



**Intertribal Tax Initiative:
An Update
NCAI 2012 Annual
Sacramento, CA**

Derrick Beetso, Staff Attorney



Boston Tea Party - Colonists dressed as Indians when protesting British Rule

Our Rights, Our Sovereignty

**“ . . . the power to tax is the power to destroy . . . ” -
Chief Justice Marshall, McCulloch v. Maryland**

“The power to tax members and non-Indians alike is surely an essential attribute of . . . self-government; the Navajos can gain independence from the federal government only by financing their own police force, schools & social programs.” – Chief Justice Burger, Kerr-McGee v. Navajo Nation (Unanimous Opinion)

Inter Tribal Tax Initiative

April 2011 - Miccosukee Tribe hosted Native Nations Tribal Leaders Tax Summit

Working Group:

- NCAI
- Affiliated Tribes of Northwest Indians
- California Association of Tribal Governments
- United South and Eastern Tribes
- Native American Finance Officers Association

Flexible enough to address new issues, but 4 core issues were identified

Inter Tribal Tax Initiative

Initial Core Focus Areas:

1. Tax-Exempt Bond Authority
2. The IRS' General Welfare Exclusion & Tribal Government Programs and Benefits
3. State Taxation of Permanent Improvements to Tribal Trust Land
4. PACT Act/STOP Act Tobacco Compliance Issues

Tax Exempt Bond Authority

‘Essential government function’ threshold hinders tribes from using an important financing tool

ARRA

1. TED Bond Allocations – \$ 2 Billion

- Authorities made available during height of economic downturn
- Most tribes that received allocations did not have ‘shovel ready’ projects
- \$ 25 million cap per allocation

2. Congressionally mandated Report to Congress

Tax Exempt Bond Authority

Treasury Report to Congress – Dec. 2011

1. Essential government function threshold should be eliminated
2. PAB authority should be expanded
3. Tribes need improved access to capital

Treasury reissued remaining bond authority – Spring 2012

1. First come-first served incentive to use bond authority – reworked caps to meet needs of larger development projects in Indian Country
2. Requirements to show that tribe has ‘shovel ready’ project in the hopper

General Welfare Doctrine & Indian tribes

Issue that came out of audits conducted by regional offices of IRS' Office of Indian Tribal Governments

“General Welfare Doctrine” - government benefits to address need not taxable

- i. Legislatively enacted
- ii. For social benefit
- iii. Not compensation for services

IRS working from assumption that tribal programs are “disguised per capita payments.”

General Welfare Doctrine & Indian tribes

Treasury Dept. working to provide guidance.

The tribe, as a sovereign nation, should be given deference as to what constitutes an educational, health, or cultural program and/or benefit, and community needs should not be limited to financial needs

NCAI Midyear Resolution to pursue legislative fix

State Taxation of Improvements on Trust Lands

State taxation of the non-Indian interests of tribal economic development projects has hindered growth in various industries, most notably, energy & resource development

Our Position: All activities occurring on leased rights-of-ways and trust land should fall within the tribe's tax jurisdiction

BIA Amending Part 162 Leasing Regulations

Tobacco Compliance

Smuggling Tobacco Prevention (STOP) Act

Creates an electronic “Track and Trace” system of collecting state taxes at the manufacturer, upsetting tribal-state tobacco compacts

Would require federal license for all manufactures & wholesalers (including tribal), which in turn would require compliance with federal laws that currently do not apply to tribe–to-tribe commerce.

Good News: Tribes changed the direction of bill

Partnership with Native Tobacco Trade Association

National Tax & Economics Landscape

- General Discussion Re: Tax Rates
- Expiring Tax Incentives (e.g., Wind Energy Tax Credits)
- Broad Discussion Regarding Simplification of the Internal Revenue Code
- Fiscal Cliff & Sequestration

Our Legislative Agenda

Tribal Tax Parity

Since Indian tribes are governments, they should generally be treated like states for federal tax purposes.

Section 7871 should be broadened to treat Indian tribes like states for all tax Code purposes, except in limited instances where a special rule for tribal governments is absolutely necessary, such as:

- A special rule to allow tribes to continue to offer 401(k) retirement savings plans
- Legislation meant to protect tribal general welfare programs from tax scrutiny

Legislative Agenda (cont.)

