9-1981

Ramah Navajo School Board v. Bureau of Revenue of New Mexico

Lewis F. Powell Jr.

Probably Deserves because it is an appeal; We probably should Note, Vacate & Remand on TM's opinion last Term in White Mountain Apache Tribe v. Bracker, 448 US 136. Could CVSG.

Tax is on the construction co., not on the Tribe.

Reply To motion to Dismiss has been filed (over)

PRELIMINARY MEMORANDUM

Summer List 23, Sheet 1

No. 80-2162

RAMAH NAVAHO SCHOOL BOARD INC. et al.

v.

NEW MEXICO BUREAU OF REVENUE

App from NM Ct App (Wood, Hernandez, Andrews)

State/Civil

Timely

OK

SUMMARY: Appts argue that the state was preempted from taxing the gross receipts of a construction company hired by the Navajo Indians to build a school on its reservation.

FACTS: The Navajo Indians received more than $9 million from Congress to build a school on their reservation. Appts note that construction of the school was necessary because the state closed a public high school in 1968, forcing Navajo youth to attend a federal boarding school. The money was disbursed through the

CVSG w/ eye to Note Vacate & remand in light of Bracker.

DFL

Bureau of Indian Affairs. The school board entered into a cost-plus contract with appt Lembke Construction Company, a non-Indian company, which required the board to reimburse Lembke for any taxes. New Mexico collected about $232,000 in taxes on Lembke's gross receipts. The Navajos claim this has prevented completion of the school facilities.

DECISION BELOW: The NM Ct. of App. affirmed a trial court's decision that the state had authority to tax the construction company's gross receipts. The court's reasoning was that the legal incidence of the tax was on Lembke rather than the Navajos. It relied upon Mescalero Apache Tribe v. O'Cheskey, 625 F.2d 967 (10th Cir. 1980), cert. denied, 49 U.S.L.W. 3619 (Feb. 23, 1981). In O'Cheskey a divided CA10 en banc upheld New Mexico's authority to collect its gross receipts tax from a contractor building a hotel and recreational facility on a reservation. The NM Ct. of App. denied a motion for a rehearing to consider this Court's decisions in Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980), and White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980). The NM Sup. Ct. granted a writ of certiorari but then quashed it as improvidently granted.

CONTENTIONS: Appts argue that New Mexico is preempted from taxing the gross receipts of the construction project because the tax conflicts with a comprehensive federal scheme to accomplish a major national goal, the improvement of Indian education. Appts point to the 1868 Navajo Treaty which obligated the federal government to provide schools and a 1969 congressional report that termed Indian education "a national tragedy." They further argue that a necessary implication of the congressional appropriations directing the BIA to provide a school for the

Navajos is that the appropriations were for construction costs and not for paying state taxes. And under Bracker, appts argue, the state is preempted from collecting its tax because of the pervasive federal involvement in the project. Appts term the NM Ct. of App.'s reliance on the "legal incidence" of the tax "a mechanical application of a discredited labeling test ... ."

Resp contends that Bracker is distinguishable because the federal involvement was more comprehensive. Bracker involved logging on a reservation, for which there are detailed federal regulations, unlike construction of school buildings. And in Bracker the state tax was levied on a contractor who operated exclusively on a reservation while Lembke constructs buildings throughout New Mexico. Resp finds O'Cheskey on point and persuasive. It notes that the Apache resort considered in that case was constructed with funds appropriated by Congress and administered by the Economic Development Administration. It also notes that Congress knows how to specifically designate appropriations that the states may not tax and argues that Congress either intended to allow New Mexico to tax the appropriation for the Navajo school or had no intent on the issue.

DISCUSSION: Bracker stated that to determine whether a state may regulate non-Indians on a reservation a court must make "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." 448 U.S. at 145. The New Mexico courts have not made a particularized inquiry but have instead based their decision primarily on which party bore the legal

incidence of the tax. Such an approach, endorsed by CA10 in O'Cheskey, seems contrary to Bracker. The SG argued that the Court should grant cert in O'Cheskey because application of a legal incidence test gives no attention to federal and tribal interests. The federal and tribal interests involved in this case, Indian education, would appear to be at least as strong as the interests involved in Bracker, logging on a reservation, and much stronger than the interests involved in O'Cheskey, construction of a resort.

I recommend CVSG with an eye toward NPJ or perhaps a summary reversal.

There is a response.

