No. 97-1536

In the Supreme Court of the United States

OCTOBER TERM, 1997

ARIZONA DEPARTMENT OF REVENUE, PETITIONER

v.

BLAZE CONSTRUCTION COMPANY, INC.

ON WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION ONE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a State may impose a transaction privilege tax on a contractor who enters into contracts with the Bureau of Indian Affairs to construct and improve roads on an Indian reservation.

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INTEREST OF THE UNITED STATES

This case involves the assessment of a tax by the State of Arizona on the gross proceeds respondent received under contracts with the Bureau of Indian Affairs, an agency within the United States Department of the Interior, for construction of roads on Indian reservations in Arizona. The United States has an interest in the principles governing state taxation of contractors doing business with the federal government and state taxation and regulation of the activities of non-Indians on Indian reservations.

STATEMENT

From 1986 through 1990, the Bureau of Indian Affairs (BIA) awarded respondent Blaze Construction Company (Blaze) 19 separate contracts to build and repair roads on six Indian reservations in Arizona. The Arizona Depart-

ment of Revenue subsequently sought to impose a transaction privilege tax on Blaze's gross receipts under the contracts. Blaze contested the applicability of the transaction privilege tax to the contracts, and this litigation ensued. Pet. App. 2-3; J.A. 14-21.

1. a. Federal local roads on Indian reservations are constructed and improved pursuant to the Federal Lands Highways Program. 23 U.S.C. 204, amended by Transportation Equity Act For The 21st Century (Transportation Equity Act), Pub. L. No. 105-178, Tit. I, § 1115(d)(2), 112 Stat. 157 (1998).[1] Under that program, funds for road construction and improvement projects on Indian reservations are appropriated in a lump sum for each fiscal year, and are derived from the federal Highway Trust Fund. See, *e.g.*, Transportation Equity Act, § 1101(a)(8), 112 Stat. 112 (appropriating $225,000,000 from Highway Trust Fund for "Indian reservation road" projects for fiscal year 1998 and $275,000,000 for fiscal years 1999 to 2003). See generally 26 U.S.C. 9503 (establishing Highway Trust Fund and providing for transfer to Fund of sums equivalent to proceeds from various transportation and fuel taxes).

The Secretary of Transportation allocates the funds available for Indian reservation roads "according to the relative needs of the various reservations as jointly identi-

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[1] The Federal Lands Highways Program consists of public lands highways, park roads, parkways, and Indian reservation roads. See 23 U.S.C. 204(a). "Indian reservation roads" are defined as "public roads that are located within or provide access to an Indian reservation or Indian trust land or restricted Indian land which is not subject to fee title alienation without the approval of the Federal Government." 23 U.S.C. 101(a), 204(a). Roads on the Interstate System and the National Highway System that cross through Indian reservations are "federal-aid" highways subject to the different provisions applicable to such highways. See 23 U.S.C. 103(a), 120(f); see generally 23 U.S.C. 101-160.

fied by the Secretary [of Transportation] and the Secretary of the Interior." 23 U.S.C. 202(d), amended by Transportation Equity Act, § 1115(b), 112 Stat. 154-156 (providing that, beginning in fiscal year 2000, funds "shall be allocated among Indian tribes" on the basis of a formula established by the Secretary of the Interior pursuant to a negotiated rulemaking procedure involving representatives of Tribes).[2] The Secretary of Transportation and the Secretary of the Interior are jointly responsible for performing the necessary planning. 23 U.S.C. 204(a) and (f), amended by Transportation Equity Act, § 1115(d), 112 Stat. 156-157.

