to do so in the future.

Another significant issue for the Tribe is that we do not see a benefit from the taxes that are collected by the states. In Colorado, for instance, revenues acquired by the state from taxation of on-Reservation oil and gas activities are deposited into various funds, some of which are specifically designated for use in Montezuma County. None of the revenues serve the Tribe directly and we see no benefit from the taxes collected.

Similarly, the Tribe pays state property taxes for some of its ranches in Colorado which are held in fee and restricted fee, and yet we have a very difficult time obtaining services for these ranches that would be available to any other tax payer, such as law enforcement.

Taxation also carries with it an implied right to regulate through audits and other regulatory functions. Tribes are experiencing a high number of audits from the Internal Revenue Service based upon the tribes' obligations to pay certain federal employment taxes. The states of Colorado and Utah assert the right to inspect the Tribe's underground fuel storage tanks and to impose sanctions if the tanks are not properly maintained.

Finally, everything the Tribal government does is for the purpose of helping its members and its employees. State and federal taxation hinders the Tribe's ability to act in promotion of these interests. If the Tribe desires to impose a tax or a fee in order to defray its costs and the activity is already taxed by the state or the United States, then the contactors paying the taxes are exposed to higher taxation then they would experience off the Reservation, thus making onReservation work much less attractive. When Tribal activities are unencumbered by state and federal taxation, then the Tribe can best determine how to receive compensation for the services it provides. In order to remain competitive and secure contracts for economic development activities, the Tribe may wish to levy fees and taxes, or it may not, but at least the Tribe gets to make the determination based upon what it feels is necessary for its people.

The Ute Mountain Ute Tribe strives for independence. The Tribe is proud of its heritage and the Ute people have demonstrated strength in stamina, perseverance, and foresight. There will be a day when the Tribe can survive on its own, as it did for centuries before European settlers arrived. The Ute people will not always be dependent upon the states and the Federal Government for assistance. A day will come when the Ute Mountain Ute Tribe can stand with its neighbors as an equal, able to assert its sovereignty for the betterment of all people, but this day will not come soon enough if the Tribe continues to have to accommodate the taxation regimes that are imposed on its activities without its consent.

Thank you, again, for this opportunity. If there is any other assistance I can provide as you take on this very important work, please do not hesitate to ask.

The CHAIRMAN. Thank you very much, Mr. Ortego, for your remarks.

Chairman Leecy, you mentioned that lenders often ask you for a list of advantages to doing business on the reservation. Without the accelerated depreciation and employment tax credit, do you think you would be at a competitive disadvantage?

Mr. LEECY. I think we would be at a disadvantage without those opportunities and the New Market Tax Credits. I just want to say that right now we are looking at a biofuels plant, for instance, on the Bois Forte Reservation, to not only assist our economy but assist the declining logging industry in northern Minnesota. We are looking at the possibility of tax cuts for that. That is an advantage that we could use in designing a demonstration plant on the Bois Forte Reservation to employ a lot of people.

So we feel that that is a good advantage for us.

The CHAIRMAN. Chairman Leecy, how can Congress improve existing Federal incentive programs, such as accelerated depreciation and Indian employment tax credit?

Mr. LEECY. I think right now there is a need to spur investment in the United States. I think we need to provide both the corporate and government and have them work together. One of the ways we can do that, for instance, I am going to use an example, because it was just discussed the other day with our planning department, with our Tribal council, is health care is one, and health care is a matter in the United States, it is also a matter in Indian Country. We are looking at a new clinic in the health services building.

We looked at the New Market Tax Credits and we also looked at the USDA Rural Loan program. We cannot use one and use the other. If we use the tax credit program, we cannot use the USDA loan program. I think by putting them together and having them work together, I think you are going to have more, spur more development, not only in Indian Country but across the Country, if government and corporations work hand in hand to make these happen.

The CHAIRMAN. Thank you.

Mr. Ortego, you discuss how taxation of Tribal activities can impact the Tribe's ability to be self-sufficient. How can we improve the tax scheme to make your Tribe more self-sufficient?

Mr. ORTEGO. I think that if we were not encumbered by the State taxes that are imposed upon us for operations on the reservation, I think that would free us up a great deal. As Chairman Leecy has mentioned, there is a benefit to doing work on the reservation. That resolution I mentioned in 1992 would allow the Tribe to increase its taxes by the same amount as the State taxes, but frankly, we don't feel that that would be appropriate. Because that would still put us at a competitive disadvantage. It is up to the tribes to figure out what those taxes should be.

So to be blunt, Mr. Chairman, if the tribes are not under the regime of State taxation, then I think that would free us up a great deal in economic development and the ability to attract people to come onto the reservation and work with us would be greatly enhanced. Much of what we do is in coordination and in cooperation with either other tribes or non-Tribal entities. And those entities need an incentive to come onto the reservation as these tax credits do. But the State taxation pushes them away and makes them decide to do their work off the reservation.

So I think literally eliminating the ability of a State to tax a Tribe would be an incredible gift to the tribes. And it would free us up to truly exercise our sovereignty and do it in a way that we feel is best for our people and our community and the surrounding area.

The CHAIRMAN. Mr. Ortego, please describe some of the issues created by IRS's interpretation of essential government function. What can be done to remedy this situation?

Mr. ORTEGO. The Internal Revenue Service is essentially going, in my opinion, the Tribal casinos are a target. It appears as if casinos under these IRS regulations and other large, successful Tribal operations are going to lose their immunity from suit, for activities that they do on the reservation, they are going to come under the jurisdiction of courts that are not under the Tribe's consent.

If Tribal enterprises are parts of the Tribal government, as ours are, they serve a governmental purpose. Every dollar that is made

at our casino goes to help the people. It doesn't go into any individual's pocket to make them wealthy. We wish we could make all the Tribal members wealthy, but we can't. But we use that money to pay for the administration and we use that money to help the Tribe run the Tribal government.

