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A DISCUSSION OF THE APPLICATION OF FICA AND FUTA TO INDIAN TRIBES' ON-RESERVATION ACTIVITIES

*Robyn L. Robinson**

I. Introduction

The question of whether federal employment taxes extend to Indian tribes' on-reservation activities is unsettled. Both proponents and opponents of the application can point to numerous factors to support or oppose the argument that federal employment taxes extend to Indian tribes' on-reservation activities. In this unsettled area, it is appropriate to give weight to the fact that Congress has the federal employment tax statutes and has not made changes with respect to the FICA and FUTA provisions and their application to Indian tribes. In stark contrast, the congressional amendment of the federal withholding provisions in 1994 provides that withholding provisions apply to Indian tribes. It is clear that the case for nonapplication is strongest where the activities occur on the Indian reservation, because the policy reasons for nonapplication of federal taxes in general are strongest when the activities are located on tribal lands.¹

To support the position that federal unemployment taxes do not apply to Indian tribes, this article considers the current position of the courts and the Internal Revenue Service (IRS), and the intent of Congress in enacting statutes dealing with federal unemployment taxes. The FICA and FUTA provisions are silent as to whether they apply to Indian tribes. Thus, it is necessary to ask whether Congress intended for federal employment taxes to apply to Indian tribes' on-reservation activities. One argument with respect to this congressional silence is that the FICA and FUTA provisions are statutes of general application, which generally do not apply to Indian tribes. However, the current Supreme Court posture suggests that statutes of general application do apply to Indian tribes. A close analysis of this Supreme Court opinion in shows that it is limited to an issue under the Federal Power Act.² It would

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1. See Part V.A for a discussion of federal income taxes and "income derived from the land." In addition, the Supreme Court has distinguished on-reservation activities with respect to state taxation. See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1975) (creating an on/off distinction for gross receipts taxes as applied to off-reservation activity).

2. See *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960); discussion *infra* Part VI.A.

be overreaching to extend a rule based on analysis of the Federal Power Act to federal unemployment taxes.

Regarding the question of congressional intent, this article will examine the statutory framework of FICA and FUTA. Although the Supreme Court has not addressed the issue, the IRS takes the position that Congress has intended for federal employment taxes to apply to Indian tribes.³ In contrast, the IRS has taken the position that federal income taxes do not apply to Indian tribes.⁴ Although the IRS provides no statutory or case law support for this latter position, they have provided no explanation as to why one tax applies to the tribe while the other does not.

Directly on the issue, the Ninth Circuit in a Bankruptcy Appellate Panel⁵ opinion and the District Court of Nevada⁶ agree with the IRS that Congress has intended that federal employment taxes apply to Indian tribes. Apart from a singular Bankruptcy Appellate Panel opinion in the Ninth Circuit, none of the circuits of the United States Courts of Appeals has addressed the issue as to whether Congress has intended federal employment taxes to apply to Indian tribes' on-reservation activities.

Based on the limited authority on point, it is not clear whether Congress intends for employment taxes to apply to Indian tribes' on-reservation activities. Therefore, we must examine what Congress has specifically said with respect to certain federal taxes. In addition, we must ponder what the Supreme Court has said with respect to the application of federal income tax to Indian tribes' on-reservation activities. As a backdrop to this discussion, this article will consider the notion that general statutes do not apply to Indian tribes, the doctrine of Indian sovereignty, and the canons of construction in favor of Indian tribes.

Congress has expressly described when particular federal taxing statutes apply to Indian tribes. To assume that congressional silence demonstrates an affirmation that all federal taxing statutes apply to Indian tribes' on-reservation activities ignores historical policies of bringing Indian tribes to a state of competency and independence.

II. Statutory Framework

In addressing the question of whether Congress has intended for employment taxes to apply to Indian tribes' on-reservation activities, we must

3. See Rev. Rul. 59-354, 1959-2 C.B. 24; see also Rev. Rul. 56-110, 1956-1 C.B. 488; *infra* Part III.A.

4. See Rev. Rul. 67-284, 1967-2 C.B. 55; see also Rev. Rul. 94-16, 1994-1 C.B. 19; *infra* Part IV.C.

5. See *In re Cabazon Indian Casino v. IRS*, 57 B.R. 398 (B.A.P. 9th Cir. 1986); *infra* Part II.B.

6. See *Washoe Tribes v. United States*, 44 A.F.T.R.2d (RIA) 79-6006 (D. Nev. 1979); *infra* Part III.B.

look to the statutes for evidence of congressional intent. The Federal Insurance Contributions Act⁷ and the Federal Unemployment Tax Act⁸ both impose a tax on employers; however, neither statute mentions whether Indian tribes are included as "employers."

A. Federal Insurance Contributions Act

The Federal Insurance Contributions Act⁹ imposes an excise tax on employers under section 3111 of the Internal Revenue Code to fund the social security system for disability, survivors, and retirement benefits. The tax is in the nature of an "excise tax" on the privilege of establishing and maintaining the relationship of employer and employee. Section 3111 imposes an excise tax on every employer, with respect to having individuals in his employ, equal to a percentage of wages paid by him with respect to employment. The FICA tax consists of two portions, old age survivors and disability insurance financed by the Social Security Tax, and hospital insurance financed by the Medicare Tax. For employers paying wages after 1990, the employer must pay tax at a rate of 6.2%.¹⁰ The employment wage base for the social security tax is \$76,200 for the year 2000.¹¹ The Medicare tax rate is 1.45% with respect to wages paid after December 31, 1985.¹² The employment wage base for Medicare tax is unlimited.

Section 3111 provides that the excise tax is imposed on "every employer." Employer is not defined in the Federal Insurance Contributions Act. Section 3121(a) defines "wages" in general to include all remuneration for employment, including the cash value of all remuneration, including benefits, paid in any medium other than cash.¹³ In general "wages" means all payments received for employment with certain specified exceptions.¹⁴ In addition, section 3121(b) defines "employment" as "any service of whatever nature performed" with certain specified exceptions.¹⁵ Employment with the Indian tribe is not mentioned as one of the specified exceptions. Unless the payments are excepted from the term wages, or the services performed are

7. I.R.C. §§ 3101-3128 (1994 & Supp. IV 1998).

8. I.R.C. §§ 3301-3311 (1994).

9. I.R.C. § 3128 (1994). Chapter 21 of Subtitle C of the Internal Revenue Code is known as the Federal Insurance Contributions Tax Act.

10. *Id.* § 3111(a). The employee also pays a tax at 6.2%. *Id.* § 3101(a).

11. INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, PUB. NO. 15, CIRCULAR E, EMPLOYER'S TAX GUIDE (2000) [hereinafter EMPLOYER'S TAX GUIDE].

12. I.R.C. § 3111(b)(6) (1994). The employee also pays a tax at 1.45%. *Id.* § 3101(b)(6). All wages are subject to the Medicare tax. EMPLOYER'S TAX GUIDE, *supra* note 11.

13. I.R.C. § 3121(a) (1994).

14. *Id.* Section 3121(a)(1-21) of the Code provides a list of exceptions, none of which mention Indian tribes.

15. I.R.C. § 3121(b)(1-21) (1994) (listing exceptions to employment, none of which mention Indian tribes).

excepted from the term employment, the IRS has taken the position that such payments will be subject to FICA tax.¹⁶

B. Federal Unemployment Tax Act

The Federal Unemployment Tax Act¹⁷ imposes an excise tax on "every employer" with respect to having individuals in his employ, equal to 6.2% in the case of calendar years 1988 through 2007 of the total wages paid by him during the calendar year with respect to employment.¹⁸ The purpose of the FUTA tax is to establish a provident fund for needy workers through a system of taxation.¹⁹ Like FICA, the exaction required from the employer is with respect to the relationship of employer and employee.²⁰ The tax rate is based on a wage base of \$7000, meaning that it applies to the first \$7000 of wages paid to each employee during each year.²¹ The employer is allowed a partial credit against the 6.2% tax based on its state unemployment insurance tax liability which results in a net rate of 0.8% paid by most employers.²²

Like FICA, the FUTA tax is imposed on "every employer." However, the FUTA provisions define "employer" as: (1) any person who paid wages of \$1500 or more during any calendar quarter in any calendar year; or (2) any person who employed at least one individual in employment for some portion of the day on each of some twenty days during the calendar year or during the preceding calendar year, each day being in a different calendar week.²³ The Code does provide a special definition for agricultural labor and for domestic service, but otherwise the definition of "employer" is broad.²⁴ The amendments to the definition of "employer" in section 3306(a) have decreased the number of employees from eight to four to one over the years.²⁵ Despite the reconsiderations of FUTA occasioned by these changes in the number of

16. INTERNAL REVENUE SERV., GUIDE TO INDIAN TAX ISSUES 8 (1994).

17. I.R.C. § 3311 (1994). Chapter 23 of Subtitle C of the Internal Revenue Code is known as the Federal Unemployment Tax Act.

18. *Id.* § 3301(1). The rate changes to 6% in 2008. *Id.* § 3301(2).

19. *See* *Hearst Publications v. United States*, 70 F. Supp. 666, *aff'd*, 168 F.2d 751 (N.D. Cal. 1946).

