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NOTE

PROTECTING TRIBAL SOVEREIGNTY: WHY STATES SHOULD NOT BE ABLE TO TAX CONTRACTORS HIRED BY THE BIA TO CONSTRUCT RESERVATION PROJECTS FOR TRIBES: *BLAZE CONSTRUCTION CO. V. NEW MEXICO TAXATION AND REVENUE DEPARTMENT: A CASE STUDY*

*Richard J. Ansson, Jr.**

I. Introduction

Felix Cohen, the eminent authority on American Indian law, wrote, "One of the powers essential to the maintenance of any government is the power to levy taxes. That this power is an inherent attribute of tribal sovereignty which continues unless withdrawn or limited by treaty or by act of Congress is a proposition which has never successfully been disputed."¹ Indeed, the power to tax is essential to a governmental entities' vitality. A governmental entity may use this power for a variety of purposes or not at all. But to sustain its sovereignty and vitality it must be able to use its taxing power.

When a government wants to exert its taxing power, it must be able to do so without excessive interference from other governments. If another governmental entity can defeat its taxing power on legal grounds, then that government's taxing power will be useless. Accordingly, since the supply of taxable wealth is limited, there is always tension between government jurisdictions over which has the greater legal right to tax the wealth.

As a matter of inherent governmental power, there exists a prioritized ranking order in taxation. By virtue of the Supremacy and Commerce Clauses of the United States Constitution, the federal government exercises a great deal of control over state taxing powers.² For example, states will not violate the Interstate Commerce Clause by properly taxing local activities or property within their borders even though the product will eventually flow into interstate commerce.³ But if commerce takes place in two or more states,

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1. FELIX COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 142 (Univ. of N.M. photo. reprint 1971) (1942).

2. See U.S. CONST. art. 1, § 8, cl. 3 (Supremacy Clause); U.S. CONST. art. 6, § 2 (Commerce Clause).

3. See generally 84 C.J.S. *Taxation* § 30 (1964). Taxes, in general, may be assessed by the state authorities for the support of the government and needs of the public. Property taxes are one form of tax that the state may assess because property is deemed a matter of local concern not

each state may tax the commerce so long as the taxes are fairly apportioned between the states.⁴ The federal government has the power to control, regulate, and limit the states in taxing interstate commerce.

In some cases, two governments hold the same place in the prioritized ranking order. This occurs when there is concurrent jurisdiction over the subject of taxation. For example, as a general rule, the federal government and the state government both can tax the income of state citizens.⁵ Indeed, the taxing power of Indian tribes and states has been said to be concurrent in some cases. In *Washington v. Confederated Tribes of the Colville Reservation*,⁶ the United States Supreme Court held that both the Colville Tribes and the State of Washington could tax the sale of cigarettes to non-Indians at Indian smoke shops on the Reservation.⁷

The best arrangement, of course, is for a governmental entity to have the exclusive power to tax and therefore, not have to share its power with anyone else. For example, before the passage of the Sixteenth Amendment, states had the exclusive power to tax income because at that time, the federal government had not been given the Constitutional authority to impose income taxes.⁸ In 1913, the Sixteenth Amendment was passed, giving Congress the "power to lay and collect taxes on income, from whatever source derived, without apportionment among the several states."⁹ Since 1913, the federal government and the states have shared a concurrent power to tax income.

In *Blaze Construction Co. v. New Mexico Taxation & Revenue Department*,¹⁰ the decision facing the various courts was whether the state and the tribe share concurrent taxing powers over a non-Indian contractor who contracts with the BIA, rather than the tribe itself, for work that is done specifically within the Indian country. If concurrent taxing powers are not shared between the state and the tribe, then the preemption analysis will not apply to the situation; therefore, both the state and the tribe have the power to tax the activity. Where two taxing powers have concurrent jurisdiction, one may be able to preempt the other by exercising its power. In these cases, the question is which government has the most significant interest in the subject

effecting concerns of the federal or other state governments. Consequently, property taxes do not directly effect the flow of goods between the states, and therefore, property taxes do not violate the Interstate Commerce Clause. *Id.*

4. See generally 84 C.J.S. *Taxation* §§ 4-9 (1964). Under the Interstate Commerce Clause, the validity of a particular tax depends on whether the necessary operation of such legislation results in unjust discrimination among the states. Moreover, if the intent of the legislature is not toward equity and uniformity, the courts will invalidate that tax provision. *Id.*

5. See generally *id.*

6. 447 U.S. 134 (1980).

7. *Id.* at 146.

8. See generally 84 C.J.S. *Taxation* § 6 (1964).

9. U.S. CONST. amend. XVI.

10. 871 P.2d 1368 (N.M. Ct. App. 1993), *cert. granted*, 879 P.2d 1197 (N.M. 1993), *rev'd*, 884 P.2d 803 (N.M. 1994), *cert. denied*, 115 S. Ct. 1359 (1995).

of the tax. In the instant case, the question is whether the state, which played no role in the construction, maintenance, or regulation of certain roads built entirely on Indian reservations, may nevertheless impose gross receipts taxes upon the contractor who built the roads?

II. Tribal Sovereignty

A. Federal Preemption

The first significant case defining the relationship of tribal self-government to the corresponding powers of the federal and state governments is *Worcester v. Georgia*,¹¹ which held that all power to regulate Indians resided in the federal government and without federal permission, states could not act.¹² Additionally, the Court recognized that all powers which Congress had not taken from the tribes, still resided in the tribe.¹³ This recognition of plenary power in Congress and residual tribal sovereignty in the tribes is still the controlling principle of Indian law.¹⁴

The modern application of this principle of residual sovereignty is expressed in terms of jurisdiction.¹⁵ In 1959, the Supreme Court was called upon to test the vitality of *Worcester* in the context of a civil suit over a nonpayment of a debt. Two Navajo Indians in Arizona were sued in a state court over their failure to pay debts incurred at a store owned by a non-Indian. The Court in *Williams v. Lee*¹⁶ held that the state had no jurisdiction because state jurisdiction would interfere with the tribe's right of self-government.¹⁷ Thus a new test of state action was created, which stated, absent a governing act of Congress, state action was permissible if it did not interfere with a tribal right of self-government.¹⁸ This test appeared to open

11. 31 U.S. (6 Pet.) 515 (1832).