8/31/81 Wright Op in Petn

The Navajo argue in reply that comprehensive federal regulations do cover this project. Moreover preemption may be invoked here in any event. The state tax frustrates the federal purpose of improving Indian education. Since the Navajo treaty has been found to preempt a state income tax--McClanahan v. Arizona, 411 U.S. 164 (1973)--surely it must also preempt a state tax which burdens an objective explicitly stated in the treaty: education of the Navajo.

I don't think that McClanahan is directly on point since the state tax here is levied on the construction company--not the tribe. But there is considerable strength to their argument that existence vel non of "comprehensive federal regulations" is not the only way to determine the federal intention to preempt.

DL

NEW NOTE

The SG "reluctantly" urges the Court to note jurisdiction or grant cert in this case. The courts below did not follow Bracker or Central Machinery.

The SG suggests that summary treatment will not be enough here. The state courts are simply ignoring the decisions of this Court. Moreover, the court of appeals did purport to distinguish Bracker and Central Machinery.

Could we still GVR for further consideration in light of Bracker and Central Machinery? I think that is still the best course rather than a full blown grant.

September 28, 1981

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 80-2162

RAMAH NAVAJO SCH. BD., INC.

vs.

BUREAU OF REVENUE, N.M.

SG's Response Rec'd (over)

SG urges Grant & Summary reversal. I'd prefer to GVR on Central Machinery 448 US 160, & Bracker 448 US 136

~~CFS~~ 11/12/81

Mr. Justice Rehnquist

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
~~Stewart, J.~~													
White, J.							?						
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.				✓									
Stevens, J.				✓									
O'Connor, J.				✓									

Court ..... Voted on ....., 19...

Argued ....., 19... Assigned ....., 19...

Submitted ....., 19... Announced ....., 19...

No. 80-2162

RAMAH NAVAJO SCH. BD.

vs.

BUREAU OF REV., N.M.

G'd Dismiss before hearing or full treatment

Noted

Relist on BRW

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.				✓		✓							
Brennan, J.				✓									
White, J.				✓									
Marshall, J.						✓							
Blackmun, J.				✓	&	Rev.							
Powell, J.				Note, Vacate & Remand on 448 U.S. 136									
Rehnquist, J.						✓							
Stevens, J.						✓							
O'Connor, J.				✓									

Court ..... *Voted on*....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 80-2162

Submitted ....., 19... *Announced* ....., 19...

RAMAH NAVAJO SCH. BD.

vs.

BUREAU OF REV., N.M.

No Rev

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.						✓							
Brennan, J.				✓									
White, J.				✓									
Marshall, J.						✓							
Blackmun, J.				✓									
Powell, J.						G ✓	& R	m		448	US		136
Rehnquist, J.													
Stevens, J.													
O'Connor, J.				✓									

80-2162 RAMAH NAVAJO SCHOOL v. REV. OF N.M. N Mex S/Ct sustained gross receipts tax (a sales tax) Argued 4/28/82

Using a $9 million Grant from Fed. Govt, the Tribe built a school on Reservation, using a private contractor.

N. Mex imposed its gross receipts tax on the contractor. Tax operates like a sales tax & usually is passed on to the "purchaser" - here the Tribe that engages services of contractor.

SG's argument

In White Mt. ~~Apache~~ Apache Tribe v Braker, Court said a "particularized inquiry into the nature of the fed., state & tribal interests at stake..." p3

N Mex Ct did not weigh these interests. It looked primarily to "which party bore the legal incidence of tax". Thus, SG says the fed & tribal interests here are substantial & outweigh state interest.

But see U.S. v Miss (this term)

What exemption?

Fed Housing

State bldg

Church

Establishment

Nat Red Cross

3 Romeo ✓

mass

2 L/A

Ex/Lane ✓

1 N

H ✓

6/8

State

Apron (~~Pet~~ Apart) Navajo School Dist

Congress, in effect, created a "partnership" with School Dist to build school.

No ev. that Congress included provision for the state tax in its grant. No showing on leg. hist or record referred to tax

What about state tax on construction of religious schools

x x x

JPS asked whether Tribe would be objecting if Congress had added an amount equal to tax. Counsel answered Yes?

Claiborne (appellee - SG)

State law is "off-limits" on Reservation unless Congress provides otherwise

Unna (appellee)

Two issues:

I Legal incidence/economic burden

"Legal incidence" is not the ultimate burden-control.

The legal incidence (stated in U.S. v New Mex control) is on the contractor.

Other White Mt Apache Tribe

Unna (cont

White Mt Apache, the contractor was in effect a Tribal contractor Also the Tribe regulated the work of this contractor — roads, etc

~~Indian Traders case applied only to licensing fee~~

Central Machinery case was cited by TM — Counsel answered this was a preemption — Indian Traders case. State may not tax a licensed Indian Trader

Answering my question, Unna said there are no exceptions to the application of this tax on contractors who build for State, localities, U.S., churches, etc.