By regulation, the Commissioner of Indian Affairs has the responsibility to "plan, survey, design and construct" Indian reservation roads. 25 C.F.R. 170.2(d), 170.2(f), 170.3, 170.4, 170.4a. The Secretary of Transportation must approve the location, type, and design of all projects on the Indian reservation road system before construction may begin, and the construction is under the general supervision of the Secretary of Transportation. 25 C.F.R. 170.4. The Commissioner of Indian Affairs recommends to the

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[2] The funding formula beginning in fiscal year 2000 is to be based on factors that reflect "the relative needs of the Indian tribes, and reservation or tribal communities, for transportation assistance," and "the relative administrative capacities of, and challenges faced by, various Indian tribes, including the cost of road construction in each Bureau of Indian Affairs area, geographic isolation and difficulty in maintaining all-weather access to employment, commerce, health, safety, and educational resources." 23 U.S.C. 204(d)(2)(D), as added by Transportation Equity Act, § 1115(b)(4), 112 Stat. 155. At present, relative need is determined based on tribal population, tribal vehicle use, and the cost of improving roads. Federal Highway Administration, Department of Transportation & Bureau of Indian Affairs, Department of Interior, *Indian Reservation Roads Program Stewardship Plan* 4 (July 1996). In earlier years, relative need was determined based upon tribal population, reservation size, and reservation road mileage. *Ibid*.

Tribe concerned those proposed road projects for which there is the greatest need, as determined by a "comprehensive transportation analysis." 25 C.F.R. 170.4a. The Tribe then establishes its "annual priorities for road construction projects," and, subject to the approval of the Commissioner and the availability of appropriated funds, selects the projects to be performed. *Ibid.*; see also 23 U.S.C. 204(j), discussed in note 3, *infra*. The granting of any necessary right-of-way across lands held by the United States in trust for the Tribe or by individual Indians is governed by 25 C.F.R. Pt. 169 (see 25 C.F.R. 170.5(a)) and requires the consent of the Tribe or (with certain exceptions) the individual Indians. See 25 U.S.C. 323, 324; 25 C.F.R. 169.3.

b. Unless the Secretary of the Interior determines that another method is in the public interest, construction projects on Indian reservation roads under the Federal Lands Highways Program are undertaken pursuant to contracts awarded by competitive bidding. 23 U.S.C. 204(e). Construction and improvement projects on Indian reservation roads are, however, subject to the provisions of Section 23 of the Buy Indian Act of 1910, 25 U.S.C. 47 ("Indian labor shall be employed" "[s]o far as may be practical") and Section 7(b) of the Indian Self-Determination and Education Assistance Act (Self-Determination Act), 25 U.S.C. 450e(b) (contracts or subcontracts, to the greatest extent feasible, shall give preference to Indians for employment opportunities and to Indian organizations or Indian-owned enterprises for subcontracting awards). 23 U.S.C. 204(e).

Indian reservation roads constructed with federal funds under the Federal Lands Highways Program are open to the public. 23 U.S.C. 101(a) (definitions of "Indian reservation roads" and "public road"); 25 C.F.R. 170.8(a). Such

roads are generally maintained either by the Tribe or by the Commissioner of Indian Affairs. 25 C.F.R. 170.6.

c. Pursuant to the Self-Determination Act, a tribal organization may, if it chooses, enter into a contract with the Department of the Interior pursuant to which the tribal organization receives federal funds and assumes from the Department the responsibility "to plan, conduct, and administer [departmental] programs or portions thereof, including construction programs." 25 U.S.C. 450f(a)(1), 450j-1; 25 C.F.R. 900.3(b)(4).[3] A tribal organization may assume a variety of functions under a self-determination contract, including providing or subcontracting for the services of architects and other consultants to design projects, and of construction contractors to complete projects, 25 C.F.R. 900.130(b)(1), (c)(1) and (c)(3); administering and disbursing funds, 25 C.F.R. 900.130(b)(2) and (c)(2); directing and monitoring the work of architects, engineers, consultants, contractors, and subcontractors, 25 C.F.R. 900.130(b)(3) and (c)(4); and managing "day-to-day activities of the contract," 25 C.F.R. 900.130(c)(5). The Secretary of the Interior is responsible for overseeing the

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[3] See also 23 U.S.C. 204(j), amended by Transportation Equity Act, § 1115(d)(6), 112 Stat. 157 (up to two percent of funds made available for Indian reservation roads for each fiscal year shall be allocated to those tribal governments applying for transportation planning pursuant to the Self-Determination Act; the tribal government, in cooperation with the Secretary of the Interior and, as appropriate, a state, local, or metropolitan planning organization, shall develop a transportation improvement program that includes all projects proposed for funding; and projects shall be selected by the tribal government from the program, subject to approval by the Secretary of the Interior and the Secretary of Transportation); 23 U.S.C. 204(b), as amended by Transportation Equity Act, § 1115(d)(2), 112 Stat. 157 ("[T]he Secretary [of Transportation] and the Secretary of the appropriate Federal land management agency may enter into construction contracts and other appropriate contracts with a State or civil subdivision of a State or Indian tribe.").

performance of tribal organizations that have entered into self-determination contracts to perform departmental functions. 25 C.F.R. 900.131.