If the IRS continues to treat our casinos as if they don't share that purpose, they aren't part of that, then they are going to be subject to State laws, they are going to be subject to a whole realm of jurisdictions that are beyond the Tribe. Every other enterprise that we have on the reservation shares in the government's sovereign immunity. And it is a part of the Tribal government. The IRS is pulling that away, and it is now making it so that our casino has to operate just as if it was off the reservation. It no longer gets the benefit of being a Tribal operation. It is now simply a corporation within the State.

I think that is where we are headed with these IRS regulations. We are not in favor of that at all. We think that is a real, its impact on the Tribe is such that we cannot provide services to our members and to the community the way we would like to. The end result is that our casino is going to be a corporation like any other, off the reservation or on the reservation, and the protections that we can give it will no longer exist.

The CHAIRMAN. Thank you very much.

Senator Udall, your questions.

Senator UDALL. Thank you, Chairman Akaka. I think that the testimony has been very good in answer to the Chairman's questions.

One of the things, Mr. Ortego, you mentioned, is this whole issue of dual taxation, which we know is a problem. Because you have business entities and others that want to go on the reservation and when they see double taxation, they see that there isn't the incentive to locate there. I think you have hit on one of the things that New Mexico has tried to do, maybe not well enough, but to coordinate and cooperate and work with the Tribe and try to, in particular areas, alleviate that double taxation. I think you have made some good suggestions.

Aside from the double taxation issue, what type of tax credit would you create to spur job creation in Indian Country, and are there industries that we aren't reaching, with the programs mentioned today, that you believe we should be targeting?

Mr. ORTEGO. I feel a little uninformed about the tax credits, so if you don't mind, the example I can use is one entity we have right now who is taking advantage of renewable energy tax credits. And that has been extremely helpful. The problem with that situation, however, is that we cannot take an ownership interest in the project. It has to be owned by the entity that can take advantage of the tax. Tribes are not able to take advantage of that tax credit, because we don't pay those taxes.

So if there can be a way for tribes to have ownership interest in the projects and also the entities that work with the tribes, if they can also take advantage of the credit, even though they may not be a full or even a 50 percent owner in the project, that would be very helpful.

Senator UDALL. That area I think is one we ought to take a look at. I think that is a very good suggestion.

Chairman Leecy, on the New Market Tax Credit, you heard the question I asked him, do you think there are other areas we should be targeting where we are not hitting particular businesses that could come in and do business in Indian Country?

Mr. LEECY. Thank you, Mr. Udall. I agree totally with Mr. Ortego, and that would have been my response, is renewable energy and the ability to utilize New Market Tax Credits in that area for the benefit of the Tribe itself. That has been a struggle. I think not only renewable energy resources but emerging markets, such as that and this biofuels, this bio-oil, renewable, I think those are all new markets that Indian Country would be favorable. Because most of them, where they are located, they do have resources. But there is really no funding to extract some of the natural resources. So that would be my answer to assist in that area.

Senator UDALL. Those are, I think, good areas for us to look into. Chairman Leecy, you mentioned that, as I said in my opening statement, that the New Markets Tax Credit was working in New Mexico. You mentioned examples of it working that you knew of. Could you give us a concrete example of how that has worked and what type of business or enterprise was fostered as a result of that?

Mr. LEECY. We have done a number of tax credit, one is 60-unit housing, number one. Number two is an additional 60-unit housing. We have built a government center with New Market Tax Credit, which we couldn't have done, which houses the Tribe's government programs and services. It is essential. It has worked for us, and I have been to Montana to participate in the Montana economic development and explain the advantages of the New Market Tax Credit that we have.

We have also invited other tribes into Bois Forte to show exactly how the New Market Tax Credit has worked for us. Everyone we have spoken to has utilized that and built something for themselves. But it is kind of financially, it is financially easy to do and there are some hurdles to go through, but it is well worth it.

Senator UDALL. Thank you. Thank you both for your testimony today. I really appreciate it.

The CHAIRMAN. Thank you very much, Senator Udall, for your questions.

I want to thank Chairman Leecy and Mr. Ortego for your participation in our hearing and providing us with what you have done with your Tribe to improve the situation there. Our big hope, of course, is that other tribes in other places will be able to use and even take advantage of some of these that are already in place and hearing it from other tribes may help the cause.

So I thank you very much and I hope you continue to be with us in terms of keeping us apprised of how things are going. And if you find a better way of doing what you are doing in helping the tribes, we should also help other tribes as well. So I thank you very much for your participating here. Thank you.

And now I would like to call on the second panel, Professor Steven Gunn, Adjunct Professor of Law at the Washington University School of Law. Professor Gunn, it is good to have you. Thank you

very much for being here. Will you please proceed with your testimony?

STATEMENT OF STEVEN J. GUNN, ATTORNEY/PROFESSOR OF LAW (ADJUNCT), WASHINGTON UNIVERSITY IN ST. LOUIS

Mr. GUNN. Mr. Chairman, thank you for the opportunity to comment on the important issue of overlapping and conflicting Tribal and State tax jurisdiction claims in Indian Country.

American Indian tribes are self-governing political communities, with attributes of sovereignty over both their members and their territories. The power to tax is an essential attribute of Indian sovereignty. It enables tribes to raise revenue to build strong institutions of Tribal government and to operate essential programs and services.

Strong Tribal governments and programs fuel economic development by providing the institutional and legal framework, physical infrastructure and human capital necessary for Tribal economic development. Indian tribes have a government to government relationship with the United States. But they are not subordinate to or dependent on the States. In the area of taxation, the Supreme Court has adopted a categorical rule. States may not tax Indian tribes or their members, absent Congressional authorization.

The rationale behind that rule is simple and centuries old. As Chief Justice Marshall reminded us in *McCulloch v. Maryland*, the power to tax involves the power to destroy. If permitted, States taxation of Indian tribes and their members would essentially destroy tribes by depriving them of their revenue and their tax base. And the courts have been vigilant in striking down State taxes directly imposed on tribes and Tribal members.

State taxation of non-members in Indian Country is another matter. Such taxation is not categorically barred; instead, it is preempted if it interferes with or is incompatible with Federal and Tribal interests. The preemption analysis is flexible and requires a case by case balancing of Federal, Tribal and State interests. Applying this analysis, courts have struck down some State taxes on non-members, while upholding others.

