TRIBAL LAW

TRIBAL–STATE/MUNICIPAL INTERGOVERNMENTAL AGREEMENTS ON TAXATION

A TRIBAL COUNSEL'S PERSPECTIVE

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I. OVERVIEW – THE PROBLEM AND ROLE OF TAX AGREEMENTS

A. The Complexity of Applicable Law.

Although an extensive body of law concerning tribal and state taxing authority and the jurisdictional conflicts that arise out of differing interpretations of such authority has developed over time, there remain many grey areas when bright line principles meet unique and complex fact patterns. Application of the relevant legal principles involves questions concerning the legal status of lands involved,[1] upon whom the legal incidence of the tax rests,[2] and the nature and situs of a particular transaction,[3] among many others. The case law has identified and articulated the operative legal principles, but their application in the real world leaves much room for dispute.[4]

One way in which the parties may seek to clarify such matters is through additional litigation. A potentially more productive approach is through the negotiation of an intergovernmental tax agreement.

B. Tribal-State relations.

Disputes between and among tribes, states and their subdivisions do not arise in a vacuum. They are part of the overall tribal-state relationship. Some tribes and states have developed strong intergovernmental relationships and have found ways to resolve their conflicts, others have not been as successful with those pursuits.

Conflicts over taxation can throw fuel on a fire of a bad tribal-state relationship, and can threaten a good one. Matters of principle as well as politics may be involved. Although both parties are entitled to assert their rights and immunities within the legal system, fighting out a particular dispute until there is a winner and loser is not without consequences. As the governmental and commercial interests of tribes and states become more interconnected through economic activities associated with tribal gaming, resource development and other businesses, as well as coordination of governmental operations within their respective geographic boundaries, tax disputes need to be considered in light of the big picture of their relationship and not in the narrow context of the imposition, collection and administration of a particular tax. Again, an intergovernmental tax agreement can provide a tool that may achieve a more mutually beneficial result in terms of development and maintenance of the tribe's and state's relationship generally.

C. The Perspective of the State and its Subdivisions.

A state and its subdivisions have an interest in the uniform application of their laws. The presence of a tribe and its members possessing certain legally recognized rights and immunities

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[1] See, e.g. County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992).
[2] See, e.g. Okla. Tax Commission v. Chickasaw Nation, 515 U.S. 450 (1995)., and the nature and sites of a particular transaction
[3] See, e.g. Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005).
[4] See, e.g. The Tulalip Tribes and The Consolidated Borough of Quil Ceda Village v. the State of Washington, United States District Court for the Western District of Washington, Case No. 2:15-CV-00940; Seminole Tribe of Florida v. Florida, __ F.3d __, 2015 WL 5023891 (11th Cir 2015); Flandreau Santee Sioux Tribe v. Andy Gerlach, United States District Court for the District of South Dakota, Case No. CV-14-4171

that differentiate them from other organizations and persons within the same geographic boundaries poses an inconvenient problem when uniformity is the goal. However, because tribal rights and immunities are deeply rooted in history and law, some accommodation needs to be made to the principle of uniformity to give recognition to such rights and immunities.

The state and its subdivisions also have a clear need for tax revenue to fund the services that they provide. To the extent that a particular tax cannot be collected, a service must be curtailed or an alternate source of revenue found or created. While it is the duty of the officers, employees and agents of states and their subdivisions to maximize receipts from taxes that their legislative bodies have determined to impose, tribal rights and immunities need to be respected.

Finally, though tribal rights and immunities are recognized in law, states and their subdivisions have an interest in assuring they are not claimed in an abusive manner or for the benefit of persons not entitled to them. While what is abusive and who may be entitled to certain benefits may be a very uncertain question in certain contexts, the interest of the state and its subdivisions in avoiding tax evasion and abuse must be recognized.

D. The Tribal Perspective.

Because of their historical circumstances, many tribes have been unable to develop an adequate tax base to support their governmental operations and services. Although tribes are recognized as having authority to tax those coming upon tribal reservation and trust lands and doing business with a tribe,[5] states and their subdivisions generally do not have to afford a credit for tribal taxes paid to non-Indians that are also subject to state tax.[6]

Unless tribes and states and municipalities in which their lands are located reach some form of accommodation, tribes are then faced with a double tax dilemma: they can either raise needed tax revenues at the expense of creating an economic disadvantage for business development on their lands, or forego revenue sources available to other governments.