2. a. From 1986 through 1990, the BIA awarded respondent Blaze Construction Company 19 separate contracts to build and repair Indian reservation roads on the Navajo, Hopi, Fort Apache, Colorado River, Tohono O'Odham, and San Carlos Apache Indian Reservations in Arizona. Pet. App. 2-3; J.A. 14-21. Blaze, which works exclusively on construction projects on Indian reservations, is an Indian-owned company incorporated under the laws of the Blackfeet Tribe of Montana. J.A. 12. It is not licensed by the State of Arizona, and maintains no off-reservation facilities in Arizona. J.A. 12-13.

The State did not participate in the planning of any of Blaze's projects, and issued no permits relating to those projects. Pet. App. 4; J.A. 21. Nor did the State conduct inspections or provide any other specific services in connection with the projects. Pet. App. 4. Blaze used State roads to transport equipment between reservations and to attend pre-construction meetings at the BIA's offices in Phoenix. *Ibid.* Blaze paid fees relating to its use of Arizona's highways, including motor vehicle registration fees, motor carrier taxes, and use fuel taxes. *Ibid.* The State does not maintain the roads that were constructed and improved by Blaze pursuant to the contracts at issue. Pet. App. 4-5; J.A. 21.

b. In 1990, the Arizona Department of Revenue (ADOR) issued a tax deficiency assessment against Blaze in the amount of $1,200,581.54. J.A. 11-12. In the assessment, ADOR sought to collect transaction privilege taxes based on Blaze's gross receipts under the construction

projects Blaze had performed for the BIA. J.A. 12.[4] Arizona's transaction privilege tax is levied on the privilege or right to engage in business in the State, measured by the gross volume of business activity conducted within the State. Ariz. Rev. Stat. Ann. § 42-1306 (West 1991). A "prime contractor" is taxed based on sixty-five percent of its gross proceeds, subject to certain deductions. *Id.* § 42-1310.16. The tax rate applicable to a prime contractor is five percent. *Id.* § 42-1317(A)(1)(h).

After unsuccessfully challenging the assessment in administrative proceedings before ADOR, Blaze appealed to the Arizona Board of Tax Appeals, which held that federal law preempted application of the transaction privilege tax to Blaze. J.A. 5-10. ADOR filed a refund action in the Arizona Tax Court, which granted summary judgment to ADOR. Pet. App. 28-29. Blaze appealed to the Arizona Court of Appeals, which reversed, holding that federal law preempted application of Arizona's transaction privilege tax to Blaze's proceeds from contracts with the BIA to build Indian reservation roads. *Id.* at 1-26. The Arizona Supreme Court denied the State of Arizona's petition for review on December 16, 1997. *Id.* at 27.

SUMMARY OF ARGUMENT

I. Federal law does not preclude Arizona from imposing its transaction privilege tax upon the gross receipts that respondent, Blaze Construction Company, received under its contracts with the Bureau of Indian Affairs to construct and improve roads on Indian reservations lo-

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[4] ADOR also sought to collect transaction privilege taxes relating to contracts Blaze entered into with tribal housing authorities. J.A. 12. ADOR subsequently agreed, however, "that the receipts from these projects are not subject to the Arizona privilege tax." See Plaintiff's Statement of Facts in Support of Motion for Summary Judgment, Exh. B, at 1. See also note 16, *infra*.

cated within the State. States may impose nondiscriminatory taxes on federal contractors unless the contractors have been "incorporated into the government structure," or unless federal law expressly precludes the tax in question. *United States* v. *New Mexico*, 455 U.S. 720, 737 (1982).

