

DUAL TAXATION

New Mexico's Tribal State Solution: "Tax Peace"

PRESENTATION TO ECONOMIC AND RURAL DEVELOPMENT INTERIM COMMITTEE

OCTOBER 2, 2017

ON BEHALF OF ALL PUEBLO COUNCIL OF GOVERNOR'S LEGISLATIVE COMMITTEE AND NM NATIVE AMERICAN PETROLEUM COALITION

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Three Part Presentation:

- I. Background on Tribal State Tax Solution – Legal History and Policy Benefits
- II. Discussion of Tribal Gas Tax Deduction
 - Now
 - Under proposed bills introduced last session, and
 - With Tax at The Rack Preserving Tribal Gas Tax Deduction
- II. Policy Background On New Mexico's Working Relationship With Pueblo's/Nations and Federal Policies

TRIBAL GAS TAX DEDUCTIONS ARE CONSISTENT WITH NM'S TRIBAL STATE SOLUTION TO DUAL TAXATION

Since 1995, the State and Pueblos/Nations cooperated rather than litigated

State and Pueblos/Nations Agreed that:

- NM Tribes rely on tax revenues to provide essential government services.
- The State benefits from having strong tribal economies and strong Tribal governments with resources for essential services
- Dual Taxation depresses economic activity
- Dual Taxation hurts multitude of businesses/vendors selling to tribal businesses & governments

NM legislative agreements go back to 1995. Represent Commitments between Tribes/State that Tribal taxes will be primary on economic activity on tribal lands

USDOT has referred to NM's solution as a beneficial "Tax Peace" (with tax peace dividends)

- www.fhwa.dot.gov/policyinformation/motorfuel/aism/cahp3.cfm

New Mexico Versus Other States' Approach



Legislation to Cooperation

- Elected Native American Senators/Reps.
- Interdependent/Shared Economies
- Tribal Tourism Key to/Supports State Tourism
- Cabinet Level Indian Affairs
- Higher N-A voting Participation
- Cooperation Among Courts/Social Services
- Honor Historic Legislative Precedent
- A Commitment to Understand AND Respect -- Government to Government



Litigation to Antagonism

- Legalistic Parsing of Federal Pre-emption – count the Indians for tax deduction
- Recurrent Litigation
- Friction on voting rights, resource development, police encounters, etc.

MANY OF EARLY UNITED STATES TRIBAL STATE TAX CASES COME OUT OF NEW MEXICO

Merrion v. Jicarilla Apache Nation. (USSCt.1982)(*see all citations on last page)

- “The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management...[It derives] from a tribe’s general authority as a sovereign, to control economic activities within its jurisdiction, and to defray the cost of providing governmental services.....” (at 130)

