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## FISCAL IMPACT REPORT

**ORIGINAL DATE** 02/24/21  
**LAST UPDATED** 03/14/21    **HB** \_\_\_\_\_  
**SPONSOR** McKenna

**ANALYST** Graeser

**SHORT TITLE** Tribal Land Gross Receipts    **SB** 397/aSTBTC

### REVENUE (dollars in thousands)

Estimated Revenue					Recurring or Nonrecurring	Fund Affected
FY21	FY22	FY23	FY24	FY25		
	Potentially significantly positive. See Fiscal Implications.				Recurring	Tribal Governments
	See Fiscal Implications				Recurring	General Fund
	See Fiscal Implications				Recurring	General Fund (TRD administrative fee)
	See Fiscal Implications				Recurring	Counties and Municipalities

Parenthesis ( ) indicate revenue decreases.

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Department of Indian Affairs (DIA)

Taxation and Revenue Department (TRD)

### SUMMARY

#### Synopsis of STBTC amendment

The Senate Tax, Business and Transportation Committee amendment to Senate Bill 397 deletes the words “the lesser” from the 75 percent credit that taxpayers may take against the combined state, county, and municipal gross receipts tax and from the 25 percent credit that taxpayers may take against the tribal tax. (See “Technical Issues” for a discussion on potential unintended consequences.) The title is also amended to clarify the purpose of the amendments proposed in the bill.

#### Synopsis of Original Bill

Senate Bill 397 changes the gross receipts tax rate imposed by tribes, pueblos, and nations from “... at a rate not greater than the total of the gross receipts tax rate and local option gross receipts

tax rates imposed by this state and its political subdivisions located within the boundaries of the tribe” to “... at a rate not less than the total of the gross receipts tax rate and local option gross receipts tax rates imposed by this state and its political subdivisions located within the boundaries of the tribe.” This acknowledges that the maximum gross receipts tax rate for adopting Indian jurisdictions is generally limited to the remainder of county rate of the county that includes the Indian jurisdictions. This is despite the fact that most Indian jurisdictions provide public services similar to those provided by municipalities. Municipalities are allowed significantly higher gross receipts tax rates than prevail in county remainder areas.

The provisions of this bill, however, would not result in the state, county, or, if applicable, municipality sharing transactions with a sovereign tribal government. In long-established practice, 25 percent of the revenue derived from a tribal tax rate in excess of the combined state plus local option rate is distributed to the state and local governments and 75 percent of the revenue derived is distributed to the tribal government. The preponderance of interpretation is that 100 percent of the revenue derived from the excess rate would be distributed to the sovereign tribal government. (See “Other Substantive Issues” for a discussion of the history of this unique revenue sharing program.)

The effective date of this bill is July 1, 2021. Note: If this bill passes and is signed around March 30, 2021, it would be difficult for TRD to implement the systems changes by July 1, 2021. It would be better to move the effective date of this bill to January 1, 2022.

## **FISCAL IMPLICATIONS**

### **TRD comments:**

The legislation would require that tribal gross receipts tax rates be equal to or greater than the rates that border their boundaries. Currently, the tribal GRT rates must be at or below these rates. The ability to raise rates in excess of their current limits may result in tribes increasing their gross receipts tax rates and may result in an increase in tribal tax revenue collections.

The table below illustrates the potential tax base against which an increase in rates would create a calculated revenue increase. If used for this purpose, please note the data are a one-month sample and were extracted to show that all of the imposing jurisdictions have imposed the tribal tax at the same total rate as for the combined state and local option gross receipts tax rate. With the exception of Taos Pueblo, which failed to increase the tribal tax rate in July 2017 when the El Prado and El Valle Water and Sanitation Districts began to impose local option gross receipts taxes, all other tribal taxes are imposed at the same rate as the coterminous combined state and local option gross receipts tax rate.

