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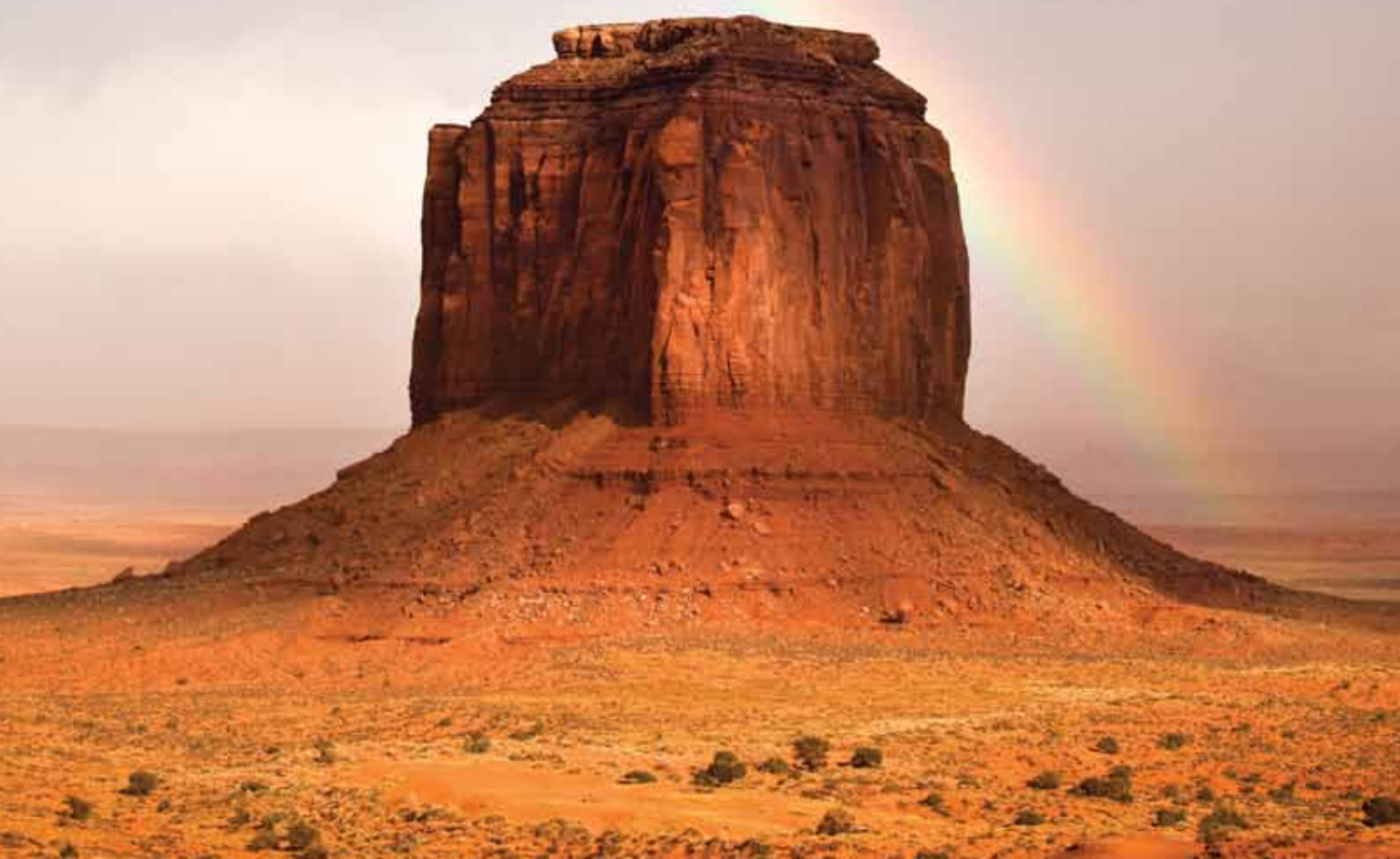
Deciphering Title to Native American Land

Turf Battle on a Checkerboard?



Deciphering Title to 'Native American' Land: Turf Battle on a Checkerboard?

Title agents must be aware of the various taxing authorities that can cloud titles to Native American land.