Ramah Navajo Sch. Bd. V. Bureau of Revenue of NM (1982)*

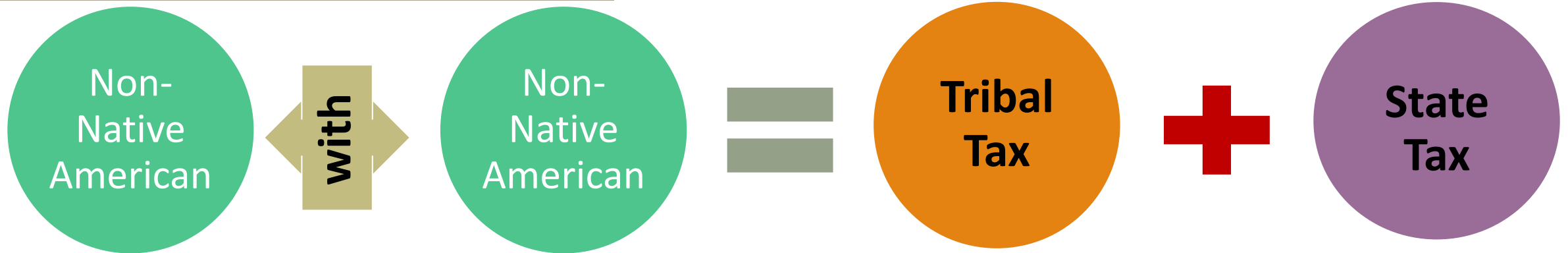
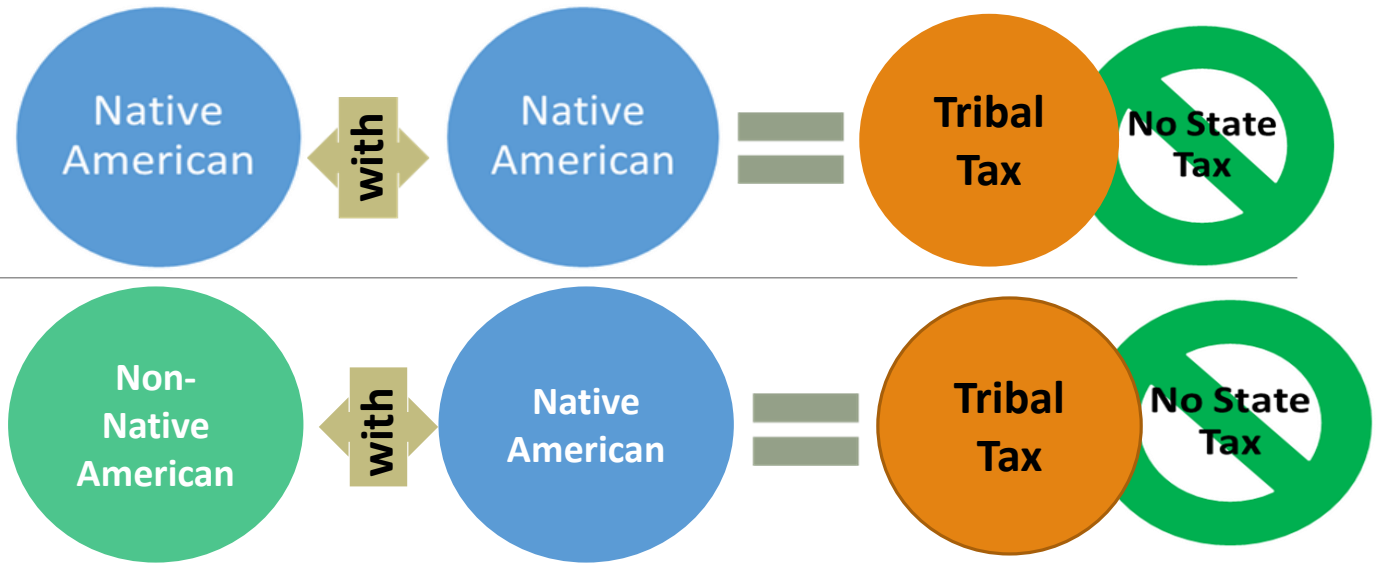
New Mexico v. Mescalero Apache Tribe (1983)*

Cotton Petroleum v. New Mexico (1989)*

Federal Preemption Of State Taxes Within Indian Country

- A State Can Not Impose Taxes on an Indian Tribe or its members in Indian Country Unless Authorized by Congress.*
- For On-Trust Land Transactions Involving a Native American person or tribal entity, easy test
- For non-Native transactions, state tax invalid
 - if State tax is pre-empted by federal law or
 - if it interferes with a tribe's ability to exercise its sovereign functions.*
- For transactions involving Non-Native Americans or questions about where legal incidence of the tax falls – it's a balancing test, and becomes a complicated, litigation-ripe question.*
- New federal regulations and interpretations: state taxes are preempted.
 - (See leasing regulations, right of way regulations...)
 - Federal government recognizes negative impacts of dual taxation.*

On-Reservation Transactions



**SOMETIMES:
DEPENDS:
A BALANCING
TEST**

COTTON PETROLEUM*

- Following *Merrion*, Cotton Petroleum sued NM claiming State severance taxes were pre-empted.
- Court determined that tribal interests did not outweigh state's interest in regulating and taxing oil and gas industry on the Reservation. Non-Indian oil company had to pay State taxes plus tribal taxes.
- Jicarilla Apache Nation was not involved in the law suit. No Tribal voice to explain the harm of double taxation or present tribal role oil and gas on reservation.
- Around the same time, *White Mountain Apache v. Bracker* was decided.
 - Supreme Court imposed its balancing test to determine if federal policy and tribal interests outweighed the state's interest. Tribal voice was before Court.
 - And Court came to the opposite conclusion: Arizona's state taxes were preempted.

The federal regulation of the two resources: timber in Arizona and oil and gas in NM was not that different, but the opposite results demonstrate the uncertainty of litigation.

Dual Taxation Did Harm Nation

Drilling on-Reservation following *Cotton Petroleum* dropped significantly. Jicarilla could show how less drilling meant less revenue to the Nation, but also the negative impact on State – fewer jobs, fewer ancillary business activity, no new severance tax at all if no new wells.

At same time, Nation was providing 90% of government (non-federal) funding for essential services. Dulce Public Schools, for which State received impact-aid, was the main state funded governmental activity on reservation.

Instead of re-litigating *Cotton* to bring to the Court's attention the Nation's regulatory oversight of oil and gas activity, lack of state spending for government services, and dual taxation's negative impact the Nation sought Cooperation and Legislation.

LEGISLATURE passed (2x) the Intergovernmental Tax Credit Act. (NMSA 7-29-C(1)) in 1995. For new wells, State receives 25%/Nation 75% of taxes.