20. However, FUTA only consists of an employer portion.

21. EMPLOYER'S TAX GUIDE, *supra* note 11.

22. I.R.C. § 3302 (1994). Section 3302 allows for a partial credit to an employer based on state unemployment insurance tax liability. If entitled to the maximum credit of 5.4%, the tax rate after the credit results in a net rate of 0.8% actually paid by most employers. *See* EMPLOYER'S TAX GUIDE, *supra* note 11. Unless the State imposes State unemployment taxes and the Indian tribes are required to pay the State unemployment taxes, then the tribes receive no credit against FUTA.

23. I.R.C. § 3306(a) (1994).

24. *Id.* § 3306(a)(3), (4). There is no special rule for Indian tribes.

25. Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, § 114(a), (c), 90 Stat. 2667, 2669; Federal-State Extended Unemployment Compensation Act of 1970, Pub. L. No. 91-373, § 101(a), 84 Stat. 695, 696; Act of Sept. 1, 1954, ch. 1212, Pub. L. No. 83-767, § 1, 68 Stat. 1130, 1130.

employees required in the definition of "employer," there has been no change with respect to Indian tribes. Congress has had the statute before them several times and has not mentioned Indian tribes.

"Wages" and "employment" for purposes of FUTA are defined in section 3306 in the same manner as defined for FICA.²⁶ Similarly, the IRS has taken the position that unless the payments are excepted from the term "wages" or the services performed by the employee are excepted from the term "employment" such payments will be subject to FUTA tax.²⁷ The FUTA provisions do provide a definition of employer, based on either the amount of wages paid per year, or the employment of at least one individual for a portion of the day over a specified period.²⁸ The FUTA provisions do not specifically mention that they apply to Indian Tribes.

C. Conclusion

Neither the FICA nor FUTA provisions mention Indian tribes. In order to determine whether the FICA and FUTA provisions apply to Indian tribes' on-reservation activities, we need to know whether Congress intended the taxes to apply to Indian tribes. Under the statutory scheme, Congress is silent as to whether FICA and FUTA apply to Indian tribes. We need to determine whether the employment taxes are statutes of general application that apply to all employers, including Indian tribes, or whether Congress should have specifically stated its intent that the taxes apply to Indian tribes. In answering the question as to whether Congress intended for employment taxes to apply to Indian tribes on-reservation activities, we will first examine authority on point.

III. Authority on Point

Although the Supreme Court has not addressed the issue of whether the FICA and FUTA taxes apply to Indian tribes' on-reservation activities, the IRS in several revenue rulings has held that the tribes are subject to the employer's share of FICA and FUTA.²⁹ In agreement with the IRS are the Ninth Circuit Bankruptcy Appellate Panel³⁰ and the District Court of Nevada.³¹ Aside

26. See I.R.C. § 3306(b), (c) (1994).

27. INTERNAL REVENUE SERV., DEPARTMENT OF THE TREASURY, GUIDE TO INDIAN TAXATION ISSUES 8 (1994).

28. I.R.C. § 3306(a) (1994).

29. See Rev. Rul. 59-354, 1959-2 C.B. 24; see also Rev. Rul. 56-110, 1956-1 C.B. 488; *infra* Part III.A.

30. See *In re Cabazon Indian Casino v. IRS*, 57 B.R. 398 (B.A.P. 9th Cir. 1986); *infra* Part III.B.

31. See *Washoe Tribes v. United States*, 44 A.F.T.R.2d (RIA) 79-6006 (D. Nev. 1979); *infra* Part III.B.

from the Bankruptcy Appellate Panel in the Ninth Circuit, the United States Court of Appeals has not addressed the issue.

A. Treatment by the IRS

The IRS in revenue rulings has asserted that FICA and FUTA apply to Indian tribes. Revenue Ruling 68-493, which deals with an Indian employee's liability for the employee portion of FICA and FUTA, held that services performed by an Indian employee are not exempt from FICA and FUTA merely because the Indian is a ward of the United States.³² As the most recent revenue ruling with respect to federal employment taxes, it is instructive in its holding that the relationship between the Indians and the United States should not affect employment tax liability.

In Revenue Ruling 59-354, the IRS held that amounts paid to Indian tribal council members for services performed as council members do not constitute wages for purposes of FICA and FUTA.³³ However, with respect to amounts paid to other salaried employees of such Indian councils and to employees of private tribal business enterprises, the IRS said that these amounts constitute "wages" subject to Federal employment taxes.³⁴ The first conclusion that tribal council members' wages are not subject to employment taxes is based on the IRS's review of court decisions and legislative enactments pertaining to Indian tribes.³⁵ The IRS's conclusion is based on an exemption provided by another federal statute, section 16 of the Wheeler-Howard Act. The ruling states that the powers vested in the tribe or tribal council by existing law within the meaning of section 16 of the Wheeler-Howard Act, 25 U.S.C. 476, do not constitute employment for federal tax purposes.³⁶ The IRS in its second conclusion that services performed by other salaried employees of tribal councils and by employees of tribal businesses constitute employment did not provide supporting authority. The IRS makes this conclusion based on the absence of authority for an exemption. The distinction drawn here is not based on where the services are performed, whether on or off the reservation, but by virtue of the type of service involved. The IRS has found that Congress did not intend for services performed by tribal council members in their capacity as such are subject to employment taxes. However, the IRS stated that Congress did intend for employment taxes to apply to other employment situations. Based on this ruling, the Indian tribe would be subject to employment taxes with respect to services provided by employees with the exception of tribal council members.

32. Rev. Rul. 68-493, 1968-2 C.B. 426.

33. Rev. Rul. 59-354, 1959-2 C.B. 24.

34. *Id.*

35. *Id.*

36. *Id.*

In Revenue Ruling 56-110, the IRS held that an *Indian tribe* is subject to FUTA on tribal business enterprise operations.³⁷ The tribal business enterprise at issue was organized and operated by the tribe itself with the approval and under the supervision and control of the Department of Interior. The ruling specifically says that an activity constituting a tribal business enterprise is not excepted from the definition of employment under section 3306(c) of the FUTA provisions.³⁸ Although the ruling does not distinguish between enterprises operating on or off the reservation, it does tell us that the IRS takes the position that Congress intended for FUTA to apply to tribal business operations organized under tribal law.

The IRS thus takes the position that federal employment taxes apply to the Indian tribe, with the exception of services provided by tribal council members. The position is reflected in more recent private letter rulings.³⁹ In Private Letter Ruling 90-43-066, the IRS ruled that a federally recognized Indian tribe was subject to FICA tax.⁴⁰ In Private Letter Ruling 90-45-037, the IRS noted that Indian tribes are treated in the same manner as private employers with respect to FICA and FUTA taxes.⁴¹ It is clear that the IRS believes that Congress intended for federal employment taxes to apply to Indian tribes, except in the case of tribal council members.

B. Case Law

The United States Bankruptcy Appellate Panel of the Ninth Circuit in *In re Cabazon* agreed with the IRS that Congress intended for federal employment taxes to apply to an Indian tribe.⁴² *In re Cabazon* involved an Indian tribe that operated a casino on the reservation, which was a debtor in possession.⁴³ The Indian tribe claimed an exemption from federal unemployment taxes by virtue of the Casino's status as an Indian tribe.⁴⁴ The Appellate Panel held that the Indian tribe was not exempt from the federal unemployment taxes for the following reasons: (1) the tribe is not a state or independent sovereign exempt from taxation; (2) the tribe is not "implicitly

37. Rev. Rul. 56-110, 1956-1 C.B. 488 (emphasis added).

38. *Id.*

39. Private Letter Rulings are informal authority which may not be used or cited as precedent. I.R.C. § 6110(j)(3).

40. Priv. Ltr. Rul. 90-43-066 (Oct. 26, 1990).

41. Priv. Ltr. Rul. 90-45-037 (Nov. 12, 1993) (ruling specific to an employee's responsibility for employment taxes and not the employer's responsibility).

42. *In re Cabazon Indian Casino v. IRS*, 57 B.R. 398 (B.A.P. 9th Cir. 1986) (holding that Indian tribe was not exempt from excise taxes under FICA and FUTA as either a "state" or instrumentality of a state).

43. *Id.* at 399.

44. *Id.*

exempt" from taxation; and (3) the tribe did not come within an exception available with respect to "income derived from the land."⁴⁵

With respect to the first conclusion, the Appellate Panel relied on Supreme Court opinions holding that Indian tribes are not states for purposes of federal excise tax exemptions.⁴⁶ In addition, the Appellate Panel cited to *Confederated Tribes of Warm Springs Reservation v. Kurtz*⁴⁷ for the Ninth Circuit's position that Indian tribes are not States for the purpose of an exemption from federal excise taxes.⁴⁸ With respect to the second conclusion, the Appellate Panel relies on the Supreme Court's holding that tax exemptions are not granted by implication.⁴⁹ With respect to the third conclusion, the Appellate Panel relies on a Court of Claims opinion, *Critzer*, for its analysis of what constitutes income derived directly from the land, which does not include income from the businesses or buildings located on tax-exempt land, such as the casino involved here.⁵⁰ The Bankruptcy Appellate Panel, thus, is in accord with the IRS that Congress has intended for employment taxes to apply to Indian tribes' on-reservation activity. In *In re Cabazon*, the casino was operated on the reservation.⁵¹

The U.S. District Court for the District of Nevada in *Washoe Tribes v. United States* agrees with the IRS that an Indian tribe is subject to FUTA.⁵² In *Washoe Tribes*, the tribe sought a refund of amounts paid pursuant to an IRS determination that the tribe was liable for federal unemployment taxes for wages paid to member employees.⁵³ The case provides no details as to whether these services were performed on or off the reservation. Although we might infer from "member employees," that the activity took place on the reservation, it is not always true that services performed by "member employees" occur on the reservation.⁵⁴

These two opinions are the only authorities from the courts that address the issue of whether employment taxes apply to Indian tribes. The Bankruptcy Appellate Panel decision has more weight than the district court opinion and

45. *Id.*

46. *Id.* at 400 (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982)).