Like states, tribes require tax revenues to fund governmental operations and services benefiting tribal members as well as non-members who enter tribal lands or maintain other relationships with a tribe. While some tribes have gaming or natural resource revenues that are available to support such operations and services, many do not. Even for those who do have alternate revenue sources, there is a real question whether it is fair to force them to use those alternate revenues to fund basic services rather than allowing at least a portion of the necessary revenues to be provided by tax collections available to other governmental units.

Finally, from the tribal perspective, there is a real question of equity in tribal-state relations posed by the present system's failure to adequately recognize the contribution of tribally provided services and activity to the economic development of tribal lands and non-tribal lands in proximity thereto. While there has been a formal recognition in the law that tribes have

[5] See, e.g. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)
[6] See, e.g. Cotton Petroleum Corporation v. New Mexico, 490 U.S. 163 (1989); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 135, 151-159 (1980)

a basis for taxing the value that they generate,[7] in practice they have faced considerable obstacles to having their right to tax their value added recognized. That is a principal source of the current dispute between the Tulalip Tribe and the State of Washington.[8]

E. Tax Agreements and Their Use.

A negotiated intergovernmental tax agreement allows tribes and states or their subdivisions to resolve, or at least mitigate, tax disputes on mutually acceptable terms. They avoid the time and expense of a litigated solution, as well as the inherent uncertainties of a litigated outcome. They also allow each side to reserve their underlying legal position without creating a winner and loser, while allowing the parties to move forward on the terms that they negotiate. All tax agreement negotiations do not have a successful conclusion and all disputes are not readily susceptible to a negotiated solution, but tax agreements deserve serious consideration as a means for addressing tribal-state tax disputes.

Tax Agreements have been used to address disputes over various types of taxes. Among them are property taxes, excise or sales taxes on certain products such as motor fuels and cigarettes, and general sales or gross receipts taxes. After addressing issues particular to each of those forms of tax, this paper will address administrative and enforcement issues common to all forms of tax agreement.

II. THE TYPE OF TAX ADDRESSED IN TAX AGREEMENTS AND ISSUES SPECIFIC TO EACH

A. Realty Taxes – Payments In Lieu of Taxes ("PILOT").

1. Examples.

(a) Taxation Compact between The Southern Ute Indian Tribe, La Plata County and The State of Colorado – available as incorporated in authorizing Legislation at CO St § 24-61-102 (hereinafter "Southern Ute–La Plata Country Agreement")

(b) Revenue Agreement Between The County of Isabella and The Saginaw Indian Tribe of Michigan – available at https:turtletalk.files.wordpress.com/2010/11/exhibit-m-county-revenue-sharing-agreement.pdf (hereinafter Isabella County–Saginaw Tribe Agreement")

The foregoing are simply examples for reference and consideration that were identified in an internet search. There are many others that reflect the particular circumstances in which they were negotiated. They may not be published, but will normally be accessible through public documents laws.

[7] Washington v. Confederated Tribes of Colville Indian Reservation, Supra. at 152-157
[8] Cited at n.4 above.

2. Purposes. There are many contexts in which the use of a PILOT Agreement can be considered and prove useful. The following are only a few common examples.

(a) Fee to Trust Applications. A PILOT can be used to address State and local government concerns regarding the fiscal impact of a tribe's application to have the federal government take land into trust for its benefit under the authority of 25 U.S.C. § 465 and the procedures described in 25 C.F.R. Part 151 (the "Part 151 Procedures").