The lack of a bright line rule creates uncertainty and this has caused some non-Indian investors to avoid participating in reservation economies.

When State taxation of non-members is permitted, it imposes significant burdens on tribes. First, it infringes on the Tribal tax base. Under existing Federal law, tribes can tax non-members and non-member businesses that engage in commercial dealings and whose activities take place on trust lands. A Tribe's ability to tax non-members in these circumstances is essential. Yet that ability is impaired when States and even local governments assert overlapping claims to tax the same transactions.

The resulting double or triple taxation is often more than Tribal markets can bear and tribes may be forced to lower their tax rates or eschew Tribal taxation altogether. This has the potential to deprive tribes of millions of dollars in tax revenue.

Second, State taxation of non-member businesses raises the cost of goods and services available to tribes and their members. Although the legal incidence of such taxes falls on the non-Indian

business, the economic burden is passed on to Tribal consumers, and for tribes, this can raise the cost of economic development projects involving non-member contractors and businesses.

Finally, State taxation of sales to non-member consumers has the effect of raising the price of goods and services they buy on-reservation. This creates a competitive disadvantage for Tribal businesses who market their goods and services to non-members. Such non-members are likely to go off-reservation instead of paying double or triple taxes on the reservation.

Some Indian tribes and States have responded to these problems by reaching cooperative agreements regarding the collection of various taxes. In fact, over 200 tribes have entered into tax collection compacts with States. A common approach involves joint collection of Tribal and State taxes with revenue sharing between the governments.

These agreements provide predictability and steady revenue streams for tribes and States. However, the process is not without its limitations. From the Tribal perspective, revenue sharing of any kind deprives tribes of tax dollars generated by on-reservation activity. Preemption of State taxation of non-member activity would better preserve Tribal tax bases.

The Federal Government can address these issues in a number of ways, two of which I will mention here. First, Congress can reaffirm the inherent authority of Indian tribes to tax all transactions in Indian Country, including non-member transactions. Such authority is essential to defray the cost of providing Tribal services to those who pass through their reservations.

Second, Congress can provide clarity on the scope of permissible State tax authority over non-members. Specifically, Congress can establish bright line rules preempting State taxation in areas where that taxation would undermine Tribal economic development. Definitive guidance from Congress would remove uncertainty, and to the extent State taxes were preempted, it would preserve the Tribal tax base from State interference.

I thank you again for the opportunity to appear before you and to comment on these important issues.

[The prepared statement of Mr. Gunn follows:]

PREPARED STATEMENT OF STEVEN J. GUNN, ATTORNEY/PROFESSOR OF LAW
(ADJUNCT), WASHINGTON UNIVERSITY IN ST. LOUIS

Mr. Chairman, Mr. Vice Chairman, and distinguished Members of the Committee, thank you for the opportunity to appear before you today and to comment on the important issue of tribal and state taxation in Indian country. I will divide my comments into four areas: first, I will address the important role tribal taxation plays in promoting economic development in Indian country; second, I will examine the burden state and local taxation places on Indian tribes and their efforts to develop their reservation economies, and the jurisdictional conflicts such taxation engenders; third, I will share insights about the cooperative approaches some tribes and states have taken to work coordinate their respective taxes in Indian country; and finally, I will suggest some ways in which the Federal Government can help shape a tax policy for Indian country that will maximize tribal self-government and economic development.

1. Tribal Taxation Plays an Essential Role in Promoting Tribal Self-Government and Economic Development in Indian Country

American Indian tribes are “self-governing political communities that were formed long before Europeans first settled in North America.”¹ Although they accepted the protection of the United States through treaties,² Indian tribes retain the sovereign status of “domestic dependent nations,”³ and continue to “possess[] attributes of sovereignty over both their members and their territory.”⁴

The power to tax has long been recognized as an “essential attribute of Indian sovereignty.”⁵ All three branches of the Federal Government recognize that this power is “an essential instrument of [tribal] self-government and territorial management.”⁶ The power to tax “enables a tribal government to raise revenues for its essential services.”⁷ The power derives from “the tribe’s general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction.”⁸

Indian tribes have primary responsibility for meeting the basic needs of their tribal members and other individuals who reside on or who do business on their reservations. Meeting these needs requires strong, well-funded tribal governments and strong, well-funded tribal programs and services. Tribal taxation provides an essential source of revenue for the operation of tribal governments and tribal programs.

Strong tribal governments and tribal programs, in turn, fuel economic development in Indian country. Among other things, tribal legislatures, agencies, and courts provide the governmental and legal framework necessary for economic development. Tribal programs pay for the construction and maintenance of reservation roads, bridges, utilities, and other facilities that provide the physical infrastructure necessary for economic growth. Tribal education and job training programs build human capital, and tribally owned economic enterprises create jobs and revenue streams for Indian tribes. Without tribal tax revenue, these government institutions and programs could not exist.

2. State and Local Taxation in Indian Country Undermines Tribal Self-Government and Economic Development

Indian tribes have a government-to-government relationship with the United States,⁹ but they are in no way “dependent on” or “subordinate to” the states.¹⁰ As a general rule, reservation Indians are subject only to federal and tribal law, not state law.¹¹ This is especially true in the area of taxation:

The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes . . . and in recognition of the sovereignty retained by Indian tribes even after the formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territories.¹²

In *McCulloch v. Maryland*, Chief Justice John Marshall reminded us that, “the power to tax involves the power to destroy.”¹³ The Supreme Court has long recognized that, if permitted, state taxation of Indian tribes and their members would “essentially destroy[]” tribes by depriving them of their tax base.¹⁴ Thus, “[i]n the special area of state taxation of Indian tribes and tribal members,” the Supreme

¹*Nat’l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985).

²*See, e.g., Treaty with the Teton*, 1815, Art. 3 (7 Stat. 125).

³*Oklahoma Tax Comm’n v. Potawatomi*, 498 U.S. 505, 509 (1991). *Accord, Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

⁴*Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982), quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975). *Accord, Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832).