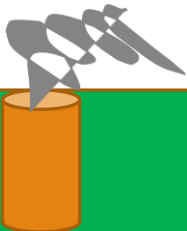
Even with credit, State still received over \$56 Million in severance taxes from tribal lands in last 5 years

WHY TRIBES TAX & WHAT IS GOOD TAX POLICY?

Tribes' and State's TAXES Should:

1. Provide Revenue for Essential Government Services
2. Support economic activity and for that they need to:
 - ❑ PROVIDE CERTAINTY TO SUPPORT LONG TERM INVESTMENT
 - ❑ NOT OVERBURDEN AN INDUSTRY TO POINT OF KILLING THE BUSINESS
 - ❑ BE CONSISTENT WITH TAXES ACROSS THE JURISDICTIONAL LINE
3. Tax deductions/exemptions are sound if they generate more economic benefit than the taxing jurisdiction gives away

Intergovernmental Tax Credit Became Building Block for the Tribal State Tax Structure



**Tribal Businesses,
Institutions and Government Not Destroyed
by Dual Tax**

Gasoline businesses only source for some Tribes' governmental revenues; taxes support cultural institutions like Indian Pueblo Cultural Center

No Dual Taxation

Certainty

**Same Tax Rates Across
Boundaries**

**Supported By New Mexico
Business Community**

**Cooperative Agreements
Encourage Sharing of
Information**

**No Discrimination – Native
American and Non-Native
American Business/Consumer
Pay Same Taxes**

TRIBAL GASOLINE STATIONS

Tax Policy – Certainty/No Dual Tax/Support Economic Development/Same Tax Rate

- Tribes had invested in gas stations based on tax structure. When NM wanted to change tax structure & impose state gasoline tax on tribal stations, recognized that the certainty of investment would be violated if imposed State tax on tribal gas stations.
- Gas tax revenue essential to many tribal budgets.

SOLUTION

- Gasoline – Tribal Tax 100% deduction
- Special Fuels – State receives 100% of special fuels tax
- Wholesalers (Nambe & Santo Domingo) tax split – 60% State/40% Tribe
- A historic compromise adopted in 1999 that was 4 years in the making.
- A historic compromise that has endured for 18 years

TAX POLICY – PROMOTE ECONOMIC DEVELOPMENT; GENERATE TAX REVENUE FROM JOBS, BUSINESS GROWTH

State and Cities offer tax deductions or exemptions to a wide range of industries and businesses with goal of promoting economic development & creating jobs. Idea is that the economic activity will result in more tax revenue than what is lost in exemption/deduction.

Tribal business activity generates significant tax revenue for State and jobs for state citizens.

NAPC and APCG are both contracting for studies/analysis of the impact of tribal businesses on New Mexico's economy. We hope to present this to the Legislature when it is completed.

A few anecdotes:

- Jobs
- Gross Receipts Tax Activity

THESE TAX AGREEMENTS AND THE BUSINESS ACTIVITY THEY SUPPORT ARE GOOD FOR BOTH GOVERNMENTS

Leverage of funds. Several Tribes have used tax revenue to leverage other federal funds or private financing. This leads to greater spending in State for both construction jobs and then the full time jobs at health care centers, new businesses, community centers, etc.

Tribes have used tax revenue for NMFA loans to build community projects that benefit both tribal and non-Tribal members. A few examples:

Santo Domingo – Health Facility (serve dialysis patients from neighboring villages); Emergency Response Facility (respond to accidents on I-25); Headstart facility

San Felipe – NMFA financed water/wastewater project

Jicarilla Apache Nation – local grocery store in Dulce (previously a food desert), health clinic, water/waste-water infrastructure

