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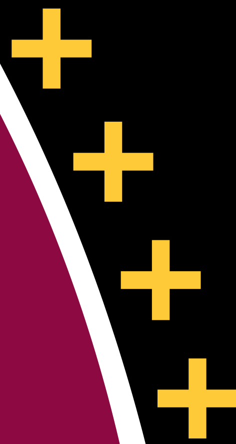
Arizona State University



Sales Tax and Online Sales Tax Issues in Indian Country

A Public Education Research Presentation

Presented by the Indian Legal Program and the Indian Gaming and Tribal Self-Governance Programs

This document was researched, written, and finalized by third-year law students, Imani Hicks and Morgan Oakes; and second-year law students, Mikaela Bledsoe Downes, Hunter Mallinger, and Sam Phillips of the Sandra Day O'Connor College of Law's Indian Legal Program. These students participated in an Indian Tax Research Cluster under the guidance and supervision of professors Derrick Beetso and Patrick Irvine during Spring 2025 and presented the substance of this document to the public on April 4, 2025, during a symposium entitled 'Sales Tax and Online Sales Tax Issues in Indian Country' held at the W.P. Carey Armstrong Great Hall, Sandra Day O'Connor College of Law.

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Sales Tax & Online Sales Tax Issues in Indian Country

Executive Summary

> "*The Congress shall have Power…[t]o regulate Commerce with…the Indian tribes*."[1]

The language above is the Indian Commerce Clause of the U.S. Constitution. Federal law has interpreted this clause, alongside Congress' treaty powers, and other federal powers to give Congress its *Indian powers*, which include the power to regulate all aspects of commerce with federally recognized tribes.[2] This constitutional framework created a sovereign-to-sovereign relationship between tribes and the United States, where tribes are recognized alongside "the several States" and "foreign Nations" as the original governing entities involved in colonial era commerce.

Today, tribal governments, like the federal and state governments, routinely exercise their sovereign authorities to provide social services, housing, education, law enforcement, and other services for entire communities. Tribal tax revenues are critical to funding these services.[3]

And while the Supreme Court has said, "tribal sovereignty is dependent on and subordinate to only the Federal Government, not the States,"[4] there are instances where state tax policies affect tribal and/or federal tax policies. This paper explores two such instances: 1) dual taxation, with a heavy focus on sales and use tax; and 2) online/remote sales tax, or taxes levied on remote sales, such as online purchases.

Here are brief descriptions of each:

1. *Dual taxation*

Dual taxation occurs when a state or local government taxes the same activity as the governing tribe.[5] The cases discussed further below guide current interpretations of when and how a state may reach into Indian country[6] and apply its taxing power. Dual taxation of nonmember economic activity within Indian country implicates tribal sovereignty, tribal economies, and the right to tax, costing tribes billions each year.[7] Despite extensive case law and scholarship on dual

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[1] U.S. CONST. art. I, § 8, cl. 3.
[2] *See* Dominic A. Azzopardi, *Dual Taxation in Indian Country: The Struggle to Correct Cotton Petroleum*, 67 WAYNE L. REV. 311, 314 (2022).
[3] *See* Benjamin Simon, *Dual Taxation Unbalanced and Arbitrary*, 11 AM. INDIAN L.J. 1, 2 (2023).
[4] Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134, 154 (1980).
[5] Wyatt Williams, *Arizona Doubles Down on Double Taxation*, 60 ARIZ. ATT'Y 34, 34-35 (2024).
[6] This paper will refer to both "Indian Country" and "Indian country," the first intending to describe Native communities within the United States generally, including politically and socially, and the other describing areas where tribal governments may assert governing jurisdiction under federal law.
[7] *See* Dominic A. Azzopardi, *Dual Taxation in Indian Country: The Struggle to Correct Cotton Petroleum*, 67 WAYNE L. REV. 311, 311-12 (2022).

taxation in Indian country, it continues to create economic uncertainty, negatively impacting investment on reservations and hindering tribes' ability to generate revenue.[8]

2. *Online/remote sales taxes*

The Internet provides a retail market that exceeds sales in brick-and-mortar stores. As online shopping increases in popularity, states seek to tax the sales occurring between out-of-state remote sellers and in-state purchasers. Since tribal members are located inside the taxing states, and since federal law provides certain exclusions from state taxes for Indians living within the reservation, state laws enacted to modernize tax policies must thoughtfully consider tribal tax interests and concerns. This paper provides an overview of the current legal framework that governs taxes on remote sales and explores the various approaches states, tribes, and the federal government have taken with respect to such taxes, including in Indian country.

Both these issues impact critical tribal resources, but before discussing each more fully, it is helpful to begin with some general principles.

Tribal and State Taxation in Indian Country

a. Tribal taxation

Tribes have always had, and continue to have, powers to self-govern.[9] This includes the power to tax, which derives from a tribe's authority to control economic activity within its jurisdiction and its need to defray the cost of providing government services.[10] A tribe's taxing authority does not derive from its power to exclude—it is inherent.[11] Further, the Indian Reorganization Act of 1934 affirmed a tribe's power to tax when it has a significant interest in the subject matter.[12] This inherent power includes the power to tax nonmember activities occurring on the reservation.[13]

In *Atkinson Trading Co. v. Shirley*, the Court considered whether the Tribe could assess a hotel occupancy tax on a business owned by a non-Indian on non-Indian fee land within the Tribe's reservation.[14] There, the Court's focus was on the non-Indian fee land, and whether the Tribe could regulate non-Indian activity on such lands by way of its taxing authority—it held the Tribe could not. Conversely, in *Central Machinery Co. v. Arizona State Tax Comm'n*, the Court held that the State could not assert *its* tax where the incidence of the tax was informed by activities occurring on the reservation.[15] Namely, the Court noted the contract was made, the payment was received,

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[8] *See* Simon, *supra* note 3, at 2.
[9] *See* Worcester v. Georgia, 31 U.S. 515 (1832).
[10] Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982) (citing Gibbons v. Ogden, 9 Wheat. 1, 199 (1824) (explaining the power of tribes to raise revenues through taxation does not derive solely from the power to exclude, but from its general authority as a sovereign).
[11] *See id.* at 130.
[12] WILLIAM CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 338 (7th ed. 2004).
[13] Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134, 154-57 (1980).
[14] *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).
[15] Cent. Mach. Co. v. Ariz. State Tax Comm'n, 448 U.S. 160, 164-65 (1980).

and the delivery took place in Indian country.[16] In addition, the Court found the mere existence of the Indian Trader Statutes, codified at 25 U.S.C. §§ 261-64, stood for Congress' intent to fully regulate commerce, between non-Indian retailers, and tribes and on-reservation Indians – to the exclusion of states.[17] Importantly, the Court noted that businesses need not be licensed under the Indian Trader Statutes to receive their protection from state taxing authority.[18] The Court also said that the fact the business was not located on the reservation was irrelevant.[19] Many tax disputes arise with fact patterns that fall between the fact patterns in *Atkinson Trading Co.* and *Central Machinery*. In such instances, who pays the tax and what type of land the activity occurs on, become critical inquiries.

Outside a tribe's inherent governing authority, the Supreme Court has determined Congress's power to regulate tribal affairs is "plenary and exclusive."[20] For instance, with respect to lands and jurisdiction, Congress has empowered the Secretary of the Interior to hold Indian lands in trust for the benefit of Indian tribes and/or individual Indians.[21] The trust character of this land creates a corresponding trust responsibility exclusively administered through "Federal power[s], and therefore outside the province of state" authority.[22] Accordingly, "[s]tates have no power, by taxation or otherwise, to… impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress[,]"[23] such as the Indian Reorganization Act. For these reasons and others, state law generally does not apply to Indians on Indian reservations except where Congress expressly says so.[24] As a result, if a state attempts to tax activity on a reservation, even where non-Indians are involved, that action may be prohibited in light of strong tribal and federal interests.[25]

b. State law and taxation in Indian country

Supreme Court precedent prevents states from taxing transactions where the responsibility to pay the tax falls directly on a tribe or tribal members inside Indian country.[26] But while states cannot tax economic activities exclusively involving tribes or their members on their reservation, states may be able to tax on-reservation transactions involving non-Indians and nonmember Indians (those tribal members that are not members of the governing tribe).[27] With respect to retail sales, the Supreme Court has treated nonmember Indians on the reservation the same as non-

[16] *Id.*
[17] *Id.* at 168.
[18] *Id.* at 167.
[19] *Id.* at 165.
[20] *See* Haaland v. Brackeen, 599 U.S. 255, 272-76 (2023) (finding that case law "leaves little doubt" as to Congress's power in tribal affairs, "superseding both tribal and state authority").
[21] *See generally*, Indian Reorganization Act, 25 U.S.C. § 5101; General Allotment Act, 25 U.S.C. §§ 331- 58.
[22] United States v. Rickert, 188 U.S. 432, 439 (1903).
[23] *Id.*
[24] *See* McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 170-71 (1973).
[25] White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980) (explaining that either of these two barriers can be sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members); *see also* Cent. Mach. Co. v. Ariz. State Tax Comm'n, 448 U.S. 160 (1980) (explaining that the existence of the Indian trader statutes preempts the field of transactions with Indians occurring on reservations).
[26] *See* Simon, *supra* note 3, at 4.
[27] Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134, 141 (1980).