47. 691 F.2d 878 (9th Cir. 1982).

48. *Id.* at 881 (holding a federal Indian tribe was not exempt from federal excise taxes on fuel and motor vehicles); *infra* Part IV.B.

49. *In re Cabazon*, 57 B.R. at 401 (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 156 (1973)).

50. *Id.* at 402 (citing *Critzer v. U.S.*, 597 F.2d 708 (Ct. Cl. 1979)); *see infra* Part V.A for a discussion of income derived from the land.

51. *Id.* at 399.

52. *Washoe Tribes v. United States*, 44 A.F.T.R.2d (RIA) 79-6006 (D. Nev. 1979) (holding that FUTA applies to an Indian tribe).

53. *Id.*

54. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (holding that the operation of a business outside of Indian Country is subject to gross receipts tax).

is binding on the Ninth Circuit unless the decision is overturned or the United States Court of Appeals decides the issue.⁵⁵

C. Conclusion

The IRS in a series of revenue rulings, the Bankruptcy Appellate Panel of the Ninth Circuit, and the District Court of Nevada all agree that Congress has intended that FICA and FUTA apply to an Indian tribe. Revenue Rulings do not have the force and effect of law.⁵⁶ The Bankruptcy Appellate Panel decision may bind the Ninth Circuit and not other circuits. However, the Ninth Circuit Court of Appeals could come out differently on the issue. If the Supreme Court or an appellate court faces the issue of whether Congress intended for employment taxes to apply to Indian tribes' on-reservation activities, the courts will need to examine what Congress has said with respect to other federal taxes and their application to the tribes, as well as any policy reasons in favor of not taxing the tribe.

IV. Federal Taxation of Indian Tribe

Although, as noted previously, the Supreme Court has not addressed the issue, the Internal Revenue Code does contain statutory provisions which expressly apply the federal tax statutes to the Indian tribe, or expressly exempt the Indian tribe or Indians from specific federal taxes.⁵⁷

A. Provisions of the Internal Revenue Code

1. Withholding, I.R.C. § 3402(r)

Congress in section 3402(r) of the Internal Revenue Code has said that Indian tribes are required to withhold certain taxable payments of Indian casino profits.⁵⁸ The withholding of income tax is required by the employer on the wages paid to employees.⁵⁹ The concern here is with the employer's

55. Bankruptcy court orders and judgments may be appealed to the district court or to a Bankruptcy Appellate Panel in circuits where they exist (e.g. Ninth Circuit), or where no such panel exists to the circuit court of appeals. Bankruptcy appellate panel decisions are reviewable if at all in the court of appeals. See GUIDE TO FEDERAL NINTH CIRCUIT CIVIL APPELLATE PRACTICE, CALIFORNIA NINTH CIRCUIT 1:15 to 1:173-73 CA PRACTICE (chapter 1-B) (Christopher A. Goelz & Meredith J. Watts, eds., Cole Benson, contributing ed. chapter 1-B, 1999). Based on the rules of practice, it then follows that the BAP decision has more weight than a district court decision but could have less weight than a United States Court of Appeals decision.

56. See generally *Bartels v. Birmingham*, 332 U.S. 126 (1942); *Helvering v. Wilshire Oil Co.*, 308 U.S. 90 (1939).

57. See I.R.C. §§ 3402(r), 7871; *infra* Part IV.A.1, IV.A.2.

58. I.R.C. § 3402(r) (1994). This section is part of Chapter 24 of Subtitle C of the Internal Revenue Code.

59. In comparing withholding taxes with FICA and FUTA, note that FICA has an employer and employee portion and FUTA is a tax on the employer. For a discussion of FICA and FUTA,

responsibility to withhold income from certain wages paid to member employees. Congress made a choice in section 3402(r) that it applies to Indian tribes.

The general rule of section 3402(r)(1) states that:

Every person, *including an Indian tribe*, making a payment to a member of an Indian tribe from the net revenues of class II or class III gaming activity conducted or licensed by such tribe shall deduct and withhold from such payment a tax in an amount equal to such payment's proportionate share of the annualized tax.⁶⁰

Congress chose to add this subsection to the withholding provisions in 1994. Public Law 103-465 made clear that Congress intended that an Indian tribe withhold on payments made to member employees from the net revenues of certain casino profits.⁶¹ Withholding applies to net revenues from class II or class III gaming activities conducted or licensed by the tribe.⁶²

Congress added this particular withholding provision to deal with net revenues from casinos paid to tribal members. In specifically stating that every person includes an Indian tribe, we have an instance where Congress chose to address a situation where the withholding provisions apply to Indian tribes. One argument is that Congress added this section to the withholding provisions because the statute is otherwise a statute of general application not applicable to Indian tribes. Similarly, with respect to FICA and FUTA, had Congress intended for these employment taxes to apply to the Indian tribe as employer, then it could have easily amended the Code to make its intent clear. On the other hand, a counterargument may be that Congress has assumed that employment taxes apply to Indian tribes since their enactment and there is no need for amendment. The problem with the latter argument is that if we allow Congress to go back and amend a statute of general application by assuming it applies to Indian tribes, then it is the equivalent of making an amendment to the statute without having to make the actual amendment.

2. Tribal Tax Act, I.R.C. § 7871

Section 7871 of the Internal Revenue Code, the Tribal Tax Act, tells us when Indian tribal governments will be treated as states with respect to certain taxes.⁶³ The statute exempts the Indian tribe from a variety of excise taxes imposed on sellers of certain items if purchased by the tribe and used in connection with the exercise of an essential government function.⁶⁴ Section

see *supra* Part II.A, II.B.

60. I.R.C. § 3402(r)(1) (1994) (emphasis added).

61. Uruguay Round Agreements Act, Pub. L. No. 103-465, § 701(a), 108 Stat. 4809 (1994). The provision is effective with respect to payments made after December 31, 1994.

62. *Id.*

63. I.R.C. § 7871 (1994).

64. *Id.* § 7871(b). The specific excise taxes mentioned arise in chapter 31 (relating to tax

7871 does not treat the tribes as states for purposes of federal employment taxes. In addition, the Tribal Tax Act does not mention the application of income taxes to Indian tribes. One commentator has noted that congressional failure to address the tax status of tribal income represents a serious weakness in the Tribal Tax Act.⁶⁵ Similarly, congressional failure to address the federal employment tax status of tribes represents another weakness in the Tribal Tax Act. The counterargument to Congress' failure to address income tax or employment tax in the Tribal Tax Act is that Congress specifically addressed only the situations where it thought that tribes should be treated as states and exempt from particular taxes. Those situations excluded from the Tribal Tax Act were situations where Congress did not intend for tribes to be treated as states.

3. Conclusion

The specific mention of the application of section 3402(r) of the Internal Revenue Code to Indian tribes and the failure to mention employment taxes under section 7871 of the Internal Revenue Code provide us with two different ways to assess whether Congress has intended the federal employment taxes to apply to Indian tribes. On the one hand, we have an amendment to a statute where Congress chose to specifically state that the particular provision, the withholding of certain taxable payments of casino profits, applied to Indian tribes. On the other hand, we have the Tribal Tax Act which mentions several excise taxes to which tribes may be exempt, but which does not mention the tribe's liability for federal employment taxes. Congress in enacting the Tribal Tax Act wanted to provide some certainty as to when a tribe could be treated as a state. Although there is no mention of federal employment taxes in section 7871, this simply means that Congress may not have intended for tribes to be treated as states for these purposes. Similarly, the failure to mention Indian tribes within the FICA and FUTA provisions indicates that Congress may not have intended for FICA and FUTA to apply to Indian tribes. Thus, we should not be left to assume Congress' intent. Congress can and has amended the federal employment tax statutes to state that they specifically apply to Indian tribes in section 3402(r) of the Code.

B. The Ninth Circuit

The Ninth Circuit in *Confederated Tribes* considered whether federal excise taxes applied to an Indian tribe.⁶⁶ None of the other circuits have decided the

on special fuels), chapter 32 (relating to manufacturers excise taxes), subchapter B of chapter 33 (relating to communications excise tax) or subchapter D of chapter 36 (relating to tax on use of certain highway vehicles).

65. Ellen P. Aprill, *Tribal Bonds: Indian Sovereignty and the Tax Legislative Process*, 46 ADMIN. L. REV. 333, 340 (1994).