⁵*Merrion*, 455 U.S. at 139.

⁶*Id.* (citing *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 153 (1980)).

⁷*Id.* at 137.

⁸*Id.*

⁹*See, e.g., 25 U.S.C. §§ 3601(1), 3701(1); Executive Order 13175*, 65 F.R. 67249 (Nov. 9, 2000); Executive Memorandum, 59 Fed. Reg. 22951 (April 29, 1994).

¹⁰*Colville*, 447 U.S. at 154.

¹¹1T3AWilliams v. Lee, 358 U.S. 217 (1959).

¹²*Montana v. Blackfeet Tribe*, 471 U.S. 761, 764 (1985) (citations omitted).

¹³17 U.S. (4 Wheat.) 316, 431 (1819).

¹⁴*Bryan v. Itasca County*, 426 U.S. 373, 388–89, n.14 (1976).

Court has adopted “a *per se* rule:”¹⁵ “such taxation is not permissible absent congressional consent.”¹⁶

”Taking this categorical approach, [the Supreme Court has] held unenforceable a number of state taxes whose legal incidence rested on a tribe or on tribal members inside Indian country,”¹⁷ including: income taxes,¹⁸ real property taxes,¹⁹ personal property taxes,²⁰ sales taxes,²¹ transaction taxes,²² vendor taxes,²³ use taxes,²⁴ mineral royalty taxes,²⁵ and hunting and fishing license fees.²⁶

State taxation of nonmembers in Indian country is not categorically barred. Instead, the courts apply a “flexible preemption analysis sensitive to the particular facts and legislation involved.”²⁷ According to the Court, such taxation is prohibited if it infringes on tribal selfgovernment or if it is preempted by federal law.²⁸ State taxation of nonmembers is preempted if it interferes with or is incompatible with federal and tribal interests, as reflected in federal law, unless there are sufficient countervailing state interests to justify the assertion of state authority.

The preemption analysis requires a particularized balancing of federal, tribal, and state interests and, thus, is inherently less predictable than the *per se* rule barring all state taxation of tribes and tribal members. Applying the balancing test, the courts have struck down certain state taxes on nonmembers in Indian country and upheld others. For example, in *Ramah Navajo School Board, Inc. v. Bureau of Revenue*:

the Supreme Court found that the state could not tax the gross receipts that a non-Indian construction company received from a tribal school board for construction of a school on the reservation. The Court found the federal regulation of construction and financing of Indian schools to be . . . comprehensive . . . Federal statutes also reflected an “express federal policy of encouraging tribal selfsufficiency” in education. In terms of the tribal interests, the tribal school board absorbed the economic impact of the tax, which could affect its ability to provide education for Indian children. And the state provided no services to either the Indian school children or the non-Indian taxpayer for its activity on the reservation.²⁹

The courts have struck down other state taxes on nonmembers in Indian country, including state taxes on nonmember retailers’ sales to tribes and tribal members.³⁰ However, the courts have upheld state taxes on cigarette sales to nonmembers,³¹ state severance taxes on oil and gas produced by nonmembers in Indian country,³² and a number of other “state taxes on non-Indians doing business in Indian country.”³³

The Court’s case-by-case approach has created uncertainty for tribes, states, and nonmembers seeking to do business in Indian country. It is difficult to determine

¹⁵ *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 267 (1992) (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987)).

¹⁶ *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) (quoting *McClanahan v. Arizona Tax Comm’n*, 411 U.S. 164, 171 (1973)).

¹⁷ *Oklahoma Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995).

¹⁸ *McClanahan*, 411 U.S. at 165–81; *Oklahoma Tax Comm’n v. Sac and Fox Nation*, 508 U.S. 114, 123–126 (1993).

¹⁹ *United States v. Rickert*, 188 U.S. 432 (1903); *The New York Indians*, 72 U.S. (5 Wall.) 761 (1866); *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866).

²⁰ See, e.g., *Bryan*, 426 U.S. at 375; *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 480–81 (1976) (motor vehicle tax); *Colville*, 447 U.S. at 163 (same); *Sac and Fox*, 508 U.S. at 127–28 (same).

²¹ *Moe*, 425 U.S. at 475–481; *Potawatomi*, 498 U.S. at 507; *Dep’t of Taxation and Finance of New York v. Attea & Bros.*, 512 U.S. 61, 64 (1994).

²² *County of Yakima*, 502 U.S. at 268.

²³ *Chickasaw Nation*, 515 U.S. at 459–62; *Moe*, 425 U.S. at 480–81.

²⁴ *Mescalero Apache Tribe*, 411 U.S. at 158.

²⁵ *Montana v. Blackfeet Tribe*, 471 U.S. at 764–66.

²⁶ *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Tulee v. Washington*, 315 U.S. 681 (1942).

²⁷ *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989).

²⁸ *Mescalero Apache Tribe*, 411 U.S. at 148.

²⁹ COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 8.03 (2005) (discussing *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982)) (internal citations omitted).

³⁰ *Warren Trading Post v. Ariz. State Tax Comm’n*, 380 U.S. 685 (1965); *Central Machinery Co. v. Ariz. State Tax Comm’n*, 448 U.S. 160 (1980). See also, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 8.03 (collecting cases).

³¹ See, *Colville*, 447 U.S. at 156–157.

³² *Cotton Petroleum*, 490 U.S. at 187.

³³ COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 8.03 (collecting lower court cases).

ex ante whether a state will have jurisdiction to tax a given nonmember transaction in Indian country. This uncertainty makes it difficult for nonmembers to evaluate the total cost of doing business in Indian country, and it may cause some nonmembers to avoid investing in Indian country altogether.