Indians.[28] Therefore, to determine whether a state tax is valid, courts look closely at where the incidence of the tax falls, or who bears the legal responsibility to pay the tax.[29]

Where the incidence of a state tax falls on nonmembers or non-Indians in Indian country, courts resort to what is known as the *Bracker* analysis – which receives its namesake from the case, *White Mountain Apache Tribe v. Bracker*.[30] The *Bracker* analysis balances tribal, federal, and state interests to resolve tax disagreements between tribes and states.[31] In this analysis, courts must:

> examine[] the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.[32]

Under the *Bracker* analysis, state taxation of on-reservation economic activity is disallowed if it infringes on or is incompatible with federal and tribal interests reflected in federal law *unless* the state interests are sufficient enough to warrant the intrusion.[33] The reviewing court makes this determination following the *Bracker* analysis, giving it significant deference in important tribal tax matters.

Not surprisingly, this balancing of tribal and state interests does not always result in predictable outcomes.[34] Courts have applied the *Bracker* analysis and rejected state efforts to tax nonmembers in Indian country, while other courts have upheld state efforts to tax nonmembers in Indian country.[35] But generally, where the balance of federal, state, and tribal interests favors the state, the state may impose its tax if not otherwise prohibited by federal law.[36] The state may then place "minimal burdens" on a tribe or tribal retailer to collect its toll.[37]

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[28] *Id.*; *see also* Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 467 (1995).
[29] *See generally Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. at 142; *Okla. Tax Comm'n*, 515 U.S. at 458; Keweenaw Bay Indian Cmty. v. Rising, 477 F.3d 881, 887 (2007).
[30] *Bracker*, 448 U.S. at 136.
[31] *See* Simon, *supra* note 3, at 2.
[32] *Bracker*, 448 U.S. at 144-45.
[33] *See* Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 275 (1992) (citing California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216); *see also Bracker*, 448 U.S. at 143-145 (1980) (recognizing "firm federal policy" of promoting tribal self-sufficiency).
[34] *See* Simon, *supra* note 3, at 9.
[35] *Id.*
[36] Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134, 154-57 (1980).
[37] Dep't of Tax'n & Fin. of N.Y. v. Milhelp Attea Bros., 512 U.S. 61, 73 (1994).

Defining Dual Taxation

a. What is dual taxation?

As stated earlier, dual taxation occurs when a state or local government taxes the same activity as the governing tribe.[38] Under federal law, and as discussed above, this generally occurs where the underlying activity is on-reservation activity and involves non-Indians or nonmember Indians. In these instances, the tribal government's inherent tax authority allows it to assess its tax, and the state is also able to assess its tax if successful under a *Bracker* analysis. In these instances, state tax revenues collected on tribal lands often supplant tribal tax revenues, which limits the resources available for tribal welfare programs and economic development.[39] Given the largely rural location of many tribes, the high levels of unemployment on many reservations, and the high percentage of members living below the poverty level, this loss of revenue makes already difficult situations worse.[40]

b. Infringements on tribal sovereignty caused by dual taxation

Dual taxation often discourages tribes from taxing certain goods in efforts to attract investment and remain competitive in the market. By forgoing its tribal tax, the tribal government avoids a cumulative tax nearly double the rates paid by that same customer off-reservation. However, "[t]axes imposed by the state on tribal lands do not return to the reservation as government services which further disadvantages tribal government[s] in providing services, regulation[s] and programs for [their] citizens and the businesses located within [their] jurisdiction."[41]

In addition, where a state's tax is found to be valid in Indian country, the state may impose "minimal burdens" on Indian businesses to help collect and enforce the state tax.[42] In *Moe v. Salish & Kootenai Tribes*, the Supreme Court held that requiring tribal smokeshops to affix tax stamps purchased from the State to individual packages of cigarettes before the time of sale to nonmembers of the Tribes constituted an acceptable minimal burden on the Tribes.[43] In addition, the Court in *Washington v. Confederated Tribes of the Colville Reservation* upheld recordkeeping requirements on the Tribes to implement a state cigarette tax, noting that "[t]here is no automatic bar . . . to Washington's extending its tax and collections and recordkeeping requirements onto the reservation in the present cases."[44] While these minimal burdens are hard to enforce, they nevertheless represent infringements on tribal sovereignty.

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[38] Williams, *supra* note 5.

[39] *See* Simon, *supra* note 3, at 2.

[40] *Id.*

[41] TREASURY TRIBAL ADVISORY COMMITTEE, SUBCOMMITTEE ON DUAL TAXATION REPORT, DEP'T OF TREASURY 5 (Dec. 9, 2020), https://home.treasury.gov/system/files/136/TTAC-Subcommittee-on-Dual-Taxation-Report-1292020.pdf.

[42] Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134, 159 (1980).

[43] Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 483 (1976).

[44] *Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. at 151.

Addressing Dual Taxation

This section discusses several ways tribes may address dual taxation, beginning with the most obvious, yet most elusive - legislation.

a. Legislation

Federal Indian law dictates that Congress has plenary power over tribes.[45] Congress has used this power to define the relationship tribes have with states. For example, in the Indian Gaming Regulatory Act of 1988, Congress developed the Tribal-State compacting process required for Class III Indian gaming. Congress' plenary authority over Indian affairs undoubtedly includes passing legislation to address dual taxation in Indian country.[46]

To cleanly address dual taxation and all its effects, Congress would likely need to pass legislation specifying that with respect to in-person sales and activities, the location of the retailer or activity controls which government may assert its tax; and with respect to remote sales, the location of the delivery controls which government may assert its tax. This legislative approach would: 1) eliminate the confusing results caused by focusing on the nonmember or non-Indian activity; 2) simplify how taxes are applied on Indian reservations, getting rid of dual taxation; and 3) encourage business activity and outside investments into Indian country.

However, a congressional legislative fix for dual taxation would take time to organize and is unlikely in the near term. But tribes can and have lobbied for state legislation clarifying their taxing jurisdiction within tribal lands.[47] The advantage of state legislation is that it may be uniquely tailored to fit tribal needs within each state and the lobbying efforts needed to pass state legislation are concentrated on one political sovereign and not all fifty states as in the U.S. Congress.

In-lieu of legislation, tax compacts and strategic business organization have proven the most prominent and effective means to address dual taxation.

b. Tribal-State tax compacts

More than 200 tribes have entered into tax compacts with eighteen states.[48] Tax compacts protect tribal members' tax rights while ensuring nonmembers pay taxes required by state law. Tax compacts may include provisions that address taxable transactions, tribal tax jurisdiction, taxpayer identification methods, the allocation of state and tribal tax revenues, and much more.[49]

Tax compacts might also establish ceilings for respective tax percentages on certain goods. Through a compact, a tribe and state might agree that the tribe remit a certain percentage of its tax revenue to the state each year or vice versa. Also, where case law has sometimes caused confusion, tax compacts may offer certainty. For example, Washington State has a comprehensive tax statute

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[45] Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).
[46] *See*, *e.g.*, 26 U.S.C. § 7871.
[47] *See*, *e.g.*, NEV. REV. STAT. § 372.805 (1989).
[48] *See* Simon, *supra* note 3, at 13.
[49] *See generally Cooperative Agreement Between New Mexico Taxation and Revenue Department and Pueblo of Tesuque*, N.M. TAX'N & REVENUE, https://www.tax.newmexico.gov/governments/tribal-governments/tribal-cooperative-agreements/ (last visited Mar. 24, 2025).

that outlines how the tribes and the State will navigate the cigarette tax scheme by including necessary contracts, describing the stamping process, implementing serial numbers, discussing when the tax is imposed, and determining when the contract will renew.[50]

c. Strategic tribal business structures

In addition to a tax compact, strategically structuring business decisions may help bolster tribal and federal interests. One business model that has proven beneficial is a tribally chartered corporation. A tribally chartered corporation is an entity organized by a tribal government pursuant to a tribal code or resolution.[51] By structuring businesses under tribal charters, tribes can promote economic development within their communities, and, in certain instances, the tribe's sovereign immunity may extend to the tribal corporation. Of course there are other business models, but for activities on Indian reservations, a tribally chartered corporation may provide the most flexibility.

When a tribal business is engaged in economic development under tribal law; when a robust tribal taxing framework is in place; when the taxing tribe provides all local government services; and when detailed federal regulatory authorities are implicated, a potential *Bracker* analysis begins on strong footing with respect to tribal and federal interests. For a state to adequately rebut strong tribal and federal interests under a *Bracker* analysis, its interest in taxing nonmember activity would need to be sufficiently significant and must not be a general interest in raising revenue alone.[52]

In addition to dual taxation, recent state tax laws intended to address e-commerce may also impact tribal governments. This is discussed in more detail next.