66. *Confederated Tribes of Warm Springs Reservation v. Kurtz*, 691 F.2d 878 (9th Cir.

tax liability of an "Indian tribe." *Confederated Tribes* involved four separate excise taxes: (1) a tax on the use of certain highway motor vehicles,⁶⁷ (2) a tax on diesel fuel used in highway vehicles,⁶⁸ (3) a tax on special fuels used in motor vehicles,⁶⁹ and (4) a tax on manufacturing,⁷⁰ in this case of a truck chassis assembled by the tribe.⁷¹ The tribe in its sawmill used the fuel and engaged in the activities with respect to which the taxes were assessed.⁷² The tribe claimed that it was exempt from the excise taxes under provisions of the Internal Revenue Code that exempt states and political subdivisions of states from the liability for excise taxes.⁷³ In the alternative, the tribe argued that other federal statutes as well as the tribe's treaty with the United States exempt it from the federal excise taxes.⁷⁴ The Court of Appeals held that the tribe was subject to the excise taxes because it was not a state or political subdivision of a state and that there was no federal statute or language in a treaty that exempt the tribe from the tax.⁷⁵

With respect to the court's first conclusion, the Code exempts from liability for federal excise taxes "any State, any political subdivision of a State, or the District of Columbia."⁷⁶ The court examined the Code and regulations and found that there was no mention of Indian tribes as part of the exemption for state governments.⁷⁷ With respect to the court's second conclusion, the court pointed out that a court will imply a tax exemption from a statute or treaty that contains express exemptive language.⁷⁸ The court found that the tribe's treaty was silent with respect to federal taxation.⁷⁹ In addition, the court did not find any federal statute to support the tax exemption.⁸⁰

Thus, the Ninth Circuit decided that an Indian tribe may be liable for certain federal excise taxes, specifically including tax on the use of certain highway motor vehicles,⁸¹ tax on diesel fuel used in highway vehicles,⁸² tax

1982), *cert. denied*, 460 U.S. 1040 (1983).

67. I.R.C. § 4481 (1994).

68. *Id.* § 4041(a).

69. *Id.* § 4041(b).

70. *Id.* §§ 4061, 4218(a).

71. *Confederated Tribes*, 691 F.2d at 879.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 881-83.

76. *Id.* at 880 (citing I.R.C. §§ 4041(g), 4221(a)(4), (d)(4), 4482(c)(1), and 4483(a)).

77. *Id.*

78. *Id.* at 881 (citing *United States v. Anderson*, 625 F.2d 910, 913 (9th Cir. 1980) and *Squire v. Capoeman*, 351 U.S. 1 (1956) (construing sections 5 and 6 of the General Allotment Act of 1887 to create an express tax exemption for an Indian deriving income from his own trust allotment)).

79. *Confederated Tribes*, 691 F.2d at 882.

80. *Id.* at 882-83.

81. I.R.C. § 4481 (1994).

82. *Id.* § 4041(a).

on special fuels used in motor vehicles,⁸³ and tax on manufacturing.⁸⁴ This leaves us with the question of whether the analysis of federal excise taxes in *Confederated Tribes* extends to federal employment taxes. At least in the Ninth Circuit, we can be certain that the court would apply a similar analysis by determining whether the tribe is exempt as a State or political subdivision of a state, whether the tribe is exempt because of language in a treaty, or whether a federal statute applies to exempt the tribe from the tax. Since the Ninth Circuit is the only circuit to have spoken on the issue with respect to federal excise taxes, it is unclear how the other circuits would decide the issue of whether federal employment taxes apply to Indian tribes' on-reservation activities.

C. The IRS

In a series of revenue rulings regarding FICA and FUTA, the IRS takes the position that the Indian tribe is liable for FICA and FUTA.⁸⁵ In examining the IRS' position on the federal taxation of Indian tribes, it is appropriate to look at what the IRS has said with respect to other areas of federal taxation. For example, in Revenue Ruling 67-284, dealing with the federal income tax status of enrolled members of Indian tribes, the IRS states that income tax statutes do not tax Indian tribes and that the tribe is not a taxable entity.⁸⁶ However, the IRS provides no statutory or case law support for this contention.

In Revenue Ruling 94-81, the IRS recognized that section 7871 of the Code provides Indian tribes with limited exemptions from a variety of federal excise taxes imposed on sellers of certain items if purchased by the tribe and used in connection with the exercise of an essential government function.⁸⁷ Employment taxes are not mentioned here.

The IRS has stated its position with respect to tribal corporations in two instances. In Revenue Ruling 94-16, the IRS has said that a corporation owned by a tribe is not subject to federal income tax on income earned in the conduct of commercial business on or off the reservation if the corporation is formed under section 17 of the Indian Reorganization Act or under tribal law.⁸⁸ However, the ruling states that a corporation owned by a tribe and

83. *Id.* § 4041(b).

84. *Id.* §§ 4061, 4218(a).

85. Rev. Rul. 68-493, 1968-2 C.B. 426; Rev. Rul. 59-354, 1959-2 C.B. 24; Rev. Rul. 56-110, 1956-1 C.B. 4881; *see* Part III.A.

86. Rev. Rul. 67-284, 1967-2 C.B. 55; *see also* Rev. Rul. 94-16, 1994-1 C.B. 19.

87. Rev. Rul. 94-81, 1994-2 C.B. 412. The ruling is specific to the limited exemption of federal excise taxes provided under I.R.C. § 7871(b). The specific excise taxes mentioned arise in chapter 31 (relating to tax on special fuels), chapter 32 (relating to manufacturers excise taxes), subchapter B of chapter 33 (relating to communications excise tax) or subchapter D of chapter 36 (relating to tax on use of certain highway vehicles).

88. Rev. Rul. 94-16, 1994-1 C.B. 19.

formed under state law will be subject to federal income tax. In addition, the ruling states that it is limited in application to federal income taxes, and does not apply to federal employment taxes.⁸⁹ In Revenue Ruling 81-295, the IRS stated that a federally chartered Indian tribal corporation has the same tax status as the Indian tribe and is not taxable on income from activities carried on within the boundaries of the reservation.⁹⁰ Again, there is no constitutional or statutory provision to support the contention that Indian tribes are exempt from federal income taxation. The IRS in this ruling stated that in general the political entity embodied in the concept of the Indian tribe has been recognized and that no tax liability has been asserted with respect to tribal income from activities carried on within the boundaries of the reservation.⁹¹

In contrast to the IRS's position that Indian tribes are liable for FICA and FUTA, the IRS has taken the position with respect to other taxes that these do not apply to the Indian tribe. The most significant is the IRS's position that federal income taxes do not apply to the Indian tribe. Unfortunately the IRS provides no authority for this contention which leaves us with a policy argument. If policy is good enough to argue in one instance where Congress has not spoken, then why can not policy be good enough to argue that employment taxes should not apply to the Indian tribes' on-reservation activity. Income taxes, like employment taxes, are not mentioned in section 7871, which provides tax exemptions for the tribe by treating it as a state. The IRS in making its conclusion with respect to income taxes didn't seem to be concerned that this was one of the taxes not accounted for in section 7871.

D. Conclusion

Congress has made it clear under section 3402(r) of the Code that federal withholding applies to Indian tribes. In addition, Congress has stated in section 7871 of the Code that there are certain taxes from which Indian tribes are exempt. The Ninth Circuit has told us that it believes that federal excise taxes apply to Indian tribes, although it did not specifically discuss federal employment taxes. Finally, the IRS has taken the position that federal income taxes, as well as certain excise taxes, do not apply to Indian tribes. The IRS has been clear that it believes Congress intends for federal employment taxes to apply to Indian tribes. The significance of Congress' power to amend and make statutes clear as to their application is key to the discussion of whether federal employment taxes apply to Indian tribes. If Congress has made clear

89. *Id.*

90. Rev. Rul. 81-295, 1981-2 C.B. 15. Once again, the IRS states that an Indian tribe is not taxable on income from activities carried on within the boundaries of the reservation. *See* Rev. Rul. 67-284, 1967-2 C.B. 55; *see also* Rev. Rul. 94-16, 1994-1 C.B. 19.

91. Rev. Rul. 81-295 (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (holding that a tribe is not taxable on income earned within the boundaries of the reservation)).

its intent that the withholding provisions apply to Indian tribes in section 3402(r), then why cannot Congress do the same with respect to FICA and FUTA.

V. Federal Income Taxation of Members

Although the Supreme Court has not addressed the issue of whether federal taxes apply to the Indian tribe, they have addressed the issue of whether income taxes apply to a tribal member's on-reservation activity in three instances.⁹² In addressing Congress' intent for federal employment taxes to apply to Indian tribes' on-reservation activities, it is important to look at how the Supreme Court has dealt with the issue of federal taxation of member's on-reservation activities as well as how Congress has dealt with the federal taxation of a member's on-reservation activity.