Specific Instances where Tribal Tax Parity is Urgently Needed:

Tax Exempt Bonds – eliminate “essential government function” analysis; expand private activity bond authority

Employee Benefit and Pension Plans – eliminate “essential government function” threshold

Tribally Funded and Controlled Charities

- (i) Treat tribal funding as public support for purposes of Section 170(b)(1)(A)(vi); *and*
- (ii) Treat charitable organizations formed to support Indian tribal governments the same as organizations formed to support state, local and federal government for purposes of Section 509(a)(3).

Legislative Agenda (cont.)

Specific Instances where Tribal Tax Parity is Urgently Needed:

General Welfare Exclusion and Tribal Programs and Benefits:

Legislatively enacted programs to benefit the social welfare of the tribe, that does not constitute compensation for services.

- Means testing concerns (*i.e.*, eligibility criteria);
- Tribal deference on what provides a benefit to the social welfare of the tribe (*e.g.*, language and culture programs, housing needs, childcare)

Legislative Agenda (cont.)

Need to Evaluate the Effectiveness of Tax Incentives for Tribal Governments

NCAI understands that Congress is engaged in reviewing the effectiveness of numerous expired or expiring tax provisions. NCAI offers its assistance in evaluating the following incentives for development in Indian Country.

- Accelerated Depreciation for Indian Reservation Property
- Indian Employment Tax Credit
- Indian Coal Credit
- Clean Renewable Energy Bonds (CREBs)
- New Markets Tax Credit

Streamlined Sales Tax

States have a tax problem

Supreme Court in 1992 (Quill v. North Dakota) – states cannot collect sales taxes on out of state retailers because 7,000 state and local taxes

Internet – states will lose 400 billion in revenue on remote sales in ten years

States need streamlined uniform sales taxes and Congress to authorize remote sales tax legislation