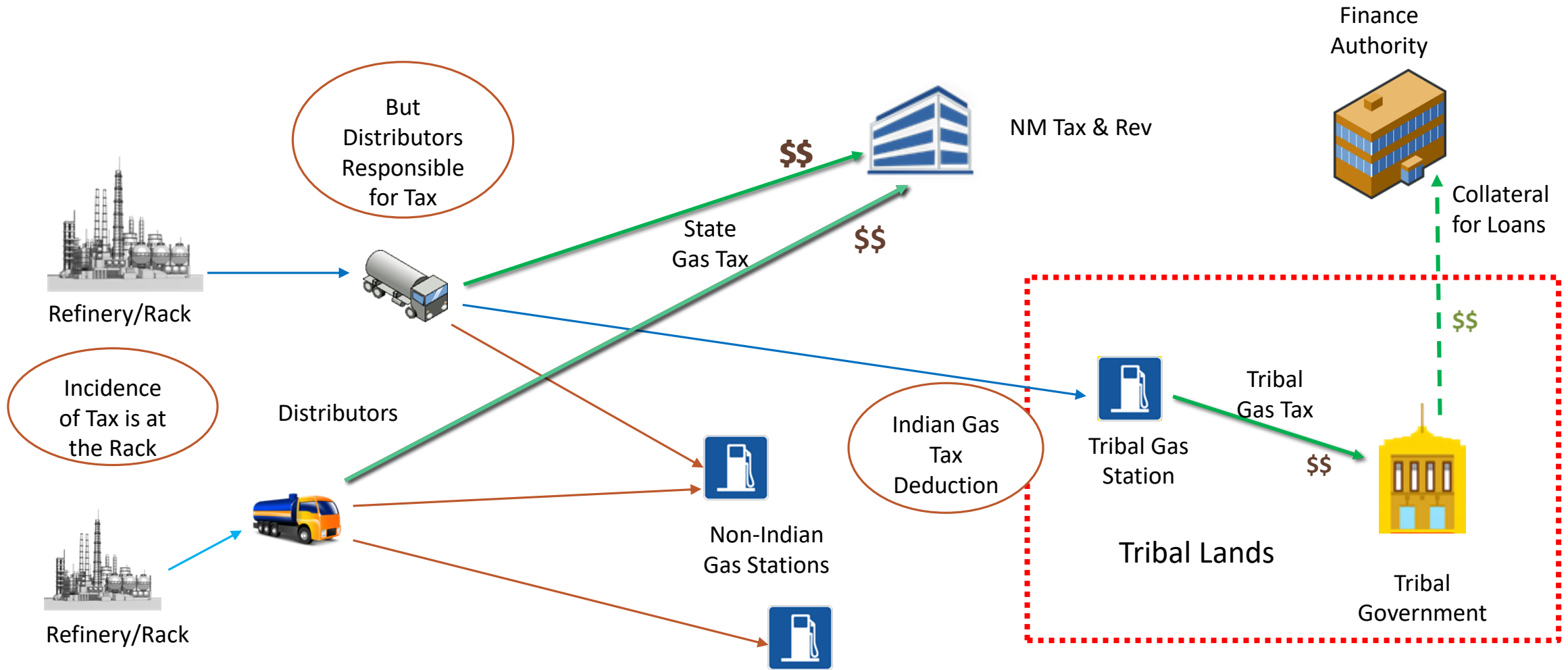
New Mexico's Tax Peace Has Broad Support

Every Republican and Democrat Governor since 1995 has pledged their support for the dual taxation fixes represented by the Severance, Cigarette, Gross Receipts and Gasoline Tax Deductions and Credits.

The Federal Highway Administration, when dubbing the Gasoline Tax Deductions a “Tax Peace”, admired the State for getting to that peace through legislation.

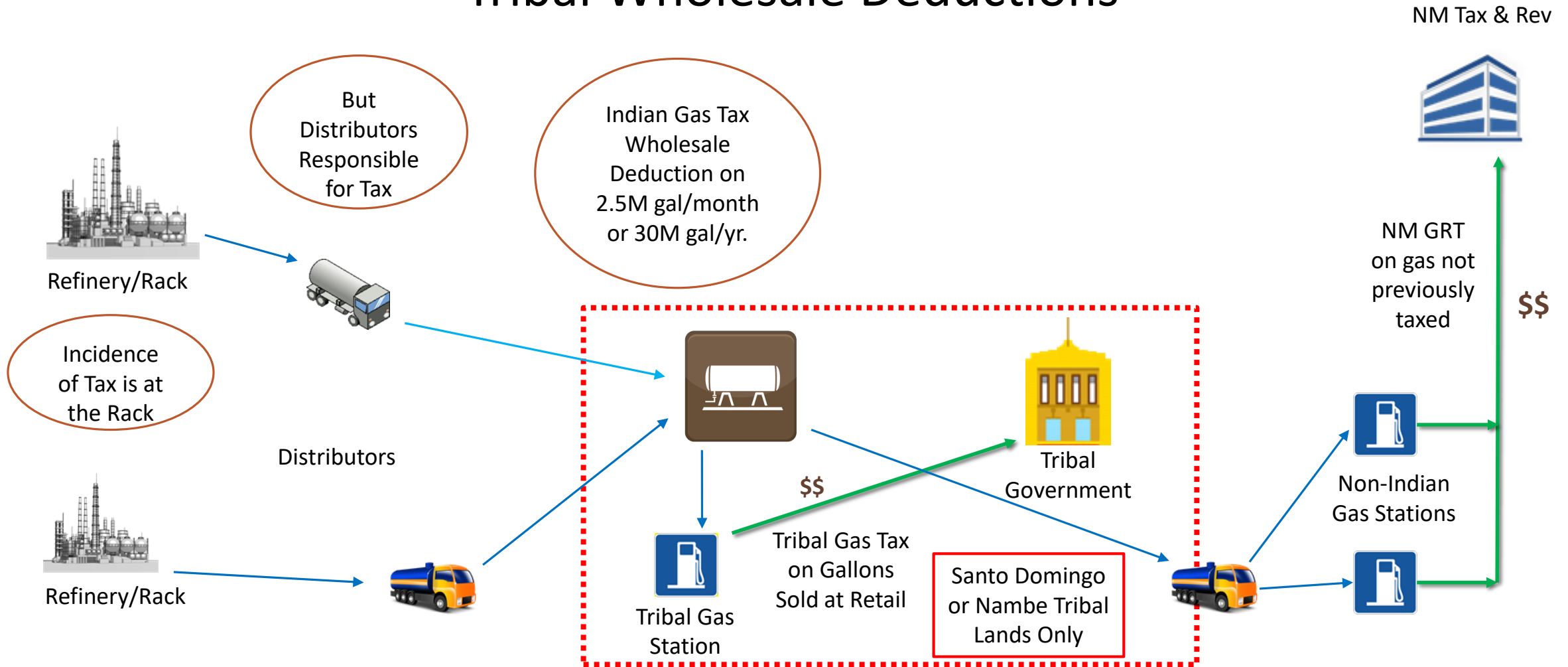
New Mexico Association of Commerce and Industry supports NM's solution to dual taxation: “ACI favors legislative action to address situations in which double taxation of industry and/or multiple administration of taxes imposed by New Mexico and the Indian nations inhibits economic growth on tribal lands” (2017 Interim Policy Agenda, p.39)