A. Supreme Court Decisions

In *Choteau v. Burnet*, the Supreme Court held that a member's per capita share of the tribe's mineral royalty income was subject to federal income tax.⁹³ In *Choteau*, the Indian owned his original allotment of tribal land as well as a one-half interest in land that he inherited from a deceased member.⁹⁴ The ownership of the land is not the issue in the case. The issue is whether the receipt of income from the oil and gas leases is taxable. In the division of the allotments of the tribal lands, oil, gas, and other minerals were expressly reserved to the tribe for a period of twenty-five years.⁹⁵ The income from such leases was to be placed in the Treasury of the United States and then distributed among the Indians quarterly.⁹⁶ The Court found that the allotment itself was not taxable to the Indian but that the minerals were taxable.⁹⁷ The Court did not find that the minerals deserved the same exemption as the allotment itself.⁹⁸

A few years later, the Supreme Court in *Superintendent of Five Civilized Tribes* held that income derived from re-invested funds, which were originally exempt because the income came directly from the restricted allotted land, was subject to federal income tax.⁹⁹ The result in this case is different from the result in *Squire v. Capoean* where the Court held that income derived

92. See *Choteau v. Burnet*, 283 U.S. 691 (1931); *Superintendent of Five Civilized Tribes v. Commissioner of Internal Revenue*, 295 U.S. 418 (1935); *Squire v. Capoean*, 351 U.S. 1 (1956).

93. *Choteau v. Burnet*, 283 U.S. 691 (1931).

94. *Id.* at 692. The provision in *Choteau* regarding the allotments is 25 U.S.C. § 331. This provision is similar to the General Allotment Act of 1887 (Dawes Act), ch. 119, 24 Stat. 388.

95. *Choteau*, 283 U.S. at 692.

96. *Id.*

97. *Id.* at 696.

98. *Id.*

99. *Superintendent of Five Civilized Tribes v. Commissioner of Internal Revenue*, 295 U.S. 418 (1935).

from the sale of timber from allotted land held by the United States on behalf of the Indian member under the General Allotment Act was not subject to federal income tax, specifically capital gains tax.¹⁰⁰ The distinguishing factor in *Capoeman* and *Superintendent* is that income which is "derived from the land" is exempt from taxation, whereas re-invested funds are not exempt.

In all three cases, the Supreme Court speaks of restricted allotted land, either under the General Allotment Act or similar acts. The purpose of the General Allotment Act or similar acts is to give the individual allottee the land at the end of the trust period free and clear of any encumbrance.¹⁰¹ Taxation puts the land at risk for a tax lien, which is inconsistent with this purpose. It is clear from *Capoeman* that Congress did not intend to tax income "derived from the land" that is representative of its value based on the notion of giving the Indian the land free and clear of encumbrances at the end of the trust period.¹⁰² However, when the income is re-invested, then *Superintendent* tells us that the policy behind the exemption no longer applies.¹⁰³ The Court in *Choteau* did not discuss the mineral income as "derived from the land," but felt that the Indians should pay tax on the mineral income when received quarterly from the federal government.

Income derived from the land within the meaning of the General Allotment Act is income as a result of exploitation of the land itself such as mining, logging, agriculture, or similar activity.¹⁰⁴ The courts have also said that income derived from business operations is not derived directly from the land.¹⁰⁵ Income derived from cattle ranching on trust lands, income for services performed on tribal land, and income from holding a grazing permit on tribal land is subject to federal income tax.¹⁰⁶

100. *Squire v. Capoeman*, 351 U.S. 1 (1956).

101. *See* General Allotment Act of 1887 (Dawes Act), ch. 119, § 5, 24 Stat. 388, 389.

102. *Capoeman*, 351 U.S. at 6-7.

103. *Superintendent*, 295 U.S. at 420-21.

104. *See* *United States v. Hallam*, 304 F.2d 629 (10th Cir. 1962) (receiving income in form of rents, royalties, and proceeds from restricted allotted lands exempt); *Stevens v. Commissioner of Internal Revenue*, 452 F.2d 741 (9th Cir. 1971) (farming and ranching exempt); *United States v. Daney*, 370 F.2d 791 (10th Cir. 1966) (receiving bonuses from oil and gas leases exempt); *Big Eagle v. United States*, 300 F.2d 765 (Ct. Cl. 1962) (receiving royalties from tribal mineral deposits exempt).

105. *See* *Critzer v. United States*, 597 F.2d 708 (Ct. Cl. 1979) (holding income from motel not immune from federal taxation simply because businesses and buildings were physically located on tax-exempt reservation land); *see also* *Saunooke v. United States*, 806 F.2d 1053 (Fed. Cir. 1986) (holding income from the operation of gift shops, motels, and a gas station located on restricted allotted land were not exempt); *Dillon v. United States*, 792 F.2d 849 (9th Cir. 1986) (holding income from the operation of a smoke shop located on restricted allotted land is subject to federal income tax).

106. *See* *United States v. Anderson*, 625 F.2d 910 (9th Cir. 1980) (holding income derived from cattle ranching under a tribal license on land held in trust is subject to income tax); *Jourdain v. Commissioner of Internal Revenue*, 617 F.2d 507 (8th Cir. 1980) (holding income from the tribal chairman is subject to income tax); *Commissioner of Internal Revenue v. Walker*, 326 F.2d

The rationale of *derived from the land* is that there must be a diminution in the value of the land. For example, once logged off, the land is of little value, and can no longer be adequate to the needs and serve the purpose of bringing Indians finally to a state of competency and independence.¹⁰⁷ Unless the proceeds are preserved for the allottee, then the Indian cannot go forward when declared competent with the necessary chance of economic survival in competition with others.¹⁰⁸

Both *Superintendent* and *Capoeman* involve income earned by an Indian while on the reservation. Both courts suggest that federal income tax statutes apply to every individual who is a citizen of the United States unless exempted by a treaty or a statute. This means that we look to see whether the issue of taxation is dealt with in the relevant treaty, if a treaty is involved, or we look to whether there is a federal statute, such as the General Allotment Act which would exempt the income from taxation.

B. Federal Statutes

1. The General Allotment Act of 1887

The General Allotment Act of 1887 and similar provisions authorized allotments of reservation land to individual members of Indian tribes.¹⁰⁹ Under the General Allotment Act, members of tribes received individual allotments to be held in trust by the United States, for the "sole use and benefit" of the Indian allottees for a period of at least twenty-five years.¹¹⁰ At the end of the trust period, the land was to be conveyed to the allottee "in fee, discharged of said trust and free of all charges or encumbrances whatsoever."¹¹¹ The Indian Reorganization Act of 1934 extended the periods of trust until otherwise directed by Congress.¹¹²

At the end of the trust period, when the certificate of competency is issued, the member is to receive the land in fee simple and "free from all taxes."¹¹³

261 (9th Cir. 1964) (holding that income received as compensation for services rendered is taxable); *Fry v. United States*, 557 F.2d 646 (9th Cir. 1977) (holding income from an Indian's logging operations is subject to federal income tax where logging operations did not take place on allotted lands); *Holt v. Commissioner of Internal Revenue*, 364 F.2d 38 (8th Cir. 1966) (holding that a grazing permit on tribal land is subject to federal income tax upon profits allocable to such lands arising from cattle operation).

107. Note that the "noncompetent" Indian often mentioned is one who lacks the legal capacity to alienate the tribal land allotted to him under the provisions of the General Allotment Act. See generally *Jourdain v. Commissioner of Internal Revenue*, 617 F.2d 507 (8th Cir. 1980).

108. See *Dillon v. United States*, 792 F.2d 849 (9th Cir. 1986).

109. General Allotment Act of 1887 (Dawes Act), ch. 119, 24 Stat. 388.

110. *Id.* § 5, 24 Stat. at 389.

111. *Id.*

112. Indian Reorganization Act of 1935, 25 U.S.C. § 462.

113. *Squire v. Capoeman*, 351 U.S. 1, 8 (1956); see General Allotment Act of 1887 (Dawes Act), § 5, 24 Stat. at 389.

The courts have construed this to exempt the member from the federal income tax of all income directly derived by a noncompetent Indian from restricted allotted land.¹¹⁴

2. *Treaty Fishing Rights, I.R.C. § 7873*

Section 7873 of the Code provides that income earned by an individual member or through a qualified Indian entity through the exercise of treaty fishing rights is exempt from tax.¹¹⁵ If the member earns the income from the tribe by working in a tribally run fishing operation, based on the exercise of treaty fishing rights,¹¹⁶ then that income is exempt from federal income tax. In addition, section 7873 also states that no tax shall be imposed by Subtitle C (federal employment taxes) on remuneration for services performed in a fishing rights related activity of an Indian tribe by members of such tribe.¹¹⁷ Section 7873 is evidence of an instance where Congress has decided that the exercise of treaty fishing rights, whether on or off the reservation, by an Indian or Indian tribe are not subject to either federal income taxes or federal employment taxes.

3. *Interest Income from Tribal Bonds, I.R.C. §§ 7871*

Interest income from qualifying tribal bonds is exempt from federal income tax in the hands of the owner of the bonds.¹¹⁸ In order for the bonds to be exempt, the tribe must use the proceeds to fund an "essential governmental function."¹¹⁹ A qualified "Indian tribe" means any Indian tribe, band, nation, or other organized group or community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.¹²⁰

C. *Conclusion*

The Supreme Court in dealing with the question of whether an Indian member pays federal income tax on income derived from the land has said "no" in situations where the land involved is an allotment under the Dawes Act or similar provisions.¹²¹ Congress has addressed the restricted allotments

114. See *Squire v. Capoeman*, 351 U.S. 1, 6-7 (1956).

115. I.R.C. § 7873 (1994).

116. *Id.* § 7873(b)(1). A fishing rights related activity is one where substantially all of the harvesting is performed by members of the tribe. *Id.* § 7873(b)(2). Recognized fishing rights are those secured as of March 17, 1988 by treaty between the tribe and the United States, an executive order, or an Act of Congress.

