

DUAL TAXATION

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

PRESENTATION TO TRANSPORTATION AND INFRASTRUCTURE INTERIM COMMITTEE

AUGUST 22, 2017

ON BEHALF OF ALL PUEBLO COUNCIL OF GOVERNORS LEGISLATIVE COMMITTEE AND NM NATIVE
AMERICAN PETROLEUM COALITION

TERESA LEGER DE FERNANDEZ, LEGER LAW & STRATEGY, LLC

CAROLYN ABEITA, VAN AMBERG ROGERS ABEITA YEPA AND GOMEZ

REGIS PECOS



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

Since 1995, the State and Pueblos/Nations in New Mexico have generally not litigated over taxes, but rather have agreed that:

- NM Tribes rely on tax revenues to provide essential government services
- Tribal tax policy promotes on-reservation business activity – both tribal and Non-Native businesses
- The State benefits from having strong tribal economies, strong Tribal governments
- State benefits from taxes collected from employees, ancillary businesses and vendors
- Dual Taxation depresses economic activity and hurts Pueblos/Nations, the State and the multitude of businesses/vendors who are tied to tribal businesses & governments
- The legislative agreements provide 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

Our presentation has three parts:

1. The economic and historic backdrop of the court decisions & New Mexico's tribal state tax structure. Why good tax policy supports keeping tribal tax deductions wherever the state imposes/collects the gasoline tax
2. An overview of the existing tribal gas tax deductions and how they would work under "tax at the rack"
3. A review of the broader context - New Mexico should promote and protect its' unique tribal-state policy

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/etc.
- 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.*

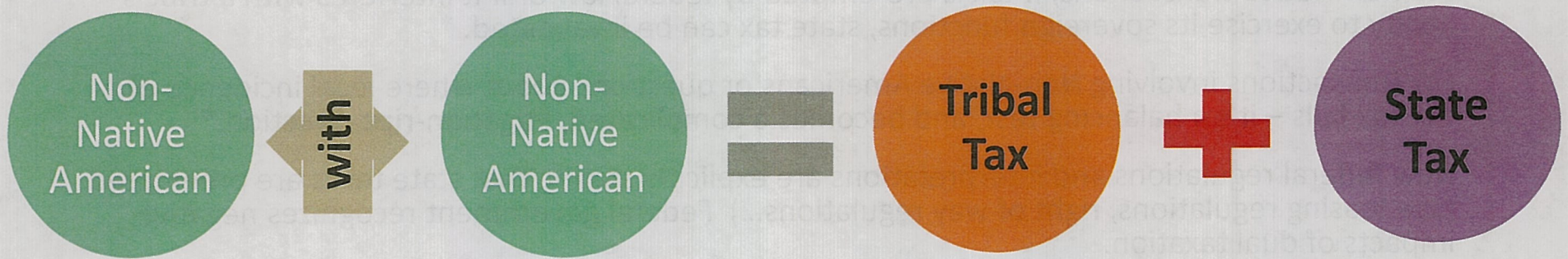
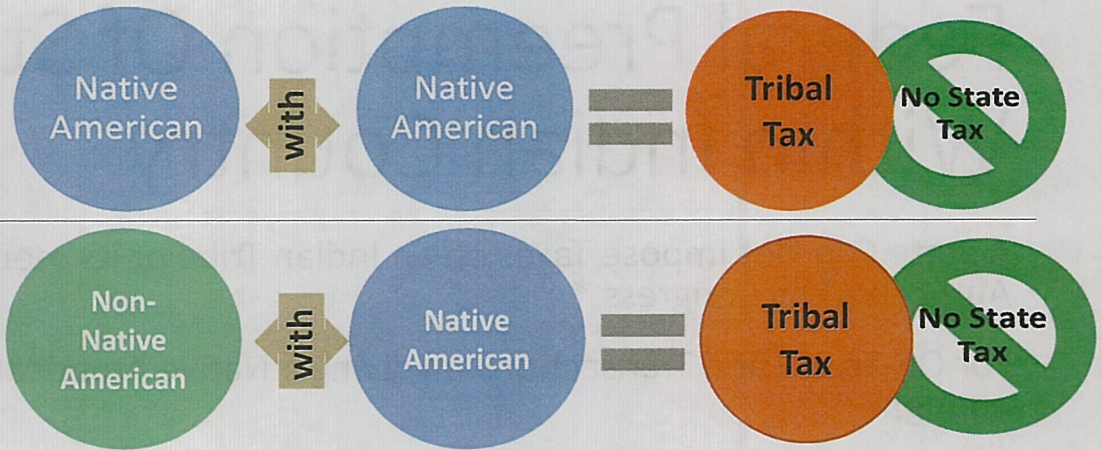
For On-Trust Land Transactions Involving a Native American person or tribal entity, this is easy enough