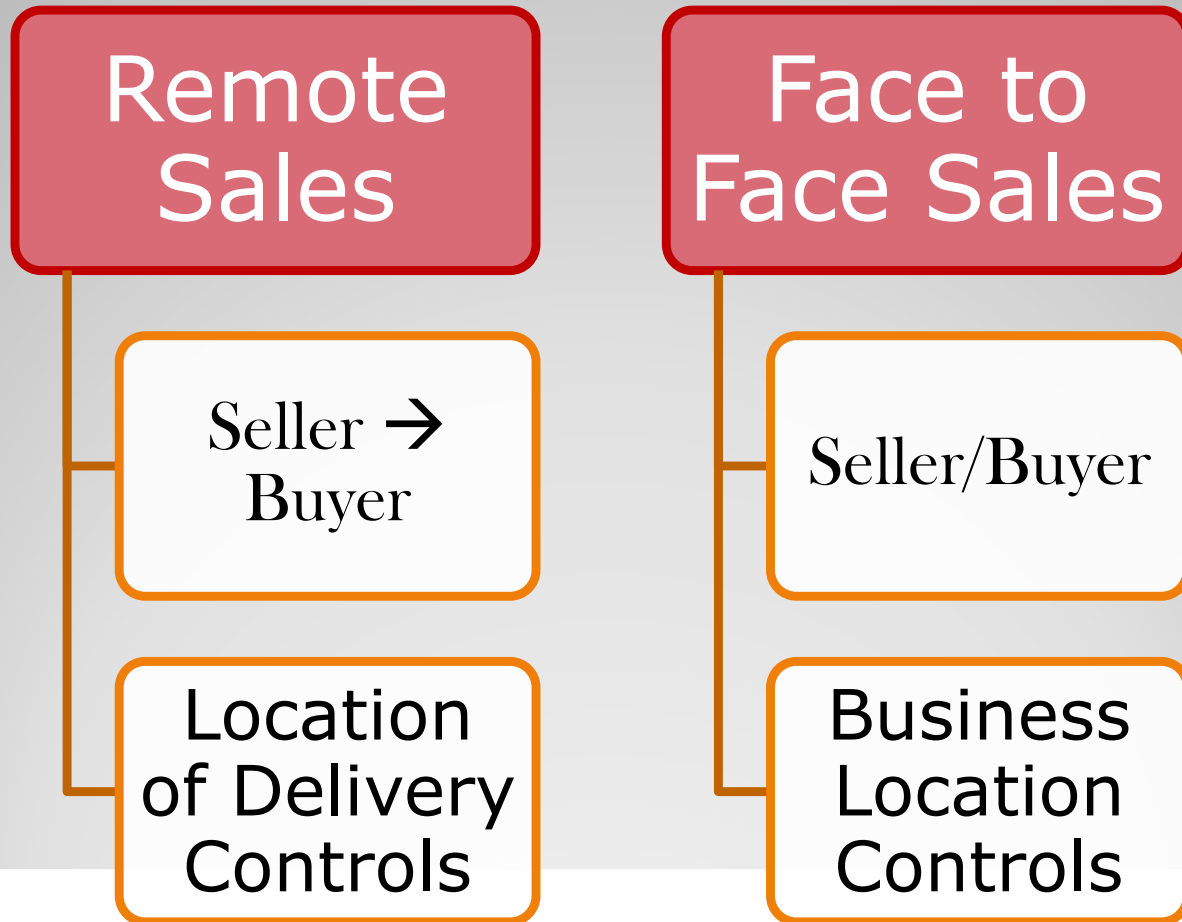
Streamlined Sales and Use Tax Agreement

Uniform Sourcing Rules

The member states agree to require sellers to source the sale of a product in accordance with the following provisions.

- a. When the product is received by the purchaser at a business location of the seller, the sale is sourced to that business location.
- b. When the product is not received by the purchaser at a business location of the seller, the sale is sourced to the location where receipt by the purchaser occurs -- the location indicated by instructions for delivery.

Streamlined Sales and Use Tax Agreement Uniform Sourcing Rules



Tribal Government Sales and Use Taxes

Tribal Governments have authority to collect sales and use taxes on transactions within reservations.

Tribal motor fuel and tobacco taxes are common.

More tribes are implementing retail sales taxes and retail development is increasing significantly on many reservations.

Tribal members make purchases from remote sellers.

Supreme Court Rules for Sales Taxes on Tribal Lands

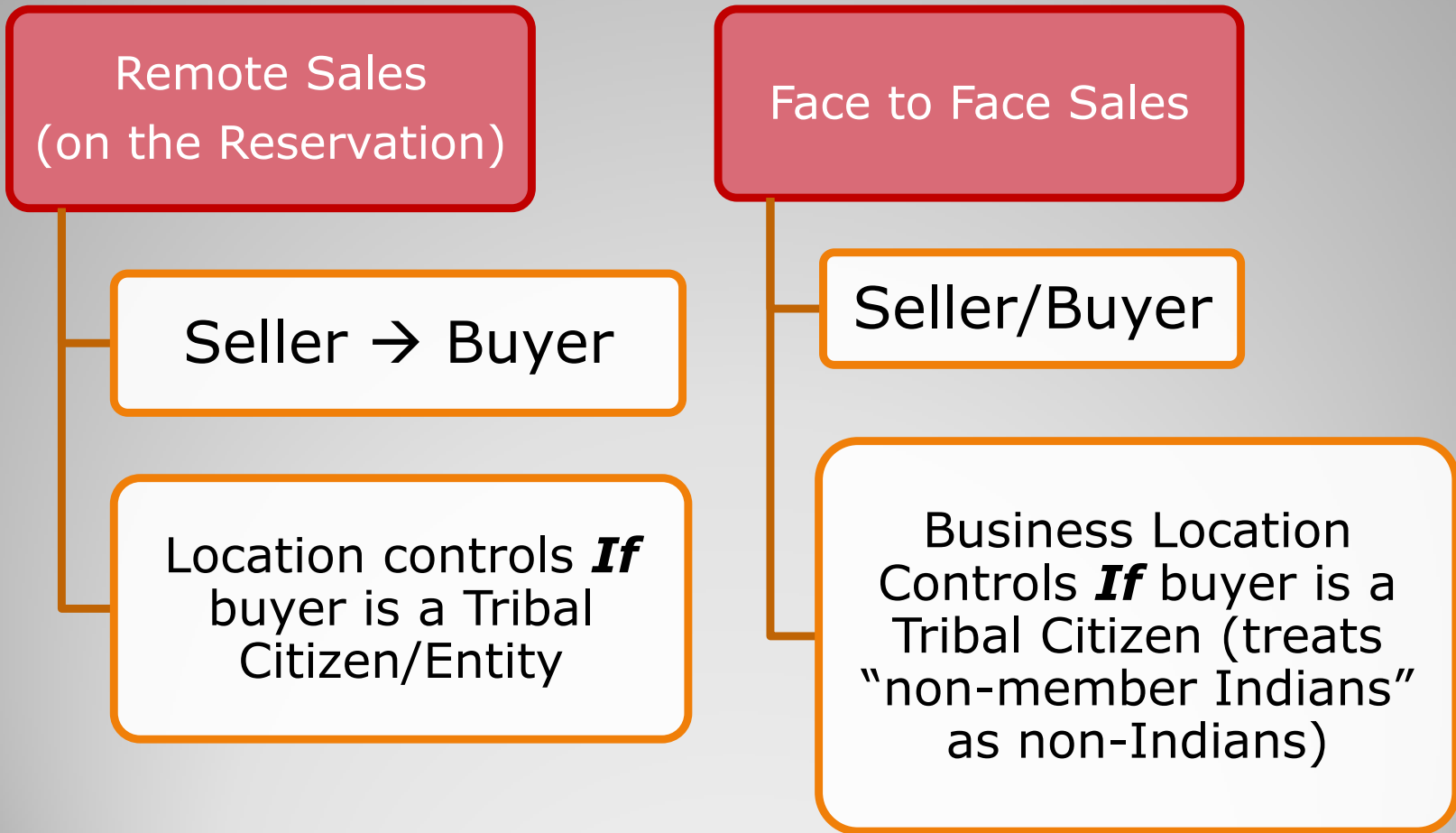
Tribal taxing authority is an inherent government function (Kerr-McGee, Colville)