12. *Id.* at 561.

13. *Id.*

14. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1979). The *Bracker* Court recognized that Congress has a broad power to regulate tribal affairs under the Indian Commerce Clause. *Id.* at 142 (citing U.S. CONST. art. I, § 8, cl. 3 (Indian Commerce Clause)). Moreover, state regulatory authority over the tribes may be thwarted in one of two ways. First, state law may be preempted by federal law. *Id.* at 143. Second, state law may not infringe on tribal sovereignty. *Id.*

15. *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 168 (1973). The *McClanahan* Court stated, "Indian nations were 'distinct political communities, having territorial boundaries within which their authority is exclusive and having a right to all the lands within those boundaries.'" *Id.* at 169 (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832)). However, Congress has the right to regulate tribal affairs under the Indian Commerce Clause. *United States v. Wheeler*, 435 U.S. 313, 322-23 (1975) (citing U.S. CONST. art. I, § 8, cl. 3 (Indian Commerce Clause)).

16. 358 U.S. 214 (1959).

17. *Id.* at 219.

18. *Id.* at 216-19.

a new area for state action pointing to an apparent void between Indian jurisdiction and federal control.

The Supreme Court clarified *Williams* in *McClanahan v. Arizona Tax Commission*¹⁹. In *McClanahan*, the Court held that the State of Arizona could not impose its state income tax on an Indian resident of the Navajo reservation who was deriving her income from reservation sources because the state lacked jurisdiction.²⁰ The Court pointed out that *Williams* went primarily to non-Indian activities.²¹ Consequently, if the subject matter is a non-Indian activity within a reservation, the *Williams'* test is applied in determining whether the claimed action violates either a governing act of Congress or interferes with the tribes right of self-government is applied. On the other hand, *McClanahan* established, if the subject matter is Indian and within the Indian reservation, that the state has no power and that power may be obtained only in a way specified by Congress.

B. Federal Control

Congress has plenary power over all Indian matters. This power stems from three sources. First, the Constitution contains two sources of power. It grants Congress, through the Commerce Clause, the power to regulate commerce among Indians and the treaty making power of the executive which has historically extended federal power as well as vesting it with substantial obligations.²² Second, in *Cherokee Nation v. Georgia*,²³ a precursor to *Worcester*, Chief Justice Marshall noted, in dismissing the Cherokees suit for lack of jurisdiction, that the relationship between the United States and the tribes resembled that of a guardian to his ward.²⁴ This analogy, elevated to a definite legal principle, is the present source of much of the claimed federal authority over Indian tribes.²⁵ Third, in *Worcester*, Chief Justice Marshall judicially created an additional power when he theorized that federal power over Indians is inherent in the United States government's ownership and dominion over all the land within its borders.²⁶

All the above theories provide the legal basis for federal authority to preclude state taxation of Indian tribes and lands. The doctrine of federal preemption developed to restrict state taxation attempts of Indians and Indian property.²⁷ The Supreme Court in *McClanahan* noted that "the trend has

19. 411 U.S. 164 (1973).

20. *Id.* at 173.

21. *Id.*

22. U.S. CONST. art. I, § 8, cl. 3 (Indian Commerce Clause); U.S. CONST. art. II, § 2, cl. 2 (Treaty Powers of the President).

23. 30 U.S. (5 Pet.) 1 (1831).

24. *Id.* at 24.

25. See *United States v. Kagama*, 118 U.S. 375 (1886).

26. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

27. *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 173 (1973).

been . . . toward reliance on federal preemption" as a bar to state attempts to extend jurisdiction over tribal communities.²⁸ This doctrine is complimentary to federal control because where the government has acted specifically to control or regulate tribal affairs it has preempted the state from any similar action in those areas.

C. Federal Preemption Since McClanahan

In analyzing state attempts to infringe on tribal lands and Indians within reservations, the three concepts of tribal sovereignty, federal control, and federal preemption must be considered as a whole. First, one must remember that tribes still retain inherent, though restricted powers of sovereignty.²⁹ Any state interference with such power may be viewed as an infringement on a tribe's right to self-government and is not be tolerated or validated.³⁰ Second, because of the tribes' unique relationship to the federal government as self-governing bodies, and benefactors of the trust created by the guardian-ward relationship, the states have no jurisdiction over tribes unless expressly granted by Congress or treaties.³¹ Third, in exercising its guardianship role, the federal government can preempt the states from any type of tribal regulation.³² Therefore, where the federal government has not given explicitly consent or where it has acted to preempt the field, the state is at a loss to enforce its laws or regulations over an Indian tribe, especially in the field of taxation.

The doctrine of federal regulatory preemption of Indian affairs ousts state tax jurisdiction over Indians residing and carrying on economic activities within Indian country.³³ The source of this immunity is not the doctrine of intergovernmental tax immunities. Congress has not enacted legislation allowing states to tax on-reservation business activities of tribal members. State Laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State Laws shall apply.³⁴ It follows that Indians and Indian property on all Indian reservations are not subject to state taxation except by virtue of express

28. *Id.*

29. *Worcester*, 31 U.S. (6 Pet.) at 561; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1979).

30. *Williams v. Lee*, 358 U.S. 214, 219 (1959).

31. *McClanahan*, 411 U.S. at 173.

32. *Id.* at 172-73.

33. *Id.* at 171-72. The term "Indian country" has been used to indicate important jurisdictional boundaries. Indeed, within Indian country, state law is frequently precluded and tribal law fostering self-government is frequently enforced. Throughout United States legal history, efforts have been made to restrict Indian legal status to well-defined geographic boundaries. The term "Indian country," in the civil context, includes Indian reservation land, dependent Indian communities, and non-extinguished Indian allotments. 42 C.J.S. *Indians* § 50 (1964).