State and local taxation of nonmembers in Indian country imposes significant economic burdens on Indian tribes, and it has the potential to undermine tribal self-government and tribal economic development. This is true for several reasons:

First and foremost, state and local taxation of nonmembers in Indian country infringes on the tribal tax base. Under existing federal law, an Indian tribe can tax nonmembers who engage in commercial dealings with the tribe or its members.³⁴ (This includes nonmember businesses that provide goods and services to the tribe or its members, and nonmember consumers who purchase goods and services from tribal businesses.) A tribe's ability to tax nonmember transactions, however, is severely impaired when state and local governments assert concurrent, or overlapping, jurisdiction to tax the same transactions. The resulting double or triple taxation is often more than tribal markets can bear, and tribes may be forced to lower their tax rates or to eschew collection of their taxes altogether on nonmember transactions. This has tremendous consequences for tribes, depriving them of millions of dollars in tax revenue on activities occurring within their jurisdictions.

Second, state and local taxation of nonmember businesses in Indian country raises the cost of the goods and services those businesses provide to Indian tribes and their members. Whenever possible, nonmember businesses, like all others, pass the financial burden of the state and local taxes on to their tribal customers in the form of higher prices. This burdens tribal members by raising the cost of the ordinary, day-to-day good and services they purchase from on-reservation, nonmember businesses. It also burdens the economic development initiatives of tribal governments and tribally owned businesses by raising the cost of construction, management, and other essential services they purchase from nonmember contractors and businesses. The impacts can be significant, especially on multi-million dollar tribal economic development projects, where the imposition of state and local taxes can add tens or hundreds of thousands of dollars to the cost of the project.

Third, if market conditions prevent nonmember businesses from passing the financial burden of state and local taxes on to their customers, the businesses may be forced to relocate off-reservation. In this way, double or triple taxation of nonmember businesses in Indian country creates a disincentive to investment in Indian country and reduces the supply of goods and services available to Indian tribes and their members.

Fourth, state and local taxation of nonmember consumers in Indian country has the effect of raising the price of goods and services sold to those consumers by tribal businesses. Imposing these taxes in addition to tribal taxes creates a competitive disadvantage for on-reservation tribal businesses in relation to their off-reservation counterparts. Nonmember consumers will have an incentive to purchase goods and services off-reservation, to avoid paying double or triple taxes.

Finally, allowing states and local governments to tax on-reservation nonmember consumers eliminates the ability of Indian tribes to attract nonmember business by marketing tribal tax rates that are lower than corresponding state and local rates. State and local governments have the power to adjust their tax rates to gain competitive advantages in relation to neighboring jurisdictions, and there appears to be no principled reason why tribes should not share in that power, especially when the value of the goods and services they offer is generated on the reservation, or when the goods and services will be consumed on the reservation.

In sum, overlapping claims of tribal, state, and local tax authority over nonmembers in Indian country hinders tribal self-government and economic development in a number of ways. It allows states and local governments to infringe on the tribal tax base; it raises the cost of goods and services sold by nonmembers to tribes and their members; it discourages nonmember investment in Indian country; it creates tax disadvantages for tribal businesses that sell goods and services to nonmembers; and it eliminates the ability of tribes to attract nonmember business by marketing lower tax rates.

3. Many Tribes and States Have Entered Cooperative Agreements to Address the Problems Created by Multiple Taxation in Indian Country

Indian tribes and states have incentives to reach cooperative agreements regarding the collection of tribal, state, and local taxes in Indian country. As has been shown, there is uncertainty in existing federal law over the precise extent of state and local taxing authority over nonmembers in Indian country. This creates the po-

³⁴ See, *Montana v. United States*, 450 U.S. 544, 565-566 (1981).

tential for expensive and protracted litigation. Further, when state and local taxation of nonmembers is permitted, it creates the potential for double or triple taxation, which imposes hardships on nonmembers and tribes. Some have suggested that, “it is in the economic interests of states and tribes to determine the maximum tax burden that a taxpayer will bear before abandoning the taxable activity entirely.”³⁵ Finally, “[t]he fact that states can tax non-Indians and nonmembers in Indian country under certain circumstances, but cannot tax tribal members, also presents states and tribes with challenging record-keeping problems.”³⁶

To address these problems, tribes and states have entered cooperative agreements and enacted laws to allocate tax authority and coordinate tax collection in Indian country:

In the face of potentially overlapping or conflicting jurisdictional claims, tribal-state cooperative agreements offer both sets of governments the opportunity to coordinate the exercise of authority, share resources, reduce administrative costs, deliver services in more efficient and culturally appropriate ways, address future contingencies, and save costs of litigation. They also enable governments to craft legal arrangements reflecting the particular circumstances of individual Indian nations, rather than relying on uniform national rules. Insofar as cooperative agreements create a stable legal environment conducive to economic development, they may appeal to the common interests of tribes and states.³⁷

It has been reported that over 200 tribes have entered into compacts with states.³⁸ These compacts and related laws employ a variety of approaches, including: “exempting sales by Indian tribes or tribal merchants from state taxes, adjusting the state tax rate when a tribal tax exists so that the total tax does not exceed the state tax rate, excluding the tribal tax from the definition of sales or gross receipts taxable by the state, extending credits to taxpayers liable for state and tribal taxes, and authorizing agreements or compacts for tribal refunds from state tax revenues.”³⁹

The tax collection agreements in South Dakota provide one example of cooperative tax collection in Indian country. These agreements encompass many, but not all, of the state taxes that are imposed in Indian country, including sales taxes, cigarette taxes, motor vehicle taxes, and contractor’s taxes. Under the agreements, tribes agree to impose tribal taxes that are uniform with the state taxes. The state collects all taxes included in the agreements and remits a percentage to the tribes. The percentage remitted to the tribes is based on the percentage of their reservation populations that are Indian. (This percentage is a proxy for the percentage of on-reservation transactions that would be taxable by the tribes, under existing law.) In most cases, the great majority of taxes collected are remitted to the tribes. State collection of uniform tribal and state taxes provides predictability for taxpayers, eases the ability of the state to collect the tax, and provides competitive equality for on- and off-reservation businesses.

Intergovernmental cooperative agreements, like those employed in South Dakota, have distinct advantages, including certainty and predictability in the imposition and collection of taxes in Indian country. While many agreements require tribes to share tax revenue with the states, they provide predictable revenue for the tribes and certainty as to collectability and enforcement of tribal taxes on nonmembers.