For non-Native transactions, if tax is pre-empted by federal law or if it interferes with a tribe's ability to exercise its sovereign functions, state tax can be invalidated. *

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 are explicitly stating that state taxes are preempted. (See leasing regulations, right of way regulations...) Federal government recognizes negative impacts of dual taxation.

On-Trust Lands



SOMETIMES, DEPENDS, IT'S A BALANCING TEST.

COTTON PETROLEUM*

- Following *Merrion*, Cotton Petroleum sued NM claiming State severance taxes were pre-empted.
- Court: applied balancing test and found state's interest in regulating and taxing oil and gas industry on the Reservation justified tax. Non-Indian oil company had to pay State taxes plus tribal taxes.
- Jicarilla Apache Nation not involved in the law suit. No opportunity to explain the harm of double taxation or present its tribal interests in regulating Cotton Petroleum.
- *White Mountain Apache v. Bracker* was decided with a different result. The Court's balancing test: federal policy and tribal interests outweighed the state's interest. 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; the contradictory court decisions demonstrate the uncertainty of litigation.

Cotton Petroleum's Dual Taxation Did Harm Nation

Drilling on-Reservation following *Cotton Petroleum* dropped significantly.

Less drilling = less revenue to the Nation

Negative impact on State: fewer jobs, fewer ancillary business activity, no new severance tax 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, main state funded governmental activity

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 TRIBAL GOVERNMENTS 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 taxes 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 BOUNDARY 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

Gross Receipts Tax: Tax Policy – Certainty/No Dual Tax/Revenue for services/same tax rates across boundaries

- *Ramah* – NM gross receipts, although imposed on non-Indian, interfered with tribe's ability to exercise its sovereign functions. Litigation uncertainty
- Tribes were imposing their own taxes. Retail businesses that weren't tribally owned couldn't open on Pueblos because of tax burden

SOLUTION – Gross Receipts Tax Deduction and Cooperative Agreements (NMSA §7-9-88.1) (1999)

- For non-Native American transactions, 75/25 split
- Dual Taxation avoided and State gets a share of tax revenue from on-reservation economic activity
- State and Tribal Taxes are the Same and Non-discriminatory (apply to Non N.A. and N.A.)
- Non-tribal businesses selling services/goods to non-tribal customers aren't paying double taxation
- The cooperative agreements encourage sharing of information; widely accepted by all businesses

Cigarette Tax

Tax Policy – Certainty So Businesses Not Destroyed; Tribal Tax Revenue/Economic Growth/Cultural Institutions Supported;

- State historically never collected cigarette tax from on-reservation sales
- Indian Pueblo Cultural Center and other tribal businesses would not exist without smoke shop revenue
- State wanted to increase cigarette tax to both raise more revenue and reduce smoking

SOLUTION

- Tribes impose a Qualifying Tribal Cigarette Tax of 75¢ a pack (of 20 cigarettes)
- No State tax if a tax stamp showing sold on reservation with a Qualifying Tribal Tax
- State increases its tax to \$1.66 a pack of 20 cigarettes
- Tax differential remains the same; Tribal taxes on-reservation activity, State policy goals met

TRIBAL GASOLINE TAX DEDUCTIONS

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 Must be same as State
- Can deduct from state tax if to a registered tribal distributor
- 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 (more in part 2)

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 the studies' findings to the Legislature in the Fall/Winter of 2017.