Under Part 151 Procedures, States and affected municipalities may comment on the tribe's trust application and the adverse impacts on the affected jurisdiction, including its impact on the jurisdiction's property tax base.[9] The jurisdiction also has the right to appeal the decision of the Bureau of Indian Affairs ("BIA") to take the land into trust on the basis of the BIA's failure to comply with the Part 151 Procedures or other applicable law. In order to eliminate or mitigate the State and/or municipality's fiscal concerns and objections, a tribe may consider entering into a PILOT in order to expedite the fee to trust process, particularly if the parcel to be placed in trust is not within or contiguous to a tribe's current reservation and trust lands which are more carefully scrutinized under the Part 151 Procedures.[10] The Isabella County–Saginaw Tribe Agreement is an example of this form of intergovernmental tax agreement.

(b) Dispute over the Application of Law. Another use of a tax agreement is to resolve a dispute regarding how the applicable law affects authority to tax in particular circumstances. An example of that use of an intergovernmental tax agreement for that purpose is the Southern Ute–La Plata County Agreement that deals with the taxation of reacquired fee lands within a reservation and activities on that land. That agreement also provides for cooperation concerning tax administration and compliance with respect to non-Indians operating within tribal lands.

(c) Cooperation Regarding Development of Adjacent Indian and Non-Indian Lands. Jurisdictional issues, including those concerning taxation, may arise when a particular development project involves adjacent tribal and non-Indian fee lands. A tax agreement may facilitate such development by establishing certainty as to the application of jurisdictional rules necessary for investment and financing required for such transactions.

3. Basis of Assessment. The amount of property tax due is most often determined by applying a tax or mill rate to the value of the property being taxed. However, since the parties to an intergovernmental tax agreement are not required to follow that model, one of the key issues posed by the negotiation of such an agreement is

[9] 25 C.F.R. § 151.10(e) and 11(a)
[10] 25 C.F.R.§ 151.11

how the amount of the PILOT payment will be determined. There are a number of possibilities.

(a) Application of the established mill rate or fraction thereof to the value of the subject property. The PILOT can be determined by the generally applicable methodology of multiplying the value of the subject property by a tax or mill rate. The rate may be the full rate that would apply under state law or an adjusted rate that includes only specific taxes that are included in a composite rate, e.g. city tax and not school tax, or an agreed fraction of the generally applicable rate.

(b) Negotiated Rate. In lieu of applying a generally recognized property tax assessment methodology, subject to agreed adjustment, the parties can just negotiate an agreed amount for the PILOT.

(c) Other. Other measures and/or formulas may be used as the parties agree appropriate in various circumstances.

4. Valuing Property for Purposes of Determining PILOT. If the parties decide to determine the PILOT by applying an agreed rate to the value of a property, that raises the question of how the property is to be valued. Again, the parties have the ability to negotiate rather than just following a methodology established under state law.

(a) Adopt Existing Assessor's Valuation. If the property has been valued recently by a state or municipal assessor, the parties can just adopt that assessed valuation as the basis for the PILOT. However, that leaves the question whether:

i. the value for purposes of the PILOT will remain fixed;

ii. the property will be periodically revalued to reflect market conditions and/or future development; or

iii. whether cost of living or other formula adjustments will be made.

(b) Appraisal By Another Agreed Source. In lieu of relying on a state/municipality assessor's current and/or future assessment of value, an independent appraisal source can be agreed upon.

(c) Other. Other valuation methods such as a formula that reflects income generated from the property or changing property values in its vicinity can be used.

5. Schedule of PILOT Payments. A PILOT can be structured as:

(a) a single payment upon a property going into trust or another event, See, e.g. Isabella County–Saginaw Tribe Agreement, Section 2.C.

(b) Annual Payments, See, e.g. Southern Ute–La Plata county Agreement, Article 6; or

(c) some other schedule.

6. Cooperation concerning the Assessment and Collection of Tax on Non-Indians. In addition to dealing with tax issues directly between a tribe and a state or municipality, an intergovernmental agreement can provide for administrative cooperation and information sharing between the parties to monitor and enforce tax compliance by non-Indians doing business on or from tribal lands. Due to jurisdictional barriers and conflicts, a state or municipality may face difficulty auditing and enforcing their tax laws against non-tribal parties operating within Indian Country. See, Southern Ute–La Plata County Agreement, Articles 8–10.