These agreements are not without their limitations. From the tribal perspective, revenue sharing deprives tribes of tax dollars generated by on-reservation economic activity, including the on-reservation activity of nonmembers. Preemption of state and local taxation over nonmember activity would preserve tribal tax bases in a way that many cooperative agreements do not. Further, to the extent the cooperative agreements require tribes to impose tax rates equal to the state rates, they elimi-

³⁵ COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 8.05 (2005).

³⁶ *Id.*

³⁷ COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 6.05. *See also*, David H. Getches, *Negotiated Sovereignty: Intergovernmental Agreements with American Indian Tribes as Models for Expanding First Nations Self-Government*, 1 REV. CONST. STUD. 120, 121 (1993).

³⁸ COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 8.05 (citing *Tax Fairness and Tax Base Protection*: Hearings on H.R. 1168 Before the United States House of Representatives Committee on Resources, 105th Cong. (1998) (Testimony of W. Ron Allen, President, National Congress of American Indians); Arizona Legislative Council, *STARTED: State Tribal Approaches Regarding Taxation & Economic Development*, 81–105 (1995)). *See also*, Richard J. Ansson, Jr., *State Taxation of Non-Indians Whom Do Business With Indian Tribes: Why Several Recent Ninth Circuit Holdings Reemphasize the Need for Indian Tribes to Enter Into Taxation Compacts with Their Respective State*, 78 Or. L. Rev. 501, 546 (1999).

³⁹ COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 8.05 (summarizing various approaches and authorities).

nate the ability of tribes to attract nonmember business by marketing lower tax rates. Finally, tax agreements are not an option for tribes in states that are unwilling to enter into such agreements.

4. The Federal Government Can Promote Economic Development in Indian Country by Reaffirming Inherent Tribal Taxing Authority and Preempting State and Local Taxing Authority

The Federal Government plays a critical role in shaping tribal and state tax policy in Indian country. The Government is dedicated to promoting tribal self-government and economic development in Indian country, and its tax policies for Indian country can help fulfill those objectives.

First, Congress can reaffirm the inherent authority of Indian tribes to tax all transactions in Indian country. As it stands, Indian tribes have the power to tax their own members, but their authority to tax nonmembers who reside or do business in Indian country has been diminished by the Supreme Court. Under existing case law, Indian tribes have the power to tax nonmembers who engage in commercial dealings with the tribes or their members,⁴⁰ or whose activities occur on tribal trust lands,⁴¹ but they have little inherent power to tax nonmembers outside these contexts. In *Atkinson Trading Co. v. Shirley*, the Supreme Court held that the Navajo Nation could not tax nonmember patrons of an on-reservation hotel to defray the cost of providing tribal governmental services available to those patrons, including tribal police and fire protection and tribal emergency medical services.⁴² This is contrary to principle previously articulated by the Court in *Merrion*, that Indian tribes, like other governments, have the inherent power “to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction.”⁴³ Congress can assist tribes by reaffirming their inherent power to tax all transactions in Indian country in order to defray the cost of providing government services throughout Indian country.

Second, the Federal Government—in particular, the Justice Department—can work with Indian tribes to challenge direct state and local taxation of tribes and tribal members. Despite the Supreme Court’s clear, categorical bar against such taxation, tribes still face challenges from states and local governments that seek to impose their taxes on the property and activities of tribal members in Indian country. The Federal Government has intervened on behalf of tribes and their members in the past to challenge such taxes, and to seek restitution of taxes unlawfully collected,⁴⁴ and it should continue to do so. (Federal intervention is necessary to overcome state sovereign immunity and to seek restitution of past taxes.)

Third, it would be most helpful if Congress could provide, by Joint Resolution or otherwise, clarity on the scope of permissible state and local taxing authority in Indian country. In particular, Congress could reaffirm the categorical bar against state and local taxation of tribes and tribal members. In addition, Congress could establish bright line rules preempting state and local taxation of nonmembers in areas in which such taxation would undermine well-settled federal and tribal interests in promoting tribal self-determination and economic development in Indian country. Such guidance from Congress would remove uncertainty for tribes, states, and cities—and for nonmembers seeking to invest in Indian country. Preemption of state and local taxation would also preserve the tribal tax base from state and local interference. As discussed above, the existing federal preemption doctrine employs a costly, case-by-case approach and is prone to uncertainty and inconsistent results. It is based on the federal common law and is susceptible to clarification by Congress.⁴⁵

Finally, Congress could pass legislation to alleviate the burdens of multiple taxation in Indian country, in cases where state and local taxes are not preempted. For example, Congress could provide a federal tax credits for individuals forced to pay overlapping state and tribal taxes, or it could provide federal incentives for tribes and states to enter cooperative agreements. In these and other ways, the Federal Government can help shape a tax policy for Indian country that will maximize tribal self-government and economic development.

I thank you again for the opportunity to appear before you and to comment on these important issues.

⁴⁰ *Montana*, 450 U.S. at 565–566.

⁴¹ *Merrion*, 455 U.S. at 137–140.

⁴² 532 U.S. 645, 654–655 (2001).

⁴³ *Merrion*, 455 U.S. at 137.

⁴⁴ See, e.g., *South Dakota v. U.S. ex rel. Cheyenne River Sioux Tribe*, 105 F.3d 1552 (8th Cir.), cert. denied, 522 U.S. 981 (1997), on remand, 102 F.Supp.2d 1166 (D.S.D. 2000) (striking down state motor vehicle tax as applied to Sioux tribal members residing on their reservations).

⁴⁵ *United States v. Lara*, 541 U.S. 193 (2004).

The CHAIRMAN. Thank you very much, Professor Gunn.

In your testimony, Professor, you discuss the importance of tribes being able to develop their own tax structures to support the communities, similar to State and local governments. How does dual taxation of the same goods and services on Tribal lands prevent this?

Mr. GUNN. States, under existing law, have some authority to tax the same transactions that tribes can tax. For example, tribes have authority to tax non-members who engage in consensual relationships with the Tribe or its members, and in some cases, Federal law allows dual taxation by the States.