A few anecdotes:

- Jobs
- Gross Receipts Tax Activity
- Vendor contracts – businesses contracting with Tribal enterprises/governments

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 and other loans to build community projects that benefit both tribal and, often, 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); Head Start facility

San Felipe – NMFA financed water/wastewater project

Tesuque – Waster water treatment facility at mobile home village – (mostly non-tribal residents)

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

Ohkay Owingeh – Tribal Government Services Bldg – Public works, public safety, social services/Natural resources

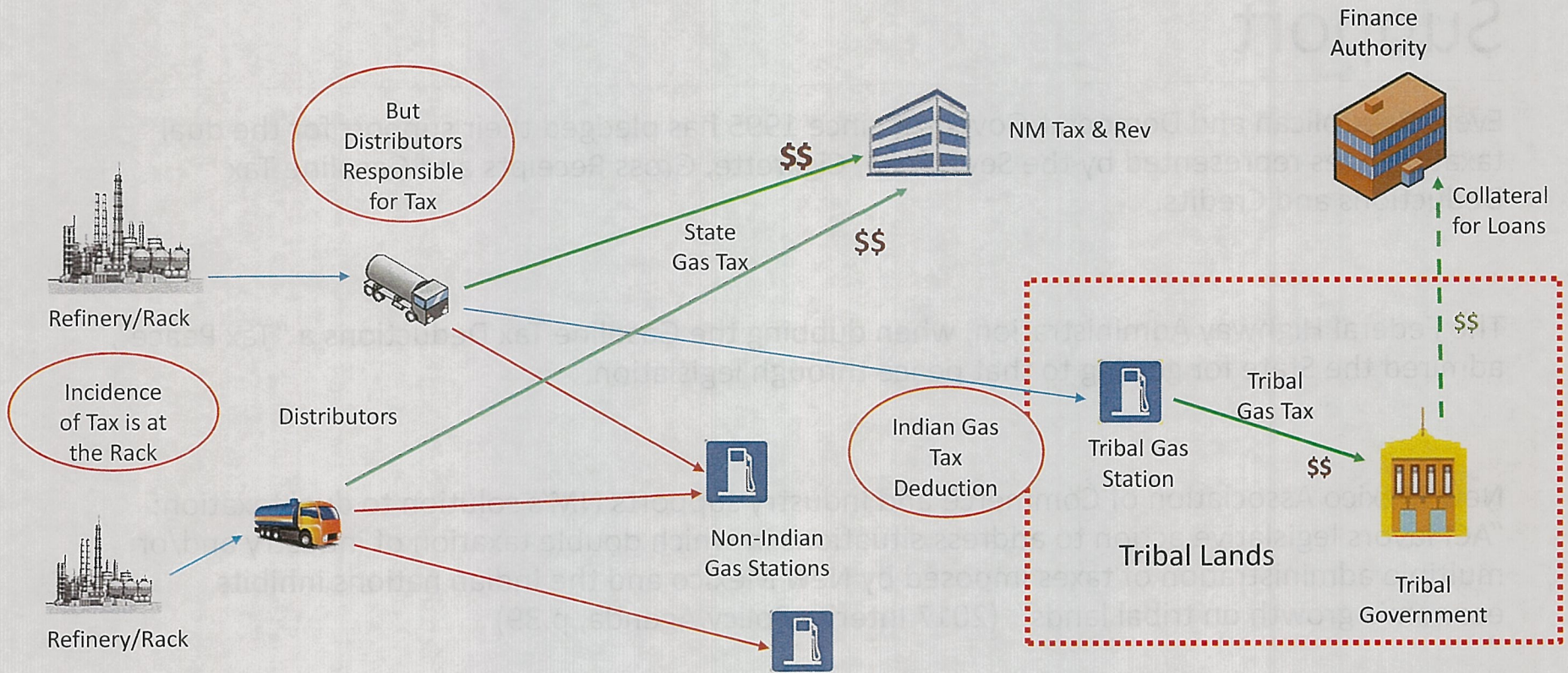
New Mexico's Tax Peace Has Broad Support

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.