A one-month sample of currently implemented gross receipts tax rates for the 18 Indian jurisdictions that have negotiated gross receipts tax sharing agreements with TRD is included along with the comparative rate in the jurisdiction sharing the jurisdiction gross receipts tax. Note the substantially higher imposed rate for Santa Fe Indian School, the Pueblo Culture Center in Albuquerque and Santa Clara that shares with Española, Rio Arriba County and Santa Fe County. A portion of Jicarilla is in Sandoval County, although the bulk of the reservation is in Rio Arriba County. A portion of Ohkay Owingeh shares land with Española.

ID	Class	Jurisdiction	Matched Taxable	Total Tax Paid	Total Rate	County Remainder Total Rate	Muni Total Rate	Notes
01907	Indian	SF Indian School	6,743	572	8.476%			
01123	Muni	Santa Fe, City of	283,042,410	23,987,897	8.475%		8.438%	
01952	Indian	Pueblo of Nambe	199,593	14,217	7.123%			
01953	Indian	Tesuque Pueblo	198,725	14,568	7.331%			Dec 19 7.123%,
01962	Indian	Pojoaque Pueblo	2,244,179	159,947	7.127%			
01975	Indian	San Ildefonso Pueblo	2,215,827	157,725	7.118%			
01001	County	Santa Fe County			7.125%	7.125%		
02905	Indian	AIS Property/Nineteen Pueblo	2,860,227	225,243	7.875%			
02100	Muni	Albuquerque, City of	1,351,393,876	106,950,406	7.914%		7.875%	
13901	Indian	Zuni Pueblo	382,283	25,911	6.778%			
13013	County	McKinley County Remainder			6.750%	6.750%		
17904	Indian	Santa Clara Pueblo	1,811,738	148,308	8.186%			Santa Clara -- In/out Espanola, RA/SF
17215	Muni	Espanola	25,048,086	2,249,295	8.980%		8.938%	
17942	Indian	Ohkay Owingeh Pueblo	771,917	55,032	7.129%			88% county, 12% Espanola
29932	Indian	Jicarilla Apache Nation	534,981	35,902	6.711%			
17017	County	Rio Arriba County			6.875%	6.875%		
20913	Indian	Taos Pueblo	912,259	74,425	8.158%			May be recent rate increase for Taos County
20126	Muni	Taos	27,563,142	2,358,136	8.555%		8.688%	
20918	Indian	Picuris Pueblo	917,224	67,074	7.313%			
20020	County	Taos County			7.500%	7.500%		
29912	Indian	Sandia, Pueblo of	267,991	17,439	6.507%			
29952	Indian	Santa Ana Pueblo	700,503	44,659	6.375%			
29972	Indian	Cochiti Pueblo	167,829	10,810	6.441%			
29974	Indian	Santo Domingo Pueblo	-4,099,931	-259,650	6.333%			
29029	County	Sandoval County			6.375%	6.375%		
33902	Indian	Laguna, Pueblo of (Dec 2019)	679,748	44,994	6.619%			
33909	Indian	Acoma Pueblo	129,558	8,874	6.849%			
33033	County	Cibola County			6.813%	6.813%		

The change proposed in this bill would allow Indian jurisdictions to impose gross receipts tax rates applicable throughout their boundaries in excess of the amounts currently allowed. These amounts are currently limited by other laws, including Section 7-19D-9 and 7-20E-9 NMSA 1978. Even if an Indian jurisdiction stayed within these limits applicable to municipalities and counties, the credits would not be balanced. The amount of credit shall be equal to the *lesser* of seventy-five percent of the tax imposed by the tribe on the receipts from the transaction or seventy-five percent of the revenue produced by the sum of the rate of tax imposed pursuant to the gross receipts and Compensating Tax Act and the total of the rates of local option gross

receipts taxes imposed on the receipts from the same transaction. The 25 percent credit against the tribal tax is worded similarly – the *lesser* of twenty-five percent of the tax imposed by the tribe ... or twenty-five percent of the tax revenue produced ... by rates imposed on the receipts from the same transaction.”

Any increase in rates for the tribal tax would limit the credit amounts to the lower amount – effectively the state rate plus the county remainder rate. Thus, the rate in excess of the state plus county rate would result in 100 percent of the additional revenue distributed to the imposing jurisdiction. If this additional rate were kept within bounds, it would not practically constitute a dual tax, but it would still become a disincentive of up to three percent or more that might discourage new businesses to relocate into those areas or provide incentives for existing businesses operating within those tribal boundaries to relocate the business outside the tribal jurisdiction.