This dual taxation, if permitted, can have deleterious effect. First, tribes may not be able to impose their taxes to the full extent, because their reservation markets won't support double taxation. Non-member businesses can't afford to pay double; non-member consumers won't pay double. They will shop off-reservation.

And in these ways, it depresses economic development, discouraging investment and driving non-member consumers off-reservation.

Additionally, any time a State taxes a transaction that is within the Tribal authority, it deprives the Tribe of that tax revenue. And in that way, potentially takes hundreds of thousands or, depending on the amount of revenue, millions of dollars away from Tribal governments.

The CHAIRMAN. Professor, in a recent hearing, the Committee examined the impacts that potential internet gaming legislation may have on tribes. One area of particular concern deals with the taxation of Tribal governments who choose to participate in internet gaming. In your view, would that type of taxation be consistent with treatment of tribes in Federal Indian tax policy?

Mr. GUNN. No, it would not. The United States has a treaty-based government to government relationship with Indian tribes. The Federal Government historically has not taxed the income of Tribal governments or tribally-owned corporations or Tribal gaming enterprises in existing land-based Class 1, 2, and 3 gaming facilities.

There is no reason to depart from this longstanding Federal policy in the case of tribally-owned internet gaming facilities. Under the Indian Gaming Regulatory Act, Tribal gaming revenues are dedicated to Tribal government programs and services, Tribal economic development initiatives, among other uses. The Tribal perspective, as I understand it, is that Tribal revenue generated by internet gaming facilities, should remain within the Tribal governments, subject to the same uses. It should stay in Indian Country. The revenue is generated there, and it should benefit the Indian people who live there.

Retention of this revenue would further Tribal self-government and economic development, and those are goals that the Federal Government has endorsed for decades. These goals are critical for tribes seeking to improve their economic condition, including the Sioux Tribes I have represented for over a decade, many of which are located on the poorest counties in America.

The CHAIRMAN. Thank you. Professor, as someone who has negotiated many State-Tribal taxation agreements, let me ask, what do

you think are the keys to their successes? Are these agreements a model for other parts of the Country?

Mr. GUNN. The agreements that I am most familiar with and have been involved with have been in the State of South Dakota. And there, by statute, the State is authorized to enter agreements with tribes to collect certain taxes within Indian Country. Those agreements are effective in that the State and the tribes impose corresponding taxes on the same transaction at the same tax rate. All taxes are collected by the State with a percentage remitted to the Tribe. The percentage is based on the population on-reservation of Indians to non-Indians. So in many cases, the vast majority of revenue collected by the State is remitted to the tribes, well over three-quarters.

This provides a steady source of revenue for Tribal governments. It also takes advantage of the efficient State administrative mechanism for collecting taxes and State enforcement mechanisms.

As I said in my testimony, it is not without flaws. Federal preemption of State taxation of non-Indian activity in Indian Country would be a bright line fix and would provide the same kind of clarity and predictability that tax collection agreements can. It would have the effect of preserving nearly 100 percent of the Tribal tax base for tribes. However, in the absence of a Federal fix, these agreements are an effective way for States and tribes to avoid costly litigation, acrimony and to efficiently collect the maximum amount of Tribal and State tax.

The CHAIRMAN. Well, I want to thank you very much for your views on tax policy that affects the indigenous people, tribes especially, of our Country. We are looking for ways of trying to help the tribes across the Country by making good use of what is available and not being used. So we value your responses and look forward to continuing to work with you for future advice as well, when we work on these.

But as we do this, we want to, if need be, to get as far as legislatively trying to help or administratively trying to help them. But we want to take advantage of what is there now for the Indian tribes of our Country and I thank you for adding to this and look forward to continuing to work with you on this.

I want to thank you very much, and thank you to all of our witnesses today. It has been very helpful for us to hear from all of you about the ways that our Federal and State tax policies can promote or inhibit strong Tribal economic development. We have heard about several important tax incentives offered through Federal law that have been used to attract capital, grow jobs and build economies in Tribal communities. And we have also heard about some of the challenges for tribes when States attempt to tax Tribal lands or enterprises. It is important that we identify tax policy tools that promote and not harm Tribal economic development.

Again, I want to say thank you for all those who participated today and I want to remind you that the Committee record will remain open for two weeks for any other contributions to the record. It will remain open for two weeks from today.

So again, I thank you very much, and thank you very much, Professor Gunn.

This hearing is adjourned.

[Whereupon, at 4:33 p.m., the Committee was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF HON. CEDRIC BLACK EAGLE, CHAIRMAN, CROW TRIBE

Introduction

Thank you for the opportunity to share the views and concerns of the Crow Nation on Federal tax policy. Given that the Crow Nation's resources are primarily energy-based, our comments today focus on Indian energy development.

The Crow Nation's energy resources are abundant— an estimated 3 percent of US coal reserves along with significant oil, natural gas and wind reserves—and the financial stability of our Tribe is wholly dependent upon them. As such, the Crow Nation is uniquely positioned to contribute to the energy independence of our country.

We applaud this Committee's leadership in reviewing ways that tax policy can help level the playing field for energy, development in Indian Country and help realize the economic value of such resources not only to the Tribes that own them, but to the nation as a whole.

Providing tax incentives to create energy jobs in Indian Country will help overcome other obstacles to energy project development, and will build additional national capacity to create even more jobs in the national economy. This is an opportunity that cannot be missed.

Energy Opportunities and Obstacles

Coal

There is an estimated (some believe conservatively so) 9 billion tons of coal held by the Crow Nation. The *Absaloka mine* outside of Hardin, Montana produces 6 million tons of Crow coal annually; over 175 millions of tons since 1974. The mine annually pays taxes and royalties to the Crow Nation totaling \$19 million, which is 60 percent of our non-Federal budget. The mine provides skilled jobs that pay \$16 million; again critical in our economy which struggles with nearly 50 percent unemployment. As a source of jobs, critical financial support, and U.S. produced energy, it is absolutely critical that it remain open and competitive.