B. Realty Taxes – Service Agreement in Lieu of PILOT.

In some circumstances, particularly where the tribal-state/municipal relationship consists of one providing the other with limited services, it may be easier to negotiate an agreement with respect to those services and payment of their cost rather than negotiating a full PILOT Agreement. When the circumstances involve the state or municipality's provision of services to tribal land, the tribe may find a service agreement more palatable than paying a quasi-tax, and the state/municipality may find the arrangement as a satisfactory method of funding services actually provided to the tribal land.

1. Who Provides Service(s) To a Particular Parcel. Some services and their source, such as the provision of utility, water and waste-water service, may be easily identified. Other services, such as the provision of law enforcement, fire and dispatch services as backup to a tribe that also maintains police and fire service of its own, may be more complicated.

2. Basis for Valuing and Paying For Service. Even if the parties are agreeable to the concept of a service agreement to deal with particular circumstances, there are issues they need to address to value the service being provided. Once again, it may be relatively easy to value utility services based on metered usage or a similar measure. However, the parties may need to address an allocation of direct and overhead costs with respect to a specific service. The service cost may be based on a tax rate or fraction of a tax rate reflected in a municipal budget, but that may not be a good proxy for the actual cost and value of a service.

3. Services Included in a Tax Rate That Do Not Benefit a Tribe. There are some elements reflected in a tax rate that may provide little or no benefit to a tribe, such as general administrative or political costs like those for maintaining a municipal election board. Flood control or other services that are provided to other areas of a municipality,

but not a tribal parcel also may be included in a tax rate. Looking at a particular service or services in terms of the taxes generally supporting it or them may or may not be a good measure of the value of service(s) provided to tribal lands.

4. Tribal Services. The services that a tribe provides should also be considered, both as they may discharge a responsibility that the municipality may otherwise have, e.g. police and fire, and to the extent the municipality itself benefits from the tribal presence, e.g. through economic development of municipal lands adjacent to tribal land.

So, while a service agreement may prove a good alternative to a PILOT in certain circumstances, there are a number of issues that must be addressed in the negotiation of an intergovernmental service agreement as well.

C. Sales/Gross Receipts Taxes – Cooperation and Sharing Agreements.

1. Examples.

(a) Tax Agreements Between the State of Michigan and Individual Michigan Tribes – available at http://www.ncai.org/initiatives/partnerships-initiatives/ncai-tax-initiative/examples-of-tribal-tax-codes-tax-agreements-other-resources (hereinafter "Michigan–Tribal Tax Agreement")

(b) Cooperative Agreements Between New Mexico Taxation and Revenue Department and Individual Tribes available at http://www.tax.newmexico.gov/tribal-cooperative-agreements.aspx (hereinafter "New Mexico–Tribal Cooperative Agreement"

2. Application Based on Land Status. Since a tribe's tax immunity and tax authority generally exists and applies only within its Indian Country, i.e. principally its reservation and trust lands, there is a geographic component in any intergovernmental agreement on sales/gross receipts taxes. The application of the agreement itself can be limited to Indian Country. See, e.g. New Mexico–Tribal Cooperation Agreement, Sec. 3. Alternatively, the tax agreement can differentiate between land outside of Indian Country where State law applies exclusively, and within Indian Country where the terms of the agreement apply. See, e.g. Michigan–Tribal Tax Agreement, Art. III, Sec. B. The parties can also agree to special treatment of certain lands such as the "Agreement Area" concept incorporated in the Michigan–Tribal Tax Agreement.

3. Sales by Tribes and Tribal Members/Entities. The applicability of state tax within Indian country will generally turn on the identity of the taxpayer on whom the tax is incident, normally the retail purchaser. If and how a tax is collected and administered if the retail merchant is a tribe/member/tribal entity presents a question for negotiation.