Many title professionals recognize that the "Indian" or "Native American" character of land, landowners and the communities in which those lands are situated may affect a government's power to tax. Most have heard that states and their political subdivisions, such as municipalities and counties, have a restricted ability to levy taxes in Native American land, but are unsure about the extent of those restrictions.
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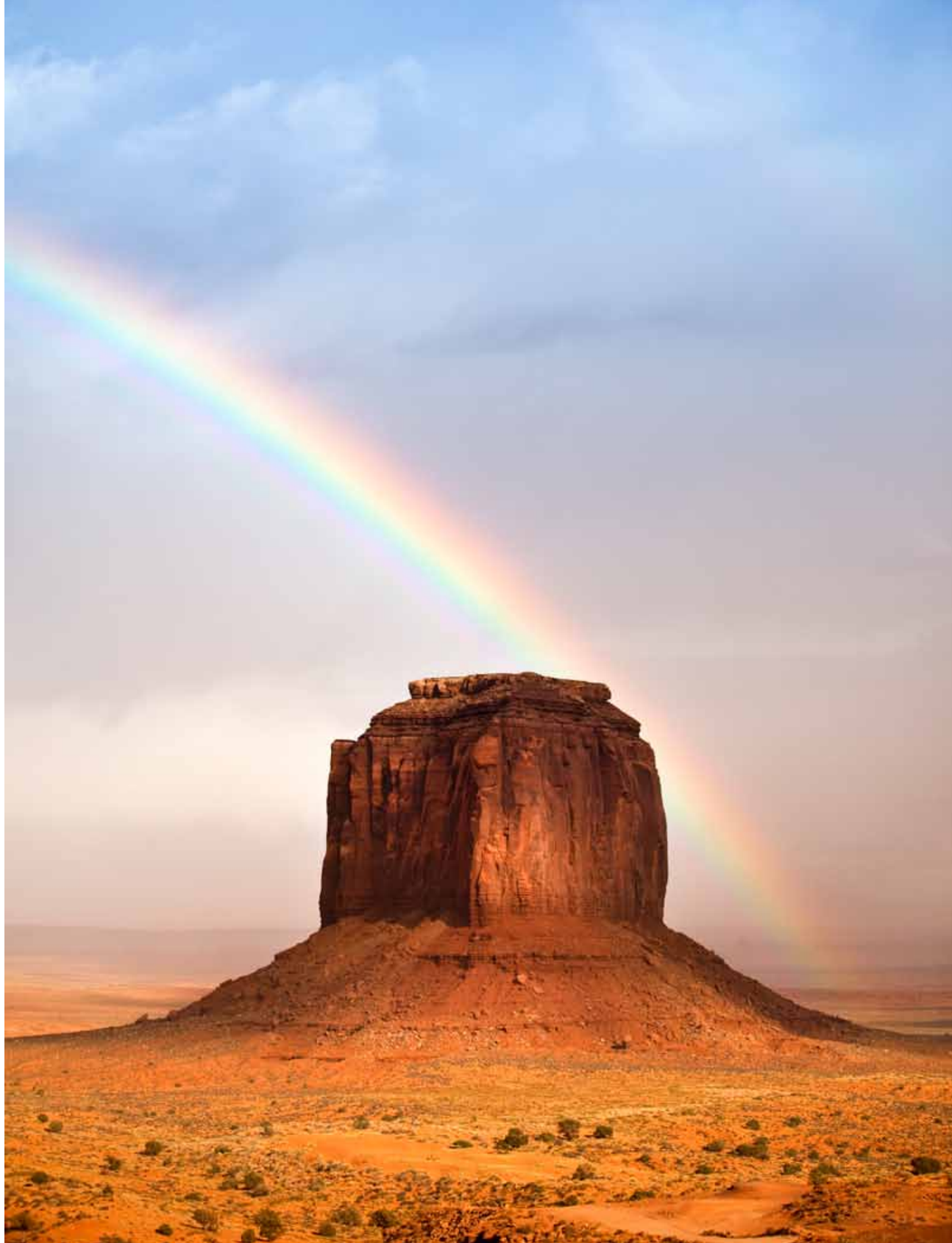
By Lynn H. Slade and Greg L. Gambill



One area of uncertainty is whether certain lands and improvements may be assessed for state ad valorem or similar property taxes. Given the many different titles that may exist within Native American country, often forming a patchwork resembling a checkerboard, sorting out the taxing authority of the different entities that may claim the power should be of importance to the title professional looking for a cloud on title in Native American country. This article aims to inform title professionals about the considerations that may affect evaluating taxation in Native American land.