(Next page)

Gross (Reply)

N. Mex argument turns on two "fictions".

Indian law answers both.

~~Sneed~~

Relies on Navaho Treaty that excludes all non-Indian activities?

Renewed 4/30
— David Hunter Indians should win — & they usually do!

jsw 04/29/82

Memorandum to Justice Powell

Bobtail memo on No. 80-2162, Ramah Navajo

Two years ago, you wrote separately in two cases. That writing provides relevant guideposts for deciding this case.

In Central Machinery Co. v. Arizona Tax Comm'n, 448 U.S. 160 (1980), a company that had no license to trade with Indians and no place of business on the reservation entered the reservation to make a single sale of farm machinery. The Court (TM writing) held that Arizona could not tax that sale. You dissented, stressing that the single sale did not interfere with the statutory plan that Congress set up to govern such transactions:

> "Since a seller not licensed to trade with the Indians must secure specific federal approval for each isolated transaction, there is no danger that ordinary state business taxes will imparin the Bureau [of Indian Affair's] ability to prevent fraudulent or excessive pricing." Id., at 173.

In this course of this reasoning you quoted language stating that taxes will not be invalidated if they do not "to a substantial extent frustrate the evident congressional purpose . . . ." Id.

In White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), the Court held that Arizona could not collect gas tax and a gross receipts tax from a motor carrier operating on an Indian reservation. You agreed, stating that the carrier's "daily operations are controlled by a comprehensive federal regulatory scheme designed to assure the Indian tribe the greatest possible return from their timber." Id., at 174.

I gather from these expressions that the key inquiry is whether a state tax substantially impairs comprehensive federal regulatory scheme benefitting Indians. If so, then the state tax is preempted. This is in accord with general principles of preemption, with the caveat that federal preemption in the Indian field will be found somewhat more readily than otherwise. See White Mountain Apache, 448 U.S., at 143 (opinion of TM).

Applying these principles to this case, I conclude Indians should win this fairly close case. The SG lists the two relevant federal statutes at pages 13-126 of his brief. These statutes authorize federal grants for the purpose of funding Indian education. As part of this purpose, they also specify that the Bureau of Indian Affairs (BIA) will review and monitor school construction agreements. The regulations and BIA review in this case made no provision for payment of state taxes. The SG's basic argument is that, in the absence of explicit federal approval of such a state tax, its payment will have the simple effect of reducing the funds available to further the central federal purpose: education of Indian children.

In response, New Mexico makes two central arguments. Its strongest is that calculations that included provisions for the NM tax formed the basis for estimates upon which Congress based its award of Ramah Navajo construction funds. This is a potentially powerful argument. I think it would win if NM were able to show that Congress had any actual knowledge that the estimates included state taxes, or had Congress expressed any intent to devote federal funds to the payment of state taxes. NM fails, however, to make these showings. I understand their argument to be only that the Ramah Board assumed at first that it would have to pay the tax, that the Board submitted its estimate totals to Congress, and that Congress approved an award. Apparently at no point did the federal government have any actual knowledge that the grant was designed to include sums devoted to NM taxes. Under these circumstances, I believe that the Indians have the better argument that extraction of the taxes will reduce a federal grant that Congress did not intend to have reduced by the payment of state taxes. I do note, however, that reasonable minds certainly could differ on this point.

The State's second argument is that the federal scheme makes provision for state provision of Indian schooling in some instances. The State concludes that collection of the state tax cannot interfere with the federal scheme. This argument is essentially irrelevant, it seems to me, because this is not a situation in which the State has agreed to undertake the burdens of

participating in Indian education. If so, this would be a different case if it had -- a point that I believe the SG concedes.

In conclusion, I think the Indians have succeeded in demonstrating that the federal Indian education statutes and regulations have the goal of maximizing Indian educational opportunities by means of federal grants. The purpose of this fairly comprehensive federal scheme is infringed to a degree by the payment of state taxes out of the federal grant. Although I do not think that the argument is an overwhelming one, on balance I believe that the NM tax is preempted by federal law.

Rev - 6-3
(Thank ~~Hoo~~ tentative including LFP)

No. 81-2162, Ramah Navajo School Bd. v. Bur. Conf. 4/30/82

The Chief Justice Rev (tentative)

Justice Brennan Rev
White Mt & Central Machinist
require reversal

Justice White Affirm

Justice Marshall Rev

Justice Blackmun Rev.