That rule is fully applicable to state taxes imposed upon federal contractors working on Indian reservations. In cases involving state efforts to tax non-Indians engaging in direct dealings with Tribes or tribal members on a reservation, this Court has determined whether federal law preempted the state tax by conducting a "particularized examination of the relevant state, federal, and tribal interests." *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 176 (1989) (quoting *Ramah Navajo School Bd., Inc.* v. *Bureau of Revenue*, 458 U.S. 832, 838 (1982)). The Court has not, however, previously applied that approach to state taxes imposed upon non-tribal contractors whose contract is with an agency of the United States rather than a Tribe. For four principal reasons, the legality of such state taxes is properly determined under the rule of *United States* v. *New Mexico*, rather than under the approach the Court has applied to state taxes "when a tribe undertakes an enterprise under the authority of federal law." *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 336 (1983).

First, state taxes upon federal contractors will not unduly interfere with tribal sovereignty. When the United States is the contracting party, tribal involvement in the making and performance of the contract will be far less substantial than in cases in which a tribal entity is a party to the contract. Second, state taxes imposed upon non-tribal parties who contract with agencies of the United States will generally have an uncertain and indirect effect on tribal interests, because the ultimate effect of such

taxes will depend on the federal agencies' response to the taxes. Third, state taxes on contractors whose contract is with the United States do not implicate the distinctive concerns that arise when a State attempts to enter into the "comprehensively regulated" area of direct relations between Indians and non-Indians. *Central Mach. Co.* v. *Arizona State Tax Comm'n*, 448 U.S. 160, 163 (1980). Fourth, the conclusion that *United States* v. *New Mexico* applies to all federal contracts, even those bearing some relation to Indian matters, also has the virtue of simplicity. A different approach would require the courts to determine the point at which the connection of a contract to Indian matters was sufficient to displace the rule of *United States* v. *New Mexico*.

II. The state tax at issue here does not unduly interfere with important federal policies. Neither the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.*, nor the Buy Indian Act of 1910, § 23, 25 U.S.C. 47, reflects a federal policy that is impeded by Arizona's tax. And although imposition of Arizona's tax increases the costs of federal contracting, *United States* v. *New Mexico* makes clear that a state tax is not preempted by federal law simply because the burden of the tax will ultimately fall on the United States.

ARGUMENT

ARIZONA IS NOT BARRED BY FEDERAL LAW FROM ASSESSING ITS TRANSACTION PRIVILEGE TAX AGAINST THE GROSS PROCEEDS RESPONDENT RECEIVES UNDER ITS CONTRACTS WITH THE BUREAU OF INDIAN AFFAIRS

This case involves the State of Arizona's transaction privilege tax, which the State imposes upon persons who engage in business in the State. Ariz. Rev. Stat. § 42-

1306(A) (West 1991). The issue is whether federal law precludes Arizona from imposing that tax upon Blaze's gross receipts under its contracts with the BIA to construct and improve roads on Indian reservations located within the State.

I. A NON-TRIBAL MEMBER'S CONSTRUCTION CONTRACTS WITH THE BUREAU OF INDIAN AFFAIRS ARE SUBJECT TO THE GENERAL RULE OF *UNITED STATES* v. *NEW MEXICO* THAT A STATE MAY TAX THE PROCEEDS RECEIVED BY A CONTRACTOR UNDER A CONTRACT WITH A FEDERAL AGENCY

A. *United States* v. *New Mexico* Establishes A General Rule That A State May Tax A Federal Contractor

States are generally free to impose nondiscriminatory taxes upon federal contractors. *United States* v. *New Mexico*, 455 U.S. 720 (1982). In *New Mexico*, the State sought to impose a gross receipts tax and a use tax on three companies that provided management and construction services to atomic laboratories operated in the State by the Atomic Energy Commission. *Id.* at 722-723. The taxes were legally incident upon the contractors, but the United States was contractually obligated to reimburse the contractors for their costs, including the taxes at issue. *Id.* at 723, 738. The United States contested the legality of the taxes, arguing that its immunity from state taxation precluded New Mexico from imposing its taxes upon certain of the operations of the federal contractors. *Id.* at 728.