E-Commerce Taxation: Legal Shifts and Challenges

a. Tax collection and e-commerce

After the COVID-19 pandemic, e-commerce boomed. In 2020, e-commerce sales increased by forty-three percent, from $571.2 billion in 2019 to $815.4 billion in 2020.[53] The United States Census Bureau estimated total e-commerce sales for 2024 to be worth $1,192.6 billion, an 8.1 percent increase from 2023.[54] Until recently, states could not tax remote sellers, and reported losing

[50] WASH. REV. CODE ANN. § 82.36.450 (2002).
[51] BUREAU OF INDIAN AFFAIRS, U.S. DEP'T OF THE INTERIOR, CHOOSING A TRIBAL BUSINESS STRUCTURE, https://www.bia.gov/service/starting-business/choosing-tribal-business-structure?form=MG0AV3(last visited Mar. 24, 2025).
[52] White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 150-51 (1980).
[53] Mayumi Brewster, *Annual Retail Trade Survey Shows Impact of Online Shopping on Retail Sales During COVID-19 Pandemic*, U.S. CENSUS BUREAU (Apr. 27, 2022), https://www.census.gov/library/stories/2022/04/ecommerce-sales-surged-during-pandemic.html.
[54] Press Release, U.S. Census Bureau, Q. Retail E-Com. Sales 4th Quarter 2024 (Feb. 19, 2025), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf.

millions of dollars in tax revenue.[55] However, after the Supreme Court's *South Dakota v. Wayfair* decision (discussed further below), states can collect sales and use taxes from out-of-state online retailers, increasing sales tax revenue.[56] In Arizona, transaction privilege tax revenue has increased yearly since the State started taxing remote sellers post-*Wayfair*.[57] In 2024, Arizona collected $18.6 billion in transaction privilege taxes.[58]

b. Historic prohibitions on remote sales taxes

In the past, federal law prohibited states from imposing a tax on out-of-state sellers for sales conducted through the mail. In the 1967 case *Nat'l Bellas Hess, Inc. v. Dept' of Revenue of State of Ill.*, the United States Supreme Court held that a state cannot require a seller to collect its tax when the seller's only connection to customers in the state is through the mail.[59] The Court determined that taxation of an out-of-state company without sufficient minimum contacts within a state violated both the Due Process Clause and the Commerce Clause.[60] According to the Court, the Constitution requires a "definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."[61] Thus, a seller needed a physical presence in the state to be required to collect the state's sales and use tax.[62] An example of physical presence the Court envisioned would be if the seller owned a brick-and-mortar business within the taxing state, or a warehouse or shipping center.

After the Court decided *Bellas Hess*, it developed a four-prong test to further define when a tax violated the Commerce Clause.[63] Thereafter, a tax is consistent with the Commerce Clause where "the tax: 1) is applied to an activity with a substantial nexus with the taxing state; 2) is fairly apportioned; 3) does not discriminate against interstate commerce; and 4) is fairly related to the services provided by the state."[64] Throughout the late sixties, seventies, and nineteen-eighties,

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[55] *See* Bill Chappell, *Online Sales Cost Cities And Counties Billions In Taxes, Mayors Say*, NPR (June 21, 2013), https://www.npr.org/sections/thetwo-way/2013/06/21/194047123/online-sales-cost-cities-and-counties-billions-in-taxes-mayors-say.
[56] *See* South Dakota v. Wayfair, 585 U.S. 162, 188-89 (2018); *see also* Eric Syverson & Brian Wanko, *States Adapt Tax Laws as Online Sales Surge*, NAT. CONF. OF STATE LEGISLATURE (Apr. 16, 2024), https://www.ncsl.org/state-legislatures-news/details/states-adapt-tax-laws-as-online-sales-surge.
[57] *Annual Report*, ARIZ. DEP'T OF REVENUE 17-23 (Nov. 2024), https://azdor.gov/sites/default/files/document/REPORTS_ANNUAL_2024_ASSETS_fy24_annual_report.pdf; *see also Transaction Privilege Tax*, ARIZ. DEP'T OF REVENUE, https://azdor.gov/business/transaction-privilege-tax (last visited Mar. 23, 2025). In Arizona, the "transaction privilege tax" is a tax on vendors for the "privilege" of doing business in the State, *id.*, and it applies to out-of-state retailers "making sales of tangible property to Arizona purchasers," *id.*
[58] ARIZ. DEP'T OF REVENUE, *supra* note 57, at 10.
[59] Nat'l Bellas Hess, Inc. v. Dep't of Revenue of State of Ill., 386 U.S. 753, 758 (1967), *overruled by* South Dakota v. Wayfair, 585 U.S. 162 (2018).
[60] *Id.* at 756.
[61] *Id.* at 756 (quoting Miller Bros. Co. v. State of Maryland, 347 U.S. 340, 344-45 (1954)).
[62] *Id.* at 757-58.
[63] *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).
[64] *Id.*

this was generally how out-of-state sales were treated. Then in 1992, the Court partially overruled *Bellas Hess*.

In *Quill Corp. v. North Dakota*, the state of North Dakota challenged the *Bellas Hess* framework and imposed a tax on "every person who engages in regular or systematic solicitation of a consumer market in the [S]tate."[65] In other words, North Dakota targeted entities that regularly solicited customers within the State, for example, through the mailing of sales catalogues into the State. North Dakota claimed that the Court's evolved rulings on Due Process no longer required physical presence in the State for "minimum contacts" to be established.[66]

In response, the Court agreed, clarifying that the Due Process Clause is primarily concerned with providing adequate notice to companies that they are subject to state regulation.[67] However, the Court noted that the Commerce Clause requires it to consider the impact of the tax on the national economy,[68] which is a different analysis altogether. The Court ultimately upheld *Bellas Hess*' requirement of physical presence under the Commerce Clause. In doing so, it opined that a company may have sufficient contact with a state under the Due Process Clause yet still lack a "substantial nexus" with a state under the first prong of the Commerce Clause's analysis described above.[69] As a result, remote sellers without a physical presence in North Dakota could not be subject to the State's tax.[70]

In deciding *Quill*, the Court was not oblivious to the change in commerce that lingered in the background. The majority opinion noted the "remarkable growth of the mail-order business 'from a relatively inconsequential market niche' in 1967 to a 'goliath' with annual sales that reached 'the staggering figure of $183.3 billion in 1989.'"[71] Also, Justice White, in partially dissenting with the Court, discussed the many changes in commerce, where "[w]ire transfers of money involving billions of dollars occur every day; purchasers place orders with sellers by fax, phone, and computer linkup; sellers ship goods by air, road, and sea through sundry delivery services without leaving their place of business."[72] But with respect to these economic considerations, the Court in *Quill* said, the Commerce Clause issue "is not only one Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve." Since Congress' Commerce powers were implicated, the Court viewed Congress to be the best body to overturn *Bellas Hess's* physical presence requirement.

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[65] Quill Corp. v. North Dakota By & Through Heitkamp, 504 U.S. 298, 303 (1992), *overruled by* South Dakota v. Wayfair, 585 U.S. 162 (2018).
[66] *Id.* at 312.
[67] *Id.*
[68] *Id.*
[69] *Id.* at 313.
[70] *Id.* at 317-18.
[71] *Id*. at 303.
[72] *Id*. at 328 (White, J., concurring in part, dissenting in part).

c. *Addressing online/remote sales tax issues through South Dakota v. Wayfair*

Finally, in 2018, after years of inaction by Congress, the Court overruled the holdings in *Bellas Hess* and *Quill* and concluded that physical presence in a state is not needed for a seller to have a "substantial nexus" to the state under the Court's Commerce Clause analysis.[73] In *Wayfair*, the Court reviewed a challenge to the South Dakota legislature's proposed tax on remote sales; the State developed the tax law after concluding that the *Bellas Hess* and *Quill* cases hurt its tax base and placed the burden on its residents to report and pay taxes on purchases from out-of-state sellers.[74] The law enacted by the South Dakota state legislature would require out-of-state sellers to "collect and remit sales tax 'as if the seller had a physical presence in the [S]tate.'"[75]

The tax would apply to sellers that delivered more than $100,000 of goods and services to South Dakota or to sellers that conducted two hundred or more transactions for goods and services with a delivery address in the State.[76] The law sought to apply "South Dakota's sales and use tax obligations to the limit of federal and state constitutional doctrine" and noted the need for the Court to reconsider its precedents, namely *Bellas Hess* and *Quill*.[77] The South Dakota law stated it would not go into effect until it was deemed Constitutional.[78]

The Court's review of South Dakota's law immediately focused on the first prong of the Commerce Clause test, whether the tax "applies to an activity with a substantial nexus with the taxing state."[79] The Court admitted its precedents created an "internet tax loophole" that unfairly burdened smaller business owners within a state to pay all applicable sales and use taxes, while allowing remote sellers without a physical presence in the state to avoid the state's tax.[80]

The *Wayfair* Court held that, under the first prong of its Commerce Clause analysis, a "substantial nexus" exists where a remote seller "avails itself of the substantial privilege of carrying on business" in a state.[81] The Court determined that out-of-state sellers delivering more than $100,000 worth of goods and services or conducting more than two hundred transactions had availed themselves of the privilege of doing business in South Dakota, especially national online retailer Wayfair, an entity that "undoubtedly maintain[ed] an extensive virtual presence."[82]

The Court having overturned *Bellas Hess*'s and *Quill's* physical presence requirement under the Court's "substantial nexus" consideration, remanded the matter back to state court to

[73] South Dakota v. Wayfair, 585 U.S. 162, 188-89 (2018).
[74] *Id.* at 169-70.
[75] *Id.* at 170.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.* at 174.
[80] *Id.* at 182-83.
[81] *Id.* at 188 (quoting Polar Tankers, Inc. v. City of Valdez, Alaska, 557 U.S. 1, 11 (2009)).
[82] *Id.*

consider the other three prongs of the Court's Commerce Clause analysis.[83] In doing so, the Court noted that the South Dakota law had features that could prevent discrimination or undue burden on interstate commerce, such as a safe harbor provision for businesses that only conducted transactions in South Dakota;[84] that the duty for out-of-state sellers to collect and remit taxes did not apply retroactively;[85] and that South Dakota's adoption of the Streamlined Sales and Use Tax Agreement (SSUTA) when the legislature enacted the law was a beneficial tool that could help the law survive under the Commerce Clause analysis.[86]

While the Court was developing its approach to remote sales and use tax described above, the collective states were organizing their own approach, and Congress was considering legislation as well.