117. *Id.* § 7873(a)(2).

118. *Id.* § 7871(a)(4). The exemption applies to all taxpayers that hold tribal bonds.

119. *Id.* § 7871(c)(1), (e). Essential government function shall not include any function, which is not customarily performed by State and local governments with general taxing powers.

120. *Id.* § 7871(c)(3)(E)(ii).

121. General Allotment Act of 1887 (Dawes Act), ch. 119, 24 Stat. 388.

in the Dawes Act and the Courts have construed "free of all taxes" to mean that there is an exemption from federal income tax of all income directly derived from the land.¹²² Thus, we are typically looking at a member's on-reservation activity with respect to his restricted allotment. Congress also decided to give the Indians an exemption for income earned from the exercise of treaty fishing rights,¹²³ whether exercised on or off the reservation, and an exemption for interest income from tribal bonds.¹²⁴ Congress does not speak to employment taxes as they apply to individual Indians, except in relation to the exercise of treaty fishing rights.¹²⁵

With respect to the issue of whether Congress intended for federal employment taxes to apply to Indian tribes' on-reservation activity, the General Allotment Act and the Supreme Court decisions regarding *income derived from the land* are the most helpful in determining how Congress addresses federal tax issues with individual Indians. Because *income derived from the land* does not include income earned from businesses located on the restricted allotments; it is not likely to exempt other taxes that apply to these businesses, such as federal employment taxes. However, the rationale behind the exemption from tax of *income derived from the land* is based on the idea that Congress intended that the *individual Indian* receives the land clear of encumbrances to provide the necessary chance of economic survival in competition with others. The limitation of *income derived from the land* makes sense when applied to individual Indians. However, the limitation of *income derived from the land* has not been extended to the federal taxation of an Indian tribe. Congress may equally feel that the Indian tribe should be accorded the necessary chance of economic survival in competition with others. In the same manner as an individual Indian's allotment is protected from federal taxation, Congress may wish to protect tribal businesses on reservation lands from employment taxes. That Congress thought to exclude income earned from the exercise of treaty fishing rights from employment taxes is another example of where Congress has made its intent clear with respect to employment taxes.¹²⁶

VI. Statutes of General Application and Indian Sovereignty

As a backdrop to the discussion of whether Congress intends for employment taxes to apply to Indian tribes' on-reservation activity, we must consider both the notion that statutes of general application do not apply to Indian tribes and Indian sovereignty. These concepts tend to give support as

122. *Squire v. Capoeman*, 351 U.S. 1, 6-7 (1956).

123. I.R.C. § 7873 (1994).

124. *Id.* § 7871(a)(4).

125. *Id.* § 7873(a)(2).

126. *Id.*

to "why" federal employment taxes should or should not apply to the Indian tribes.

A. General Statutes

The Supreme Court in 1884 in *Elk v. Wilkins* recognized that general acts of Congress did not apply to Indians unless so expressed as to clearly manifest an intention to include them,¹²⁷ and followed this for three-fourths of a century. However, in 1960, the Supreme Court in *Federal Power Commission v. Tuscarora Indian Nation* held that statutes of general application do apply to Indian tribes.¹²⁸ Although neither *Elk v. Wilkins* nor *Tuscarora* involved federal taxes, the lower courts have often cited to language in *Tuscarora* stating that "it is well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests."¹²⁹

The Ninth Circuit in *Donovan v. Coeur d'Alene Tribal Farm* followed the *Tuscarora* decision that general statutes in terms applying to all persons include Indians and their property interests.¹³⁰ *Donovan* stated that in the Ninth Circuit, the courts have used the language of *Tuscarora* to justify the general application of federal tax statutes to Indian tribes and individual Indians unless an express treaty or statutory provision grants a tax exemption.¹³¹ The *Donovan* court cites to two tax cases where the Ninth Circuit has applied the *Tuscarora* rule.¹³²

In *Confederated Tribes*, the Ninth Circuit held that the Indian tribe was liable for various excise taxes.¹³³ The court based its decision that the Indian tribe is liable for the various excise taxes on its finding that there was no exemption. The tribe is not considered a State or political subdivision under the statutes in question and the court found no federal statute or language in a treaty to exempt the tribe from the tax.¹³⁴ As previously discussed,

127. *Elk v. Wilkins*, 112 U.S. 94 (1884) (involving an Indian who had not become a "naturalized citizen" and as such was not accorded protection under the phrase "Indians not taxed" phrase of the 14th Amendment).

128. *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960) (finding that land purchased in New York in 1804 by a tribe in fee with funds from a sale of tribal lands located in North Carolina was not a reservation for purposes of the Federal Power Act).

129. *Id.* at 116.

130. *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1984) (holding that the Occupational Safety and Health Act applied to the commercial activities carried on by an Indian tribal farm).

131. *Id.* at 1115-16.

132. *Id.* (citing *Confederated Tribes of Warm Springs Reservation v. Kurtz*, 691 F.2d 878 (9th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983) and *Fry v. United States*, 557 F.2d 646 (9th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978)).

133. *Confederated Tribes of Warm Springs Reservation v. Kurtz*, 691 F.2d 878 (9th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983). See *supra* notes 66-84 and accompanying text.

134. *Confederated Tribes*, 691 F.2d at 881-83.

Confederated Tribes does not discuss federal employment taxes.¹³⁵ That the Ninth Circuit may try to extend the same analysis to federal employment taxes is possible. However, none of the other circuit courts of appeals have spoken with regard to whether federal excise taxes or federal employment taxes apply to Indian tribes.

In *Fry v. United States*, the Ninth Circuit held that an individual Indian was liable for income tax from logging operations that were performed on lands other than allotted lands.¹³⁶ The result in this case depended on whether the income was *income derived from the land*.¹³⁷ Because the lands involved were not allotted lands, the court found no reason to extend to these lands the same analysis applied to under the General Allotment Act or similar provisions based on the concept that the individual allottees are to receive the land "free of taxes" at the end of the trust period.¹³⁸

As previously discussed the *Donovan* decision cites to these two tax cases, *Confederated Tribes* and *Fry*, for the proposition that general federal laws apply to Indian tribes.¹³⁹ Although the rule from *Tuscarora* that statutes of general application apply to Indian tribes may be one factor in these decisions, this analysis is secondary. The decision in *Confederated Tribes* turned on a review of the taxing statutes, the treaty, and other federal statutes in search of an exemption. The decision in *Fry* also looked to whether the income from the lands involved was exempt by a treaty or act of Congress. In the Ninth Circuit, these cases may stand for the proposition that taxing statutes of general application apply to Indian tribes unless there is some treaty or federal statute that provides an exemption. However, many of the treaties for tribes probably did not contemplate federal taxation. There also may be Indian tribes without treaties. With respect to an act of Congress, we are dealing with instances where Congress has not spoken. The Ninth Circuit assumes that congressional silence means that Congress intended to tax. However, we know that in some instances Congress can and has said when a particular statute does or does not apply to an Indian tribe.¹⁴⁰

In the Ninth Circuit, the court in *United States v. Farris* outlines three exceptions to the *Tuscarora* rule that statutes of general application apply to Indian tribes.¹⁴¹ *United States v. Farris* provides three exceptions: (1) the

135. See *supra* notes 66-84 and accompanying text.

136. *Fry v. United States*, 557 F.2d 646 (9th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

137. This is the same analysis used in *Superintendent of Five Civilized Tribes v. Commissioner of Internal Revenue and Squire v. Capoeman*. See *supra* notes 100-03.

138. See *Squire v. Capoeman*, 351 U.S. 1 (1956).

139. *Donovan*, 751 F.2d at 1115-16.

140. See *supra* Parts IV.A, V.B; see I.R.C. §§ 3402(r), 7871, 7873; General Allotment Act of 1887 (Dawes Act), ch. 119, 24 Stat. 388.

141. See *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981), *superseded by* *United States v. E.C. Investments, Inc.*, 77 F.3d 327 (9th Cir. 1996) (discussing how IGRA eliminated the public policy test of Public Law 280 followed in *United*

law touches on the exclusive rights of self-governance in purely intramural matters,¹⁴² (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties, or (3) there is proof by the legislative history or some other means that Congress intended the law not to apply to Indians on reservations.¹⁴³ With respect second exception for treaties, the courts have recognized that a treaty can provide an exemption from federal taxation to Indians but none of the cases have been decided based on a treaty.¹⁴⁴ For those tribes that have treaties, they may not have contemplated federal taxation. However, there may be history, which supports a tax exemption. There are also some tribes who do not have treaties. In reviewing the tax status of any tribe, the message here is to check the relevant treaties.