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Are We in Indian Country Yet?

"Indian country," while a colorful phrase, may have legal, geographic and cultural meanings. We employ it here to connote lands where the title professional should be alert to consider whether the Native American character of lands may affect which sovereign can tax the lands or activities on them. There are 565 federally recognized Native American tribes in the United States, all unique in some respect. Federal law makes no general distinction between classes of tribes; however, specific treaties, statutes, or executive orders may define more specifically the legal attributes of tribally or individually owned Native American lands. Landholdings of the numerous tribes and their members may take one of perhaps a dozen different forms.

Tribal ownership, or ownership by tribal members, may be a factor affecting taxation. Other factors affecting taxation include the lands' relationship to any tribal reservation, and the precise nature of the ownership interest. While no neat generalization will hold, the "Indian" character of lands generally may affect taxation — if the lands are considered "Indian country" under federal law. Though federal Native American land status by no means compels the conclusion that land-based taxation of Native American lands changes based solely on that factor, it is a convenient flag indicating when further analysis may be necessary.

Despite its geographically focused title, Indian country takes into account both the ownership of land and its location. Perhaps surprisingly, since 1948, Native American land has been defined for most legal purposes by the federal criminal code, 18 U.S.C. § 1151, and means:

a) *all land within the limits of any Indian reservation, notwithstanding the issuance of any patent, including rights-of-way running through the reservation,*
b) *all "dependent Indian communities;" and*
c) *"all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."*

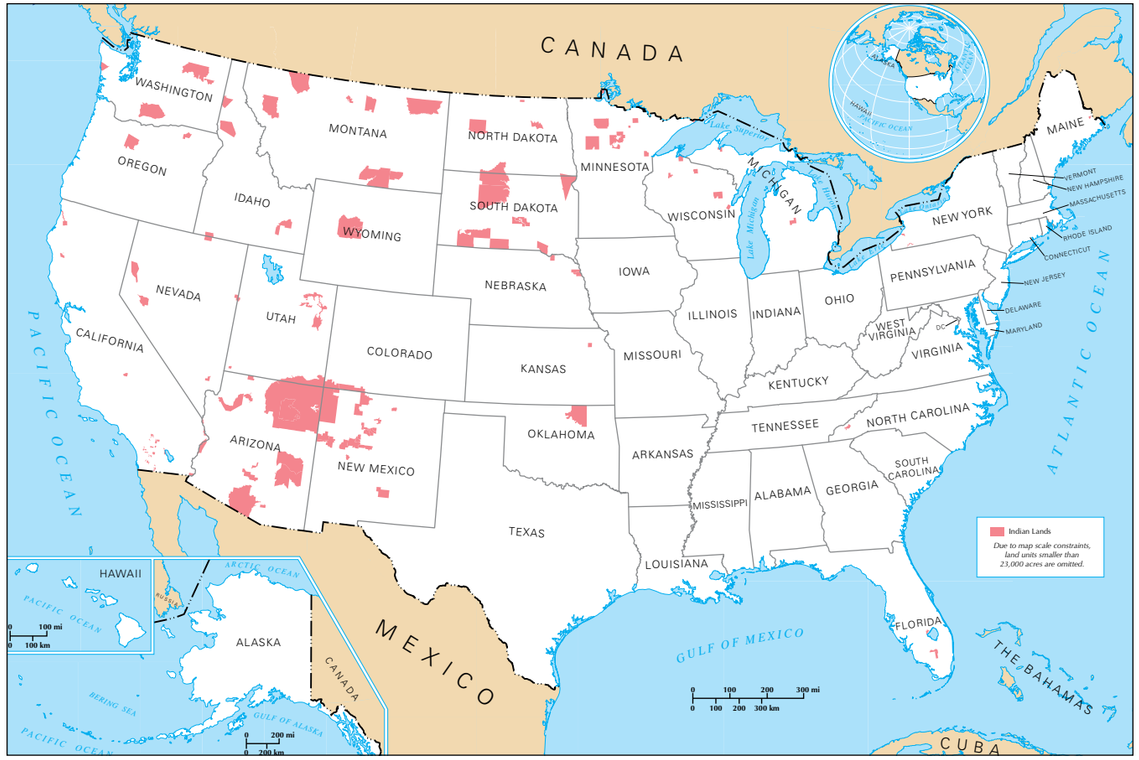
A brief word about each category follows.