The deletions proposed in the STBTC amendment do not resolve this problem. See “Significant Issues” for a discussion and “Technical Issues” for suggested amendments.

## **SIGNIFICANT ISSUES**

The preponderance of interpretation is that, before the STBTC amendment, tribal entities imposing tax rates in excess of the combined state, local, and county rates imposed on transactions within the boundaries of tribal jurisdiction would receive 100 percent of the revenue from the excess of the tribal rate over the combined GRT rate. If this is the intent, then the STBTC amendments are neither needed, nor do they accomplish the alternative.

If the intent of the STBTC amendment is to restore the revenue sharing intent of the statute, then it should be amended. (See “Technical Issues.”)

It should also be noted, pursuant to the provisions of this bill, it would no longer be possible for a participating tribal jurisdiction to impose a tribal tax at a rate less than the combined state and local option gross receipts tax rate on the same transactions.

### **DIA comments:**

The New Mexico Taxation and Revenue Department (“NMTRD”) collects tribal gross receipts taxes on transactions on tribal lands and remits the collected taxes to the tribal governments pursuant to cooperative agreements with Indian tribes. Under current law, qualifying gross receipts, sales or similar taxes levied by tribes on taxable transactions must not exceed a rate greater than the total of the gross receipts tax rate and local option gross receipts tax rates imposed by this state and its political subdivisions located within the exterior boundaries of the tribe. Section 7-9-88.1 (B)(3) NMSA 1978.

In some areas, this results in arbitrary taxing rates for pueblos and tribes where the exterior boundary of the tribe may extend across multiple counties or into municipalities.

Like any other government, there are times when tribes may need to increase their gross receipts tax rate. When tribes do increase their gross receipts tax beyond that of the state and its political subdivisions located within the exterior boundaries of the tribes, NMTRD is unable to collect the full amount of the tribal gross receipts taxes due to the definition of a qualifying tax in the New Mexico law. As a result, tribes are not collecting the full amount of

tribal gross receipts taxes, rather they are limited to collecting the same amount as neighboring counties and local governments.

The following example was provided by the Pueblo of Acoma. Example: The Pueblo of Acoma increased its gross receipts tax to 8 percent, similar to that charged by the neighboring municipality of Grants, NM, but NMTRD will only collect and pay to Acoma 6.8 percent, the same as Cibola County, where tribal lands are located.

TRD comments:

The legislation would permit tribes to increase their gross receipts tax rates with no known limit to the rate. This would provide more flexibility for tribal governments to increase their rates and may better allow them to fund their desired level of governmental services.

The legislation may result in tribal governments whose tribal GRT rates are currently lower than the surrounding state and local rates raising their GRT rates to meet the new requirement to be at a rate no less than the surrounding jurisdictions. This may result in the rate being increased above the level a tribal government believes is optimal for revenue collection and a fair rate. The bill could be amended to unbind a tribal government's GRT rate from the rates that border their boundaries and allow tribes to set the rate at whatever level they deem to be desirable.

LFC staff notes that, for the most part, Indian lands are in areas where the tax rate is that rate imposed in "county areas" also known as county remainder areas. In general, municipal rates can range up to 3 percent plus the statutory 1.225 percent for the state share. Section 7-19D-9 NMSA 1978 (HB479 – 2019 – Laws 2019, Chapter 274) allows municipalities 2.5 percent without voter approval and an additional .45 percent with voter approval. However, in general these local option rates may not be imposed by any Indian jurisdiction without having one of the state's 105 chartered municipalities within its borders. This bill would allow all Indian jurisdictions, without bound, to increase gross receipts tax rates.

LFC staff further notes there seems to be a difference between TRD's analysis and the Laguna example on page 2. The difference may well be in the agreements between the tribe and the TRD secretary pursuant to Section 9-11-12.1. In that section, the TRD secretary is given authority to ensure proper administration of the revenue sharing provisions.