With respect to the third exception, the General Allotment Act and sections 7871 and 7873 of the Internal Revenue Code are examples of "other means" provided by Congress that show that Congress intended the law not to apply to Indians on reservations.¹⁴⁵ The *Farris* case holds that Congress must mention in its legislative history that the statute does not apply to Indians.¹⁴⁶ A requirement that Congress mention that the statute does not apply to Indian tribes in its legislative history advocates the position that all statutes apply to Indian tribes unless Congress provides otherwise. If all statutes of general application apply to Indian tribes unless Congress states the statute does not apply to the Indian tribe in the legislative history of the statute, then why did Congress amend section 3402(r) of the Code to provide that the Indian tribe must withhold from members payments from certain casino profits?¹⁴⁷ If Congress did not mention that the statute did not apply to Indian tribes in its legislative history, then under *Tuscarora* we are to presume the statute applied to Indian tribes. Based on this rule, Congress would not have had to amend section 3402 of the Code.

Elk v. Wilkins required that Congress manifest an intent to include Indians. Section 3402(r) provides us with an instance where Congress amended the statute to make its intent clear. The *Farris* rule may bind the Ninth Circuit; however, other circuits may see that Congress can and has said when statutes apply to the Indian tribes, and may decide that Congress has not made its intent clear.

In determining Congress' intent, the Ninth Circuit has said that it is clear that taxing statutes apply to everyone, including Indian tribes, unless there is

States v. Farris)).

142. There has been no discussion of tribal self-governance to this point. This exception will be discussed as part of Indian Sovereignty in Part VII.B.

143. *Farris*, 624 F.2d at 892-94.

144. See generally *Squire v. Capoeman*, 351 U.S. 1 (1956).

145. See *supra* Parts IV.A, V.B; I.R.C. §§ 7871, 7873; General Allotment Act of 1887 (Dawes Act), ch. 119, 24 Stat. 388.

146. *Farris*, 624 F.2d at 893-94.

147. I.R.C. § 3402(r) (1994); see *supra* Part IV.A.1.

a treaty exemption, a federal statute providing an exemption, or Congress has said in the legislative history that Indians or Indian tribes are exempt from taxation.¹⁴⁸ Outside of the Ninth Circuit, other courts could follow *Elk v. Wilkins*¹⁴⁹ and take the position that statutes of general application do not apply to Indian tribes unless there is a manifest intent to include them.

Farris provides another exception to the rule in *Tuscarora* where the law touches on the exclusive rights of self-governance in purely intramural matters.¹⁵⁰ The right to self-governance is also referred to as "Indian sovereignty." Part VI(B) below will address Indian sovereignty as a backdrop to the discussion of whether federal employment taxes should apply to Indian tribes' on-reservation activities.

B. Indian Sovereignty

Another plausible argument is that Congress did not intend for federal employment taxes to apply to the Indian tribes' on-reservation activity because these taxes interfere with the tribes' sovereign immunity. As early as 1831, the Supreme Court recognized that Indian nations have long been "distinct, political communities having territorial boundaries within which their authority is exclusive."¹⁵¹ The Supreme Court in *Santa Clara Pueblo v. Martinez* recognized "Indian sovereignty" must serve "as a backdrop against which applicable federal statute[s] must be read."¹⁵² Although *Santa Clara Pueblo* does not involve federal taxes, it does tell us that there must be a clear indication of legislative intent to give proper respect for "tribal sovereignty" and the plenary authority of Congress over the Indian tribes.¹⁵³ In *Santa Clara Pueblo*, "tribal sovereignty" prevailed and the Court found that the Indian Civil Rights Act, which grants certain enumerated rights to individual Indians, did not waive the sovereign immunity of the tribe or create a cause of action against the tribe.¹⁵⁴ The right to tribal self-government is ultimately dependent on and subject to the broad powers of Congress.¹⁵⁵

148. *Farris*, 624 F.2d at 892-94; see *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1984); see also *Confederated Tribes of Warm Springs Reservation v. Kurtz*, 691 F.2d 878 (9th Cir. 1982), cert. denied, 460 U.S. 1040 (1983); *Fry v. United States*, 557 F.2d 646 (9th Cir. 1977), cert. denied, 434 U.S. 1011 (1978).

149. *Elk v. Wilkins*, 112 U.S. 94 (1884).

150. *Farris*, 624 F.2d at 893.

151. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

152. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978) (involving a cause of action against the tribe for relief against enforcement of an ordinance denying tribal membership to children of female members who married outside of the tribe).

153. *Id.* The Supreme Court in *Santa Clara Pueblo* stated that although tribes have the power to regulate their internal and social relations, and make and enforce their own substantive law, Congress has plenary authority to limit, modify or eliminate the powers of local self-government possessed by the tribe. *Id.* at 60.

154. *Id.* at 72.

155. See *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980) (stating

One commentator has said that "the backdrop of sovereignty has meant that *state power* is presumed not to apply to tribal members in Indian Country."¹⁵⁶ In order to determine whether "Indian sovereignty" protects Indian tribes and tribal lands and Indian activities on tribal lands from federal taxation, we must look at what the Supreme Court has said in federal tax cases. The Supreme Court has said that the doctrine of Indian sovereignty protects the tribes from state taxation or state law in the absence of federal law expressly allowing it.¹⁵⁷ These cases involve the notion of "Indian sovereignty" as protecting the tribe from state taxation or state laws, but none involve the protection of an Indian tribe from federal taxation.

The three Supreme Court decisions that discussed the federal taxation of Indians, *Choteau v. Burnet*, *Superintendent of Five Civilized Tribes v. Commissioner of Internal Revenue*, and *Squire v. Capoeman*, did not discuss Indian sovereignty.¹⁵⁸ The Bankruptcy Appellate Panel in *In re Cabazon* did not discuss Indian sovereignty in its discussion of federal employment taxes.¹⁵⁹ The Court of Appeals for the Ninth Circuit in *Confederated Tribes* addressed tribal self-government when considering whether the Tribe was considered a State or political subdivision of a state.¹⁶⁰ There, the notion of Indian sovereignty was used to differentiate the Indian tribe from a State and not to provide a reason for exempting the tribe from federal excise taxes.¹⁶¹ Finally, the District Court of Nevada in *Washoe Tribes* disagreed with the

that the traditional notions of Indian self-government provide an important backdrop against which vague and ambiguous statutes must be measured).

156. Erik M. Jensen, *The Continuing Vitality of Tribal Sovereignty under the Constitution*, 60 MONT. L. REV. 3 n.23 (1999) (emphasis added).

157. *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980) (holding that Arizona's sales tax did not apply to the sale of farm machinery to the Gila River Indian tribe where the sale took place on the reservation); *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114 (1993) (holding a state cannot impose a vehicle excise tax on members who lived in "Indian Country"); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995) (holding that Oklahoma's gasoline excise tax whose legal incidence fell on the tribe could not be imposed absent congressional authorization); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985) (holding Montana could not impose its coal severance tax on royalty interests owned by a tribe under a lease with a private coal company); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (holding that the operation of a ski resort off the reservation was subject to gross receipts tax); *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832 (1982) (holding that New Mexico gross receipts tax could not be imposed on a non-Indian company that contracted with a tribe to build a school because of the federal regulation).

158. See *Choteau v. Burnet*, 283 U.S. 691 (1931); see also *Superintendent of Five Civilized Tribes v. Commissioner of Internal Revenue*, 295 U.S. 418 (1935); see also *Squire v. Capoeman*, 351 U.S. 1 (1956); *supra* Part V.A.

159. See *In re Cabazon Indian Casino v. IRS*, 57 B.R. 398 (B.A.P. 9th Cir. 1986); *supra* Part III.B.

160. *Confederated Tribes*, 691 F.2d at 879. The Ninth Circuit recognized that the right to tribal self-government is dependent on and subject to the powers of Congress. The court said that this is what distinguishes tribes from states. See *supra* Part IV.B.

161. *Id.*

plaintiff that the independent sovereignty of the Indian tribes has the consequence of overruling many decisions sustaining federal taxing power.¹⁶² Because there is no authority extending "sovereign immunity" to protect Indian tribes from federal taxation, it does not serve as a helpful "backdrop" to our discussion.

VII. *Canons of Construction in Indian Law*

In reviewing the Supreme Court decisions regarding the taxation of Indian tribes, there is discussion of the federal canons of construction with respect to Indian law. In discussing these canons, the canons of federal tax law tell us that exemptions should be strictly construed.¹⁶³ A competing maxim, in the area of Indian law, is that any ambiguities in federal statutes should be construed in favor of the Indian tribes.¹⁶⁴ Although these canons are not dispositive of the decisions, they do provide a backdrop for the discussion of whether the federal employment taxes should apply to Indian tribes' on-reservation activity.

As early as 1832, the Supreme Court stated that the language used in treaties with the Indians should never be construed to their prejudice.¹⁶⁵ In *Choate v. Trapp*, the Supreme Court applied the federal canons of Indian law outside of the treaty context to a federal statute.¹⁶⁶ At issue was the state taxation of individual Indians.¹⁶⁷ The Court found an exemption based on federal law.¹⁶⁸ In *Choate*, the Court recognized a more liberal rule with respect to construing statutes in cases involving Indians as opposed to the normal rule strict construction of tax exemptions.¹⁶⁹ The Supreme Court in *Choate* recognized that the rule of more liberal construction in favor of Indians had been recognized for more than one hundred years by the Court, without exception, and applied in tax cases.¹⁷⁰

162. *Washoe Tribes v. United States*, 44 A.F.T.R.2d (RIA) 79-6006 (D. Nev. 1979). The court declined to follow plaintiff's argument that *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), and its victory for tribal self-government had the effect of overruling the power of federal taxation. For a discussion of *Washoe Tribes*, see *supra* Part III.B.