Justice Powell Rev (tentative)

Inclined to think White Net & Central Mackenzie come close to ~~controlling~~ controlling.

There probably is federal preemption - though I don't think this should be the law & could be persuaded not to Rev.

Justice Rehnquist Affirm

Prior cases do not control
Can distinguish White Net + Central Machinery. Regs in those were more specific.

Justice Stevens Affirm

No reason why State can't tax contractor.

Justice O'Connor Rev - tentative

Language in White Net - in particular - seems to control.

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

Circulated: MAY 29 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-2162

RAMAH NAVAJO SCHOOL BOARD, INC., ET AL., APPELLANTS *v.* BUREAU OF REVENUE OF NEW MEXICO

APPEAL FROM THE COURT OF APPEALS OF NEW MEXICO

[June ——, 1982]

JUSTICE MARSHALL delivered the opinion of the Court.

In this case, we address the question whether federal law pre-empts a state tax imposed on the gross receipts that a non-Indian construction company receives from a tribal school board for the construction of a school for Indian children on the reservation. The New Mexico Court of Appeals held that the gross receipts tax imposed by the State of New Mexico was permissible. Because the decision below is inconsistent with *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136 (1980) (*White Mountain*), we reverse.

I

Approximately 2,000 members of the Ramah Navajo Chapter of the Navajo Indian Tribe live on tribal trust and allotment lands located in west central New Mexico. Ramah Navajo children attended a small public high school near the reservation until the State closed this facility in 1968. Because there were no other public high schools reasonably close to the reservation, the Ramah Navajo children were forced either to abandon their high school education or to attend federal Indian boarding schools far from the reservation. In 1970, the Ramah Navajo Chapter exercised its authority under Navajo Tribal Code, Title 10, §51, and established its own school board in order to remedy this situ-

Renewed 5/30-31

Join.

Though I don't like the result, I believe White Mountain controls

ation. Appellant Ramah Navajo School Board, Inc. (the Board) was organized as a nonprofit corporation to be operated exclusively by members of the Ramah Navajo Chapter. The Board is a Navajo "tribal organization" within the meaning of 25 U. S. C. § 450b(c), 88 Stat. 2204. With funds provided by the federal Bureau of Indian Affairs (BIA) and the Navajo Indian Tribe, the Board operated a school in the abandoned public school facility, thus creating the first independent Indian school in modern times.[1]

In 1972, the Board successfully solicited from Congress funds for the design of new school facilities. Pub. L. 92–369, 86 Stat. 510. The Board then contracted with the BIA for the design of the new school and hired an architect. In 1974, the Board contracted with the BIA for the actual construction of the new school to be built on reservation land. Funding for the construction of this facility was provided by a series of congressional appropriations specifically earmarked for this purpose.[2] The contract specified that the Board was the design and building contractor for the project, but that the Board could subcontract the actual construction work to third parties. The contract furthered provided that any subcontracting agreement would have to include certain clauses governing pricing, wages, bonding, and the like, and that it must by approved by the BIA.

The Board then solicited bids from area building contractors for the construction of the school, and received bids from

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[1] On July 8, 1970, in his Message to the Congress on Indian Affairs, President Nixon referred specifically to these efforts of the Board to assume responsibility for the education of tribal children abandoned by the State as a "notable example" of Indian self-determination. 6 Weekly Comp. of Pres. Doc. 894, 899 (1970).

[2] See Pub. L. 93–245, 87 Stat. 1073 (1973) (amending Pub. L. 93–120, 87 Stat. 431 (1973) to specifically earmark funds appropriated there for the construction of the Ramah school facility); Pub. L. 93–404, 88 Stat. 810 (1974); Pub. L. 94–165, 89 Stat. 985 (1975); Pub. L. 95–74, 91 Stat. 293 (1977).

two non-Indian firms. Each firm included the state gross receipts tax as a cost of construction in their bids, although the tax was not itemized separately. Appellant Lembke Construction Company (Lembke) was the low bidder and was awarded the contract. The contract between the Board and Lembke provides that Lembke is to pay all "taxes required by law." Lembke began construction of the school facilities in 1974 and continued this work for over five years. During that time, Lembke paid the gross receipts tax and, pursuant to standard industry practice, was reimbursed by the Board for the full amount paid. Before the second contract between Lembke and the Board was executed in 1977, a clause was inserted into the contract recognizing that the Board could litigate the validity of this tax and was entitled to any refund.

Both Lembke and the Board protested the imposition of the gross receipts tax. In 1979, after exhausting administrative remedies, they filed this refund action against appellee New Mexico Bureau of Revenue in the New Mexico District Court. At the time of trial, the parties stipulated that the Board had reimbursed Lembke for tax payments of $232,264.38 and that the Board would receive any refund that might be awarded.