Current NM Gasoline Tax Structure



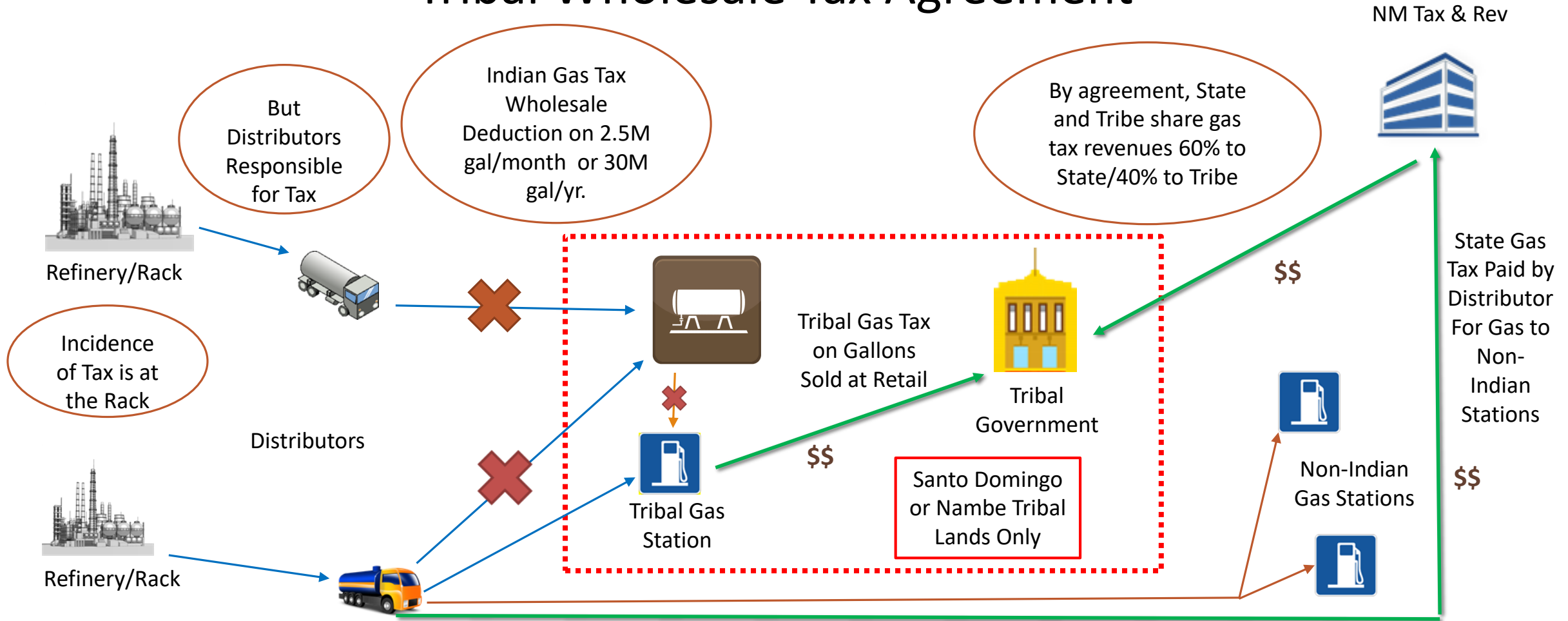
Current NM Gasoline Tax Structure

Tribal Wholesale Deductions