34. *McClanahan*, 411 U.S. at 172.

authority conferred upon the state by an Act of Congress. *McClanahan* confirmed this by stating "if Congress has expressly consented to state taxation or regulation of on-reservation business activities of tribal members, the doctrine of federal regulatory preemption does not apply"³⁵

Since *McClanahan*, the doctrine of preemption has ousted state tax jurisdiction over non-Indians doing business within Indian country, if there was a federal statute or treaty giving the tribe exclusive tax jurisdiction over the non-Indian activity³⁶ or if the state tax interfered to an impermissible extent with the ability of the tribe to govern itself.³⁷ That is, the concept of Indian sovereignty defined the boundaries of tribal-state tax jurisdiction if there was a finding of interference with tribal self-government³⁸ or if the effect of the state tax was to reduce the profit inuring to the tribe from tribal sources.³⁹

D. The BIA and State Taxation of Federal Agencies

The Bureau of Indian Affairs (BIA) is one of the agencies within the Department of the Interior. The Secretary of the Interior is charged with the supervision of public business relating to Indians. The BIA was created by the Department of the Interior to supervise the public business relating to the Indians.⁴⁰ Consequently, the Commissioner of the BIA has the power to "manage all Indian affairs and all matters arising out of Indian relations."⁴¹ The BIA, acting on behalf of the United States, has become the guardian of Indian wards.⁴² The BIA Commissioner's power is very broad. For example, any agreement between any person and any tribe must be in writing, bear the approval of the Secretary of Interior, and contain the tribal authorities scope of authority or the agreement will be considered void.⁴³ Moreover, the BIA can hire contractors to perform certain congressionally approved duties on tribal lands.⁴⁴

35. *Id.* at 173.

36. *See* *Central Mach. Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 169 (1980); *Ramah Navajo Sch. Bd. v. New Mexico*, 458 U.S. 832, 848 (1982).

37. *Crow Tribe of Indians v. Montana*, 819 F.2d 895, 902 (9th Cir. 1987), *aff'g* 484 U.S. 997 (1988).

38. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 146 (1980).

39. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 149 (1980).

40. 25 U.S.C. §§ 1a, 2 (1994).

41. *Id.* § 2.

42. *Rainbow v. Young*, 161 F. 835, 838-41 (8th Cir. 1908). *Rainbow* held, in effect, that the Commissioner of Indian Affairs was enabled to have the authority to manage all Indian affairs with just regard to the rights and welfare of Indians as well as the duty to protect them by reason of their state of tutelage and dependency. *Id.* at 838.

43. 25 U.S.C. § 81 (1994).

44. *See* 25 U.S.C. §§ 1, 2 (1994); *see also id.* § 450f (authorizing the BIA, in conjunction with the Indian tribes, "to enter into a self-determination contract or contracts with a tribal

The U.S. Supreme Court in *United States v. New Mexico*⁴⁵ held that federal governmental contractors may be subject to state taxes.⁴⁶ However, the Court did not specifically address whether the BIA was excluded from this absolute statement. The BIA, a federal agency, has been instructed to contract on behalf of the tribes on many occasions.⁴⁷ The case at bar addressed the question of whether the BIA's federal governmental contractors should be excluded from state taxation since the BIA has been charged with the specific duty of assisting Indian tribes?

III. The Factual History of Blaze Construction Co.

Blaze Construction is an Indian-owned company whose owner is a member of the Blackfeet tribe. The BIA hired Blaze to build roads on the Jicarilla Reservation, Zia Pueblo, Laguna Pueblo, and Navajo Reservation. Blaze built the roads on tracts of land provided by each tribe or pueblo. Blaze had to build the roads pursuant to the Federal Lands Highways Program.⁴⁸ Each individual tribe or pueblo helped plan the route of each road across tribal land, and also provided water and base materials needed for the construction projects.

The BIA had also required Blaze to hire local reservation residents to work on each project, and each tribe provided the services of a labor office to give Blaze the names of workers from which to draw. As a result, most of Blaze's employees for each project were Indians residing on the respective reservation upon which the road was being constructed. Moreover, the labor office monitored Blaze's compliance with tribal labor laws. The state, on the other hand, did not attempt to identify any interest in the construction projects of the roads themselves either before or after they were built, nor did the state attempt to license Blaze as a construction contractor.

IV. The Legal History of Blaze Construction Co.

In April 1986, Blaze requested a ruling from the New Mexico Taxation and Revenue Department on whether the construction projects were taxable. Blaze was informed by the Department in May 1986 that the construction projects it undertook were subject to state taxation. Although Blaze did not contest this ruling, it declined to pay the tax. Hence, the Department assessed Blaze for the delinquent gross receipts tax and was required to pay the State

organization to plan, conduct, and administer programs or portions thereof, including construction programs"); *id.* § 452 (authorizing the Secretary of Interior to enter into a contract with the state on behalf of an Indian tribe for education, medical attention, relief, and social welfare).

45. 455 U.S. 720 (1981).

46. *Id.* at 734.

47. 25 U.S.C. §§ 1, 2 (1994).

48. 23 U.S.C. §§ 204 (1994). The Federal Lands Highway Program provides federal funding to construct and improve Indian reservation roads. *Id.* § 204(b).

Taxation and Revenue Department \$222,401, plus an interest penalty amounting to \$68,500.

In March 1988, Blaze filed an administrative appeal from the Department's assessment. The Department issued a final decision upholding the validity of the assessment in October 1989 and in January 1990. Consequently, Blaze appealed the Department's decision to the Court of Appeals.

The court of appeals reversed the Department's ruling in September 1993. This court rejected the Department's argument that Blaze was a federal government contractor subject to state taxes under *United States v. New Mexico*, but instead applied the Indian preemption doctrine holding that the state taxes in question were preempted with respect to construction of roads on tribal land.⁴⁹ However, on October 18, 1994, the New Mexico Supreme Court reversed, holding that federal law did not preempt imposition of the state tax.⁵⁰ On March 20, 1995, the United States Supreme Court denied certiorari.⁵¹ Accordingly, Blaze Construction Co. was required to pay the state of New Mexico the assessed gross receipts tax.