The New Mexico–Tribal Cooperative Agreement provides, at Section 3, that it applies only to retail sellers who are non-tribal. The tribe is left to collect its tax from tribal sellers. However, the tribe is required to impose a tax that is substantially

equivalent to the state tax to eliminate competitive economic advantage between tribal and non-tribal merchants as a condition of eligibility to enter into the Cooperative Agreement and gain the benefit of tax sharing.[11]

The Michigan–Tribal Tax Agreement applies to sales by tribes/members/tribal entities to non-Indian purchasers within Indian Country. Art. III, Sec. B. 2 and 3. The collections can be treated as state tax or tribal tax subject to a state credit, but are subject to the same sharing regime. However, Michigan does not leave the room for a tribal tax on tribal merchant sales to non-members which New Mexico does. Those sales are recognized as exempt from state tax under New Mexico Statute,[12] so only the tribal tax will apply. That reflects a distinction regarding the incidence of the New Mexico Gross Receipts and Michigan Sales Taxes.

4. Sales To a Tribe/Member/Tribal Entity. Sales to Tribes, their members and tribal entities within Indian Country are generally not subject to state tax as a matter of federal Indian law pre-emption. New Mexico recognizes that in its Administrative Code.[13] It also differentiates between classes of sales in the New Mexico–Tribal Cooperative Agreement at Section 2, Definitions.

Michigan recognizes the applicability of preemption on sales to tribal purchases through exemptions described in Article III. Section A of the Michigan–Tribal Tax Agreement. The Michigan exemption can in certain cases extend beyond recognized Indian Country through the Agreement's "Agreement Area" concept.

Whether or not embodied in an Agreement, pre-emption will apply to tribal purchases within their Indian Country. However, there are advantages to clearly setting forth the applicable rules through the negotiation of an agreement.

5. Tax Sharing. A common feature of intergovernmental agreements on gross receipts/sales tax agreements is a tax sharing provision. Such a provision provides a means for compromising disputes regarding authority to tax while maintaining a uniform sales/gross receipts tax system within and without Indian Country from the non-tribal purchaser's perspective. The New Mexico–Tribal Cooperative Agreement, Section 9, provides for a 75% Tribal–25% State split on sales to non-members that are legally taxable by each sovereign. The Michigan–Tribal Tax Agreement Art. III, Section B, provides for 2/3rds Tribe–1/3rd State share of the first $5 million of gross receipts, and 50–50 thereafter. Such an arrangement provides a tribe with an incentive to enter into the agreement and cooperate with the State, and assures the state that its tax or an equivalent to it is being collected on sales within Indian Country, as well as outside.

6. Tax Rate. One issue to be addressed if the state tax rate is not uniform throughout the state, because of local option taxes or similar variations, is how to coordinate the state and tribal taxes. The New Mexico–Tribal Cooperative Agreement

[11] NMSA § 7-9-88.1.B
[12] NMSA § 7-9-13.A(3)
[13] 3 NMAC § 2.4.9.

does that by requiring merchants to report sales based on state taxing sub-jurisdictions, thus effectively requiring the tribe to set its tax rates to match the applicable state rates. See, New Mexico–Tribal Cooperative Agreement, Section 8, and NMSA § 7-9-88.1.

7. Documentation of Exempt Sales to Tribal Purchasers. Another matter for negotiation is how exempt sales to tribes/members/tribal entities are required to be documented. New Mexico leaves that largely to the non-tribal merchant subject to audit. New Mexico–Tribal Cooperative Agreement, Sec. 2, definition of "Class 1 Receipts". Michigan uses a more detailed tax certificate or refund claim mechanism. Michigan–Tribal Tax Agreement, Art. XII.

D. Fuel & Cigarette Taxes – Cooperation, Collection and Sharing.

An area in which the operative rules have been largely set out, but in which there remains much room for dispute and conflict with respect to administration and collection is the excise taxation of goods such as cigarettes and motor fuel. In general, if the incidence of such taxes fall on non-members, they are subject to the state tax. Sales to tribal purchasers who bear the tax are not. To facilitate cooperation on the collection of such taxes on non-Indians, an intergovernmental tax agreement can play a significant role.

Providing a quantity of product saleable to tribal purchasers without tax, while controlling the possibility of diversion of such product to the black market can be complicated. A common approach is the use of quota and refund mechanisms. See, e.g. Michigan–Tribal Tax Agreement, Articles X and XI.