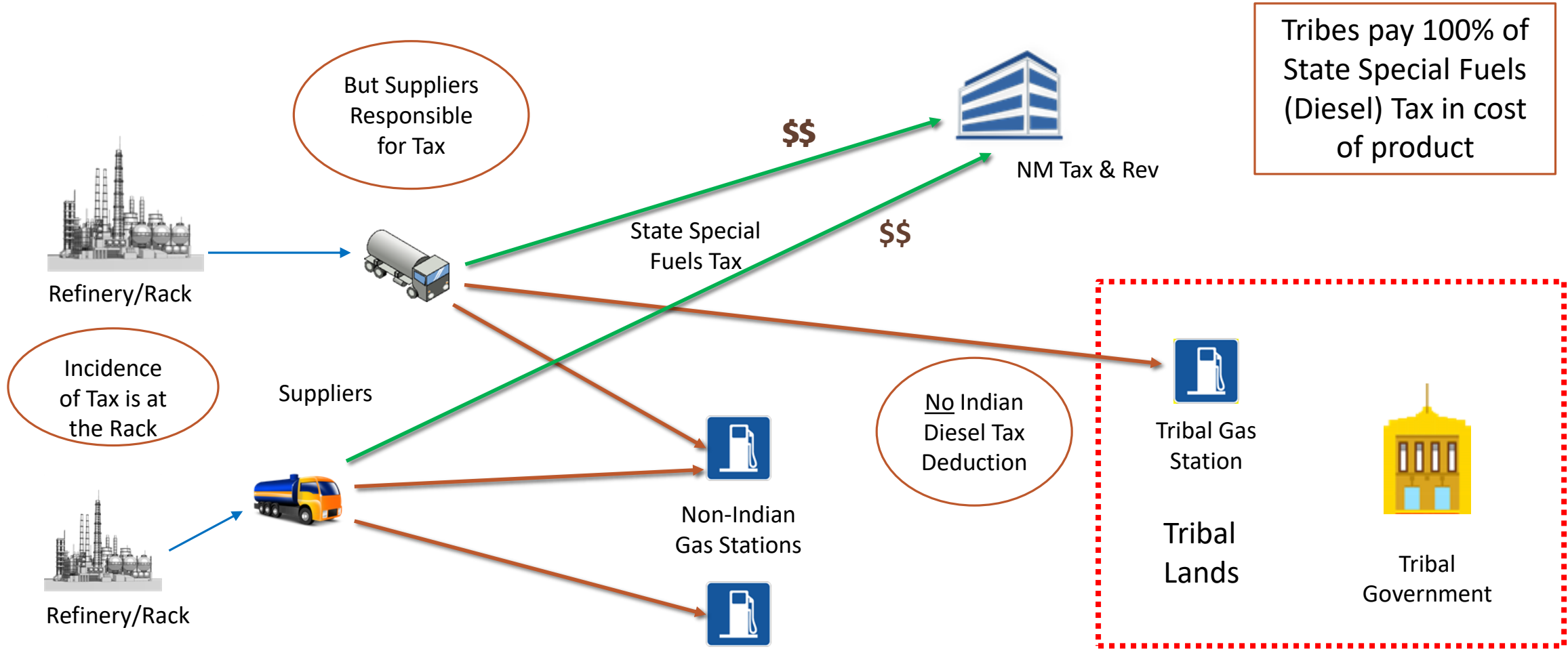


Current NM Gasoline Tax Structure

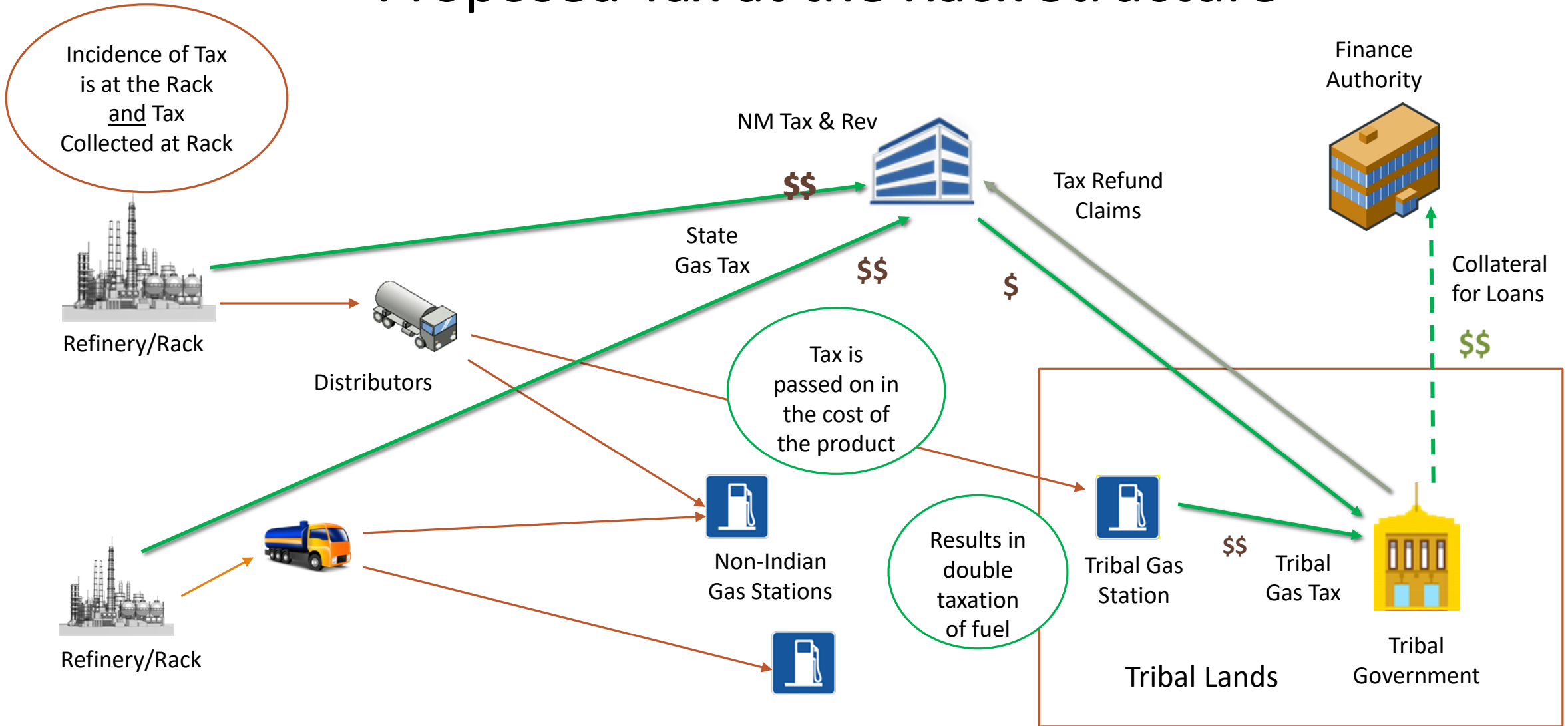
Tribal Wholesale Tax Agreement