Streamlined Sales and Tax Use Agreement (SSUTA)

In the interim between *Quill* and *Wayfair*, states continued to rethink how taxes could be administered. The SSUTA was the product of forty-four states, the District of Columbia, local governments, and businesses working toward the goal of providing a uniform and simplified application, administration, and implementation of sales and use taxes.[87] The SSUTA seeks to streamline how taxes are collected but, importantly, does not preempt state law.[88] To become a member state, a state must implement the requirements in the Agreement, including having a centralized system for tax administration, uniform rules for tax returns and rates, and simplified and uniform tax definitions.[89] Currently, twenty-three states agreed to the terms of the SSUTA, and there is one associate member state.[90]

Marketplace Fairness Act (MFA)

As noted earlier, Congress failed to pass legislation to allow states to collect taxes on remote sales, but it was not for lack of effort. In 2011, the Marketplace Fairness Act (MFA) was introduced in the 112th Congress as a solution to *Bella Hess* and *Quill*'s physical presence requirement.[91] The MFA integrated the SSUTA into its language and allowed states to tax remote,

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[83] *Id.* at 188-89.
[84] *Id.* at 189.
[85] *Id.*
[86] *Id.*; *State Guide to the Streamlined Sales Tax Project*, STREAMLINED SALES TAX GOVERNING BD., INC. 3 (Jan. 14, 2021), https://www.streamlinedsalestax.org/docs/default-source/guides/state-guide-to-streamlined-sales-tax-project.pdf?sfvrsn=53d3448f_4.
[87] STREAMLINED SALES TAX GOVERNING BD., INC., *supra* note 86, at 3.
[88] *Id.*
[89] *Id.*; *see also FAQs - General Information About Streamlined*, STREAMLINED SALES TAX GOVERNING BD., https://www.streamlinedsalestax.org/ (last visited Mar. 7, 2025).
[90] STREAMLINED SALES TAX GOVERNING BD., https://www.streamlinedsalestax.org/ (last visited Mar. 7, 2025).
[91] Marketplace Fairness Act, S.1832, 112th Cong. (2011).

out-of-state retailers.[92] The MFA would provide two options, one for member states under the SSUTA and an alternative for non-member states.[93]

For member states, the MFA required sellers to collect and remit sales and use taxes from remote sales to the member state under the terms of the SSUTA.[94] The SSUTA also needed to comply with the "minimum simplification requirements" in the bill, which required a single entity within a state that administered and oversaw remote sales, a single audit of a remote seller in the state, and only one filing requirement for sales and use tax.[95] Another simplification requirement prevented a state or local jurisdiction from requiring remote sellers to file more often than in-state sellers. A non-member also had to comply with the minimum simplification requirements.[96]

In the first version of the bill, there was a "small seller exception" that prohibited a state from requiring a remote seller to collect its sales tax if the remote seller's gross annual receipts for all remote sales in the United States were below $500,000.[97] Later versions of the bill raised the threshold amount to $1,000,000.[98]

E-Commerce and Tribal Tax Interests

States clearly have a strong interest in collecting sales and use taxes from remote sellers; the same can be said for tribal governments. Tribal governments also have strong protections against undue state interference, including unwarranted tax assessments, which if left unresolved, could erode bedrock principles of federal Indian law against tribal interests, and further contribute toward the dual taxation issues discussed earlier.

a. *Indian Trader Statutes and Central Machinery*

The Indian Trader Statutes, 25 U.S.C. §§ 261-64, play a major role in thinking about sales and use taxes in Indian country. The Non-Intercourse Act, enacted in 1790, prohibited trade with tribes without a federal license.[99] The Act, a precursor to the Indian Trader Statutes, designated a "superintendent of the department" or presidential appointee to issue the licenses.[100] Today, the United States Department of Interior implements regulations on Indian traders doing business in

[92] *Id.* § 2(a).
[93] *Id.* § 2(a)-(b).
[94] *Id.* § 2(a).
[95] *Id.* § 2(b).
[96] *Id.* § 2(c).
[97] *Id.*
[98] *See* Marketplace Fairness Act of 2013, H.R. 684, 113th Cong. § 2(c) (2013); Marketplace Fairness Act of 2015, S. 698, 114th Cong. § 2(c) (2015); Marketplace Fairness Act of 2017, S. 976, 115th Cong. § 2(c) (2017).
[99] An Act to regulate trade and intercourse with the Indian Tribes, Ch. 33, 1st Cong. (2nd Sess. 1790) (enacted), https://maint.loc.gov/law/help/statutes-at-large/1st-congress/session-2/c1s2ch33.pdf; *see also* 25 U.S.C. § 177.
[100] Ch. 33, 1st Cong. § 1 (2nd Sess. 1790).

Indian country.[101] These statutes aim to prevent "fraud and imposition" on Indian tribes and their members.[102] In certain instances, the Indian Trader Statutes retain a preemptive effect on state taxation in Indian country.[103]

In *Central Machinery*, a company sold eleven farm tractors to Gila River Farms, owned by the Gila River Indian Community.[104] The company solicited the sale, drafted the contract, procured payment, and delivered the tractors on tribal lands.[105] The company was not located on the reservation and had no federal traders license, but the Bureau of Indian Affairs approved the transaction.[106] The State of Arizona imposed a "transaction privilege tax" on the sale, and Central Machinery Co. claimed that federal law preempted the State's tax.[107] The Court agreed with Central Machinery Co., noting that the existence of Indian Trader Statutes preempts transactions with Indians on reservations.[108] The fact that the company was not licensed and had no permanent place of business on the reservation did not hinder the preemptive effect of the federal Indian Trader Statutes.[109] Similarly, that the tax fell on the seller of goods and not the buyer did not change the Court's analysis.[110] In the Court's view, the transaction took place on the reservation, and the payment and delivery also occurred on the reservation; therefore, the Indian Trader Statutes applied.[111]

Importantly, the Court's holding in *Central Machinery* is limited to those transactions where a tribal member or the tribal government is purchasing goods delivered to the reservation. Thus, where a state implements a tax on non-Indian purchases delivered to an Indian reservation, the Indian Trader Statutes have little force and effect.[112]

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[101] 25 C.F.R. § 140.
[102] Cent. Mach. Co. v. Ariz. State Tax Comm'n, 448 U.S. 160, 163 (1980).
[103] *Id*. at 163-64; *See also* Warren Trading Post Co. v. Ariz. State Tax Comm'n, 380 U.S. 685, 690-92 (1965) (holding Arizona could not tax the gross receipts from a trading post owned by non-Indians on the Navajo Nation based on the extensive federal regulations for traders in Indian Country).
[104] *Cent. Mach. Co.*, 448 U.S. at 161.
[105] *Id.*
[106] *Id.*
[107] *Id.* at 162.
[108] *Id.* at 165.
[109] *Id.* at 164.
[110] *Id.*
[111] *Id.* at 165.
[112] Dep't of Tax'n & Fin. of N.Y. v. Milhelm Attea & Bros., 512 U.S. 61, 73 (1994).

State Tax Approaches to E-Commerce, and Indian Tribes

As noted above, an overwhelming majority of states attempted to address remote sales tax issues through developing the SSUTA framework and Congress attempted to resolve the matter by introducing the MFA. In the end, *Wayfair* seems to have quelled Congress's appetite to pass the MFA.[113] In 2023, marking the fifth anniversary of *Wayfair*, the Government Accountability Office (GAO) reported that the thirty-three state revenue agencies who responded to a 2022 survey reported they had collected an aggregated $23.1 billion dollars from remote vendors in 2021 alone.[114]

Based on *Wayfair* and parallel tribal-state tax jurisprudence, this section considers how states can craft tax policy that does not disadvantage tribes or their members based on the following framework: First, a good purchased online is subject to the taxing jurisdiction of wherever it is shipped, notwithstanding who the purchaser is.[115] Also, goods purchased online from within Indian country, or being shipped inter-tribally, should generally be subject to tribal taxation only, leaving little room for state taxation.[116]

a. *Indian country as a policy consideration*

Sales taxes "are a form of consumption tax levied on retail sales of goods and services."[117] Goods purchased online from within Indian country, or purchased and delivered inter-tribally, no matter who the purchaser is, are subject to tribal taxation.[118] For this reason, states with a significant amount of Indian country, or that have Indian country that runs between multiple states, should actively consider tribes when developing remote sales tax policies.

In the context of e-commerce and Indian country, it is imperative that states mandate an approach that does not encourage dual taxation nor impede tribes' inherent power to impose and collect taxes to generate revenue.[119] Moving the goalposts any further on these policies would conflict with the federal government's policy of promoting tribal economic independence and self-governance.

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[113] Marketplace Fairness Act of 2013, S. 743, 113th Cong. (2013), https://www.congress.gov/bill/113th-congress/senate-bill/743.

[114] *Remote Sales Tax: Initial Observations on Effects of States' Expanded Authority: Hearing Before the S. Comm. on Finance,* 117th Cong. 5 (2022) (statement of James R. McTigue, Jr., Director, Tax Policy and Administration, Government Accountability Office)

[115] *See* Adam Crepelle, *Legal Issues in Tribal E-Commerce*, 10 AM. U. BUS. L. REV. 396 (2022).

[116] *Id.*

[117] ARIZ. CTR. FOR ECON. PROGRESS, TRIBAL TAX PRIMER 2 (Dec. 2023), https://azeconcenter.org/wp- content/uploads/2023/12/Tribal-Tax-Primer-3.pdf.