V. The Appellate Court's Decision

The court felt that the issue of whether Blaze was an Indian entity and automatically exempt from state taxation did not have to be decided since the court found in favor of Blaze.⁵² However, even the court acknowledged that the merits of this argument were dubious.⁵³

The court held that the State of New Mexico could not tax Blaze Construction Co.⁵⁴ Even though the BIA was a federal agency, the court felt that the BIA was a federal agency that had a special relationship with the Indian tribes.⁵⁵ Indeed, the Supreme Court in *Ramah Navajo School Board v. Board of Revenue*⁵⁶ and *White Mountain Apache Tribe v. Bracker*⁵⁷ stated that heavy federal involvement in a tribal activity had been a factor weighing in favor of finding preemption, rather than in not finding it.⁵⁸ As a result, the Court found that the BIA had assisted tribes in many different areas including

49. *Blaze Construction Co. v. New Mexico Taxation & Revenue Dep't*, 871 P.2d 1368, 1369 (N.M. Ct. App. 1993), *cert. granted*, 879 P.2d 1197 (N.M. 1993), *rev'd*, 884 P.2d 803 (N.M. 1994), *cert. denied*, 115 S. Ct. 1359 (1995).

50. *Blaze Construction Co. v. New Mexico Taxation & Revenue Dep't*, 884 P.2d 803, 805 (N.M. 1994), *cert. denied*, 115 S. Ct. 1359 (1995).

51. 115 S. Ct. 1359 (1995).

52. *Blaze Construction Co.*, 871 P.2d at 1369.

53. *Id.*

54. *Id.*

55. *Id.*

56. 458 U.S. 832 (1982).

57. 448 U.S. 136 (1979).

58. *Ramah*, 458 U.S. at 838-39; *Bracker*, 448 U.S. at 152.

performing governmental functions, developing economic lands, and maintaining and enhancing tribal sovereignty.⁵⁹

Since the BIA's role in *Blaze Construction Co.* was to monitor road building projects on Indian lands in cooperation with the tribal involvement, the Court felt that the BIA and the tribes' were like partners performing essential governmental functions.⁶⁰ Indeed, in *Bracker*, the Supreme Court held that it was not necessary to distinguish between roads maintained by a tribe and roads maintained by the BIA.⁶¹ Moreover, the BIA, by undertaking this partnership, was helping the tribes to improve their transportation systems to facilitate future economic tribal development.⁶² Therefore, since the BIA was undertaking its inherent governmental function of helping Indian tribes, the court felt that preemption analysis should be applied irregardless of whether the tribe or the BIA entered into the contractual agreement.⁶³

VI. The New Mexico Supreme Court's Opinion

The Supreme Court of New Mexico first stated that *Blaze Construction Co.* was not automatically exempt from state taxation just because it was an Indian-owned corporation performing work solely on Indian reservations.⁶⁴ On the contrary, in *Washington v. Confederated Tribes of the Colville Reservation*,⁶⁵ the United States Supreme Court upheld a state's power to levy taxes on Indians who lived on a reservation but had no tribal affiliation with the particular reservation Indians among whom they lived.⁶⁶ The *Colville* Court stated that "the mere fact that nonmember residents on the reservation c[a]me within the definition of 'Indian' for purposes of the Indian Reorganization Act . . . d[i]d not demonstrate a congressional intent to exempt such Indians from State taxation."⁶⁷ Moreover, the *Colville* Court felt that such a tax would not interfere with the right of tribal self-government because nonmember Indians were not constituents of the governing tribe.⁶⁸ Consequently, nonmember Indians stood on the same footing as non-Indian residents on the reservation.⁶⁹ Therefore, the State's interest in taxing

59. *Blaze Construction Co.*, 871 P.2d at 1369.

60. *Id.*

61. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 148-49 (1979).

62. *Blaze Construction Co.*, 871 P.2d at 1369.

63. *Id.*

64. *Blaze Construction Co. v. New Mexico Taxation & Revenue Dep't*, 884 P.2d 803, 804 (N.M. 1994), *cert. denied*, 115 S. Ct. 1359 (1995).

65. 447 U.S. 134 (1980).

66. *Id.* at 164.

67. *Id.* at 161.

68. *Id.*

69. *Id.*

nonmember Indians outweighed any tribal interest that may have prevented the State from imposing its taxes.⁷⁰

Blaze Construction company was owned by a member of the Blackfeet tribe.⁷¹ However, the road construction Blaze performed did not take place on an Indian reservation belonging to the Blackfeet Tribe.⁷² Under *Colville*, Blaze would not be per se exempt from paying taxes for the construction of roads in New Mexico.⁷³

Next the Supreme Court of New Mexico addressed the issue of whether the appellate court erred by deciding that the Indian preemption doctrine applied in *Blaze Construction Co.* In *United States v. New Mexico*, the U.S. Supreme Court held that the state may tax corporate or private entities who contract with the federal government.⁷⁴ The New Mexico Supreme Court found that Blaze Construction Co. contracted directly with BIA, an agency of the federal government, rather than with an Indian tribe or with individual tribal members.⁷⁵ Since Blaze contracted with a federal government agency rather than with Indian tribes or tribal members, the Indian preemption doctrine is inapplicable under *United States v. New Mexico*.⁷⁶ Indeed, the United States Supreme Court has only applied the Indian preemption doctrine when the contracts were made directly with the Indian tribes or tribal members.⁷⁷ Accordingly, Blaze should be subject to state taxes since Blaze contracted with a federal government contractor.⁷⁸

The court of appeals conceded that the BIA was a federal agency.⁷⁹ Nevertheless, the court of appeals felt that Indian preemption analysis applied because the agency had a special relationship with the Indian tribes and because the BIA was a partner in the tribes' performance of integral governmental functions.⁸⁰ However, the New Mexico Supreme Court was unpersuaded by the lower court's rationale for two reasons.⁸¹ First, in *United States v. New Mexico*, the Supreme Court held that the tax immunity would be applicable only if the tax fell on the United States itself or an agency "so closely connected to the Government that the two could not realistically be

70. *Id.*

71. *Blaze Construction Co. v. New Mexico Taxation & Revenue Dep't*, 884 P.2d 803, 804 (N.M. 1994), *cert. denied*, 115 S. Ct. 1359 (1995).

