

**CONSTRUCTION ON INDIAN RESERVATIONS:  
Watch Out For The State Tax And The Tribal Tax**

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A. *Both State and Tribal Taxes May Apply.*

There are some 22 Indian tribes in Arizona, and Indian reservations and tribal communities comprise over a quarter of Arizona's lands.<sup>1</sup> Many of these Indian communities are located in or near urban areas (Phoenix and Tucson). As a result, a significant amount of construction activity in Arizona takes place on Indian lands.

Contractors performing services in "Indian country"<sup>2</sup> are faced with the somewhat daunting dilemma of determining what tax laws apply--those of the state, the Indian tribe,<sup>3</sup> or both. Indian tribes and states have been recognized as having concurrent taxing authority over non-Indian transactions on Indian reservations, unless the state tax is preempted by federal law or interferes with the tribe's ability to govern itself. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 188-189 (1989); *Washington v. Confederated Trading of the Colville Reservation*, 447 U.S. 134 (1980); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-143 (1980). Thus, in some situations, a contractor performing services on an Indian reservation may be subject to *both* state and tribal taxes.

Contractors should undertake a careful analysis of what tax laws apply *before* bidding on a project in Indian country, to ensure the bid includes the appropriate taxes, or prior to commencing construction under a non-bid contract. This analysis involves two separate questions: does the Arizona transaction privilege tax apply, and does a tribal tax apply?

B. *Does The State Tax Apply?*

1. *State Tax Applies Unless Preempted By Federal Law.*

Historically, the U.S. Supreme Court held that states had no jurisdiction within the territory of an Indian tribe. *Worcester v. Georgia*, 31 U.S. 515 (1832). Though Indian tribes are still treated as "sovereign" entities under federal law, the U.S. Supreme Court "long ago" departed from the view that "'the laws of [a State] can have no force' within reservation boundaries." *White Mountain Apache Tribe*, 448 U.S. at 141 (1980) (quoting *Worcester*, 31 U.S. at 520); *Nevada v. Hicks*, 533 U.S. 353, 361 (U.S. 2001). Even so, states do not enjoy the same degree of regulatory authority within a reservation as they do without: "The principle that Indians have the right to make their own laws and be governed by them requires 'an

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<sup>1</sup> See Arizona Commission of Indian Affairs, *Tribes of Arizona--FAQ*, <http://www.indianaffairs.state.az.us/tribes/index.html>; University of Arizona Economic Development Research Program, *Arizona's Native American Tribes*, <http://ag.arizona.edu/edrp/tribes.html>.

<sup>2</sup> The term "Indian country" is defined by federal law to include Indian reservations, Indian allotments, and dependent Indian communities. See 18 U.S.C. § 1151 ("Indian country defined"); *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, \_\_\_ U.S. \_\_\_, 125 S.Ct. 1478, 1488 n.5 (Mar. 29, 2005); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 453 & n.2 (1995). In this article, the terms "Indian country" and "Indian reservation" are used interchangeably.

<sup>3</sup> While recognizing that there are significant cultural and historical differences between the various types of Indian communities, the term "Indian tribe" is used throughout this article to refer collectively to Indian nations, communities, tribes, and bands of Indian tribes, unless referring to a specific community.

accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other.” *Nevada v. Hicks*, 533 U.S. at 362 (quoting *Colville*, 447 U.S. at 156). Thus, state tax will apply unless the federal government has expressly prohibited state taxation or the state tax would unduly interfere with significant federal and tribal interests. *Cotton Petroleum*, 490 U.S. at 188-189. There are several situations where the state tax may be preempted by federal law.

2. *Construction Company is Owned by Tribe or Enrolled Member of Tribe and Services are Performed on the Reservation -- State Tax Does Not Apply.*

The preemption principle is strongest where a state tax is imposed on activities on an Indian reservation performed by the Indian tribe or enrolled members of the tribe: “When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the state’s regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest.” *White Mountain Apache Tribe*, 448 U.S. at 144.

Transaction Privilege Tax Ruling 95-11, which details the Arizona Department of Revenue’s position on the taxability of construction work performed on an Indian reservation, recognizes that Arizona tax does not apply to work performed on an Indian reservation by the Indian tribe, a tribally-owned enterprise, or an enrolled member of that Indian tribe:

Arizona’s transaction privilege tax does not apply to business activities performed by businesses owned by an Indian tribe, a tribal entity or an individual tribal member if the business activity takes place on the reservation which was established for the benefit of the tribe.