[118] *See* Brief for Nat'l Cong. Of Am. Indians & Indian Tribes in S.D. as Amici Curiae in Support of Neither Party at 7-10, South Dakota v. Wayfair, Inc., 585 U.S. 162 (2018) (No. 17-494) (arguing "states cannot tax items delivered to the tribal government or tribal members in the Tribe's Indian country"); *see also* Crepelle, *supra* note 115, at 396 (suggesting that "online sales made within Indian country should be subject solely to tribal taxation" and accordingly, e-commerce between reservations should be exempt from state taxation).

[119] *See* Brief for Nat'l Cong. Of Am. Indians & Indian Tribes in S.D., *supra* note 118, at 3-5.

b. Upholding Indian country tax precedent in e-commerce approaches

In a contemporary and increasingly globalized economic landscape, where goods and services are a mere touchscreen or click of the keyboard away, state sales tax approaches must meet the principles laid out in *Wayfair* to pass Constitutional muster. Indeed, as of January 1, 2023, each state that implements a sales tax "has economic requirements for remote out-of-state sellers" pursuant to the *Wayfair* holding.[120]

Equally important is the opportunity *Wayfair* presents for tribal governments. As the NCAI noted, if tribal governments can secure legal tax parity with states, they can:

> [c]reate the sales tax collection system for the next century, and sales taxes are a critical source of government revenue for Indian Tribes. State governments rely on federal funding for approximately 25% of their budgets, while tribal governments rely on federal funding for more than 60% of their budgets. Most often tribal governments are supplying services that the federal government is under treaty and trust obligations to provide . . . tribal governments should have the same opportunities to collect taxes as other jurisdictions within the federal system.[121]

Therefore, any efforts to capture online sales tax must meaningfully include Indian tribal governments; the Supreme Court's *Central Machinery* case discussed above requires it.[122]

Because tribal governments, as separate sovereigns, have the inherent authority to "collect sales taxes on Indian reservations" and to use the revenues thereof to provide services on their reservations, state legislatures should keep tribal sovereignty at the fore of their concerns when drafting taxing legislation.[123] In 2018, the NCAI urged the *Wayfair* Court to expressly hold that "to the extent that States are permitted to tax remote sales, they cannot tax items delivered to the tribal government or tribal members in the Tribe's Indian Country...blackletter federal law renders reservation Indians and those who trade with them immune from state sales taxes."[124] Unfortunately, the *Wayfair* Court omitted any express limits to states' ability to impose a sales tax in Indian country. Nevertheless, the blackletter federal law referred to remains intact.

In addition to tribal concerns, opponents of *Wayfair* expressed valid concerns about the adverse impact online sales taxes could have on small "brick-and-click" remote retailers within a taxing state. This issue is not restricted solely to in-state small retailers, but also likely effects on-reservation and off-reservation tribal enterprises operating within the "brick-and-click" market.[125] It is argued that larger remote retailers like Amazon gain a competitive advantage because of their ability to absorb any tax implications, thus discouraging smaller retailers from competing in a

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[120] *Economic Nexus State Guide*, SALES TAX INST., https://www.salestaxinstitute.com/resources/economic-nexus-state-guide (last visited Mar. 5, 2025).

[121] Nat'l Cong. of Am. Indians, COMMENTS TO THE SENATE FINANCE COMMITTEE COMMUNITY DEVELOPMENT & INFRASTRUCTURE WORKING GROUP: TAX PARITY AND ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 9 (Apr. 15, 2015), https://www.finance.senate.gov/imo/media/doc/NCAI.pdf.

[122] Brief for Nat'l Cong. Of Am. Indians & Indian Tribes in S.D., *supra* note 119, at 18-19.

[123] *Id.* at 7–8.

[124] *Id*. at 6.

[125] Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505 (1991).

lopsided remote market.[126] For this reason, states should consider their approach and its possible effects on small businesses, including tribal enterprises. For example, states should consider repealing any transaction-based thresholds to create a safe harbor for small businesses that engage in small-dollar-amount transactions. Such modifications may benefit small tribal enterprises who fall short of the revenue-based threshold in their respective state but conduct many low-dollar remote sales.

Finally, in passing remote sales tax laws, it is incumbent upon states to incorporate economic thresholds and remittance obligations pursuant to preexisting frameworks, either federal or state, such as the SSUTA; and to ensure consistency with *Central Machinery*.

c. Comparative Analysis of State Online Tax Laws

Pursuant to *Wayfair*, almost all states have employed a sales tax regime that requires remote sellers to collect and remit sales taxes. Even if remote sellers lack a physical presence in the taxing state, states can nonetheless tax them if their gross retail sales meet a specified dollar amount or number of transactions annually.[127] Though there is no bright-line rule for what a "substantial nexus" is, many states have modeled their approach on the South Dakota tax law at issue in *Wayfair*. This model adopts a combination of: 1) revenue-based thresholds of $100,000 or less; or 2) transaction-based thresholds of 200 or more transactions during the previous calendar year.[128]

In addition, to address the competitive disadvantage that smaller retailers may experience, some states have begun repealing their transaction-based thresholds to help create a safe-harbor for small businesses that engage in many, small-dollar-amount transactions. Such businesses with fewer than $100,000 in annual sales may be assured that their sales of goods or services into states like South Dakota and Washington will not require collection of a sales tax.

South Dakota Codified Laws: Title 10

Before February 13, 2023, South Dakota required remote sellers to collect and remit sales and use taxes if the retailer's in-state sales exceeded $100,000 or the retailer conducted 200 or more separate transactions in the previous calendar year.[129] However, the state has since eliminated the 200-transaction threshold, finding that eliminating the transaction-threshold could streamline tax compliance and provide legislative clarity. Removing the threshold has resulted in relief to

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[126] Rifat Azam, *Online Taxation Post Wayfair* 51 N.M. L. REV. 115, 133 (2021).

[127] *See Wayfair's Impact & Marketplace Fairness Act*, WASH. DEP'T OF REVENUE, https://dor.wa.gov/taxes-rates/retail-sales-tax/marketplace-fairness-leveling-playing-field/wayfairs-impact-marketplace-fairness-act (last visited Mar. 5, 2025).

[128] SALES TAX INST., *supra* note 120.

[129] Diane Yetter, *South Dakota Court Rules that State's Economic Nexus Legislation is Unconstitutional*, SALES TAX INST. (Mar. 6, 2017), https://www.salestaxinstitute.com/resources/south-dakota-court-rules-state-s-economic-nexus-legislation-unconstitutional.

smaller businesses who, despite not meeting the $100,000 sales threshold, would consistently exceed the 200-transaction threshold.[130]

Pursuant to South Dakota Codified Law 10-45-10, the "sale of products and services to tribal governments are exempt from sales tax and use tax." [131] A tribal government may provide an exemption certificate to the business it purchases from, and the business must keep records—either an exemption certificate, purchase order, or copy of the check showing the transaction was paid from tribal government funds to support the exempt transaction.[132] This is a common procedure for other states with Indian country which may have inherent problems of its own.[133] However, the applicability of South Dakota's sales tax to other transactions purchased from within and delivered to Indian country, including purchases made by individual tribal members, depends on specific tax collection agreements entered into between the State and individual tribes.[134]

It is not clear whether South Dakota's tax code levies a sales tax on transactions protected by *Central Machinery* in the absence of such an agreement; nevertheless, entering such an agreement comes with the benefit of ensuring that "all retail transactions…on property included in a tax collection agreement are subject to the same taxes, tax rates, and exemptions."[135] Five Tribes, including the Cheyenne River Sioux, Crow Creek Sioux, Oglala Sioux, Rosebud Sioux, and Standing Rock Sioux, have entered tribal-state tax agreements, giving tribal land encompassed within a tribal-state agreement "Special Jurisdiction" status, and ensuring a uniform 4.2% sales tax rate on goods purchased or delivered within the Special Jurisdiction.[136]

On one hand, South Dakota's sales tax may run afoul of *Central Machinery*, by authorizing a state tax on transactions between a non-Indian seller and a tribal entity occurring in Indian country without express congressional authorization.[137] On the other hand, South Dakota's tribal-state agreement approach provides certainty and addresses the dual taxation problem. Recall, there is no absolute bar to state taxes on "purchases by non-Indians (or nonmember Indians)" in Indian country, giving rise to the possibility of both tribes and states having taxing authority over the same transactions.[138] Yet South Dakota's tribal-state "tax collection agreements ensure that *all* retail transactions…on property [within a special jurisdiction, and] included in a tax collection

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[130] *Id.*; *see also Washington Issues Guidance for Remote Sellers following Wayfair Decision*, SALES TAX INST., https://www.salestaxinstitute.com/resources/washington-issues-guidance-for-remote-sellers-following-wayfair-decision (last visited Mar. 6, 2025).
[131] *Tribal*, S.D. DEP'T OF REVENUE (2023), https://dor.sd.gov/media/5cnnz2ww/tribal.pdf (last visited Mar. 6, 2025); *see also* S.D. CODIFIED LAWS § 10-45-10 (2023), https://sdlegislature.gov/statutes/10-45-10.
[132] S.D. DEP'T OF REVENUE, *supra* note 131.
[133] S.F. 94, 67th Leg., Gen. Sess. (Wyo. 2025), https://www.billtrack50.com/billdetail/1767578.
[134] *Sales of Products or Services Within Indian Country*, S.D. DEP'T OF REVENUE, https://dor.sd.gov/businesses/taxes/sales-use-tax/sales-of-products-or-service-within-indian-country/ (last visited Mar. 6, 2025).
[135] *Id.*
[136] *Id.*; There is some discrepancy between the exact tax rate for these purchases. While the South Dakota Department of Revenue's guidance states a sales tax rate of 4.2%, its Municipal/Special Jurisdiction Tax Schedule states a sales tax rate of 4.5% fort the five tribes mentioned above.
[137] Brief for Nat'l Cong. Of Am. Indians & Indian Tribes in S.D., *supra* note 118, at 18-19.
[138] Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134, 141 (1980).

agreement are subject to the same taxes, tax rates, and exemptions."[139] To summarize, South Dakota applies a stable modest tax across the board for special taxing jurisdictions, including five of the nine tribes that entered into such agreements.[140]

Beyond the five Special Jurisdictions, other South Dakota tribes have negotiated "Limited Tax Collection Agreements" to gain the same uniformity over fewer, particularized tribal enterprises like casinos, gas stations, convenience stores, and restaurants. [141] In today's economy, these tribal enterprises increasingly rely on a steady stream of goods or supplies from out-of-state to offer their customers. Thus, it is important they understand their respective states' economic nexus frameworks post-*Wayfair*. For these tribes, Limited Tax Collection Agreements offer needed certainty in those particularized markets prioritized by the tribe.