72. *Id.*

73. *Id.*

74. *United States v. New Mexico*, 455 U.S. 720, 734 (1982).

75. *Blaze Construction* 884 P.2d at 804.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Blaze Construction Co. v. New Mexico Taxation & Revenue Dep't*, 871 P.2d 1368, 1370 (N.M. Ct. App. 1993), *cert. granted*, 879 P.2d 1197 (N.M. 1993), *rev'd*, 884 P.2d 803 (N.M. 1994), *cert. denied*, 115 S. Ct. 1359 (1995).

80. *Id.*

81. *Blaze Construction* 884 P.2d at 804.

viewed as separate entities."⁸² This holding in essence prevented a state government from violating the immunity doctrine by directly taxing the federal government.⁸³ Yet, under *United States v. New Mexico*, allowing states to tax governmental contractors did not offend the traditional notion of governmental immunity.⁸⁴ Consequently, since Blaze contracted with a governmental agency, the state may tax Blaze without violating governmental tax immunities.⁸⁵

Second, the New Mexico Supreme Court felt that the BIA was not a partner or agent of an Indian tribe for purposes of entering into agreements with contractors to construct roads on Indian land.⁸⁶ The Court felt that the BIA and tribal governments have retained an element of sovereignty separate and distinct from the federal government.⁸⁷ For example, in *Bracker*, the United States Supreme Court acknowledged that while the tribes did not retain full attributes of sovereignty, the tribes have nonetheless retained the power to govern their own internal relations.⁸⁸ Thus, even though the BIA acted in its administrative capacity on the tribe's behalf, this action cannot be considered synonymous with an action of the tribe.⁸⁹ Therefore, the New Mexico Supreme Court held that the Indian preemption doctrine did not apply.⁹⁰

VII. Why the Preemption Doctrine Should Apply

The Supreme Court of the United States, by denying certiorari in *Blaze Construction Co.*, acknowledged the validity of the Supreme Court of New Mexico's decision not to apply the preemption doctrine when the BIA, instead of the tribe, is the main contractor. However, the New Mexico Supreme Court's holding is fundamentally flawed for several reasons. First, contrary to the New Mexico Supreme Court's allegations, the BIA and Indian tribes have maintained a special relationship unlike any other governmental agencies. Second, the *United States v. New Mexico* decision can be interpreted to take this special relationship into account. Third, the New Mexico Supreme Court's assertion that the only cases allowing preemption have been those where the contract is between the tribe and the contractor is true, only to the extent that the United States Supreme Court has never actually decided a case where the BIA was the main contractor. Finally, if the cases allowing for preemption

82. *United States v. New Mexico*, 455 U.S. 720, 735 (1982).

83. *Blaze Construction*, 884 P.2d at 804.

84. *Id.*

85. *Id.* at 806.

86. *Id.* at 805.

87. *Id.* (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141-42 (1980)).

88. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980).

89. *Blaze Construction*, 884 P.2d at 805.

90. *Id.* at 806.

were evaluated, the New Mexico Supreme Court would have seen that the similarities between those cases and *Blaze* are such that the distinction the court made would actually be irrelevant.

A. *The BIA and Indian Tribes*

The relationship between the Indian tribes and the United States is one that is patently different from the relationship between the states and the United States. The Commissioner of Indian Affairs, under the Direction of the Secretary of Interior, shall, according to 25 U.S.C. § 2, "have the management of all Indian affairs and of all matters arising out of Indian relations."⁹¹ In short, the Secretary of Interior is charged with the supervision of the public business relating to the Indians. Federal executive officers charged with these duties are only limited to the authority conferred on them by Congress in Indian matters.⁹²

Indeed, Congress has consistently passed broad federal statutory provisions regulating Indian affairs. Therefore, these federal officers have been left to create programs and initiate action to implement these provisions and other policy objectives.⁹³ Consequently, the federal executive officers' power has been broad because these officers are charged with formulating Indian policy on a day-by-day basis, and hence, these officers have become a policy organ unto themselves.

Matters that the BIA and Secretary of the Interior regulate are broad and diverse. For instance, no agreement shall be made by any person with any tribe concerning any matter unless certain statutory requirements are met and the Secretary of the Interior approves it.⁹⁴ Any agreement made between a party and a tribe is otherwise void.⁹⁵ On the other hand, states do not have departments governing every activity they undertake like the federal government. Some powers that states retain are inherently theirs without any federal governmental interference. Likewise, when the state contracts with a party, this contract does not need approval from the United States government or any of its departments nor are there any requirements on states to follow any set federal process or federal guidelines that indicate what constitutes a valid contract between the states and the party with whom they contracted. Accordingly, any contractual matter undertaken by a state falls within the legal domain of that state.

Indian tribes are dependents of the government of the United States, and their members are wards of the federal government.⁹⁶ The federal

91. 25 U.S.C. §§ 1, 2 (1994).

92. *Northern Arapaho Tribe v. Hodel*, 808 F. 2d 741, 748 (10th Cir. 1987).

93. *See generally* 25 U.S.C. §§ 1, 2 (1994).

94. *Id.* § 81.