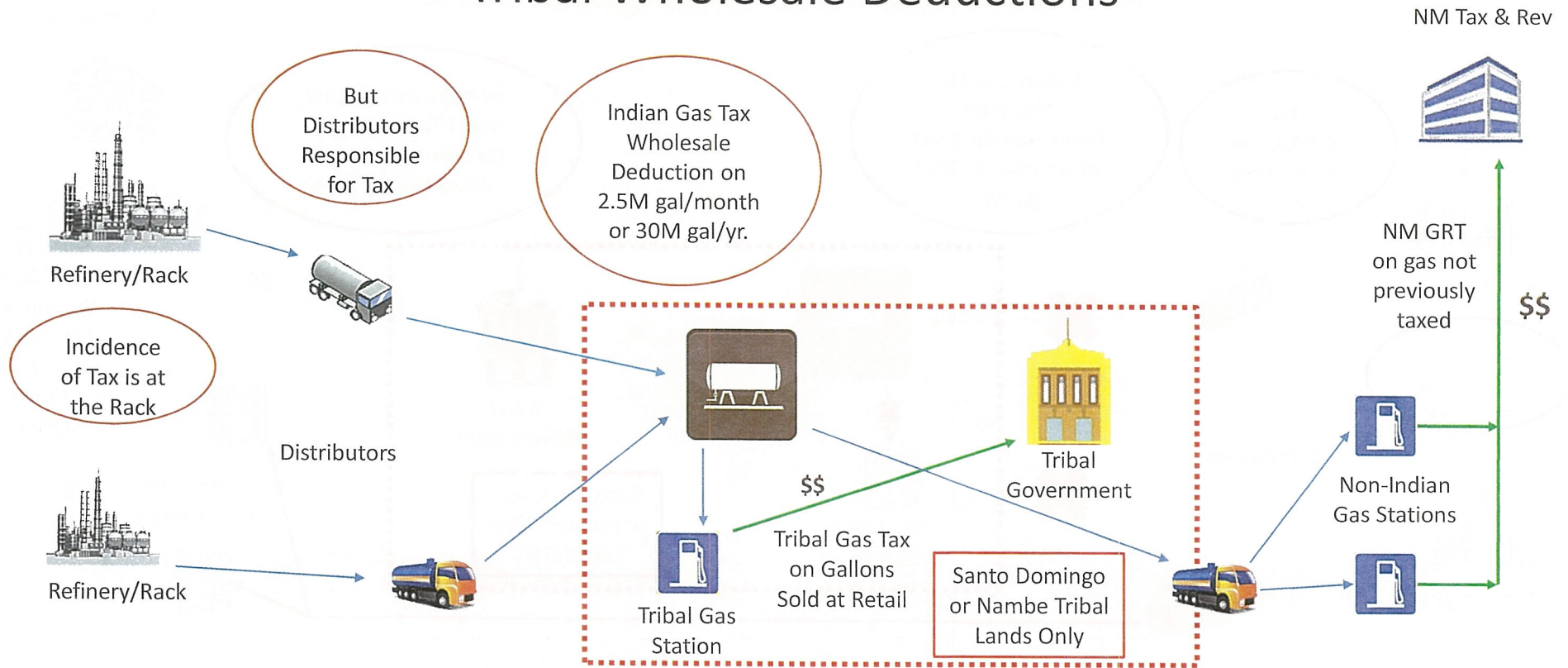
The Federal Highway Administration, when dubbing the Gasoline Tax Deductions a “Tax Peace”, admired the State for getting to that peace through legislation.

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)