Current NM Diesel Tax Structure



Proposed Tax at the Rack Structure

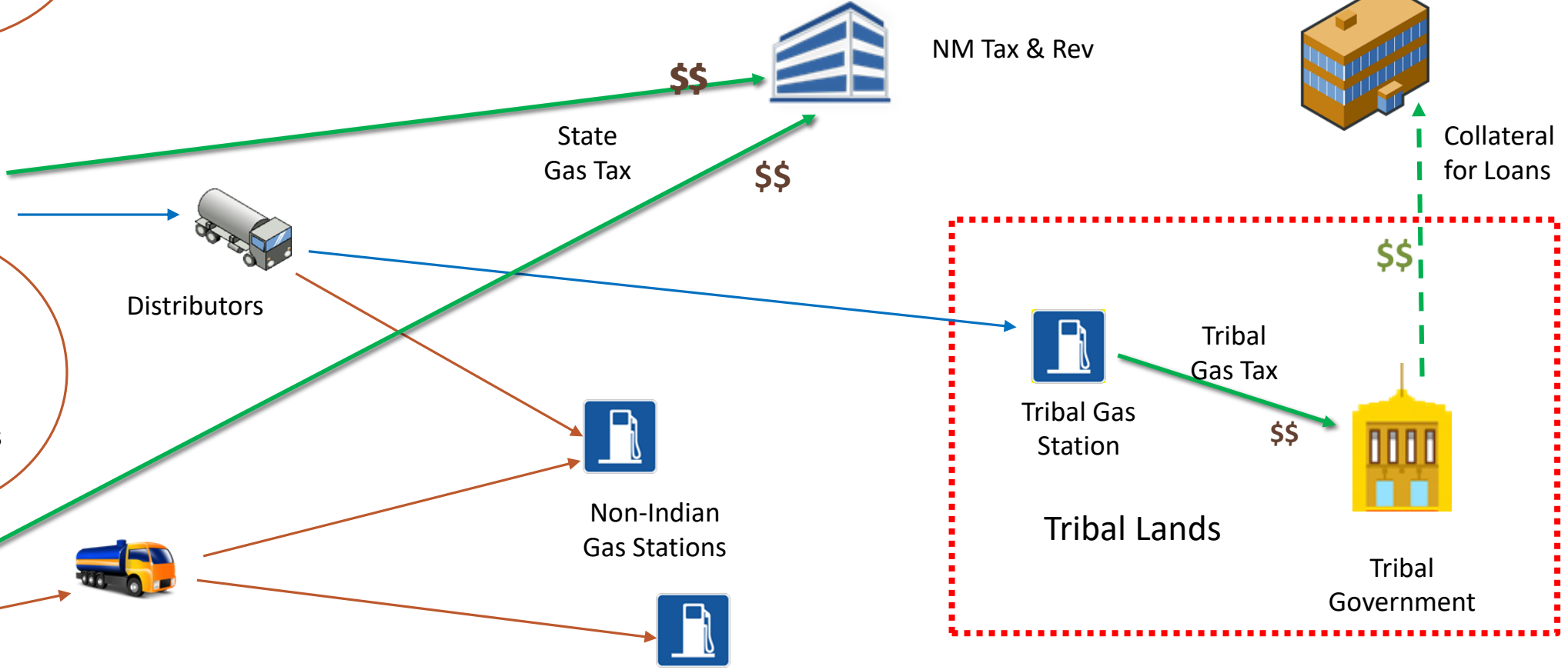
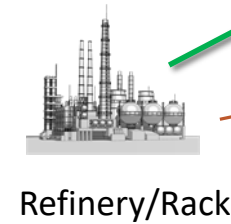