While under the law, state taxes will generally apply to sales to non-members and there is the opportunity for the state to precollect such taxes through stamping and at the rack imposition, it may still be worth considering an agreement to foster harmony and encourage administrative cooperation. Tax sharing and/or permitting exemption of tribally taxed sales may provide a means of accomplishing those objectives.[14]

III. ISSUES COMMON TO ALL FORMS OF TRIBAL–STATE TAX AGREEMENT

In addition to issues specific to the particular tax at issue, there are certain matters regarding administration and enforcement to be considered in the negotiation of all forms of tax agreement. There are a number of issues that clearly should be addressed in light of the identity of the parties and the subject matter of their agreement. The first among them is sovereign immunity.

A. Sovereign Immunity.

1. The State. State governments and their subdivisions are generally immune from suit absent a waiver. In each state, the manner in which the state or a subdivision can bind itself and how another party can enforce the state's or subdivision's contractual

[14] See, e.g. Section 139.323 Wis. Stats. (tribal cigarette tax rebate); NMSA § 7.12-2.K, 4.A(2) and 4.1 (tribal cigarette tax exemption); NMSA § 7-13-4.E and 4.4 (gasoline tax exemption based on equivalent tribal tax).

agreements is a matter governed by that state's constitution and statutes, particularly tort and contract claim statutes. A tribe and its legal counsel need to be aware of the legal requirements, and ensure that they are met, so that a state or subdivision's commitments are enforceable.

2. Tribes. Likewise, as a government recognized by the United States, a tribe possesses sovereign immunity.[15] Particularly relevant to the current discussion is the Supreme Court's holding that, even when a state tax may be validly imposed on non-Indians for transactions within Indian Country and tribes have a recognized obligation to assist with collecting that tax, a state's effort to enforce that obligation directly through a lawsuit is barred by the tribe's sovereign immunity.[16] Among the methods that the Supreme Court suggested that a state could use to enforce its tax, notwithstanding tribal sovereign immunity, is the negotiation of an intergovernmental tax agreement.[17] That is one of the key incentives and objectives leading a state or municipality to enter into a tax agreement.

3. Tribal Waiver. Tribes can waive their sovereign immunity by express and unequivocal waiver. That waiver can take the form of a tribe's agreement to arbitrate a dispute or use another dispute resolution process,[18] but the best practice is to clearly state the intent and scope of the waiver in an agreement, as well as a resolution adopted by the tribes governing body, usually a tribal council. It is important to ensure that the waiver meets the requirements of a tribe's constitution and statutes, just as it is necessary to make sure any state waiver is properly authorized. Although counsel for a state or municipality should do their own due diligence on that point, they may also wish to obtain an opinion from the tribe's counsel on the due authorization and enforceability of a waiver of sovereign immunity.

4. Scope and Limitation of a Waiver. The scope of a waiver of sovereign immunity is limited by its terms. The tribe will normally seek to restrict the terms of the waiver to (a) ensure it is enforceable only by the other party to an agreement and not by an unintended third party beneficiary, (b) allow it to be used and enforced only through the agreed dispute resolution procedures set forth in the agreement, (c) limit the assets subject to levy to enforce an award, such as the tax collected but not paid over to the state or subdivision under a tax agreement, and (d) to be enforceable only during a particular period, e.g. during the term of a tax agreement and a fixed period thereafter. The detailed negotiation of the scope and limitations on a waiver are a key task of counsel on both sides of the negotiation.

B. Dispute Resolution and Enforcement.

[15] Michigan v. Bay Mills Indian Community, 134 S. Ct. 2024 (2014); Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998)
[16] Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991)
[17] Id. at 514
[18] C & L Enterprises, Inc. v. Citizen Bank of Potawtomi Indian Tribe of Okla., 532 U.S. 411 (2001)

Another aspect of the enforcement of an intergovernmental tax agreement is the selection of dispute resolution procedures. Again, this is an area that requires detailed negotiation in most cases.