A recent outage at Absaloka's largest coal customer's power plant will hurt jobs and revenues in 2012, and emphasizes the need for multiple energy projects to diversify our revenue sources.

To that end, we have been developing *Many Stars*, a planned Coal to Liquid mine and production facility. The original plans are for a state of the art clean coal facility that will be capable of producing up to 50,000 barrels or more of liquid products per day ultimately ultra-clean liquid fuel capable of replacing oil for jet and diesel fuel, which translates to a significant reduction in the need for importing foreign oil, which in turn contributes to national security. It was anticipated that *Many Stars*, as designed, would create many jobs—up to 2,000 construction jobs and a range of 250 to 900 production jobs dependent on through-put. And with full carbon capture and sequestration, *Many Stars* seems to be the best way to monetize the Tribe's vast coal resources in the long run while not contributing to the climate change problem.

But uncertainty about national energy policy has made it difficult to attract investment for this cutting edge project. Regulatory uncertainty combined with expiring tax provisions make future planning quite difficult. Fortunately, technology improvements have made a smaller scale facility possible. We are currently working to bring in a new developer and starting on a smaller scale (8,000 barrels per day), which is now more feasible due to technology improvements.

In addition to Absaloka and *Many Stars*, there is a potential for additional development of very low-sulfur coal on the Reservation that is dependent on rail access to the west coast. This option is complicated by some cost disadvantage and additional BIA regulatory hurdles, as compared to nearby Federal coal.

Oil and Gas

Recent oil and gas exploration has found reserves worth developing, but activity has been hampered by the markets and the Bureau of Land Management's Application for Permit to Drill (APD) fees of which the Committee is aware.

Wind

Several years-worth of wind data indicates a steady and reliable Class 5/6 wind resource in several areas of the Reservation located in direct proximity to existing transmission lines. Because the wind resource areas encompass lands held in a variety of ownership patterns, including tribal trust, individual tribal member allotments (many of which are highly fractionated), and non-Indian fee lands, developing this resource will be a challenge.

Hydropower

The recent Crow Water Rights Settlement Act of 2010 grants the Nation exclusive rights to develop and market hydropower from the Yellowtail Afterbay Dam. Preliminary planning and feasibility studies are underway. To date, the plan is to build a small, low-head hydropower facility with an estimated capacity of 10–15 Megawatts to supply the local rural cooperatives that provide electric power to the Reservation.

Leveling the Playing Field for Indian Energy Projects*Regulatory Obstacles*

The lease approval process is needlessly burdensome, excessively slow, and inaccurate. BIA requirements for surface access approvals to conduct exploration, along with slow environmental assessments, create delays significant enough to make our projects non-competitive. These types of burdens and other limitations in the federal Indian law tend to discourage investments in, and ultimately development of our projects.

Incomplete land records, inadequate staffing, and surface land fractionation add more burdens to energy projects on Reservation lands, in the form of extensive land title work, mineral rights research, and surface landowner consents.

Effective Federal tax incentives are essential to help offset some of these extra burdens.

Federal Tax Incentives

While the existing federal tax incentives work to encourage investment and development on Indian energy projects, their usefulness is limited by the length of their applicability.

For example, the tax incentives that have worked to keep the Absaloka mine open and competitive since 2006 are due to expire next year, and thus do not help encourage new long-lead-time projects and investments that will take 5–10 years to begin producing.

We strongly recommend that the *Indian Coal Production Tax Credit* and the accelerated depreciation provision be made permanent, along with some additional modifications. We also recommend that the Indian Wage Tax Credit be refashioned to mirror the very successful Work Opportunity Tax Credit, which will be a much more effective tool to encourage employment on reservations.

Extension of Wind Energy Production Tax Credit is also essential to development of Tribal wind resources—and ability for the Tribe to make direct use of the credit will provide options for ownership and control.

Many Stars Needs Government Support

Grant the Department of Defense and other federal agencies the ability to enter into long-term, guaranteed fixed-price contracts that will underpin the commercial framework needed to base-load these types of long-term CTL projects.

Extend the expiration date of the current 50-cents per gallon alternative fuel excise tax credit for a period of 10 years following start-up for those projects starting construction prior to 2015.

Support a twenty percent investment tax credit for each CTL plant placed in service before the same future date, and/or allow 100 percent expensing of investments in the year of capital outlay for any CTL plant in operation by the same future date.

Support DOE and DOD alternative fuel development programs as part of a comprehensive energy policy that supports the full spectrum of energy technologies and provides a level playing field for developing new innovation in clean coal technology to meet national environmental goals.

Enact longer-term tax incentives for clean-coal projects will help remove the general uncertainty in energy policy and will provide investors confidence to support

new innovation and major investment in the clean coal sector. Our observation is that policy uncertainty—including lack of long-term tax incentives—with respect to clean coal technology, equates to paralysis in trying to move the Many Stars CTL Project forward with new investors.

Conclusion

Given our vast mineral resources, the Crow Nation can, and should, be self-sufficient. We seek to develop our mineral resources in an economically sound, environmentally responsible and safe manner that is consistent with Crow culture and beliefs.

The Crow people are tired of saying that we are resource rich and cash poor. We respectfully request your assistance in setting the foundation to make our vision a reality.

We have been working to develop our energy resources and to remove obstacles to successful development. We hope to build a near-term future when our own resources, in our own hands, provide for the health, hopes and future of our people.

It is critical that Congress act to protect Indian nations' sovereignty over their natural resources and secure Indian nations as the primary governing entity over their own homelands. This will have numerous benefits for the local communities as well as the Federal Government.

The Crow Nation has been an ally of the United States all through its history. Today, the Crow Nation desires to develop its vast natural resources not only for itself, but to once again help the United States with a new goal—achieving energy independence, securing a domestic supply of valuable energy, and reducing its dependence on foreign oil.

However, our vision can only become a reality with Congress' assistance. Mr. Chairman and Committee members, thank you again for the opportunity to provide testimony on how federal tax policy and incentives can help level the playing field for Indian Energy development.