This Court disagreed. Acknowledging the "confusing nature" of its prior decisions concerning the scope of the federal government's immunity from state taxation, the Court reiterated the basic principle that "a State may not, consistent with the Supremacy Clause, lay a tax 'directly

upon the United States.'" *New Mexico*, 455 U.S. at 733 (citation omitted; quoting *Mayo* v. *United States*, 319 U.S. 441, 447 (1943)). Conversely, the Court held, immunity from state taxation is not conferred "simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy." *Id.* at 734. Rather, a conclusion that the Constitution itself confers "tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." *Id.* at 735. The Court further noted that Congress could grant broader immunity to federal contractors, by "so expressly providing." *Id.* at 737. Because Congress had not so provided, and because the contractors in question were not so closely connected to the federal government as to have been "incorporated into the government structure," the Court upheld New Mexico's taxes. *Id.* at 737, 738-744.

Under the rule announced in *New Mexico*, Arizona is entitled to enforce its transaction privilege tax against Blaze. The transaction privilege tax is legally incident upon Blaze, not the BIA. *Tower Plaza Invs. Ltd.* v. *DeWitt*, 508 P.2d 324, 326 (Ariz. 1973), appeal dismissed, 414 U.S. 1118 (1974); *Arizona Dep't of Revenue* v. *Hane Constr. Co.*, 564 P.2d 932, 934 (Ariz. Ct. App. 1977). There is no suggestion that any provision of federal law expressly provides Blaze with immunity from state taxation with respect to its contracts with the BIA. Blaze's relationship to the BIA, moreover, is simply that of a typical government contractor, and Blaze therefore cannot be said to have been "incorporated into the government structure" in a way that would confer tax immunity. *New Mexico*, 455 U.S. at 737.

B. There Is No General Exception To The Rule Of *United States* v. *New Mexico* For A Non-Tribal Member's Contracts With The Bureau Of Indian Affairs To Construct Roads On Indian Reservations

The Arizona Court of Appeals held that the rule established by this Court's decision in *New Mexico* is inapplicable to the present case, because the BIA's contracts with Blaze involved construction on Indian reservations. Pet. App. 5-9. In that context, the court held, the State's ability to impose its transaction privilege tax turns on application of "the implied preemption analysis that the United States Supreme Court has repeatedly applied to assertions of state authority over the activities of non-Indians on Indian reservations." Pet. App. 5. In our view, however, neither the location of the construction work nor the ultimate purpose of the federal government's expenditures—here, the furnishing of public roads to serve reservation communities—renders the general rule of *New Mexico* inapplicable.[5]

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[5] If the BIA entered into a contract with a tribal entity or member to perform work on the tribal reservation, the contractor would not be subject to the state tax. In such a case, the transaction privilege tax would be legally incident "on an Indian tribe or its members inside Indian country." *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 458 (1995). "If the legal incidence of [a tax] rests on a tribe or on tribal members for [activity conducted] inside Indian country, the tax cannot be enforced absent clear congressional authorization." *Id.* at 459.

Although Blaze is an Indian-owned company incorporated under the laws of the Blackfeet Tribe of Montana, it has properly conceded that, for purposes of state taxation, it should be treated as a non-Indian contractor with respect to work that it performs on the reservations of other Tribes. See *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 160-161 (1980) (for purposes of state taxation, Indians residing on reservation of different tribe "stand on the same footing as non-Indians resident on the reservation"); Resp. Br. in Opp. 2

1. a. This Court has on many occasions considered the question whether federal law permitted a State to impose a given tax upon non-Indians engaging in direct dealings with a Tribe or tribal members on a reservation. Although the Court's approach to that question "has varied over the course of the last century," the Court now treats the question as one of federal preemption. *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 173, 176-177 (1989). The Court has emphasized, however, that "questions of pre-emption in [that] area are not resolved by reference to standards of pre-emption that have developed in other areas of law." *Id.* at 176. Rather, the preemption analysis in that setting turns on "a particularized examination of the relevant state, federal, and tribal interests." *Ibid.* (quoting *Ramah Navajo School Bd., Inc.* v. *Bureau of Revenue*, 458 U.S. 832, 838 (1982)). Specifically, "State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983); accord *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987). Cf. *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 459 (1995) ("But if the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy.").