The trial court entered judgment for the State Bureau of Revenue. After noting that the "legal incidence" of the tax fell on the non-Indian construction firm, the court rejected appellants' arguments that the tax was pre-empted by comprehensive federal regulation and that it imposed an impermissible burden on tribal sovereignty. The Court of Appeals for the State of New Mexico affirmed. Although acknowledging that the economic burden of the tax fell on the Board, the Court of Appeals concluded that the tax was not preempted by federal law and that it did not unlawfully burden tribal sovereignty. *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue, State of New Mexico*, 95 N.M. 708, 625 P. 2d 1225 (N.M. App. 1980), cert. quashed, 96 N.M. 17, 627

P. 2d 412 (1981). The Board filed a petition for rehearing in light of this Court's intervening decisions in *White Mountain, supra*, and *Central Machinery Co.* v. *Arizona State Tax Comm.*, 448 U. S. 160 (1980). The Court of Appeals denied the petition, stating only that this case did not involve either "a comprehensive or pervasive scheme of federal regulation" or "federal regulation similar to the Indian trader statutes." *[Cite if published]. After initially granting discretionary review, the New Mexico Supreme Court quashed the writ as improvidently granted. 96 N.M. 17, 627 P. 2d 412 (1981). We noted probable jurisdiction. —— U. S. ——.

II

In recent years, this Court has often confronted the difficult problem of reconciling "the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations." *McClanahan* v. *Arizona State Tax Commission*, 411 U. S. 164, 165 (1973). Although there is no definitive formula for resolving the question whether a State may exercise its authority over tribal members or reservation activities, we have recently identified the relevant federal, tribal, and state interests to be considered in determining whether a particular exercise of state authority violates federal law. See *White Mountain*, 448 U. S., at 141–145.

A

In *White Mountain*, we recognized that the federal and tribal interests arise from the broad power of Congress to regulate tribal affairs under the Indian Commerce Clause, Art. I, § 8, cl. 3, and from the semi-autonomous status of Indian Tribes. 448 U. S., at 142. These interests tend to erect two "independent but related" barriers to the exercise of state authority over commercial activity on an Indian reservation: state authority may be pre-empted by federal law,

or it may interfere with the Tribe's ability to exercise its sovereign functions. *Ibid.* (citing, *inter alia*, *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685 (1965); *McClanahan* v. *Arizona State Tax Comm'n*, *supra*; and *Williams* v. *Lee*, 358 U. S. 217 (1959)). As we explained in *White Mountain*:

> "The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important "backdrop," . . . against which vague or ambiguous federal enactments must always be measured." *Id.*, at 143 (quoting *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, at 172).

The State's interest in exercising its regulatory authority over the activity in question must be examined and given appropriate weight. Pre-emption analysis in this area is not controlled by "mechanical or absolute conceptions of state or tribal sovereignty;" it requires a particularized examination of the relevant state, federal, and tribal interests. *Id.*, at 145. The question whether federal law, which reflects the related federal and tribal interests, pre-empts the State's exercise of its regulatory authority is not controlled by standards of pre-emption developed in other areas. *Id.*, at 143–144. Instead, the traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional Acts promoting tribal independence and economic development, inform the pre-emption analysis that governs this inquiry. See *id.*, at 143 and n. 10. Relevant federal statutes and treaties must be examined in light

of "the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence." *Id.*, at 144–145. As a result, ambiguities in federal law should be construed generously, and federal pre-emption is not limited to those situations where Congress has explicitly announced an intention to pre-empt state activity. *Id.*, at 143–144, 150–151.

In *White Mountain*, we applied these principles and held that federal law pre-empted application of the state motor carrier license and use fuel taxes to a non-Indian logging company's activity on tribal land. We found the federal regulatory scheme for harvesting Indian timber to be so pervasive that it precluded the imposition of additional burdens by the relevant state taxes. *Id.*, at 148. The Secretary of the Interior (Secretary) had promulgated detailed regulations for the purpose of developing "'Indian forests by the Indian people for the purpose of promoting self-sustaining communities.'" *Id.*, at 147 (quoting 25 CFR § 141.3(a)(3) (1979)). Under these regulations, the BIA was involved in virtually every aspect of the production and marketing of Indian timber. *Id.*, at 145–148. In particular, the Secretary and the BIA extensively regulated the contractual relationship between the Indians and the non-Indians working on the reservation: they established the bidding procedure, set mandatory terms to be included in every contract, and required that all contracts be approved by the Secretary. *Id.*, at 147.