Lastly, though South Dakota's sales tax exempts only tribal governments and not tribal members, upon collecting the sales tax within a Special Jurisdiction, the tax is remitted back to the State and tribal governments according to the agreement.[142] Contrast this with Arizona's approach, which generally does not remit taxes back to tribes.[143] Therefore, considering the minimal burden the sales tax imposes on South Dakota tribes, and that on a $1,000 transaction, only $42 may be assessed on a purchaser within a Special Jurisdiction—a portion of which is distributed back to the tribe—the South Dakota scheme appears viable since it seems to narrow, rather than compound, the dual taxation problem.

Washington Revised Code: Title 43

Like South Dakota, Washington State implements a remote seller revenue-threshold of $100,000 in annual gross sales, and a transaction-threshold of 200 or more separate transactions into Washington within a calendar year.[144] However, on March 4, 2019, Governor Jay Inslee signed into law S.B. 5581, removing the 200-transaction threshold for remote sellers.[145]

Unlike South Dakota, the Washington Department of Revenue issued guidance that "federal law provides that the sales of tangible goods…to tribes and enrolled tribal members are exempt from sales tax if the goods are delivered to or the sale is made in the tribe or enrolled tribal

[139] *Tribal*, S.D. DEP'T OF REVENUE (2023), https://dor.sd.gov/media/5cnnz2ww/tribal.pdf (last visited Mar. 6, 2025) (emphasis added).
[140] *Id.*
[141] *Sales of Products or Services Within Indian Country*, S.D. DEP'T OF REVENUE, https://dor.sd.gov/businesses/taxes/sales-use-tax/sales-of-products-or-service-within-indian-country/ (last visited Mar. 6, 2025).
[142] *Economic Nexus State Guide*, *supra* note 120.
[143] ARIZ. CTR. FOR ECON. PROGRESS, TRIBAL TAX PRIMER 6 (Dec. 2023), https://azeconcenter.org/wp-content/uploads/2023/12/Tribal-Tax-Primer-3.pdf.
[144] *Washington Issues Guidance for Remote Sellers Following Wayfair Decision*, SALES TAX INST., https://www.salestaxinstitute.com/resources/washington-issues-guidance-for-remote-sellers-following-wayfair-decision (last visited Mar. 6, 2025).
[145] *Id.*

member's Indian country."[146] Additionally, Washington's Administrative Code expressly recognizes that the State may not tax Indians or Indian tribes in Indian country but that in limited circumstances the State can tax a nonmember doing business in Indian country with an Indian or an Indian tribe unless preempted by federal law.[147] By comparison, South Dakota guidance provides that sales of goods by a non-Indian retailer to any purchaser that is not a tribal government, even if that purchaser is a tribal member located in Indian country, may be subject to its state sales tax.[148]

Like South Dakota, Washington also provides a compacting scheme. Though "sale[s] to persons other than tribal members [are generally] subject to the retail sales tax regardless of where delivery…takes place, . . . a tribe . . . can enter into an agreement covering the collection of state tax by tribal members or the tribe."[149] Some Washington tribes, like the Tulalip Tribes, have done just that. Though, the Tulalip compact is unique among its counterparts.[150] Specifically, the compact was entered into only after a federal court ruled that state and local sales taxes could be imposed on sales by nonmember retail businesses operating at a shopping center located on Tulalip property.[151] Yet, the Tulalip compact demonstrates how states and tribes may enter into limited agreements intended to address dual taxation. With respect to sales and use taxes, the Tulalip compact provides that "the first $500,000 of revenue is allocated to the Tribes," and for revenue that exceeds $500,000, "the allocation formula depends on whether a tribe has made a 'qualified capital investment'" in the construction of a particular facility negotiated for in the compact.[152]

As appealing as Washington's compacting scheme may appear, tribes located in states without a "one-size-fits-all" tribal-state tax agreement approach, like South Dakota's Special Jurisdiction framework, may remain disadvantaged. This is because the likelihood that a state chooses to enter into these unique compacts depends on a variety of circumstances, including incentives that are not always aligned with tribal economic interests. For example, in the Tulalip compact above, the "qualified capital investment" that was the lynchpin of the sales tax allocation formula for revenue above $500,000, was the Tribes' agreement to invest $35 million into constructing a "civil commitment facility" on Tribal lands "apparently in exchange for tax revenue."[153] However, only time and data will reveal the collective advantages of Washington and South Dakota's schemes within the context of state sales tax applicability in Indian country.

[146] *Native Americans*, WASH. DEP'T OF REVENUE, https://dor.wa.gov/education/industry-guides/auto-dealers/native- americans (last visited Mar. 1, 2025).
[147] WASH. ADMIN. CODE § 458-20-192.
[148] S.D. DEP'T OF REVENUE, *supra* note 139 (emphasis added).
[149] *Indian Tax Guide*, WASH. DEP'T OF REVENUE, https://dor.wa.gov/book/export/html/1112 (last visited Mar. 7, 2025).
[150] Pippa Browde, *Sacrificing Sovereignty: How Tribal-State Tax Compacts Impact Economic Development in Indian Country*, 74 HASTINGS L.J. 1, 35–37 (2022).
[151] *Id.* at 35.
[152] *Id.*
[153] *Id.*

Arizona Revised Statutes: Title 42

H.B. 2757, enacted by the Arizona legislature in 2019, employs an economic nexus model that diverges from other states with Indian country. Arizona is the first state to use a "graduated approach" for their economic nexus threshold, which excludes "marketplace sales" if a remote seller makes "both direct sales and sales through a marketplace in Arizona."[154] "Marketplace sales" are sales made through a "marketplace facilitator," defined as "any business operating a marketplace by listing or advertising for sale, on behalf of others, items of tangible personal property and accept[ing] payment on behalf of the retailer/wholesaler and then remit[ting] the sales proceeds to the retailer/wholesaler," like Amazon or eBay.[155]

Importantly, "Arizona's state, county and city transaction privilege tax (TPT) does not apply to the gross income derived" from sales made by an enrolled member of a Native American tribe who purchases goods from an online retailer while on the tribal member's home-reservation.[156] Like Washington, and unlike South Dakota, the Arizona Department of Revenue (AZDOR) adheres to the general rule that, whether the transaction arrives by plane, train, or automobile to Indian country, if it occurs with Indian buyers who are members of the tribe, only the tribe can tax such transactions.[157] Additionally, A.R.S. § 42-5122 explicitly exempts "retail sales of tangible personal property to a Native American tribe, tribally owned business, tribal entity or affiliated tribe member if the tangible personal property is *ordered from* and *delivered to* a Native American Reservation."[158]

The AZDOR also takes the position that "the state…may impose a tax on non-affiliated Native Americans doing business on reservations" in Arizona, and the state may tax on-reservation activity if "the state regulates or provides services to the activity, and the effect of the tax on the tribe is insubstantial, indirect, or non-existent."[159] Thus, while Arizona law is seemingly consistent with the principles of *Central Machinery*, this framework also recognizes the Court's precedent discussed earlier that give rise to dual taxation issues. Hence, although Arizona's TPT applies only when a seller is not a tribal member and the buyer is not a tribal member, this factual circumstance "yielded over $69.3 million to the state" from Arizona's 22 tribal reservations in 2023 alone.[160] In such instances, the "nontribal customer must pay both the state and tribal sales tax and the tribe receives direct revenue from its own TPT since the state largely does not share TPT revenue with tribes."[161] Meanwhile, Arizona cities and counties receive a dedicated share of the state TPT revenue.[162]

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[154] *Arizona Enacts Economic and Marketplace Nexus Legislation*, SALES TAX INST. (Oct. 31, 2019), https://www.salestaxinstitute.com/resources/arizona-enacts-economic-and-marketplace-nexus-legislation.
[155] *Frequently Asked Questions: Out-of-State Sellers*, ARIZ. DEP'T OF REVENUE, https://azdor.gov/business/transaction- privilege-tax-tpt/retail-sales-subject-tpt/out-state-sellers/frequently-asked-questions (last visited Mar. 7, 2025).
[156] ARIZ. DEP'T OF REVENUE, ARIZONA TRANSACTION PRIVILEGE TAX RULING TPR 22-1 6 (May 10, 2022), https://azdor.gov/sites/default/files/2023-03/RULINGS_TPT_TPR22-1.pdf.
[157] *Id.*
[158] ARIZ. REV. STAT. § 42-5122, https://www.azleg.gov/ars/42/05122.htm (last visited Mar. 7, 2025)
[159] ARIZ. DEP'T OF REVENUE, TRANSACTION PRIVILEGE TAX RULING TPR 22-1 (2022), https://azdor.gov/legal- research/rulings/tpr-22-1.
[160] *Id.*
[161] *Id.*
[162] *Id.*

And where a transaction occurs on the reservation, and the seller and purchaser are both non-members, pursuant to its Tribal Government Consultation Policy, the state may engage with tribes in forming state-tribal tax agreements, often through Intergovernmental Agreements (IGAs) and compacts.[163] But as noted above, tribes must fully understand the myriad incentives motivating a state to enter such an agreement. Failing to do so risks stipulating to conditions that are otherwise contrary to tribal governmental policy or that force tribes to sacrifice fundamental characteristics of their sovereignty in exchange for tax revenue.