95. *Id.*

96. *See generally* *United States v. Klamath & Moadoc Tribes*, 304 U.S. 119 (1938); *Jaybird*

government is under no obligation to continue perpetually the relationship of guardian and ward between itself and the Indians.⁹⁷ However, it is for Congress alone to say when and how the relationship shall terminate.⁹⁸ Moreover, if Congress does terminate its relationship with the tribe, the government's guardianship continues and cannot be terminated by the courts or the Indians.⁹⁹

The federal government's power over the Indians is derived in part from the necessity of giving uniform protection to a dependent people. Congress is free to exert its guardianship over Indians in any manner which it deems appropriate, and may adjust its action to new or changing conditions as long as no fundamental right is violated.¹⁰⁰ Congress has the full authority to pass such laws and authorize such measures as necessary to give Indians full protection in their persons and property and to protect the advancement of a tribe. This power to control and manage a tribe's affairs is subject to limitations inherent in a guardianship and to pertinent constitutional restrictions.¹⁰¹ Hence, Congress has the power or duty to Indians to preserve their dependent nations as a cohesive culture until such time as they can be assimilated in the mainstream of American culture so as not to be a people apart, and to protect their substantial resources.

B. Taxation and the United States v. New Mexico

The New Mexico Supreme Court stated that *United States v. New Mexico* only barred those federal agencies that could not be viewed as separate agencies from state taxation.¹⁰² This view, the New Mexico Supreme Court felt, would comport with the principal purpose of the immunity doctrine by not allowing states direct authority to lay taxes on the federal government.¹⁰³

Mining Co. v. Weir, 271 U.S. 609 (1926). However, this view has been supplanted by the idea that although wards of the federal government, the BIA should help the Tribes through the Self-Determination acts to become self-sufficient. See 25 U.S.C. §§ 450a, 450b (1994).

97. See *Cramer v. United States*, 261 U.S. 219, 232 (1923).

98. See *United States v. Ramsey*, 271 U.S. 467, 469 (1926).

99. See *Pourier v. Board of County Comm'rs*, 157 N.W.2d 532, 533 (1954).

100. Congress is bound by constitutional restrictions. See *United States v. Sioux Nations of Indians*, 448 U.S. 371, 411 (1980).

101. Tribes and individuals have invoked the First Amendment's guarantee of free exercise of religion. See *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 443 (1988). Moreover, tribes and individuals have invoked the equal protection clause and the due process clause principles to challenge governmental action that burdens rather than benefits Indians. See *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 467 (1979). Finally, tribes and individuals have invoked the Fifth Amendment takings clause to compensate and revoke any federal actions that may have infringed on tribal or individual land rights. See *Hodel v. Irving*, 481 U.S. 704, 710 (1987).

102. *Blaze Construction Co. v. New Mexico Taxation & Revenue Dep't*, 884 P.2d 803, 805 (N.M. 1994), cert. denied, 115 S. Ct. 1359 (1995).

103. *Id.*

The court felt that Blaze Construction Co. was separate from the government and could, therefore, be taxed.¹⁰⁴

The court erred in believing that the principles set forth in *United States v. New Mexico* should also be applied to the BIA and its contractors. The Supreme Court's ruling in *United States v. New Mexico* did not specifically address the BIA. Indeed, the BIA has been charged to work with Tribal entities.¹⁰⁵ Moreover, tribal entities always have been recognized as being inherently different from state governmental entities.¹⁰⁶

Furthermore, the BIA has exclusive control to regulate and promote development in Tribal entities.¹⁰⁷ However, the BIA has limited resources to achieve such goals. If contractors are taxed when they contract with the BIA, these contractors will include any expected tax costs in their bid prices, and the prices the BIA will have to pay will be higher. Therefore, the BIA will have less money to appropriate for other projects. Since the BIA is contracting on the behalf of tribes for purposes solely within tribal country and since any form of taxation by states on these projects will effect the amount of money the BIA has to appropriate elsewhere, state governments should not be able to tax that contractor.

C. The Applicable Preemption Cases

The New Mexico Supreme Court correctly recognized that the United State Supreme Court had only allowed preemption in cases where there had been a contract between the tribe and the contractor.¹⁰⁸ However, the New Mexico Supreme Court was wrong to conclude that this barred the application of preemption where the contract was directly between the BIA and the contractor. The United States Supreme Court has never directly ruled on whether preemption applies when the BIA contracts directly with a contractor. However, after closely examining *White Mountain Apache Tribe v. Bracker*¹⁰⁹ and *Ramah Navajo School Bd. v. Bureau of Revenue*¹¹⁰ — both of which held that the preemption doctrine should apply in cases where the tribe contracted with the contractor¹¹¹ — it will be clear that these cases are almost identical to *Blaze Construction Co.*

In *White Mountain Apache Tribe v. Bracker*, White Mountain Apache Tribe entered into a BIA approved agreement with Pinetop Logging Co., a

104. *Id.*

105. See generally 25 U.S.C. §§ 1, 2 (1994).

106. See *id.*; see also *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

107. See generally 25 U.S.C. §§ 1, 2 (1994).

108. *Blaze Construction Co. v. New Mexico Taxation & Revenue Dep't*, 884 P.2d 803, 805 (N.M. 1994), *cert. denied*, 115 S. Ct. 1359 (1995).

109. 448 U.S. 136 (1980).

110. 458 U.S. 832 (1982).

111. *Bracker*, 448 U.S. at 152; *Ramah*, 458 U.S. at 848.

non-Indian enterprise authorized to do business in Arizona. Pinetop Logging Co. harvested tribal timber on the Fort Apache Reservation and transported it to the tribal organization's sawmill. Pinetop's activities were performed solely on the reservation. The state, however, sought to impose Arizona's motor carrier license tax and its use fuel tax on Pinetop. The license tax was assessed on the basis of carrier's gross receipts and the diesel fuel tax was assessed on the amount of fuel used by a motor vehicle on any highway within the state. Pinetop protested the state asserted taxes but paid them nevertheless. Later, Pinetop brought suit in state court, asserting that the taxes could not be imposed on logging activities conducted exclusively within an Indian reservation or on hauling activities conducted on BIA or tribal roads. The trial court ruled in favor of the state and refused to use preemption analysis. The Arizona Court of Appeals affirmed the trial court's judgment.