Reservations

The tax consequences of land ownership may be affected if the lands lie within the limits of an "Indian reservation." Determining whether lands have "reservation" status or boundaries may be less obvious than one might think, and many folks, including some officials, use the term imprecisely to refer to Indian lands or Indian-affiliated areas, even if no formal reservation remains. Reservations typically were areas reserved from non-Indian settlement for use by Native American tribes before the end of the 19th Century, whether by treaty, act of Congress or executive order. However, in the "allotment era" of the late 1800s and early 1900s, Congress became convinced that the reservations were impeding Native American's progress, and set about to break up the reservations and transfer communal tribal lands into "allotments" to be transferred to individual Native Americans. As a result, many reservations were modified by statutes or executive actions that diminished the size of or completely terminated or "disestablished" the reservation.

The Supreme Court has held that some "allotment era" statutes terminated the pertinent reservation, leaving Native Americans living on allotments outside reservation boundaries, but that Congress intended other reservation boundaries to remain, even when a statute transferred most of the land to non-Indians, leaving only scattered allotments, thus leaving a predominately non-Indian populace living within a continuing reservation. (*Solem v. Bartlett*, 465 U.S. 463; 1984). Although Congress shifted gears in the 1930s and abandoned the allotment policies, many reservations remain diminished or terminated.

While determining whether specific lands lie within reservation boundaries may entail detailed research, the most efficient approach for initially assessing whether lands fall within a reservation may be to consult with the Department of the Interior.



A look at Native American land in the United States.
Source: *U.S. Dept. of the Interior and U.S. Geological Survey*

Allotments

The remnants of the allotment era of federal Native American policy are the thousands of allotment landholdings owned by individual Native Americans that still exist, usually in 40- to 160-acre parcels, and either held in trust by the United States or subject to a statutory restriction on alienation preventing their leasing or sale without approval of the Bureau of Indian Affairs (BIA). Often, allotted lands have been passed down to numerous heirs and Congress has enacted several statutes to facilitate land transactions among the numerous undivided interest owners, including the Indian Land Consolidation Act, 25 U.S.C. § 2218(b).

While most allotments are held in trust by the United States for the individual owners, called "allottees," some "restricted" Native American lands were created by fee patents to the allottee, though a statute made them subject to federal restraints on alienation requiring BIA approval of any conveyance. Most allotment statutes identified a specific time, such as 25 years, or milestones such

as the allottee's "literacy," when trust protections or restrictions on alienation would be lifted and the lands could be alienated and, consequently, taxed. However, Congress has extended the periods of restriction repeatedly, and many have now been extended indefinitely. When allotment lands are transferred out of "trust status" or freed of federal restrictions on alienation, immunity from taxation often ceases.

Dependent Indian Communities

The Supreme Court has defined "dependent Indian communities," as lands that are neither reservations nor allotments but, rather, lands that

1. have been set aside by the Federal Government for the use of Native Americans; and
2. are under federal superintendence.

The "federal set aside" requirement contemplates a specific federal action regarding the lands in question placing the lands in trust or imposing restrictions on alienation. The federal superintendence requirement means that it is the federal government and the Native Americans involved, rather than the states, which are to exercise primary jurisdiction over the land in question. A related category characterizes tribal lands held in trust status but not within reservation boundaries as "informal reservation" lands, still considered Indian country for some tax purposes (*Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114; 1993).