...

The gross proceeds derived from contracting activities performed on a reservation by the Indian tribe, a tribal entity or an affiliated Indian are not subject to Arizona’s transaction privilege tax.

TPR 95-11 §§ I.A, C.

3. *Non-Indian Contractor Provides Services on the Reservation for Indian Tribe or Enrolled Members of Tribe (Ramah Case) -- State Tax Does Not Apply.*

Most litigation dealing with construction contracts in Indian country concern taxes imposed upon non-Indian contractors or, more broadly, nonmembers of the Indian tribe. Such taxes are generally preempted when the contractor is performing services on a reservation directly for the Indian tribe, a tribally-owned business, or enrolled members of the tribe.

In *White Mountain Apache Tribe v. Bracker*, *supra*, the U.S. Supreme Court struck down the application of Arizona’s motor carrier license tax and use fuel tax on a non-Indian enterprise cutting timber on a reservation and delivering it to a sawmill owned by a tribal

enterprise. The taxes were held to be preempted because (1) the economic burden of the asserted taxes would ultimately fall on the Indian tribe, (2) the federal government has undertaken comprehensive regulation of the harvesting and sale of tribal timber, and (3) the activity that would be subject to tax was conducted solely on federal and tribal roads within the reservation. 448 U.S. at 151.

Two years after the *White Mountain Apache* case, in *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982), the Supreme Court held that states are preempted from imposing tax on contracting receipts for work performed on an Indian Reservation for an Indian tribe or tribal enterprise.

The *Ramah* case involved the State of New Mexico's attempt to impose its gross receipts tax on the proceeds from the construction of a school built on the Navajo Indian reservation by a local school board which had been formed by the Ramah Navajo Chapter. The Supreme Court found that federal regulation of the construction and financing of Indian educational institutions was "both comprehensive and pervasive" and ruled that this detailed regulatory scheme over schools controlled and operated by tribes or tribally approved Indian organizations left no room for the additional burden sought to be imposed by the State of New Mexico through its taxation of the gross receipts paid to the contractor by the school board. 458 U.S. at 841-42.

Arizona's regulation, A.A.C. R15-5-620 (withdrawn), which had indicated that receipts from contracting by non-Indians on an Indian reservation were taxable, was voided by the *Ramah* decision. TPR 95-11 (the Department's ruling dealing with state taxation of activities conducted on Indian reservations) provides that Arizona tax does not apply to construction projects performed on an Indian reservation for the Indian tribe or an enrolled member of the Indian tribe:

The gross proceeds derived from construction projects performed on Indian reservations by non-affiliated Indian or non-Indian prime contractors are not subject to the imposition of Arizona transaction privilege tax under the following conditions:

1. The activity is performed for the tribe or a tribal entity for which the reservation was established; or
2. The activity is performed for an individual Indian who is a member of the tribe for which the reservation was established.

Under *Ramah* and TPR 95-11, in order to be exempt from paying Arizona tax on a construction contract for work performed on the reservation, the contract must be with the Indian tribe, a tribal entity, or an enrolled member of the tribe. As illustrated by the two cases discussed below (*Greenberg* and *Blaze*), if the contract is with a federal or state agency, the proceeds will be subject to state taxation even though the ultimate beneficiary(ies) of the project may be the Indian tribe or tribal members.

4. *Non-Indian Contractor Performs Services on the Reservation for State School District (Greenberg Case) -- State Tax Applies.*

In *Dep't of Revenue v. M. Greenberg Constr.*, 182 Ariz. 397, 897 P.2d 699 (Ct. App. 1995), the Arizona Court of Appeals held that construction contracts with Arizona school districts where the work was on the reservation were taxable and that *Ramah* did not apply. Greenberg Construction did construction work on the Navajo Indian Reservation. It had contracts with the Ganado School District and the Chinle School District. The Department of Revenue assessed sales taxes under the contracting classification on Greenberg's from those school district projects. Greenberg argued that the state was preempted by federal law from imposing sales tax on its construction because it was doing work on the Indian reservation. Greenberg relied upon the United States Supreme Court's *Ramah* decision, which struck down the New Mexico sales tax on a contractor's from construction work done for the Ramah Navajo School Board.