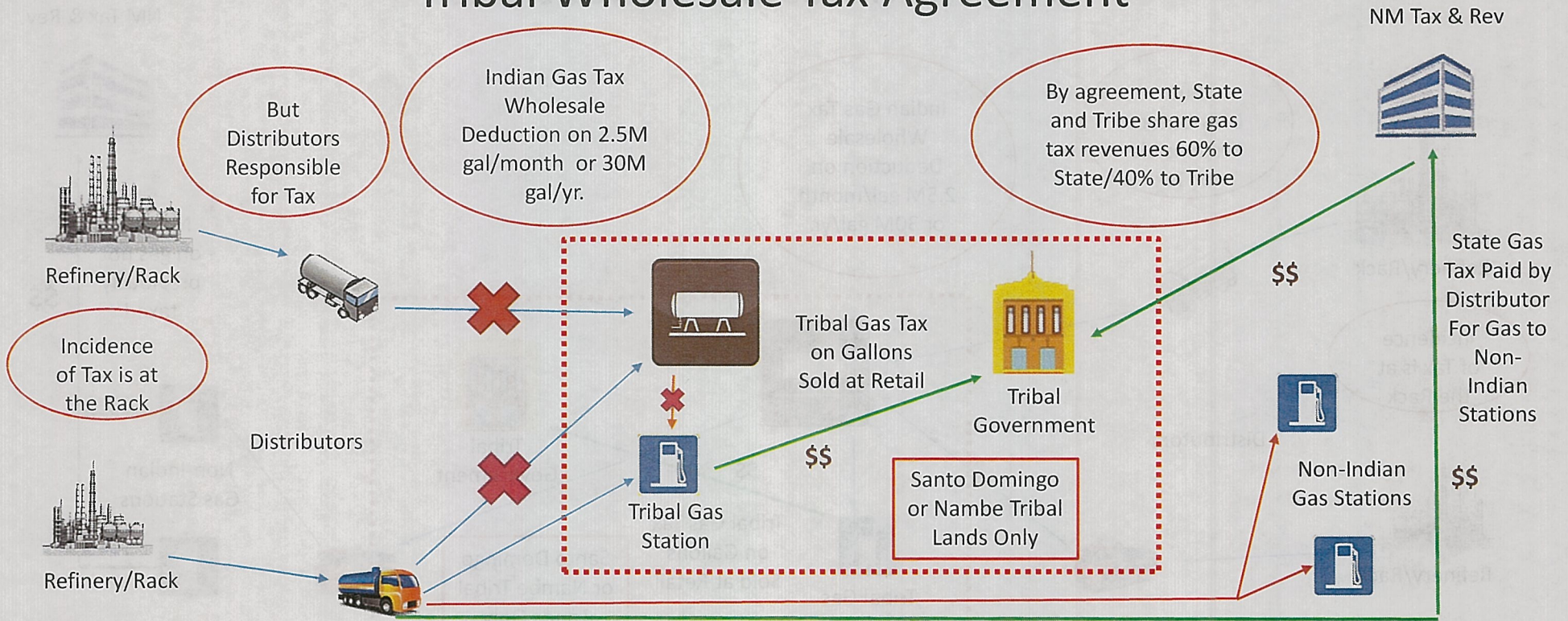
Current NM Gasoline Tax Structure



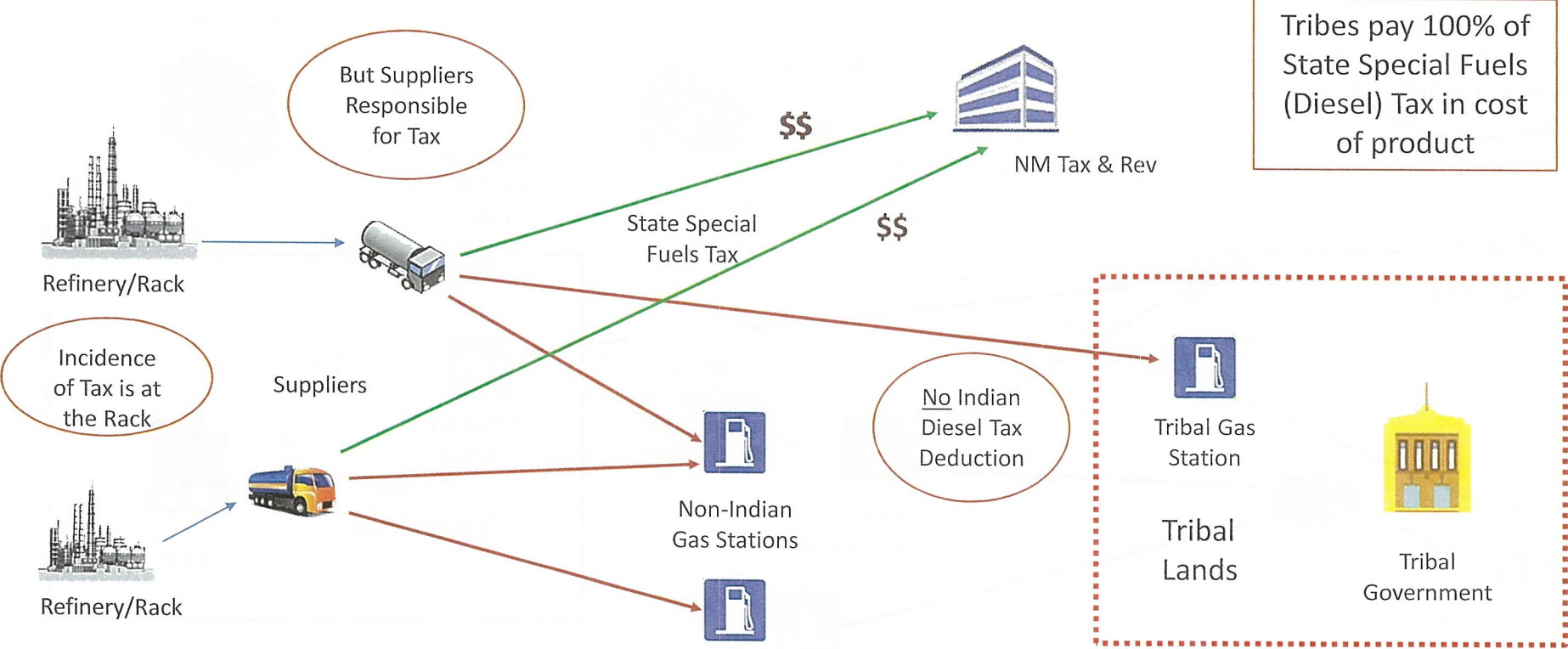
Current NM Gasoline Tax Structure Tribal Wholesale Deductions