Effect of Indian Country Status: "Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the states." (*Alaska v. Native Village of Venetie*, 522 U.S. 520; 1998). However, the effect of Indian country is still in flux. In the Sac and Fox case, the Supreme Court indicated that Indian country status may determine state taxing authority; more recently, the Court has discounted the significance of Indian country status in considering a tribe's power to tax nonmember business that occurs on a reservation (*Atkinson Trading v. Shirley*, 532 U.S. 645; 2001). Nonetheless, lands located in Native American land within a state may be subject to different taxation, and other laws, than lands located outside of Indian country but within the same state.

ALTA's Native American Lands Committee

The Native American Lands Committee keeps ALTA and its members apprised of new developments in the Native American lands area by monitoring legislation, regulation, case law and ongoing litigation to determine its general impact on title insurance and conveying. As more title insurers and title insurance agents become involved with tribal transactions including gaming, economic development and housing development, it is important to recognize that there are unique laws and regulations that apply to Indian tribes and Indian lands. It is relatively simple for a tribe to lease tribal lands to a tribally chartered entity and then for that entity to mortgage that leasehold interest as part of a financing project. (In some cases, Department of Interior approval is required.) As part of such transactions, a title insurance loan policy may be required to insure the mortgage of the leasehold. The need for prudent underwriting, compliance with established standards, and discussions with the title insurer is amplified when a transaction involves tribes and Indian lands.

Determining Title in Indian Country

Determining title to Indian lands, including leases and rights-of-way to or across them, may require review of BIA, state or county, and possibly tribal, records. The BIA's Regional Land Titles and Records Offices (the BIA-LTRO) are that agency's official repositories for documents reflecting title to or encumbrances on Indian lands. (For more information, title professionals should consult the federal regulations found in 25 C.F.R. Part 150.) All title documents regarding transfers or issuance of leases, rights-of-way, or permits on trust or restricted Indian lands "shall be submitted" immediately upon BIA approval to the appropriate BIA-LTRO. The regulations charge LTRO personnel with the responsibility to prepare "land title status reports," land status maps, and certification of land records and title documents. While state, county, or other local land records repositories are not "offices of record" for trust or restricted lands, they may contain instruments that provide notice to junior interest owners and records of divorce or estate proceedings that do not appear in BIA records, and those offices become repositories of record when restrictions are removed from Native American lands. State and local tax assessors often have up-to-date records regarding Indian lands that have been freed from restrictions on alienation and are therefore taxable.

Who Can Tax What Turf?

Taxation in Native American land may entail a plot-by-plot contest between competing sovereigns. Within any particular area, a variety of titles and ethnic identities may be present and may be participants in land transactions. The taxable nature of two adjacent parcels in Native American land may be completely different depending on the identity of the taxpayer and the history of the property involved. Determining which sovereign can tax any property or activity can present the title professional with a multi-step inquiry. The analysis that follows focuses on state versus tribal taxation, with a brief look at federal taxing authority.

State Taxation

States have broad jurisdiction to tax persons and property within each state's territorial boundaries, subject to constitutional limitations. State taxing jurisdiction, however, may be pre-empted by federal treaties or statutes validly enacted under a substantive federal constitutional power. Pre-emption refers to the doctrine derived from the United States Constitution's Supremacy Clause, and means that a federal law can supersede any inconsistent state (or tribal) law or regulation. In Indian country, the pre-emption doctrine and federal policies favoring tribal self-government without interference by the states can be obstacles to state taxation.

Non-Indians earning income or owning property within Indian country generally are subject to state taxes (*Ariz. Dept. of Revenue v. Blaze Construction*, 526 U.S. 32; 1999; tax on gross proceeds of construction contract); (*Pimalco v. Maricopa County*, 937 P.2d 1198; Ariz. Ct. App. 1997; tax on leasehold property interest). If non-members are subject to a state tax, so too are similarly situated "non-member" Native Americans, who are not members of the taxing tribe (*Washington v. Confederated Tribes of Colville Res.*, 447 U.S. 134; 1980). Unless the state tax conflicts with a federal statute or with strong federal policies, state taxation of non-Indians and non-member Indians generally is not pre-empted.

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The pre-emption limitations on state power to tax are most restrictive when the tax is imposed on tribes or tribal members within Indian country. The United States Supreme Court has rejected state taxation of tribal members' activities on fee lands, which were nonetheless Indian country by virtue of being located within the tribe's reservation boundaries (*Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463; 1976). Clarifying the importance of land or other Indian country status (*Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450; 1995), held that tribal members must pay state income tax unless the taxpayer Indian both lives and earns the taxed income on Native American country lands.