In *Greenberg*, the Arizona Department of Revenue took the position that *Ramah* did not apply because the contracts in the Greenberg case were with the Ganado and Chinle school districts, which are political subdivisions of the state of Arizona and are not part of the Navajo tribal government. The contracting school district in the *Ramah* case was formed by the Ramah Navajo Chapter as a nonprofit corporation under Navajo law. The Department in *Greenberg* was making a fine distinction but the Arizona Court of Appeals agreed and upheld the Arizona contracting tax.

According to *Greenberg*, construction work will be subject to the Arizona sales tax unless the contract is with the Indian tribe or an agency of the tribe. If it is with an Arizona school district, even though the work is done on the Indian reservation and for the benefit of the tribe of tribal members, the *Greenberg* decision concludes that such work is taxable.

Greenberg Construction filed a petition for review on February 17, 1995. The Arizona Supreme Court denied the petition for review on June 29, 1995. Greenberg did not file a petition for certiorari with the United States Supreme Court.

The holding of *Greenburg* was reaffirmed and expanded in *Flintco Inc. v. Dep't of Revenue*, Arizona Board of Tax Appeals, No. 1801-99-S (Oct. 19, 1999). In *Flintco*, the Board held that construction contracts entered into by a Cherokee Nation prime contractor (considered the non-member Indian) with the Tuba City Unified School District, a political subdivision of Arizona located on the Navajo Nation, were not exempt from taxation under the preemption doctrine even though, unlike *Greenburg*, the contractor was an Indian owned contractor. The board found the two circumstances indistinguishable for purposes of taxation as a prime contractor.

5. *Non-Indian Contractor Performs Services on the Reservation for Bureau of Indian Affairs (Blaze Case) -- State Tax Applies.*

a) *The New Mexico Case.*

*Blaze Constr. Co. v. New Mexico Taxation & Revenue Dep't*, 118 N.M. 647, 884 P.2d 803 (1994), *cert. denied*, 514 U.S. 1016 (1995), involved contracts entered

into by Blaze Construction with the BIA for construction work on Indian reservations located in New Mexico. The New Mexico Taxation & Revenue Department took the position that those contracts, since they were with the BIA and not directly with an Indian tribe or an agency thereof, were taxable, not falling under the preemption doctrine of the *Ramah* case. The New Mexico Court of Appeals held that the BIA contracts were not taxable but the New Mexico Supreme Court reversed, concluding that they were taxable. The United States Supreme Court denied certiorari, meaning that the New Mexico Supreme Court decision stands as the law, at least in New Mexico.

b) *The Arizona Case—Board of Tax Appeals and Tax Court.*

To add confusion to this subject, Blaze Construction was involved in a similar case in Arizona. The Arizona Department of Revenue, like its counterpart in New Mexico, took the position that Blaze's contracts with the BIA (this time for road building work on Indian reservations in Arizona) were taxable. Blaze Construction appealed and received a favorable decision from the Arizona Board of Tax Appeals in *Blaze Constr. Co. v. Dep't of Revenue*, Arizona Board of Tax Appeals, No. 950-92-S (July 18, 1994). Issued in July 1994, the Arizona *Blaze* decision was issued after the New Mexico appeals court decision, but before the New Mexico Supreme Court decision, which was released on October 18, 1994. The Arizona Department of Revenue appealed the Board of Tax Appeals decision to the Arizona Tax Court. The Tax Court overturned the Board's decision and held for the Department.

c) *The Blaze Court of Appeals Case.*

Blaze appealed the tax court's decision to the Arizona Court of Appeals. The court of appeals reversed the tax court and held that Blaze's construction projects on an Indian reservation, where the contract was with BIA, were not subject to the Arizona sales tax. *Dep't of Revenue v. Blaze Constr. Co.*, 190 Ariz. 262, 947 P.2d 836 (Ct. App. 1997). The court concluded that the principles of Indian law preemption analysis applied even though Blaze's contracts for on-reservation road improvements were with the BIA rather than with the affected tribes and that those preemption principles required the court to conclude that the imposition of Arizona's contract and privilege tax on Blaze was impliedly preempted by federal law and therefore had no legal effect.