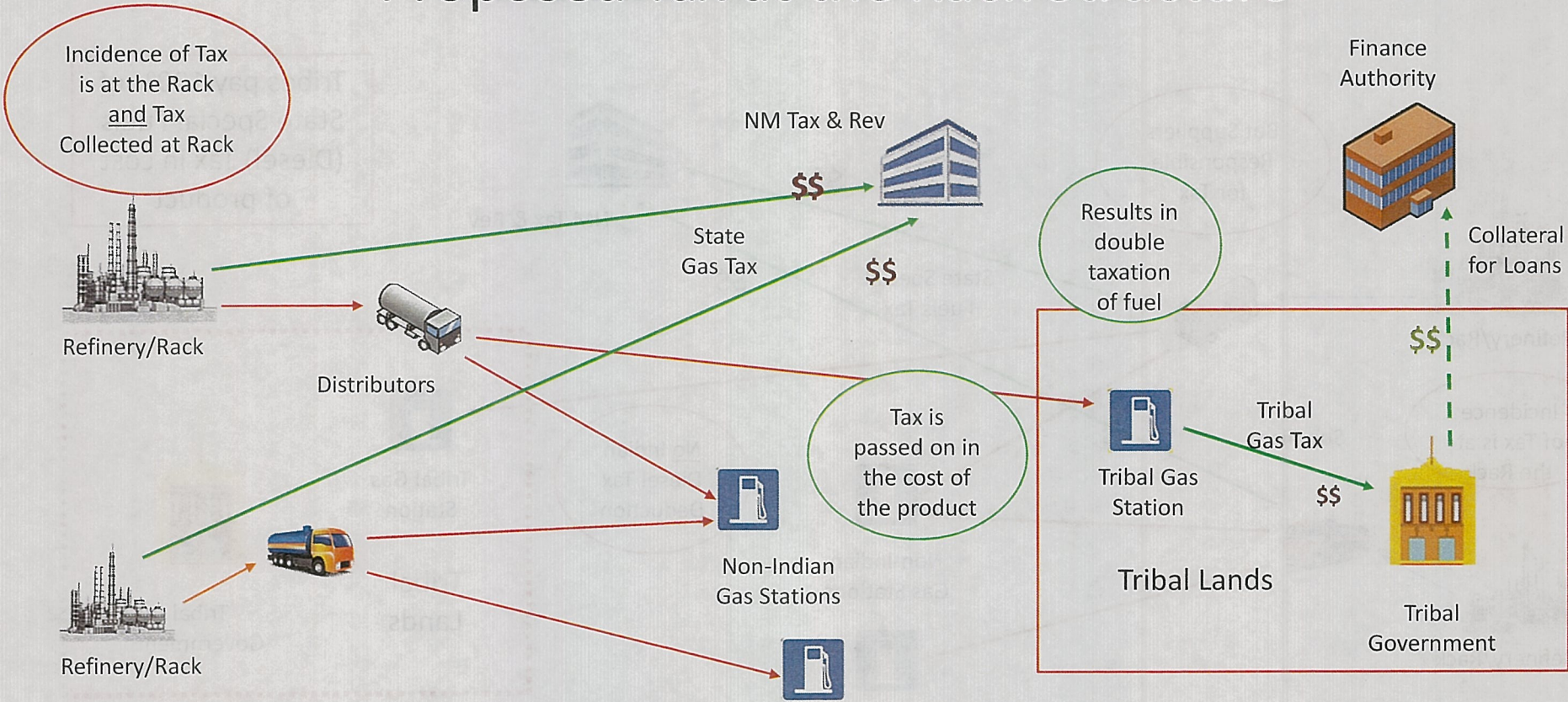
Current NM Gasoline Tax Structure Tribal Wholesale Tax Agreement