The prohibition against state taxation of Native Americans' trust or restricted property is so longstanding (*The Kansas Indians*, 72 U.S. 737; 1867), that it is seldom litigated unless specific statutory authority is advanced to authorize the tax is in issue, as the issue was presented in *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992). Tribes and tribal members within Native American country have thus been found to be immune from a variety of state taxes, including personal property taxes (*Bryan v. Itasca County*, 426 U.S. 373, 1976) and real property taxes on "restricted" Indian land (*United States v. Rickert*, 188 U.S. 432; 1908).

Although states generally cannot tax lands held in trust by the United States for tribes or individual Native Americans, three cases reflect the rule that states may tax real property owned in fee by tribes and individual Native Americans. The allotment statutes have been the focus of the Court on this issue. In *Goudy v. Meath*, 203 U.S. 146 (1906), the Court upheld county ad valorem

property taxes assessed against an allottee after the allottee's land became alienable. In the County of Yakima case, the Court revisited the issue of ad valorem taxes, and determined that federal law rendering the lands alienable and susceptible to encumbrances rendered those lands subject to assessment and forced sale for taxes.

Finally, *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998), involved a county's imposition of ad valorem property taxes on a tribe concerning lands that had been allotted in the past, were transferred into fee ownership, and later reacquired in fee by the tribe (but not yet placed into trust with the United States). The Court confirmed the state's power to tax, holding that the requirement that federal allotment laws express a "clear intent to tax" is satisfied if the statute rendered the lands in question freely alienable, even in the absence of express mention of taxation. Together, these cases stand for the proposition that Congress is presumed to authorize state taxation of real property when it renders land freely alienable; however, the Court has declined to extend that rationale to authorize other state taxes ancillary to the real property, such as excise taxes on the sale of land.

Tribal Taxation

The taxing power is an inherent part of the concept of sovereignty, and Indian tribes retain this power except when limited by federal law (*Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130; 1982). However, the Supreme Court recognized an important limitation on this and other tribal powers in Montana v. United States, 450 U.S. 544 (1981). In that case, the Court held that tribes have no inherent authority to regulate non-Indians on non-Indian fee land within reservation boundaries unless

1. non-members engage in "consensual" dealings with a tribe or its members; or non-Indian conduct threatens the integrity, security or health and welfare of the tribe.

The Court applied the *Montana* rule to reject tribal hotel occupancy taxation of a non-Indian trader doing business within the Navajo Reservation in *Atkinson Trading v. Shirley*, 532 U.S. 645 (2001), holding neither the trading post nor the hotel business had entered into a "consensual relationship," nor had they impacted tribal health and welfare in a manner satisfying the Montana test.

Federal Taxation

Addressing federal taxation here only in the most general terms, Congress has broad authority to enact legislation concerning Native Americans (*United States v. Lara*, 541 U.S. 193, 200; 2004). Federal laws taxing "all persons" apply to individual Native Americans under most circumstances, but federal tax laws are assumed not to be intended to infringe on the rights of Indians under treaties and Indian legislation, absent clear congressional intent to the contrary (*Squire v. Capoeman*, 351 U.S. 1; 1956). Because the text of federal law will control, addressing federal taxation of any particular activity involves a specific analysis of the federal tax law in question.

A Practical Primer

Analyzing whether taxes on land are valid in Indian country involves three preliminary determinations to be made after careful research:

- Is the taxpayer a "member Indian," i.e., a member of the tribe having primary authority over the lands or activities in question; a non-member Indian, i.e., a member of another tribe; or a non-Indian?
- Is the land or area of activity in question within formally recognized reservation boundaries of the tribe with primary authority over any tribal member involved?
- Is the land held in trust or restricted status for the tribe or an individual member of the applicable tribe?

However, a firm conclusion will depend upon applicable reservation history and pertinent statutes. It's recommended title professionals consult their legal counterparts who are familiar with applicable federal, state, and tribal laws for questions concerning taxing authority in Indian country. ■

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