## **ADMINISTRATIVE IMPLICATIONS**

TRD indicates that this will not affect any administration.

## **TECHNICAL ISSUES/PROPOSED AMENDMENTS**

The STBTC amendment results in a quandary. The 25 percent credit would read

...provides a credit against the tribe's tax equal to ~~the lesser of~~ twenty-five percent of the tax imposed by the tribe on the receipts from the transactions *or* twenty-five percent of the tax revenue produced by the sum of the rate of tax imposed pursuant to the Gross Receipts and Compensating Tax Act and the total of the rates of the local option gross receipts taxes imposed on the receipts from the same transactions.

And the 75 percent credit would read

... the credit shall be equal to ~~the lesser of~~ seventy-five percent of the tax imposed by the tribe on the receipts from the transaction *or* seventy-five percent of the revenue produced by the sum of the rate of tax imposed pursuant to the Gross Receipts and Compensating Tax Act and the total of the rates of local option gross receipts taxes imposed on the receipts from the same transaction.

In both cases, the “or” causes the problem. It is uncertain how TRD would be expected to administer the alternatives.

The original “deal” creating the mutual credits was an attempt to recognize the right of sovereign tribal governments to tax transactions within the boundaries of tribal sovereignty. However, policymakers at the time realized it would set up a significant barrier to economic development for the tribal tax to be added to the state plus local option gross receipts taxes. The remedy was to impose the tribal tax at the same rate as the rate imposed on transactions within the boundaries of the tribal sovereignty. In effect, the state, county, and municipal governments would get 25 percent of the joint tax rate and the tribal government would get 75 percent of the revenue generated by the combined rate.

With this tax sharing principle in mind, the task is to see how to allow tribes to impose taxes that exceed the combined state plus local option rates but not penalize non-Indian vendors with cascaded tax rates and allow the state, county, and (if applicable) the municipality the 25 percent share of total revenue.

If the intent of the amendment (and the original bill) is to allow certain tribal governments to impose tribal tax rates higher than imposed by the gross receipts and compensating tax act, while preserving the traditional 25 percent/75 percent sharing of the resulting additional revenue, then sponsors should consider the following three required amendments and one optional amendment.

1. Strike STBTC amendments.
2. On page 2, line 4 strike the words “the lesser of” and insert in lieu thereof the words “the greater of”;
3. On page 3, line 4 strike the words “the lesser of” and insert in lieu thereof the words “the greater of”;
4. Optional -- Since the basic change proposed in this bill means that tribal jurisdictions could increase tax rates without limit, it might be appropriate to cross-reference Sections 7-19D-9 and 7-20E-9 NMSA 1978. Language similar to, “rates not greater than the total of the gross receipts tax rate and local option gross receipts as limited by Sections 7-19D-9 and 7-20E-9 NMSA 19789 if the tribal area were regarded as a municipality” would allow up to 2.95 percent plus any excess of the maximum county remainder rate and the amount of the county remainder rate actually imposed in the jurisdiction.
5. Optional -- amend 9-11-12.1 NMSA 1978 to allow the TRD Secretary the authority to approve additional tribal tax rates in excess of the state and local option gross receipts tax rates within the exterior boundaries of the tribal jurisdiction. Note: The text of 9-11-12.1 is attached to this review as Appendix A. If the Legislature chooses to adopt the optional fifth amendment above, the proper place to put this amendment would be in paragraph C or separately in a new paragraph D.

## OTHER SUBSTANTIVE ISSUE

LFC staff provide the following background.