Although the preemption inquiry in cases involving state taxes affecting the relations between the Tribes or

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n.1. See also *Duro* v. *Reina*, 495 U.S. 676, 686 (1990) ("Exemption from state taxation for residents of a reservation * * * is determined by tribal membership, not by reference to Indians as a general class.").

individual Indians and non-Indians on a reservation is "sensitive to the particular facts and legislation involved," *Cotton Petroleum*, 490 U.S. at 176, it is also informed by certain fundamental principles of general applicability in such cases.

First, "'Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.' Because of their sovereign status, tribes and their reservation lands are insulated in some respects by a 'historic immunity from state and local control.'" *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. at 332 (citation omitted; quoting *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975), and *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 152 (1973)). That history of tribal sovereignty "serves as a necessary 'backdrop'" to the preemption analysis. *Cotton Petroleum*, 490 U.S. at 176.

Second,

> both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes. * * * Congress' objective of furthering tribal self-government * * * includes Congress' overriding goal of encouraging "tribal self-sufficiency and economic development." * * * * Thus, when a tribe undertakes an enterprise under the authority of federal law, an assertion of State authority must be viewed against any interference with the successful accomplishment of the federal purpose.

New Mexico v. *Mescalero Apache Tribe*, 462 U.S. at 334-336 (footnote omitted; quoting *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143 (1980)). Cf. *Cotton Petroleum*, 490 U.S. at 176 ("[I]n examining the pre-emptive force of the relevant federal legislation, we are cognizant of * * * the broad policies that underlie the legislation.").

Third, State assertions of authority over direct commercial relations between Indians and non-Indians must be viewed from the perspective that "[t]hroughout this Nation's history, Congress has authorized 'sweeping' and 'comprehensive federal regulation' over persons who wish to trade with Indians and Indian tribes, * * * [in the] exercise of Congress' power to 'regulate Commerce . . . with the Indian Tribes,' see U.S. Const., Art. I, § 8, cl. 3." *Department of Taxation & Fin.* v. *Milhelm Attea & Bros.*, 512 U.S. 61, 70 (1994). See also *Central Mach. Co.* v. *Arizona State Tax Comm'n*, 448 U.S. 160, 163 (1980) ("In 1790, Congress passed a statute regulating the licensing of Indian traders. Act of July 22, 1790, ch. 33, 1 Stat. 137. Ever since that time, the Federal Government has comprehensively regulated trade with Indians to prevent 'fraud and imposition' upon them.").[6]

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[6] The Articles of Confederation granted Congress "the sole and exclusive right and power of regulating * * * the trade and management of all affairs with the Indians," but that grant of authority excepted Indians who were "members of any of the states," and it was subject to a proviso "that the legislative right of any state, within its own limits, be not infringed or violated." *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 573 (1831) (M'Lean, J., concurring). The attempt in the proviso to afford the States some authority along with the power of the federal government proved unsatisfactory, because the proviso was invoked by Georgia and North Carolina to treat with the Indians regarding their land and other objects, and thereby "to annul the power itself." *Id.* at 559. Accordingly, "[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law." *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 234 (1985).

The relations between Indians and non-Indians are now often governed by federal statutes, Executive Orders, and regulations adopted pursuant to the Indian Commerce Clause or other federal authority (see *Williams* v. *Lee*, 358 U.S. 217, 220 n.4 (1959), citing *United States* v. *Kagama*, 118 U.S. 375 (1889)), that overlay the sovereignty of the Tribes within their reservations. The preemption analysis under such provisions, however, is informed by the realization that each new

Fourth, "[d]oubtful expressions are to be resolved in favor of the [Indians,] who are * * * dependent upon [the Nation's] protection and good faith." *McClanahan* v. *State Tax Comm'n*, 411 U.S. 164, 174 (1973) (quoting *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930)). "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." *Ramah Navajo School Bd.*, 458 U.S. at 838. See also *Cotton Petroleum*, 490 U.S. at 176-177 ("federal pre-emption is not limited to cases in which Congress has expressly—as compared to impliedly—pre-empted the state activity"; "ambiguities in federal law are, as a rule, resolved in favor of tribal independence").