d) *The United States Supreme Court Decision -- Taxable.*

In *Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32 (1999), the Supreme Court reversed the Arizona Court of Appeals decision, holding that construction contracts with the BIA for construction on an Indian reservation are subject to the Arizona transaction privilege tax under the prime contracting classification. The Supreme Court reversed the Arizona Court of Appeals relying upon the rule in *United States v. New Mexico*, 455 U.S. 720 (1982), which generally permits state taxation of federal contractors, in the absence of express action by Congress to exempt the transaction, even though the contractor's services are performed on an Indian reservation. The United States Supreme Court concluded that governmental tax immunity is appropriate only when the levy falls on the United States itself, or on its agency or closely connected instrumentality. This immunity can be expanded only if Congress especially provides for an exemption. The Arizona transaction privilege tax under the

prime contracting classification fell on Blaze Construction, and not on the BIA (a federal agency). Since Blaze was not an agency or instrumentality of the federal government and since Congress has not exempted these contracts from taxation, the United States Supreme Court held that Blaze’s construction contracts with the BIA were taxable.

The Court also noted that it would confuse such a clear rule to impose an interest-balancing test, which Blaze had asked for, in such situations. Normally, an interest balancing test is applied when the tax affects an Indian tribe, with the interest of the state in asserting the tax being balanced against the interests of the Indian tribe and its sovereignty. The Court did not view this as a preemption analysis because the contract was not imposed upon the United States government or an agency or instrumentality of the federal government and, under *United States v. New Mexico*, the rule of taxation in such circumstances is clear.

TPR 95-11 confirms the Arizona Department of Revenue’s position that “[t]he gross proceeds derived from construction projects performed on Indian reservations by non-affiliated Indian and non-Indian prime contractors for all other persons, *including the federal government*, are subject to the imposition of Arizona transaction privilege tax” (emphasis added).

6. *Summary of State Taxation on Indian Reservations.*

The state tax consequences of construction work in Indian country is summarized in the following chart:

<b>Contractor</b>	<b>Contracting Party</b>	<b>Arizona Transaction Privilege Tax Result</b>	<b>Case</b>
Indian Tribe, Tribal Entity or Enrolled Member of Indian Tribe (Affiliated Indian)	Anyone	Not Taxable	<i>White Mountain Apache</i>
Nonmember (Non-Indian or non-affiliated Indian)	Indian Tribe, Tribal Entity, or Affiliated Indian	Not Taxable	<i>Ramah</i>
	State School District	Taxable	<i>Greenberg Construction</i>
	Bureau of Indian Affairs	Taxable	<i>Blaze Construction</i>

C. *Does Tribal Tax Apply?*

Independent of whether a contractor performing work on an Indian reservation is subject to the Arizona sales tax, the contractor may be subject to a tax imposed by the Indian tribe. The U.S. Supreme Court has made it abundantly clear that Indian tribes have the authority to levy taxes on activities that take place on the reservation and to impose tax on non-Indians. *See, e.g.,*

*Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985); *Arizona Public Service v. Aspaas*, 77 F.3d 1128 (9th Cir. 1995). This power is derived from an Indian tribe's general authority, as a sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982). In recent years there has been a steady increase in the number of Indian tribes that impose taxes on non-Indian businesses.

1. *Has the Tribe Passed a Tax Ordinance?*

The first step in determining whether a project in Indian country is subject to tribal tax is to find out whether the tribe has been authorized by its constitution, charter, or other governing instrument to impose taxes and whether the tribe has passed a tax ordinance pursuant to such authority. The best way to determine whether a particular Indian tribe has a tax ordinance in place is to contact the Indian tribe itself. The Arizona Commission of Indian Affairs maintains a list of Indian tribes in Arizona, with contact information for each tribe, at <http://www.indianaffairs.state.az.us/tribes/tribes.html>.

Some information on tribal codes and tax rules may be obtained from the Web, but the extent of online resources vary greatly from tribe to tribe. There are increasing efforts to digitize tribal codes and make them available online. The National Indian Law Library, a service of the Native American Rights Fund, maintains a listing of all federally-recognized tribes with links to each tribe's constitution and code (if available electronically), information on where print copies may be obtained, and a link to the tribe's Website (if the tribe has one). This resource is available at <http://www.narf.org/nill/tlpmain.htm>.