1. Forum. Normally, neither the state/municipality nor tribe will want to agree to resolve disputes in the other's courts for fear of home field advantage and procedural unease. Federal court may be an alternative, particularly if the agreement arises out of a settlement of federal litigation, but the parties may not be inclined to agree on that either. A typical compromise is binding arbitration on agreed terms. See, e.g. New Mexico–Tribal Cooperative Agreement Section 21; Michigan–Tribal Tax Agreement Article XIV.

2. Enforcement of Obligation to Arbitrate and the Arbitrator's Award. There may still be a need for judicial involvement to enforce the agreement to arbitrate or the award of the arbitrators. Again, forum selection becomes an issue, but it is more limited if the merits are to be decided through arbitration. One technique that is sometimes used is to allow the Tribal Court to enforce the obligation or award for a short period out of respect of tribal sovereignty and its institutions, and to allow enforcement by federal or state court if the Tribal Court does not act within a short period or seeks to modify the award.

3. Review of Award. In order to be effective, arbitration must be final unless the process is clearly flawed. Review of awards is often limited by Federal Arbitration Act standards.

4. Limitation on Enforcement. In addition to limitations negotiated as part of a waiver of sovereign immunity or dispute resolution procedures in an agreement, the tribal assets against which an award or judgment may be further limited by law. Assets, particularly land held in federal trust and revenues from federal programs, such as the Indian Self-Determination and Educational Assistance Act[19] will not be subject to levy.

C. Waiver of Exhaustion of Tribal Remedies.

The doctrine of exhaustion of tribal remedies, by which the federal courts defer to tribal judicial process before considering a claim as a matter of comity or form of abstention, should be considered. Normally, the non-tribal party will want to obtain a waiver from the tribe to ensure that the tribe does not frustrate the agreed dispute resolution procedures by pursuing its own judicial process initially.

D. Governing Law.

The parties need to carefully consider how to describe the governing law in their agreement. Normally, a tribe will be willing to use state contract law, but will want to incorporate applicable federal law such as pre-emption principles for purposes of interpreting the agreement. How the tax laws of the individual parties are to be interpreted can be left to their

[19] 25 U.S.C § 450 et. seq.

separate administration and enforcement systems. See, e.g. New Mexico–Tribal Cooperative Agreement, Sections 6 and 12.

E. Term and Right to Terminate.

The term and potential early termination rights with respect to an intergovernmental tax agreement present a key issue that is sometimes subject to extensive negotiation. See, e.g. Michigan–Tribal Tax Agreement, Article XV, and New Mexico–Tribal Cooperative Agreement, Sections 17 and 19. A Common approach is to leave the term open ended or periodically renewable so that it can continue on if it is working, but to allow the parties some way out if it is not.

F. Reservation of rights and Legal Position.

As discussed in the introduction of this paper, one advantage of a tax agreement is to allow the parties to reserve their rights and interpretation of the law while allowing them to get on with life on agreed terms. Tax Agreements typically contain an express reservation of rights and legal position should the agreement terminate. See, e.g. Michigan–Tribal Agreement, Article I, sections A and D; New Mexico–Tribal Cooperative Agreement, Section 4.

G. Administrative Mechanics.

The parties need to consider the administrative mechanics that they will employ to execute their agreement, particularly if there are both state and tribal taxes involved. For instance, New Mexico has insisted that the State Taxation and Revenue Department serve as the administrative agency to collect state and tribal gross receipts taxes. New Mexico–Tribal Cooperative Agreement, Section 5. Michigan allows either the state or tribal agencies to be administratively responsible for sales tax collection. Michigan–Tribal Tax Agreement, Article III, Sections B. 2 and 3.

H. Confidentiality.

Because an intergovernmental tax agreement can involve the sharing of information concerning private taxpayers that may be protected from disclosure under state and/or tribal law, such agreements normally contain a confidentiality provision. See, e.g. New Mexico–Tribal Cooperative Agreement, Section 15; Michigan–Tribal Tax Agreement, Article I, Section E.

I. Consultation.

Because tax agreements are part of an ongoing tribal-state relationship that should be fostered and are not simply static arrangements, they may provide for on-going consultation, the form of which depends on the nature and scope of the agreement and preferences of the parties. See, e.g. Michigan–Tribal Tax Agreement, Article I, Section F.