We found that the the state taxes in question would "threaten the overriding federal objective of guaranteeing Indians that they will 'receive . . . the benefit of whatever profit [the forest] is capable of yielding. . . .'" *Id.*, at 149 (quoting 25 CFR § 141.3(a)(3) (1979)). We concluded that the imposition of state taxes would also undermine the Secretary's ability to carry out his obligations to set fees and rates for the harvesting and sale of the timber, and it would impede the "Tribe's ability to comply with the sustained-yield management policies imposed by federal law." *Id.*, at 149–150.

Balanced against this intrusion into the federal scheme, the State asserted only "a general desire to raise revenue" as its justification for imposing the taxes. *Id.*, at 150. In this context, this interest is insufficient to justify the State's intrusion into a sphere so heavily regulated by the Federal Government. *Ibid.*

B

This case is indistinguishable in all relevant respects from *White Mountain*. Federal regulation of the construction and financing of Indian educational institutions is both comprehensive and pervasive. The Federal Government's concern with the education of Indian children can be traced back to the first treaties between the United States and the Navajo Tribe.[3] Since that time, Congress has enacted numerous statutes empowering the BIA to provide for Indian education both on and off the reservation. See, *e. g.*, Snyder Act, 42 Stat. 208, 25 U. S. C. § 13 (1921); Johnson-O'Malley Act, 48 Stat. 596, 25 U. S. C. § 452 *et seq.* (1934); Navajo-Hopi Rehabilitation Act, 64 Stat. 44, 25 U. S. C. § 631 *et seq.* (1950); Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 25 U. S. C. § 450 *et seq.* (1975) (Self-Determination Act). Although the early focus of the federal efforts in this area concentrated on providing federal or state educational facilities for Indian children, in the early 1970's the federal policy shifted toward encouraging the development of Indian-controlled institutions on the reservation. See 6 Weekly Comp. of Pres. Doc. 894, 899–900 (Message of Pres. Nixon)

This federal policy has been codified in the Indian Financing Act of 1974, 88 Stat. 77, 25 U. S. C. § 1451 *et seq.*, and

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[3] Article VI of the 1868 Treaty between the United States and the Navajo Tribe, 15 Stat. 669, provides that "[i]n order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted."

most notably in the Self-Determination Act. The Self-Determination Act declares that a "major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being." 88 Stat. 2003, as set forth in 25 U. S. C. 450a(c). In achieving this goal, Congress expressly recognized that "parental and community control of the educational process is of crucial importance to the Indian people." 88 Stat. 2003, as set forth in 25 U. S. C. § 450(b)(3).

Section 450k empowers the Secretary to promulgate regulations to accomplish the purposes of the Act. 88 Stat. 2212, 25 U. S. C. § 450k. Pursuant to this authority, the Secretary has promulgated detailed and comprehensive regulations respecting "school construction for previously private schools now controlled and operated by tribes or tribally approved Indian organizations." 25 CFR § 274.1 (1975). Under these regulations, the BIA has wide-ranging authority to monitor and review the subcontracting agreements between the Indian organization, which is viewed as the general contractor, and the non-Indian firm that actually constructs the facilities. See 25 CFR § 274.2 (1975).[4] Specifically, the BIA must conduct preliminary on-site inspections, and prepare cost estimates for the project in cooperation with the tribal organization. 25 CFR § 274.22 (1975). The Board must approve any architectural or engi-

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[4] Although these regulations did not become effective until several months after the BIA and the Board had executed the initial contracts, the Secretary and the BIA had applied similar requirements under the authority of the Johnson-O'Malley Act, 48 Stat. 496, 25 U. S. C. § 452 *et seq.* In any event, the two subsequent agreements between the BIA, the Board and Lembke, accounting for two-thirds of the total construction, were signed after the effective date of these regulations, which clearly authorize the BIA to monitor these construction agreements.

neering agreements executed in connection with the project. 25 CFR § 274.32(c) (1975). In addition, the regulations empower the BIA to require that all subcontracting agreements contain certain terms, ranging from clauses relating to bonding and pay scales, 41 CFR § 14H–70.632 (1975), to preferential treatment for Indian workers. 25 CFR § 274.38 (1975). Finally, to ensure that the Tribe is fulfilling its statutory obligations, the regulations require the tribal organization to maintain records for the Secretary's inspection. 25 CFR § 274.41 (1975).