In *Bracker*, the Court recognized that the federal and tribal interests arose from the broad power of Congress to regulate tribal affairs under the Indian Commerce Clause¹¹² and from the semiautonomous status of Indian tribes.¹¹³ These interests tend to erect two independent but related barriers to the exercise of state authority over commercial activity on an Indian reservation: states authority may be preempted by federal law, or it may interfere with the tribe's ability to exercise its sovereign functions.¹¹⁴ The two barriers, are independent because either can suffice in holding a state law inapplicable to activity undertaken on the reservation or by tribal members.¹¹⁵ However, the barriers are related because the right of tribal self-government is ultimately dependent upon and subject to the broad powers of Congress.¹¹⁶

Furthermore, the *Bracker* court held that preemption analysis in this area is not controlled by absolute conceptions of state or tribal sovereignty.¹¹⁷ Instead, preemption analysis requires a particularized examination of the relevant state, federal and tribal interests.¹¹⁸ Under the preemption analysis, the *Bracker* court felt that the traditional notions of tribal sovereignty and the recognition and encouragement of this sovereignty in Congressional acts tilted the preemption analysis in favor of the federal government's interests.¹¹⁹ The *Bracker* court stated that relevant federal statutes and treaties should be broadly examined in light of the policies that underlie them.¹²⁰ As a result, any ambiguities in federal law should be construed generously in favor of the

112. U.S. CONST. art. I, § 8, cl. 3.

113. *Bracker*, 448 U.S. at 142 (citing U.S. CONST. art. I, § 8, cl. 3).

114. *Id.*

115. *Id.* at 143.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 144.

120. *Id.*

federal government.¹²¹ Therefore, federal preemption should not be limited to those situations where Congress has explicitly announced an intention to preempt state activity.¹²²

In *Bracker*, the court applied these principles and held that federal law preempted application of the state motor carrier license and use fuel taxes to a non-Indian logging company's activity on tribal land.¹²³ The court stated that the federal regulatory scheme was so pervasive that it precluded the imposition of additional burdens by the relevant state taxes.¹²⁴ The Secretary of the Interior had promulgated detailed regulations for developing "Indian forests by the Indian people for the purpose of promoting self-sustaining communities."¹²⁵

Under these regulations, the BIA was involved in virtually every aspect of the production and marketing of Indian timber.¹²⁶ In particular, the Secretary of Interior and the BIA extensively regulated the contractual relationship between the Indians and non-Indians working on the reservation.¹²⁷ Moreover, the BIA established the bidding procedure, set mandatory terms to be included in every contract, and required that the Secretary of Interior approve all contracts.¹²⁸ The record showed that some of those contracts were drafted by employees of the federal government.¹²⁹

The BIA also decided such matters as how much timber would be cut, which timber would be cut, which hauling equipment Pinetop should use, the speeds at which logging equipment could travel, and the width, length, height, and weight of loads.¹³⁰ Furthermore, the Secretary also administered detailed regulations governing the roads developed by the BIA.¹³¹ Moreover, bureau roads were open for free public use and were administered, maintained, and funded by the federal government, with contributions from the Indian tribes.¹³² Consequently, the *Bracker* court found that the state taxes in question would "threaten the overriding federal objective of guaranteeing Indians that they will 'receive . . . the benefit of whatever profit [the forest] is capable of yielding.'"¹³³

121. *Id.*

122. *Id.*

123. *Id.* at 152-53.

124. *Id.* at 148.

125. *Id.* at 147.

126. *Id.*

127. *Id.*

128. *Id.* at 147.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 148.

133. *Id.* at 149.

The court felt that the imposition of state taxes would first undermine the Secretary's ability to carry out his obligations to set fees for the harvesting and sale of the timber and second would impede the "tribe's ability to comply with the substantial-yield management policies imposed by federal law."¹³⁴ Since the state only asserted that the tax was assessed as a means to raise revenue, the *Bracker* court decided that the state's interest was insufficient to justify the state's intrusion into a field which was heavily regulated by the federal government.¹³⁵

The preemption principles of *Bracker* were reaffirmed in *Ramah Navajo School Board, Inc. v. Bureau of Revenue*.¹³⁶ In *Ramah*, the United States Supreme Court held that federal law preempted New Mexico's attempt to impose a gross receipts tax on a non-Indian construction company involved in the construction of a school for Indian children on the Navajo Reservation.¹³⁷ The Navajo tribal organization contracted with the BIA for the construction of the new school, and the tribe then subcontracted, subject to the BIA approval, with a non-Indian construction company that did business both on and off the reservation.

The Court relied on several congressional statutes that authorized the BIA to provide for Indian education,¹³⁸ including the Snyder Act,¹³⁹ the Johnson-O'Malley Act,¹⁴⁰ and the Indian Self-Determination and Education Assistance Act.¹⁴¹ The *Ramah* Court noted that federal educational policies had shifted toward encouraging Indian-controlled educational institutions on the reservation as reflected in the Indian Self-Determination and Educational Assistance Act of 1975.¹⁴² Accordingly, the Secretary of the Interior authorized the construction of schools on tribal land. The Court held that the burden of the state tax, "although nominally falling on the non-Indian contractor, necessarily impedes the clearly expressed federal interest in promoting the 'quality and quantity' of education opportunities for Indians for depleting the funds available for the construction of Indian schools."¹⁴³

In *Blaze Construction Co.*, the roads were built on right-of-ways provided by each tribe and built pursuant to the Federal Lands Highway Program.¹⁴⁴ This program was designed to establish a coordinated federal lands highways program which would consist of the public lands highways, park roads,

134. *Id.* at 149-50.

135. *Id.* at 150.

136. 458 U.S. 832 (1982).

137. *Id.* at 848.

138. *Id.* at 840.

139. 25 U.S.C. 13 (1994).

140. 25 U.S.C. §§ 452-456 (1994).

141. 25 U.S.C. §§ 450, 455-458 (1994).

142. *Ramah*, 458 U.S. at 842 (citing 25 U.S.C. §§ 450, 455-458).

143. *Id.* at 844.