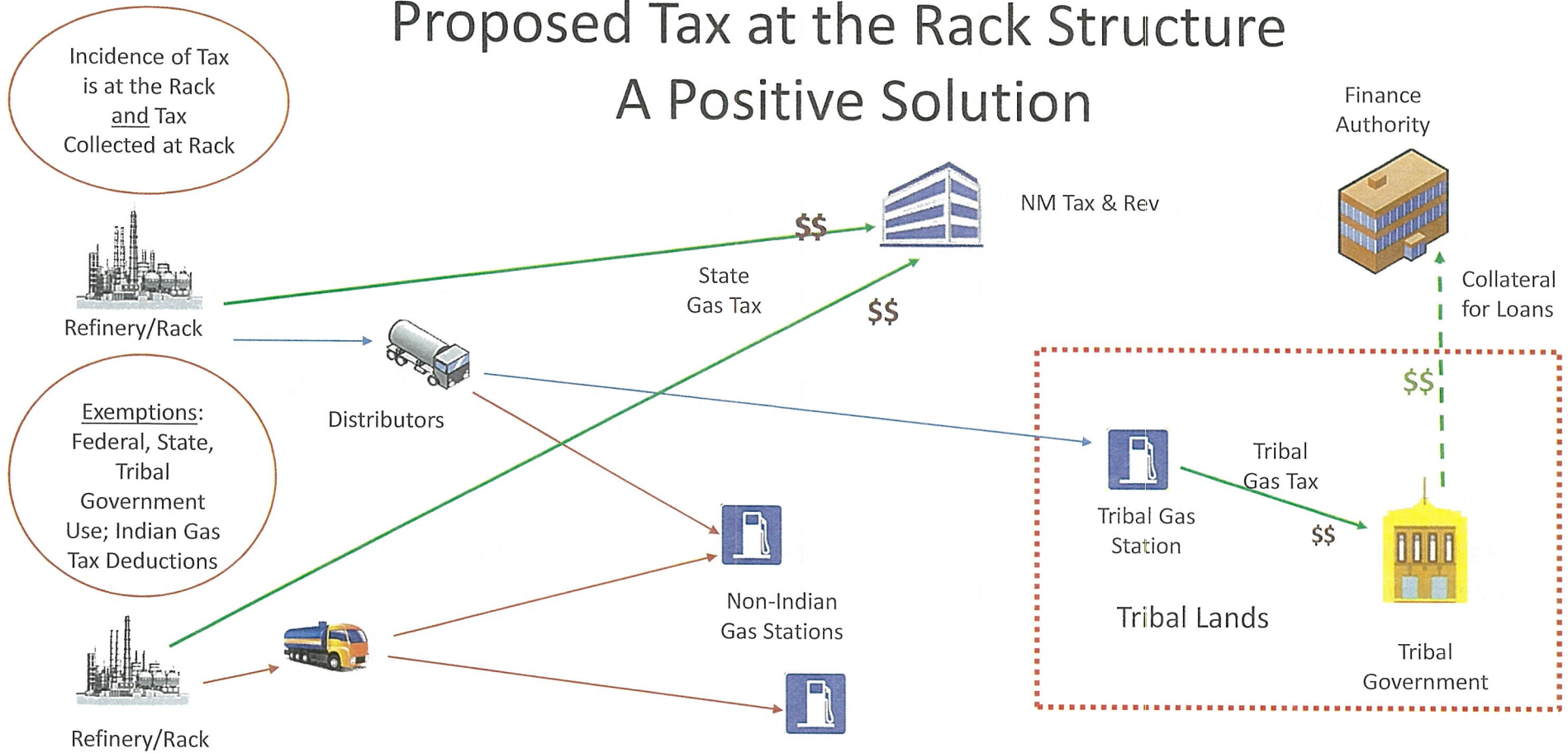
Current NM Diesel Tax Structure



Proposed Tax at the Rack Structure



Proposed Tax at the Rack Structure A Positive Solution



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.

- We accept your statement that you are not proposing the changes to negatively impact the Tribes, but only for administrative, good governance purposes.

Tribal Nations would OPPOSE restructuring the gasoline tax act in a way that REMOVES the tribal gasoline tax deductions.

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

FEDERAL POLICY CONSIDERATIONS SUPPORTING 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 and the federal policy overview

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).

White v. Johnson & White, 100 U.S. 130 (1880).

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