Wyoming Statutes: Title 39

Pursuant to Wyoming Statutes, Title 39, any remote seller of tangible personal property, without a physical presence within Wyoming, must collect and remit to the State a sales tax if its annual gross revenue from sales exceeds $100,000 dollars.[164] The State defines "tangible personal property" as all property that can be "weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses." In other words, goods and possibly services.

While purchases of tangible personal property through e-commerce are generally subject to the State's sales tax, tribal members of the Eastern Shoshone and Northern Arapaho Tribes are eligible for an "entity-based" exemption from the sales tax pursuant to W.S. 39-15-105(a)(i)(A).[165] So long as the purchaser can prove they (1) are an enrolled member of one of the two Wyoming Tribes, and (2) received the purchase on the Wind River reservation (Wyoming's only Indian reservation), the purchaser is eligible for an "entity-based" sales tax exemption.[166] Furthermore, the purchaser must submit a "Streamlined Exemption Certificate" (Form) to the remote vendor to claim the exemption.[167] Once approved, the certificate applies to either one-time or reoccurring purchases.[168]

In theory, filling out an electronic exemption certificate should be relatively painless and user-friendly. However, enrolled tribal members of the Eastern Shoshone and Northern Arapahoe have recently urged Wyoming's Select Committee (Committee) on Tribal Relations to address issues with the current system, which has been described as "cumbersome."[169] For example, to obtain an exemption certificate, the purchaser must fill out a section of the form labeled "purchaser's type of business."[170] This specific section has confused some tribal members who

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[163] *See* ARIZ. DEP'T OF REVENUE, TRIBAL CONSULTATION ANNUAL REPORT 12 (Jan. 15, 2020) (on file with authors).
[164] WYO. STAT. ANN. § 39-15-501 (2023).
[165] WYO. DEP'T OF REVENUE, SALES TAX & TRIBAL RELATIONS 4 (July 13, 2023), https://wyoleg.gov/InterimCommittee/2023/STR-2023071305-01WYDOR_Powerpoint_Tribal.Relations_7.13.23.pdf.
[166] *Id.*
[167] *Id.* at 5.
[168] *Id.*
[169] Hannah Habermann, *Lawmakers Mull How to Return Improperly Assessed Online Sales Taxes to Wind River Tribes*, WYO. PUB. MEDIA (Aug. 29, 2024), https://www.wyomingpublicmedia.org/politics-government/2025-02-07/bill-considers-how-to-return-improperly-collected-online-sales-tax-on-the-wind-river-reservation.
[170] Katie Roenigk, *Local Lawmaker Proposes Collecting, Distributing Sales Tax Revenues on the Wind River Reservation*, CNTY. 10 (Sept. 8, 2022), https://county10.com/local-lawmaker-proposes-collecting-distributing-sales-tax-revenues-on-the-wind-river-reservation/.

erroneously, but perhaps intuitively, select the "not a business" option, because they do not own a business.[171] Instead, these non-business-owning purchasers are supposed to select, perhaps nonintuitively, the "government" option.[172]

The above process received partial blame for wrongfully collected online sales taxes levied on tribal members.[173] However, the Committee is attempting to correct this problem with a draft bill that "would return improperly collected online taxes" back to the tribes, "who would then independently decide how to use the money."[174] As of February 10, 2025, the bill appears dead.[175] The situation in Wyoming spotlights a problem that tribes and states may encounter moving forward: what to do when online sales taxes are improperly assessed on tribes and tribal members.[176]

The curative Wyoming bill would run afoul of *Central Machinery* by giving the State a 1% cut of online sales taxes on purchases made by Indians on the Reservation, but this percentage would be earmarked for the administrative costs in redistributing what was properly owed the Wyoming tribes since the tax should not have been levied in the first place. Indeed, the Wyoming bill was intended to not only address future issues but to retroactively correct improper taxation. Therefore, under a "certificate" framework, tribes should advocate for both a streamlined and user-friendly application process, and provisions that prevent improperly assessed sales tax, even where tribal purchasers forget to fill out the required paperwork.

Addressing Tribal E-Commerce Issues

a. Tribe-State Sales Tax Compacts

Tribe-state sales tax compacts represent one practical path to address e-commerce. Tax compacts provide the mutual recognition of taxing authority, and rules for remittance and enforcement across sovereign lines. Importantly, compacts should empower tribal governments to operate with a degree of uniformity and predictability in the e-commerce marketplace, allowing tribes to capture tax revenue while addressing dual taxation. However, as seen with the Tulalip Tribes, compacts could be used as a tool that, in effect, allows states to force tribes into sacrificing fundamental aspects of sovereignty in exchange for tax revenue.[177] Nevertheless, the legal framework for such arrangements already exists in other intergovernmental agreements, like those under South Dakota's "Special Jurisdiction" scheme, which, despite running afoul of *Central Machinery* by taxing tribal members making purchases from within their reservation, may provide uniformity in prices to nonmembers that may otherwise be subject to burdensome, fluctuating rates.[178] In addition, intergovernmental compacts could open doors to tribal governments' entry

[171] *Id.*
[172] *Id.*
[173] *See* Habermann, *supra* note 169.
[174] *Id.*
[175] *See* S.F. 94, 67th Leg., Gen. Sess. (Wyo. 2025), https://www.billtrack50.com/billdetail/1767578.
[176] Habermann, *supra* note 169.
[177] *See generally* Browde, *supra* note 150.
[178] Yetter, *supra* note 129.

into frameworks like those found in the SSUTA or its equivalent, allowing for simpler, centralized tax administration while preserving tribal control.

Importantly, any compact entered should explicitly acknowledge that online sales made within Indian country should be subject solely to tribal taxation.[179] Compacts should reflect the full scope of tribal sovereignty and address the legacy of economic inequity. As the NCAI emphasized, parity means more than just tribes' seat at the table; it requires acknowledging that tribes, like states, rely on sales tax revenue to fund essential services and fulfill the government functions that federal law and treaty obligations often underfund or ignore entirely.[180] Just as *Wayfair* allowed states to reclaim billions in lost tax revenue from remote sellers, tribes must be positioned on a level playing field to benefit from e-commerce. Tribes should not just settle for partaking in, but should have an appropriate degree of control over creating a "sales tax collection system for the next century."[181]

b. Secure Exemptions to Guard Against State Overreach

Another approach to guard against state overreach in Indian country is to secure categorical or blanket exemptions for tribal governments, enterprises, and members. These exemptions should be codified in federal law, state law, or both, and preempt the need for tribes to navigate a confusing patchwork of state-by-state regulatory hurdles.

Cases like *Central Machinery* affirm the preemptive force of federal law over state taxes imposed on on-reservation transactions involving tribal parties, especially where the Indian Trader Statutes apply.[182] However, courts have not always extended these protections to private or non-member tribal entities, and tribes today often operate through LLCs, corporations, or third-party vendors in ways not contemplated before. To address this, explicit exemptions for tribal entities—wholly or partially owned—may be needed to button-up loopholes that allow states to tax through semantic distinctions.

Currently, many tribal businesses and members must navigate confusing or inconsistent documentation processes to prove their tax-exempt status.[183] These processes can be administratively burdensome, or "cumbersome" as the Wyoming Committee described their process, and may disproportionately harm smaller tribal enterprises.[184] Thus, a centralized and uniform digital certification process—perhaps modeled after other federal certification processes—could possibly reduce compliance costs and help states identify and track valid exemptions. In addition, tribes should be aware of—and advocate for—lenient application grace-periods. Learning from Wyoming's mistakes, tribes should secure legislative and administrative measures that apply to cases of improper assessment.[185]

[179] Brief for Nat'l Cong. Of Am. Indians & Indian Tribes in S.D., *supra* note 118, at 6.
[180] *Id.* at 3-5.
[181] Nat'l Cong. of Am. Indians, *supra* note 121, at 9.
[182] Cent. Mach. Co. v. Ariz. State Tax Comm'n, 448 U.S. 160, 164-65 (1980).
[183] *See* Habermann, *supra* note 169.
[184] *Id.*
[185] *Id.*

It is also important not to assume that a tribal enterprise or member who engages in e-commerce on the reservation has stable internet access and the electronic literacy to navigate an exemption process. In 2019, based on a survey of 160 enrolled tribal members from 19 different states, ASU's American Indian Policy Institute found that tribal members were disproportionately affected by lack of internet access compared to their stateside counterparts.[186] Considering this, an exemption grace-period or retroactive remedy is even more important.

c. Tribal Ordinances Specific to Online Sales

To further address the complexities of post-*Wayfair* e-commerce taxation and prevent dual taxation, tribal councils should consider adopting tax ordinances specifically tailored for online sales based on comprehensive legislative fact-finding. Additionally, these ordinances should set out the purpose of the ordinance, indicating some of the points emphasized by the NCAI, such as how the tax revenue would contribute to fundamental governmental services and other functions.[187] These ordinances can assert jurisdiction over digital transactions involving tribal members, enterprises, or entities operating from or delivering to Indian country. Furthermore, tribes do not have to reinvent the wheel. By following models like the Navajo Nation's Sales Tax Regulations and the Cherokee Nation's retail and mail-order tax policies, tribes can set out clear legal frameworks that define when and how digital transactions are taxable under tribal law as a preemptive measure against conflicting state claims.