Proposed Tax at the Rack Structure A Positive Solution

Incidence of Tax
is at the Rack
and Tax
Collected at Rack



Exemptions:
Federal, State,
Tribal
Government
Use; Indian Gas
Tax Deductions



TAX AT THE RACK – Negative Effects

- ❑ Tax and Revenue FIR presented to Transportation Infrastructure Revenue Subcommittee shows minimal benefits. Analysis shows that total benefit to State is only \$880,000!
 - ❑ Repeal of Tribal Gas Tax Deductions but allowing only tribal member deductions results in approximately \$2.2 M increase in revenue in comparison to widespread detrimental impact on 20 Tribes and tribal economies with the loss of deductions.
 - ❑ But when calculated with other anticipated losses in revenues, the anticipated increase to State is only \$880,000.
- ❑ May cut down on number of taxpayers by collecting at the rack but imposes an administrative burden on the backside for processing tax refund claims from parties with exemptions. Administrative costs.

TAX AT THE RACK

APCG and NAPC tribal governments do not oppose the proposed move to Tax at the Rack. The State should administer its tax laws in the manner it believes most efficient.

- Some Legislators say only reason for proposing changes is for administrative, good governance purposes.

Tribal Nations would OPPOSE restructuring the gasoline tax act to REMOVE the tribal gasoline tax deductions.

- At last committee hearing, certain legislators did propose to remove tribal tax deductions
- Last year's bills REMOVED tribal tax deductions and replaced with system that counts individual Native Americans' purchases
- Tribes' oppose this approach and ask all legislators to support good tax policy

Solution

We have proposed language that the Committee and any lawmaker should use when drafting legislation that changes the collection of the gasoline tax.

NEGATIVE IMPACT IF TRIBAL TAX DEDUCTIONS REMOVED FROM LAW

- ❑ Potential Default on NMFA Loans
- ❑ Potential constitutional violation of contractual obligations of state on NMFA loans and Santo Domingo/Nambe's gas tax revenue share agreements
- ❑ Double taxation of gasoline sold at tribal gas stations
- ❑ If those gas stations close: loss of gasoline tax revenue to tribe
- ❑ Loss of employment at gas stations and related businesses
- ❑ Restrictions on Tribes' ability to provide essential government services
 - ❑ Loss of programs, services, infrastructure improvement and maintenance, employment for broader economic activity tied to fuel plazas

POLICY CONSIDERATIONS REGARDING TRIBAL STATE POLICY AND COOPERATION

Important for Legislature to understand broad tax policy supporting tribal distributors gas tax deductions.

Will Close with placing these tax agreements within the broader context of State government to government relations with NM Pueblos/Nations

Regis Pecos

Case Citations

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989).

Merrion v. Jicarilla Apache Tribe, 455 U. S. 130 (1982).

New Mexico v. Mescalero Apache Tribe, 462 U. S. 324 (1983).

Ramah Navajo School Bd., Inc. v. Bureau of Revenue of NM, 458 U. S. 832 (1982).

White Mountain Apache Tribe v. Bracker, 440 U. S. 136 (1980).