Tribe may collect tax when product is received by any purchaser on tribal land. (Colville, Moe)

For products without “reservation generated value,” state may collect the tax when the product is received by a non-tribal member on tribal land. Dual Taxation. (Moe, Colville)

State may not collect tax when product is received on tribal land by tribal member or the Tribe. (Central Machinery, Moe, Warren Trading Post)

Sales on Tribal Lands



Remote Sales
(on the Reservation)

Seller → Buyer

Location controls **If**
buyer is a Tribal
Citizen/Entity

Face to Face Sales

Seller/Buyer

Business Location
Controls **If** buyer is a
Tribal Citizen (treats
"non-member Indians"
as non-Indians)

Streamlined Sales and Use Tax Agreement v. Tribal Sales Transaction Rules

SSUTA	Tribal Rules
Remote Sales – Location of Delivery	Remote Sales – Location of Delivery <u>if</u> buyer is Tribal Citizen/Entity
Face to Face Sales – Location of Business	Face to Face Sales – Location of Business <u>if</u> buyer is a Tribal Citizen

Streamlined Sales Tax & Indian Tribal Governments

S. 1832, Marketplace Fairness Act

- Senators Enzi (R-WY)
- Co-Sponsors: 20

S. 1452 (Durbin/D-IL), Main Street Fairness Act

S. 971 (Wyden/D-OR), Digital Goods and Services Tax Fairness Act of 2011

H.R. 3179 (Womack/R-AR3), Marketplace Equity Act of 2011 - includes
Indian Country within definition of a State

H.R. 2701 (Conyers/D-MI14), Main Street Fairness Act

H.R. 1860 (Smith/R-TX21), Digital Goods and Services Tax Fairness Act of
2011

Streamlined Sales Tax & Indian Tribal Governments

Recently engaged in work group meetings for S. 1832

Possible consideration in early November

Sent letters to Sen(s) Akaka, Barrasso, Inouye, Baucus, Enzi, Durbin, Alexander, Reid

Tribes need to be included, much like language in S. 34 (Enzi/110th)

- Included tribes as member states;
- limited number of tribal reps on the Member Board;
- Protected future and existing tax agreements between states and tribes; and
- Did not attempt to override tribal tax jurisdiction on the reservation

The Per Capita Act & Tribal Trust Settlements

Two Issues:

1. IRS taxation of trust per capita payments made to tribal citizens
2. Obama Administration Trust Settlements
 - Notice 2012-60 (Resolves One of the above)
 - House Subcommittee on Alaska Native and Indian Affairs – Sept. 14, 2012 Oversight Hearing
 - NCAI Follow-Up letter

THANK YOU

Contact Information:

- **Derrick Beetso at (202) 466-7767 or dbeetso@ncai.org.**

For general Information on NCAI's Tax Policy Work, please visit our Intertribal Tax Initiative Website at:

<http://www.ncai.org/initiatives/partnerships-initiatives/ncai-tax-initiative/ncai>