This detailed regulatory scheme governing the construction of autonomous Indian educational facilities is at least as comprehensive as the federal scheme found to be pre-emptive in *White Mountain*. The direction and supervision provided by the Federal Government for the construction of Indian schools leaves no room for the additional burden sought to be imposed by the State through its taxation of the gross receipts paid to Lembke by the Board. This burden, although nominally falling on the non-Indian contractor, necessarily impedes the clearly expressed federal interest in promoting the "quality and quantity" of educational opportunities for Indians by depleting the funds available for the construction of Indian schools.[5]

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[5] The Bureau invites us to adopt the "legal incidence" test, under which the legal incidence and not the actual burden of the tax would control the pre-emption inquiry. Of course, in some contexts, the fact that the legal incidence of the tax falls on a non-Indian is significant. See *Washington* v. *Confederated Tribes*, 447 U. S. 134, 150–151 (1980); *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463 (1976). However, in *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 151 (1980), we found it significant that the economic burden of the asserted taxes would ultimately fall on the Tribe, even though the legal incidence of the tax was on the non-Indian logging company. Given the comprehensive federal regulatory scheme at issue here, we decline to allow the State to impose additional burdens on the significant federal interest in fostering Indian-run educational institutions, even if those burdens are imposed indirectly through a tax on a non-Indian contractor for work done an the reservation.

The Bureau of Revenue argues that imposition of the state tax is not pre-empted because the federal statutes and regulations do not specifically express the intention to pre-empt this exercise of state authority. This argument is clearly foreclosed by our precedents. In *White Mountain* we flatly rejected a similar argument. 448 U. S., at 150–151 (citing *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, *supra*; *Williams* v. *Lee*, 358 U. S. 217 (1958); and *Kenerly* v. *District Court of Montana*, 400 U. S. 423 (1971)). There is nothing unique in the nature of a gross receipts tax or in the federal laws governing the development of tribal self-sufficiency in the area of education that requires a different analysis.

In this case, the State does not seek to assess its tax in return for the governmental functions it provides to those who must bear the burden of paying this tax. Having declined to take any responsibility for the education of these Indian children, the State is precluded from imposing an additional burden on the comprehensive federal scheme intended to provide this education—a scheme which has "left the State with no duties or responsibilities." *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. at 691.[6] Nor has the State asserted any specific, legitimate regulatory interest to justify the imposition of its gross receipts tax. The only arguably specific interest advanced by the State is that it provides services to *Lembke* for its activities *off the reservation*. This interest, however, is not a legitimate justification for a tax

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[6] Of course, these statutes and regulations do not displace the States from providing for the education of Indian children within their boundaries. Indeed, the Self-Determination Act specifically authorizes the Secretary to enter into contracts with any State willing to construct educational institutions for Indian children on or near the reservation. 88 Stat. 2214, 25 U. S. C. § 458. This case would be different if the State were actively seeking tax revenues for the purpose of constructing, or assisting in the effort to provide, adequate educational facilities for Ramah Navajo children.

whose ultimate burden falls on the tribal organization. Furthermore, although the State may confer substantial benefits on Lembke as a state contractor, we fail to see how these benefits can justify a tax imposed on the construction of school facilities *on tribal lands* pursuant to a contract between the tribal organization and the non-Indian contracting firm.[7] The New Mexico gross receipts tax is intended to compensate the State for granting "the privilege of engaging in business." N.M. Stat. Ann. §§ 7–9–3.F and 7–9–4.A (Repl. Pamph. 1980). New Mexico has not explained the source of its power to levy such a tax in this case where the "privilege of doing business" on an Indian reservation is exclusively bestowed by the Federal Government.

The State's ultimate justification for imposing this tax amounts to nothing more than a general desire to increase revenues. This purpose, as we held in *White Mountain*, 448 U. S., at 150, is insufficient to justify the additional burdens imposed by the tax on the comprehensive federal scheme regulating the creation and maintenance of educational opportunities for Indian children and on the express federal policy of encouraging Indian self-sufficiency in the area of education.[8] This regulatory scheme precludes any state tax

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[7] In *Central Machinery Co.* v. *Arizona Tax Comm'n*, 448 U. S. 160 (1980), we held that the Indian trader statutes, 19 Stat. 200, 25 U. S. C. § 261 *et seq.*, pre-empted the State's jurisdiction to tax the sale of farm machinery to the Indian Tribe, notwithstanding the substantial services that the State undoubtedly provided to the off-reservation activities of the non-Indian seller. Presumably, the state tax revenues derived from Lembke's off-reservation business activities are adequate to reimburse the State for the services it provides to Lembke.