163. *C.S.R. Centennial Sav. Bank v. FSB*, 499 U.S. 573, 583-84 (stating that exclusions from gross income should be narrowly construed); *Commissioner of Internal Revenue Serv. v. Jacobson*, 236 U.S. 28, 49 (1949) (same).

164. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832).

165. *Id.* (concurring in the result, Justice M'Lean first articulated recognition of the canons of Indian law).

166. See *Choate v. Trapp*, 224 U.S. 665 (1912) (holding Indians exempt from state tax based on federal statutes providing that lands exempt from tax while remained in hands of original allottees).

167. See *id.* at 671.

168. See *id.* at 678-79. The Atoka Agreement and the Supplemental Agreement provided that the members of the tribes should have allotted to them shares of land nontaxable while the land remained in the hands of the original allottee.

169. *Id.* at 675.

170. *Id.* (citing *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 760 (1866) (discussing whether

One commentator has stated that there are two tenets of Indian law considered in interpreting federal statutes: (1) terms should be liberally construed to benefit Indians, and (2) ambiguities should be resolved in favor of the Indians.¹⁷¹ The canons of construction were part of the analysis of *Superintendent of Five Civilized Tribes* and *Capoeman*.¹⁷² Although each Court considered the policy of a more liberal construction in favor of Indian tribes, the decisions turned on whether the income involved was *income derived from the land*.¹⁷³ Although it is important from a policy perspective to apply the federal Indian law canons,¹⁷⁴ the canons have played a secondary role in the Court's decisions of whether Indians are exempt from federal taxation. If the Supreme Court were to decide the issue of whether federal employment taxes apply to Indian tribes' on-reservation activities, then the Court must consider whether the same policy considerations to prompt a more "liberal" rule of construction in favor of Indians applies today. If the canons of federal Indian law apply with respect to this issue, then the Indian tribe can argue that the ambiguity as to whether FICA and FUTA apply to the Indian tribe should be construed in favor of Indian tribes. On the other hand, the IRS could argue that the canons of federal Indian law do not apply to construe the FICA and FUTA statutes. In order to prevail, the IRS would have to show that the policy behind more liberal construction does not apply with respect to federal employment taxes and their application to Indian tribes' on-reservation activities.

VIII. Conclusion

It is not clear that Congress intended for FICA and FUTA to apply to Indian tribes' on-reservation activities. Although the IRS¹⁷⁵ and the Ninth Circuit Bankruptcy Appellate Panel¹⁷⁶ have said that federal employment taxes apply to Indian tribes' on-reservation activities, the Supreme Court and

a statute prohibiting the levy and sale of Indians lands prevented a sale for state tax purposes, and applying the "enlarged" rules of construction adopted in reference to Indian treaties)).

171. David M. Blurton, *Canons of Construction, Stare Decisis, and Dependent Indian Communities: A Test of Judicial Integrity*, 16 ALASKA L. REV. 37, 45 (1999).

172. See *Superintendent of Five Civilized Tribes v. Commissioner of Internal Revenue*, 295 U.S. 418 (1935); *Squire v. Capoeman*, 351 U.S. 1 (1956); *supra* Part V.A.

173. *Id.* The discussion of the cases in Part V.A distinguishes them based on "income derived from the land."

174. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), emphasized that the relationship between the United States and the Indians as an "unlettered" people, wards of the United States, warranted a more liberal construction in favor of the Indians, who were at an unequal bargaining position in the context of treaties. This concept of "liberal construction" was then extended to apply to federal statutes in *Choate v. Trapp*, 224 U.S. 665 (1912).

175. See Rev. Rul. 59-354, 1959-2 C.B. 24; see also Rev. Rul. 56-110, 1956-1 C.B. 488; *supra* Part III.A.

176. See *In re Cabazon Indian Casino v. IRS*, 57 B.R. 398 (B.A.P. 9th Cir. 1986); *supra* Part III.B.

the United States Court of Appeals have not spoken with respect to this issue. Congress has stated its intent as to whether federal taxes apply to Indian tribes in the withholding provisions,¹⁷⁷ the Tribal Tax Act,¹⁷⁸ and with respect to Indians' treaty fishing rights.¹⁷⁹ On the one hand, with respect to withholding, we know that Congress has the ability to amend a statute to make it clear that it applies to an Indian tribe. On the other hand, there are a variety of federal excise taxes mentioned in the Tribal Tax Act,¹⁸⁰ but there is no mention of federal employment taxes. The failure to mention the application of federal employment taxes to Indian tribes is a weakness of the Tribal Tax Act.

In the income tax arena, the IRS has stated that Indian tribes are not subject to income tax.¹⁸¹ However, the IRS has not provided any statutory or case law support for this statement. In its revenue rulings, the IRS has made clear that it believes federal employment taxes apply to Indian tribes.¹⁸² It is unclear how policy can protect the Indian tribe from one tax and not the other. The cases regarding federal income tax deal with individual Indians and not Indian tribes.¹⁸³ These cases are concerned with whether income is derived from the land and whether there is a federal statute, such as the General Allotment Act¹⁸⁴ or a similar provision, to exempt the income from tax.

The Ninth Circuit believes that Congress intended for federal excise taxes to apply to Indian tribes.¹⁸⁵ In fact, they are the only circuit to have spoken on an Indian tribe's liability for federal taxation. Although the analysis of the Ninth Circuit may extend to federal employment taxes if a case is brought before the Ninth Circuit, the other circuits have not spoken on the issue. It is not clear that the circuits agree that federal employment taxes apply to Indian tribes' on-reservation activities.

There are many notions, which may provide a backdrop to our discussion of whether federal employment taxes apply to Indian tribes' on-reservation activities. The Supreme Court has said that statutes of general application do not apply to Indian tribes.¹⁸⁶ However, the Supreme Court has also said in

177. See I.R.C. § 3402(r) (1994); *supra* Part IV.A.1.

178. See I.R.C. § 7871 (1994); *supra* Part IV.A.2.

179. See I.R.C. § 7873 (1994); *supra* Part V.B.2.

180. See I.R.C. § 7871 (1994); *supra* Part IV.A.2.

181. See Rev. Rul. 67-284, 1967-2 C.B. 55; *see also* Rev. Rul. 94-16, 1994-1 C.B. 19; *supra* Part IV.C.

182. See Rev. Rul. 59-354, 1959-2 C.B. 24; *see also* Rev. Rul. 56-110, 1956-1 C.B. 488; *supra* Part III.A.

183. See *supra* Part V.A.

184. Ch. 119, 24 Stat. 388.

185. *Confederated Tribes of Warm Springs Reservation v. Kurtz*, 691 F.2d 878 (9th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983); *see supra* Part IV.B.

186. See *Elk v. Wilkins*, 112 U.S. 94 (1884); *supra* Part VI.A.

an opinion involving the Federal Power Act that statutes of general application, such as taxing statutes, apply to Indian tribes.¹⁸⁷ The Ninth Circuit has said that general taxing statutes apply to Indian tribes.¹⁸⁸ In the Ninth Circuit, a general statute applies to an Indian tribe unless the law interferes with tribal self-governance, a treaty speaks to the matter, or legislative history or other congressional proof says otherwise.¹⁸⁹ It is clear that the Ninth Circuit believes that statutes of general application apply to Indian tribes. However, other circuits are free to decide whether or not they agree with the Ninth Circuit.

With respect to tribal sovereignty, the doctrine does not defeat the application of federal taxes to an Indian tribe. With respect to treaties, some Indian tribes may not have contemplated federal taxing statutes at the time the treaties were drawn. Today, some tribes do not have treaties. With respect to the legislative history, the Ninth Circuit says that Congress must provide that the statute does not apply to Indian tribes.¹⁹⁰ The Ninth Circuit is not correct in its holding. If we assume that the federal employment statutes have applied to Indian tribes, then we are in effect allowing Congress to make an amendment without ever having to make an actual amendment. If this were true, then Congress need not have amended the Code with respect to withholding to state that the provision affirmatively applied to Indian tribes.

In addition, the rich history and policy of construing statutes more liberally in favor of Indian tribes has been utilized by the courts as a backdrop to the discussion of the application of taxing statutes to Indians.¹⁹¹ Unless everyone agrees that the Indian tribes have reached a state of competency and independence, then we need to consider the canons of construction in favor of Indian tribes.

Given that not everyone has spoken on the issue, it is unfair to say that everyone agrees that Congress intended for federal employment taxes to apply to Indian tribes' on-reservation activities. In fact, we should not read congressional silence in the area of FICA and FUTA taxes as an indication that the taxes apply to Indian tribes' on-reservation activity. It is not unfair given our rich history with the Indian tribes to require that Congress make its intent clear with respect to the application of federal employment taxes to Indian tribes' on-reservation activities.

187. See *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960); *supra* Part VI.A.

188. See *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1984); *supra* Part VI.A.

189. See *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981); *supra* Part VI.A.

190. *Farris*, 624 F.2d at 893-94.

191. See *supra* Part VII.