For example, Navajo tax regulations recognize jurisdiction over particular sales, including deliveries from off-reservation vendors when goods are paid for and received on-reservation.[188] This section of the code also expressly delineates these types of transactions from those made off-reservation.[189] Similarly, Cherokee Nation Tax Commission regulations include mail-order sales within their taxable transaction definitions when delivery and payment are completed within Cherokee Nation territory.[190] "Mail order sales of goods or products shall be deemed to have occurred on land defined as Cherokee country if the retail sales price is tendered by the purchaser to the [vendor] concurrently with the purchaser's order or request."[191]

In addition, to increase administrative efficiency and enforceability, tribes may consider implementing a simple, streamlined certification process—one unlike the process offered in Wyoming.[192] This could come in the form of standardized certificates for tribal retailers and consumers, thereby alleviating some of the growing pains experienced under state systems. By incorporating the protective principles articulated in *Central Machinery* and left open by *Wayfair*, and by emphasizing that sales to tribes occurring within Indian country are beyond the reach of state taxation, tribal ordinances make clear the basis of tribal taxing authority.

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[186] Mary Beth Faller, *ASU Study: Much of Indian Country Lacks Access to Internet, but 5G Expansion Could Be a Chance to Catch Up*, ASU NEWS (Oct. 20, 2019), https://news.asu.edu/20191018-solutions-asu-study-native-americans-lack-internet-access-5g-opportunity-catch-up.
[187] Brief for Nat'l Cong. Of Am. Indians & Indian Tribes in S.D., *supra* note119, at 5.
[188] Navajo Nation Tax Comm'n, *Sales Tax Regulations* § 6.107(A) (2018) (amended May 9, 2018).
[189] *Id.*
[190] Cherokee Nation Tax Comm'n, *Revenue and Taxation Rules and Regulations* RT:02-2-201 (2018) (updated Dec. 2018).
[191] *Id.*
[192] *See* WYO. DEP'T OF REVENUE, *supra* note 165, at 4.

Finally, tribal governments have the opportunity—and responsibility—to develop modern, enforceable, and sovereign e-commerce tax codes that insulate online transactions made by or to Indian country from the risk of state encroachment. Drawing from existing tribal models and federal precedent, these ordinances can ensure that tribal economies are well-positioned to thrive in a digital marketplace.

Other Tax Updates Impacting Tribes

Recently, one federal regulation has been implemented that significantly impacts federal taxation of tribal businesses. Here is a summary of the regulation and what it does.

a. *Entities wholly owned by Indian tribal governments*

The Department of Treasury and the Internal Revenue Service (IRS) issued a final rule clarifying the federal tax classification of entities wholly owned by Indian tribal governments. The rule includes three key provisions: 1) tax classification of wholly owned tribal entities; 2) elective payment elections for energy credits; and 3) tribal sovereignty and self-determination.[193]

First, the rule provides that entities wholly owned by one or more tribes and organized under tribal laws are not recognized as separate entities from their tribal governments for federal tax purposes.[194] As a result of the regulations, these entities will be treated similarly to federally chartered tribal corporations under Section 17 of the Indian Reorganization Act[195] and Oklahoma Indian Welfare Act Section 3[196] corporations.[197]

Second, the rule clarifies that wholly owned tribal entities, and Section 17 and Section 3 corporations, will be treated as instrumentalities of tribal governments able to make elective payment elections under Section 6417 of the Internal Revenue Code.[198] This provision is particularly relevant for energy credits under the Inflation Reduction Act of 2022, enabling tribal entities to claim energy credits more easily and directly.

Third, consistent with Executive Order 14112, the regulations aim to strengthen tribal sovereignty and self-determination by ensuring that tribally owned entities are treated as extensions of their overarching tribal government for federal tax purposes.[199]

The IRS and Treasury Department engaged in tribal consultation to ensure the regulations align with the economic goals and sovereignty of tribal governments, abiding by its internal policy, Treasury Order 112-04.[200]

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[193] Entities Wholly Owned by Indian Tribal Governments, 89 Fed. Reg. 81871 (Oct. 9, 2024) (codified at 26 C.F.R. pt. 1).
[194] *Id.*
[195] 25 U.S.C. § 5124 (2024).
[196] 25 U.S.C. § 5203 (2024).
[197] Entities Wholly Owned by Indian Tribal Governments, 89 Fed. Reg. at 81871.
[198] *Id*; 26 U.S.C. § 7701(a)(40) (2024).
[199] Entities Wholly Owned by Indian Tribal Governments, 89 Fed. Reg. at 81871.
[200] *Id.*; Treas. Order 112-04(6)(a) (Nov. 22, 2023).

i. Eligibility

The rule adopts the definition of Indian Tribal government from the Internal Revenue Code (IRC) Section 7701(a)(40), which provides "[t]he term 'Indian tribal government' means the governing body of any tribe, band, community, village, or group of Indians, or (if applicable) Alaska Natives, which is determined by the Secretary, after consultation with the Secretary of the Interior, to exercise governmental functions."[201] In other words, only entities associated with federally recognized tribes would benefit from the rule.

ii. Benefits

The rule provides much-needed certainty for tribal corporations incorporated under tribal law by clarifying that they will be treated the same as a tribal government for federal tax purposes, and will not be subject to federal income tax on income earned from commercial business conducted either on or off the reservation. The rule will reduce unnecessary administrative costs and reaffirm tribes' inherent sovereign authority.

Growing businesses require a level of certainty to succeed, and tribal businesses have grown despite decades of uncertainty. The rule provides a level of certainty and clarity for tribal entities to continue to grow and flourish because tribes and potential investors would have a clear picture of what taxing powers exist, making Indian country a more attractive place for investment.[202] As a result, the rule promotes economic development, provide access to energy credits, and preserve tribal sovereignty while remaining consistent with the federal government's long standing policy of promoting self-determination for tribes.[203]

The rule also appropriately recognizes the role of wholly owned tribal entities in generating revenue for tribal governments, supporting economic growth, and ensures that these entities are not burdened by federal income tax. Tribal economies rely heavily on tribal businesses to generate revenue. These businesses create employment opportunities for tribal members, especially for tribes suffering from high unemployment.

Next, the clarification of elective payment elections under IRC Section 6417 is particularly important for tribes looking to invest in renewable energy projects. These credits can be crucial for supporting energy sovereignty and reducing reliance on external energy sources. Many tribes are located in rural locations and are geographically isolated, which makes it difficult to deliver reliable renewable energy to them.[204]

Tribes are not purely governments, nor are they purely business entities. Through these regulations, the IRS upholds the current policy of treating tribes as governments and as a result, the rule preserves tribal sovereignty and reduces the influence of external federal tax regulations

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[201] Entities Wholly Owned by Indian Tribal Governments, 89 Fed. Reg. at 81871; 26 U.S.C. § 7701(a)(40) (2024).
[202] *See* Erik M. Jensen, Article, *Taxation and Doing Business in Indian Country*, 60 ME. L. REV. 1, 19 (2008). (discussing the implications of taxation and doing business with and in Indian Country).
[203] *See* Mark J. Cowan, Article, *Double Taxation in Indian Country: Unpacking the Problem and Analyzing the Roel of the Federal Government in Protecting Tribal Government Revenues*, 2 PITT. TAX REV. 93, 99 (2005) (explaining the disadvantages of business taxation in Indian Country).
[204] Malcolm M. Gilbert, *What the Trust? Overcoming Barriers to Renewable Energy Development in Indian Country*, 46 PUB. LAND & RES. 133, 144-151 (2024) (explaining the value of renewable energy in Indian Country).

on tribal business operations. By reaffirming that these entities are not recognized as separate from tribal governments for federal tax purposes, the rule advances tribal self-determination by allowing tribes to create special-purpose entities engaged in economic development, separate from the tribal government, perhaps reducing tribal governmental risk.

Conclusion

Dual taxation of non-Indian economic activity on the reservation and how states pursue sales taxes from remote sellers raises concerns for the long-term success and well-being of tribes. Unless proactively addressed, both these issues will affect tribes for years. Currently, tax issues in Indian country are analyzed on a case-by-case basis, which does not provide certainty for tribes and nonmembers looking to do business there. Some approaches, such as legislation or pursuing tax compacts with states, provide more certainty and help clarify tribal jurisdiction. In the modern globalized market, tribes rely on non-Indian and nonmember business activity to remain competitive, making each of these issues very pertinent to tribal economies. At the end of the day, maintaining good relationships with states and local governments, understanding the relevant policy discussions and solutions available, and practical planning on behalf of tribal interests are paramount.