144. 23 U.S.C. §§ 204 (1994).

parkways, and Indian reservation roads.¹⁴⁵ Funds available for these areas were for the Secretary of the Interior's use to pay for costs of construction and improvement of those roads. The Secretary of the Interior was allowed to enter into construction contracts and such other contracts with a state or municipality or an Indian tribe.¹⁴⁶ In the case of Indian tribes, Indian labor could be employed in the construction, improvement, and maintenance of any proscribed roads.¹⁴⁷ Moreover, funds from the BIA could be reserved to help in the technical training of Indians for Indian tribal roads.¹⁴⁸

Furthermore, this program followed the goals of the Indian Self-Determination Act.¹⁴⁹ This program has sought to develop leadership skills crucial to the development and realization of self-government and give the Indian people an effective voice in planning and implementation of programs for the benefit of Indians which are responsive to the true needs of the community.¹⁵⁰ In *Blaze Construction Co.*, each tribe planned the roads, provided materials for the builder, and provided the work force. Furthermore, many people of each tribe were trained for specific jobs. This program employed natives in meaningful job which established a good work ethic and leadership skills among those who worked. What if this program had allowed the Indian tribes to contract but nothing else? Preemption analysis would apply and *Blaze Construction Co.* would not have to pay taxes. Yet under this scenario, Indian tribes would have had no opportunity to participate or control any of the programs. The state of New Mexico, on the other hand, did not help plan or regulate any of these highway projects nor did the state license *Blaze* as a construction contractor. Moreover, the state did not assume any responsibilities for these roads after they were built. Consequently, the state of New Mexico could not validly assert any interest in the tribal roads.

In *Blaze Construction Co.*, the state was allowed to tax the company solely because the federal government contracted with *Blaze*. Indeed, under established case law if the tribe would have contracted with *Blaze*, preemption analysis would apply and the state would not be allowed to tax *Blaze*. As a result, *Blaze* was penalized for using the BIA as a middleman. Ironically, the federal government, when it allowed the tribes to contract, exercised as much control in *Bracker* and *Ramah* as it did in *Blaze Construction Co.*

In *Bracker*, the Secretary of the Interior set detailed regulations for harvesting timber. Indeed, the BIA established the bidding procedure, set

145. *Id.* § 204a.

146. *Id.* §§ 204c, 204d.

147. *Id.* § 204b.

148. *Id.* § 204b.

149. Title 23 U.S.C. § 204b authorized local Indian labor to be used for the projects. *Id.* § 204b. Title 23 U.S.C. § 204j authorized the Indian Tribal government, under the Indian Self-Determination and Educational Assistance Act, to develop a transportation improvement program in cooperation with the BIA (all matters were subject to the approval of the BIA). *Id.* § 204j.

150. Indian Self-Determination Act, 25 U.S.C. §§ 450a, 450b (1994).

mandatory terms in each contract, and required all contracts to be approved by the Secretary of Interior. Moreover, the BIA determined what timber would be cut, which hauling equipment would be used, the width, length, and height of loads, and the weight of loads. Furthermore, BIA set extensive regulations for the use and development of tribal roads. Consequently, the tribe in *Bracker* had less control over the operations than did the Indian tribes in *Blaze Construction Co.*,¹⁵¹ yet the company in *Bracker* could not be taxed while *Blaze Construction Co.* could be taxed.

The only distinction that can be drawn between the *Bracker* and *Blaze Construction Co.* is that the taxation in *Bracker* would deprive Indian tribes of profits,¹⁵² whereas, in *Blaze Construction Co.*, the taxation would deprive the government of additional money to build more roads.¹⁵³ Under either scenario, however, tribes would be deprived of additional funds for improving their communities. Hence, either type of deprivation would hamper the federal government's quest for tribal growth and tribal self-sufficiency.

In *Ramah*, the Navajo tribal organization contracted with the BIA for the construction of a new school, and the tribe then subcontracted, subject to the BIA approval, with a non-Indian construction company. The Court relied on several Congressional Statutes as well as the Indian Self-Determination Act and concluded that federal policies shifted toward Indian-controlled educational facilities. Furthermore, the tribe had been diligently working to receive federal funding for their school for a number of years. Consequently, the *Ramah* Court held that federal preemption applied and the contractor did not have to pay taxes. In either *Ramah* or *Blaze Construction Co.*, if a state was permitted to tax the contractor, then the contractor would place the taxation costs into the building price costing the federal government more and leaving less funds to be allocated to Indian tribes. Indeed, *Ramah* and *Blaze Construction Co.* are analytically similar in every way except for who hired the contractor.

VIII. Conclusion

If the BIA in either *Ramah* or *Bracker* had contracted on behalf of the tribes, then under *Blaze Construction Co.*, the preemption doctrine would not

151. The Indian tribes in *Blaze Construction Co.* were actively involved in the highway projects. First, the tribes granted right of ways. Second, the tribes and pueblos planned each road across tribal land. Third, the tribes provided the water and base materials needed for the construction project. Fourth, each tribe provided the services of a labor officer to give *Blaze* a pool of workers from which to draw. Finally, *Blaze* was required to hire workers from the reservation on which it was working. *Blaze Construction Co. v. New Mexico Taxation & Revenue Dep't*, 884 P.2d 803, 805 (N.M. 1994), *cert. denied*, 115 S. Ct. 1359 (1995).

152. Taxation of the tribe's enterprise would reduce the profits the tribe obtained from its forest management operations. *Apache Tribe v. Bracker*, 448 U.S. 136, 152 (1979).

153. The contractor would build the additional taxation costs into the bidding price. Consequently, the BIA would have fewer funds to spend on additional road projects.

have applied and both companies could have been taxed by the state. To ensure that this problem does not reoccur, the BIA should allow the tribes to make the contractual decision. However, this seems foolhardy when, as in *Blaze Construction Co.*, the tribe had more control over the project than the tribe had in *Bracker*. Future courts should take notice of the analytical flaw set forth in *Blaze Construction Co.* and not allow such precedent to stand.