In the late 1800s, Congress permitted Santa Clara to sell some of its grant lands in fee simple. Ultimately, this gave rise to the current situation that portions of Santa Clara are in remainder Santa Fe County, the Española piece of Santa Fe County, the Española piece of Rio Arriba County and remainder Rio Arriba County. Prior to 1997, the city of Española provided some municipal services to those shared areas of Santa Clara. While Española had enacted a gross receipts tax local option, it was somewhat doubtful whether Española could legally extend that tax to transactions involving enrolled members of Santa Clara, although it was commonly held that the state, the counties and Española could legally impose the obligation on businesses not owned by Santa Clarans. After this debate persisted for some time, in 1997, the “deal” was struck. This was the first dual tax agreement between the state and the various Indian jurisdictions. The essence of the deal is that Santa Clara (and Laguna) would impose two gross receipts taxes. (1) a gross receipts tax at the combined state, county and Española (for those receipts with situs in the shared area) rates. There would be a credit for 75 percent against the state, county and municipal tax. There is a mirror credit of 25 percent of the state tax as a credit against the tribal tax. In practice, three-quarters of the regular gross receipts tax would be distributed to the pueblo government and the state, the counties and Española would receive 25 percent of the amount they would have received prior to the agreement; and (2) a tax imposed on enrolled members of Santa Clara who had gross receipts. This second tax, however, would be collected by TRD and disbursed 100 percent (minus a maximum 3 percent administrative fee) to the Santa Clara pueblo government.

By 2003, the gross receipts tax deal had been extended to all nineteen pueblos (Pueblo of Acoma, Cochiti, Isleta, Jemez, Laguna, Nambe, Picuris, Pojoaque, Sandia, San Felipe, San Ildefonso, San Juan, Santa Ana, Santa Clara, Santo Domingo, Taos, Tesuque, Zia or Zuni or the nineteen New Mexico pueblos acting collectively), the Jicarilla Apache Nation and the Mescalero Apache Tribe. To date, the Navajo nation has not been included in this deal. Currently, fifteen pueblos have executed agreements and imposed tribal gross receipts taxes. Isleta, Jemez, San Felipe and Zia have not executed agreements. In addition, Santa Fe Indian School and Indian Pueblo Cultural Center in Albuquerque are participants. Although the original enactment only shared the state gross receipts tax, by 1999, all state, county and municipal gross receipts were subject to the deal.

As mentioned, this was the first example of a dual tax agreement. Without such agreement, non-Indian businesses might have been loath to establish a business location in Indian jurisdictions, because they might have been obligated to pay the full amount of the regular gross receipts tax and an additional tax imposed by the jurisdictions. After the deal, businesses had no disincentive to establish businesses in these locations.

This was the second example of the state acknowledging tribal sovereignty in the tax arena. The first issue was that of Indian “smoke shops”, where non-Indians could buy cigarettes and other tobacco products without paying the state’s tobacco taxes. After this GRT dual tax agreement, the state receded on coal taxes, oil and gas taxes and finally gasoline taxes. Apart from perhaps Alaska, where the Alaska Native Claims Settlement Act (ANCSA) prevails, New Mexico may lead the nation in even-handed tax treatment of sovereign Indian nations.

## APPENDIX A

### **9-11-12.1. Tribal cooperative agreements.**

A. The secretary may enter into cooperative agreements with the Pueblos of Acoma, Cochiti, Jemez, Isleta, Laguna, Nambe, Picuris, Pojoaque, Sandia, San Felipe, San Ildefonso, San Juan, Santa Ana, Santa Clara, Santo Domingo, Taos, Tesuque, Zia and Zuni; the Jicarilla Apache Nation; the Mescalero Apache Tribe; and with the nineteen pueblos acting collectively for the exchange of information and the reciprocal, joint or common enforcement, administration, collection, remittance and audit of gross receipts tax revenues of the party jurisdictions.

B. Money collected by the department on behalf of a tribe in accordance with an agreement entered into pursuant to this section is not money of this state and shall be collected and disbursed in accordance with the terms of the agreement, notwithstanding any other provision of law.

C. The secretary is empowered to promulgate such rules and to establish such procedures as the secretary deems appropriate for the collection and disbursement of funds due a tribe and for the receipt of money collected by a tribe for the account of this state under the terms of a cooperative agreement entered into under the authority of this section, including procedures for identification of taxpayers or transactions that are subject only to the taxing authority of the tribe, taxpayers or transactions that are subject only to the taxing authority of this state and taxpayers or transactions that are subject to the taxing authority of both party jurisdictions.

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