The National Tribal Justice Resource Center also maintains electronic copies of selected tribal codes at <http://www.tribalresourcecenter.org/tribalcourts/codes/codesdirectory.asp>. The directory includes tribal codes for a few tribes in Arizona, including the Fort McDowell Yavapai Community, the Hopi Indian Tribe, and the White Mountain Apache Tribe (only the latter appears to have enacted a tax code).

The Navajo Nation Tax Commission's Website, [www.navajotax.org](http://www.navajotax.org), includes links to the Navajo Nation tax code, regulations, rulings, forms, and a number of other resources.

2. *Does the Tribal Tax Apply to Contracting?*

Assuming that the Indian tribe has enacted a tax code, the next step is to determine whether the tax applies to contracting activities. Below are two examples of tribal taxes that apply to contracting services performed within the Indian nation or community.

a) *Example 1: The Navajo Nation Business Activity Tax.*

The Navajo Nation Business Activity Tax (BAT) is imposed on the net source gains (gross receipts less deductions) from the sale of Navajo goods *or services*, with the legal incidence of the tax on the party receiving the gross receipts. Navajo Tax Code §§ 402, 404. Navajo goods are all goods produced, processed or extracted within the Navajo Nation. Navajo services are all services performed within the Navajo Nation. Navajo Tax Code § 404(c), (d).

The BAT rate is 3% for construction activity and 5% for all other activity. Navajo Tax Code § 406, BAT Regs. § 1.406.

The Navajo Nation tax statutes and regulations are available online at <http://www.navajotax.org>. Copies of the BAT statutes and regulations are attached hereto.

b) *Example 2: Salt River Pima Privilege License Tax.*

The Salt River Pima-Maricopa Indian Community imposes a privilege license tax on business activities, including contracting, conducted within the Community. Salt River Pima-Maricopa Indian Community Code §§ 15-51, 15-52. As with the Arizona transaction privilege tax on contracting, there is a 35% labor deduction, and subcontractors are exempt from the tax if they can establish that the job was within the control of a prime contractor. Code § 15-52(a)(4). The general tax rate for contracting is 1.65%. Code § 15-52(a). The tax rate for sales or services to nonmembers by any division of the Community or any member of the Community engaged in business within the Community is 7.95%. Code § 15-52(b) (the reason for the higher rate is because these transactions are exempt from state taxation). A copy of the Community's Privilege License and Use Tax Code is attached hereto.

c) *Example 3: Gila River Business License Tax.*

The Gila River Indian Community imposes a license privilege tax on business transacted by persons on account of their activities on the Reservation. Gila River Indian Community Law and Order Code, Title 13 (Business Licenses and Taxation), Chapter 3 (Imposition of Privilege Taxes) (flush language). The tax applies to the gross proceeds from construction contracts for construction on the Reservation of any person engaged in business as a construction contractor (the definition of that term is the same as in the Arizona statutes), and the Code provides for the 35% standard labor deduction. Code § 13.311(A) (Construction contracting). Subcontractors are not subject to tax if they obtain a written declaration that the construction contractor is liable for the tax for the project. Code § 13.311(B)(1). There is also an exemption for construction contracts for nontransient residential property to be occupied by permanent residents of the Reservation. Code § 13.311(B)(2). Finally, if the project is subject to the Arizona transaction privilege tax, a deduction equal to 75% of the gross proceeds may be taken when computing the Gila River tax liability; however, this deduction only applies where the contract is between the contractor and a tenant in areas designated by the Community for the promotion of economic development. Code § 13.311(C).

3. *Is the Project Located on Indian Lands?*

The final step to determine whether tribal tax applies is to confirm that the construction project is fact on land that is part of the Indian reservation or community.

A tribe's power to tax non-Indian business activity is not confined to its reservation, but also extends to trust allotments of tribal members, which are considered part of Indian country. *Mustang Production Co. v. Harrison*, 94 F.3d 1382 (10th cir. 1996), *cert. den.*, 117 S.Ct. 1288 (1997) (tribe may impose a severance tax on non-Indian oil and gas producers operating on trust allotments outside of the tribe's reservation). However, except in limited circumstances, a tribe's

authority to tax generally does not extend to non-Indian fee land, even if that land is within the exterior boundaries of the reservation.