[8] We are similarly unpersuaded by the State's argument that the significant services it provides to the Ramah Navajo Indians justify the imposition of this tax. The State does not suggest that these benefits are in any way related to the construction of schools on Indian land. Furthermore, the evidence introduced below by the State on this issue is far from clear. Although the State does provide services to the Ramah Navajo Indians, it receives federal funds for providing some of these services, and the State

that "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941).

C

The Solicitor General, in an amicus brief filed on behalf of the United States, suggests that we modify our pre-emption analysis and rely on the dormant Indian Commerce Clause, Art. I, § 8, cl. 3, to hold that on-reservation activities involving a resident Tribe are presumptively beyond the reach of state law even in the absence of comprehensive federal regulation, thus placing the burden on the State to demonstrate that its intrusion is either condoned by Congress or justified by a compelling need to protect legitimate, specified state interests other than the generalized desire to collect revenue. He argues that adopting this approach is preferable for several reasons: it would provide guidance to the state courts addressing these issues, thus reducing the need for our case-by-case review of these decisions; it would avoid the tension created by focusing on the pervasiveness of federal regulation as a principle barrier to State assertions of authority when the primary federal goal is to encourage tribal self-determination and self-government; and it would place a higher burden on the State to articulate clearly its particularized interests in taxing the transaction and to demonstrate the services it provides in assisting the taxed transaction.

We do not believe it necessary to adopt this new approach—the existing pre-emption analysis governing these cases is sufficiently sensitive to many of the concerns expressed by the Solicitor General. Although clearer rules and presumptions promote the interest in simplifying litigation, our precedents announcing the parameters of pre-emption analysis in this area provide sufficient guidance to state

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conceded at trial that it saves approximately $380,000 by not having to provide education for the Ramah Navajo children. App. 95, 105–106, 108.

courts and also allow for more flexible consideration of the federal, state, and tribal interests at issue. We have consistently admonished that federal statutes and regulations relating to Tribes and tribal activities must be "construed generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence." *White Mountain*, *supra*, 448 U. S., at 144; see also *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S., at 174–175 and n. 13 (1973); *Warren Trading Post Co.* v. *Arizona Tax Comm'n.*, 380 U. S., at 690–691. This guiding principle helps relieve the tension between emphasizing the pervasiveness of federal regulation and the federal policy of encouraging Indian self-determination. Although we must admit our disappointment that the courts below apparently gave short shrift to this principle and to our precedents in this area, we cannot and do not presume that state courts will not follow both the letter and the spirit of our decisions in the future.

III

In sum, the comprehensive federal regulatory scheme and the express federal policy of encouraging tribal self-sufficiency in the area of education preclude the imposition of the state gross receipts tax in this case. Accordingly, the judgment of the New Mexico Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

May 31, 1982

80-2162 Ramah Navajo School Board v. Bureau

Dear Thurgood:

Please join me.

Sincerely,

Justice Marshall

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 1, 1982

RE: No. 80-2162 Ramah Navajo School Board v. Bureau of Revenue of New Mexico

Dear Thurgood:

I agree.

Sincerely,

Bill

Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 1, 1982

Re: No. 80-2162 Ramah Navajo School Board v. Bureau of Revenue of New Mexico

Dear Byron:

I will be happy to undertake the dissent in this case.

Sincerely,

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 2, 1982

Re: 80-2162 - Ramah Navajo School Board
v. Bureau of Revenue of New Mexico

Dear Thurgood:

I shall await Bill Rehnquist's dissent.

Respectfully,

JPS

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 3, 1982

No. 80-2162 Ramah Navajo School Board v.
Bureau of Revenue of New Mexico

Dear Thurgood,

Please join me.

Sincerely,

Sandra

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 4, 1982

Re: No. 80-2162 - Ramah Navajo School Bd. v.
Bur. of Rev. of N.M.

Dear Thurgood:

I join.

Regards,

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 8, 1982

Re: No. 80-2162 - Ramah Navajo School Board v. Bureau of Revenue of New Mexico

Dear Thurgood:

Please join me.

I would prefer that the last sentence of Part II be omitted, but my joinder does not depend on this.

Sincerely,

HAB.

Justice Marshall

cc: The Conference

THE C. J.	W. J. B.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.	S. D. O'C.
			5/3/82					
Join TM 6/4/82	agree 6/1/82	Join Lu HR 6/24/82	1st Draft 5/19/82		Join TH 5/31/82	will dissent 6/1/82	await dissent 6/2/82	Join TM 6/3/82
			2nd Draft 6/9/82			typed Draft 6/24/82	Join UHR 6/24/82	
						1st proofed Draft 6/25/82		

80-2162 Ramah Navajo v. Bur. of Rev.