In *Montana v. United States*, 450 U.S. 544, 565 (1981), the Court held that with limited exceptions, Indian tribes lack civil authority (including taxing authority) over the conduct of persons who are not tribal members (nonmembers) on non-Indian fee lands. The two exceptions set forth by the Court in *Montana* are that (1) a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships, through commercial dealings, contracts, leases, or other arrangements, with the tribe or its members; and (2) a tribe may exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the tribe's political integrity, economic security, or health or welfare. 450 U.S. at 565-566. The *Montana* rule applies to a tribe's regulatory authority, *Id.* at 566, and adjudicatory authority (jurisdiction of tribal courts), *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997).

In *Atkinson Trading Company, Inc. v. Shirley*, 532 U.S. 645 (2001), the Supreme Court examined whether the Navajo Nation had the authority to impose its Hotel Occupancy Tax on a hotel located on fee land situated within the exterior boundaries of the Navajo Reservation (the hotel, owned by Atkinson Trading Company, is part of the Cameron Trading Post, located on U.S. Highway 89 near the junction with Arizona Highway 64 which leads to the Grand Canyon). Because Congress had not authorized the tax at issue through treaty or statute, and because the incidence of the tax falls upon nonmembers on non-Indian fee land, the Court ruled that the Navajo Nation must establish the existence of one of *Montana's* exceptions. 532 U.S. at 654. The Court concluded that neither of the *Montana* exceptions applied and the Navajo Nation therefore did not have the authority to impose the tax. 532 U.S. at 659.

With respect to the first exception (consensual relationships), the Court explained that the consensual relationship must stem from "commercial dealing, contracts, leases, or other arrangements" with the tribe, and a nonmember's actual or potential receipt of tribal services (such as police, fire, and medical services) does not create the requisite connection. 532 U.S. at 655 (citing *Montana*, 450 U.S. at 565). The Court further held that Atkinson had not consented to the tax by becoming an "Indian trader," as argued by the Navajo Nation, explaining that a nonmember's consensual relationship in one area does not trigger tribal civil authority in another. 532 U.S. at 656. The Court elaborated on this part of its ruling, stating that the hotel occupancy tax at issue in the case is grounded in Atkinson's relationship with its nonmember hotel guests, who could reach the Cameron Trading Post on a U.S. highway (U.S. Highway 89) and a state highway (Arizona Highway 64), which are non-Indian public rights-of-way.

With respect to *Montana's* second exception, the Court "fail[ed] to see how petitioner's operation of a hotel on non-Indian fee land 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'" 532 U.S. at 657 (quoting *Montana*, 450 U.S. at 566 n12). The Court explained that "[w]hatever effect petitioner's operation of the Cameron Trading Post might have upon surrounding Navajo land, it does not endanger the Navajo Nation's political integrity," and pointed to an earlier Supreme Court case holding that the impact of the nonmember's conduct "must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe." 532

U.S. at 659 (quoting *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 431 (1989) (opinion of White, J.)).

Following the Court's decision in *Atkinson*, it would appear that Indian tribes would not have jurisdiction to impose tax on the proceeds of construction projects on non-Indian fee land, even if that land is situated within the exterior boundaries of the Indian reservation, unless the tribe could establish that (1) the project stemmed from a direct consensual relationship between the contractor and the Indian tribe, or (2) the activity would have some demonstrably serious effect on or in some way imperil the political integrity, the economic security, or the health and welfare of the tribe.

Non-Indian businesses bringing suit in federal court to challenge a tribe's taxing authority regularly have been required first to exhaust tribal court remedies. *See, e.g., Reservation Telephone Coop. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 76 F. 3d 181 (8th cir. 1996). Exhaustion has been required even when the business is challenging a tribe's attempt to tax an off-reservation business activity. *See, e.g., Atkinson Trading Co. v. Navajo Nation*, 866 F.Supp. 506, 507, 512-13 (D.N.M. 1994) (requiring *Atkinson* to exhaust its remedies in the tribal system before bringing suit in federal court); *Texaco, Inc. v. Half*, 81 F.3d 934 (10th cir. 1996).