Finally, "[t]he exercise of state authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the State in connection with the on-reservation activity." *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. at 336. See also *Cotton Petroleum*, 490 U.S. at 185-186 (in upholding state severance tax on non-Indian oil and gas producer whose operations were located on reservation, Court emphasizes that State provided services to producer's operations and regulated operations on reservation; "This is not a case in which the State has had nothing to do with the on-reservation activity, save tax it.").

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federal enactment typically assumes and builds upon the sovereign status and powers of the Indian Tribes, as they have been preserved by the practices and commitments of prior generations, and upon the constitutionally based assumption of control over Indian affairs by the national government, rather than the States. See, *e.g.*, *Mazurie*, 419 U.S. at 556-557; *Williams* v. *Lee*, 358 U.S. at 220. That history is the basis for the "backdrop" of tribal sovereignty and self-governance in the preemption inquiry in cases involving relations between a Tribe or its members on the one hand and nonmembers on the other.

2. The Court has applied that preemption analysis to a wide variety of state taxes imposed on non-Indians "doing business with Indian tribes" or tribal members on an Indian reservation. *Cotton Petroleum*, 490 U.S. at 176.[7] The Court has also applied that analysis to determine whether federal law preempted other assertions of state authority over interactions between Indians and non-Indians on an Indian reservation. See, *e.g.*, *Cabazon Band of Mission Indians*, 480 U.S. at 216-220 (State may not regulate gaming activities of non-Indians in tribal gaming operation); *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. at 328-344 (State could not apply game laws to non-Indians hunting and fishing on tribal lands on reservation). The Court has not, however, previously applied that preemption framework in the circumstances presented by this case, *i.e.*, to a state tax imposed on a non-tribal contractor

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[7] See, *e.g.*, *Milhelm Attea & Bros.*, 512 U.S. at 73-78 (upholding state regulations designed to enforce taxes on sales of cigarettes to non-Indians on reservation); *Cotton Petroleum*, 490 U.S. at 176-187 (upholding state severance tax on non-Indian oil and gas producer conducting operations pursuant to lease with Tribe, where State regulated on-reservation activity and provided services to producer's operations, and where effect of tax was "indirect" and "insubstantial"); *Ramah Navajo School Bd.*, 458 U.S. at 836-847 (State could not impose gross receipts tax on non-Indian contractor's construction of tribal school on reservation pursuant to contract with tribal school board, where federal regulatory scheme was comprehensive, tax would interfere with federal and tribal interests underlying regulatory scheme, and State was unable to justify tax except in terms of general interest in raising revenue); *Central Machinery*, 448 U.S. at 163-166 (State could not impose transaction privilege tax on non-Indian company's on-reservation sale of farm equipment to tribal enterprise); *White Mountain Apache Tribe*, 448 U.S. at 141-153 (same, as to motor carrier license and use fuel tax imposed by State upon non-Indian logging company with respect to logging company's activities on BIA and tribal roads pursuant to contracts with Tribe for harvesting of timber from tribal trust lands).

whose contract is with an agency of the United States itself, rather than with a Tribe or tribal entity. For four principal reasons, the question whether federal law prohibits such state taxes is properly governed by the approach taken in *United States* v. *New Mexico*, rather than by the approach the Court has applied to state taxes "when a *tribe* undertakes an enterprise under the authority of federal law." *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. at 336 (emphasis added). Accord *Blaze Constr. Co.* v. *Taxation & Revenue Dep't*, 884 P.2d 803, 806 (N.M. 1994) (in case involving Blaze's contracts with BIA to construct roads on Indian reservations in New Mexico, court holds that "[b]ecause Blaze * * * contracted with a federal government agency rather than with Indian tribes or tribal members, the Indian preemption doctrine is inapplicable, and Blaze * * * [is] subject to state taxes, just as any other federal government contractor would be"), cert. denied, 514 U.S. 1016 (1995).

a. State taxes imposed on non-tribal parties to contracts with agencies of the United States do not unduly interfere with tribal sovereignty. When the United States is the contracting party, tribal involvement in fashioning the contract, and in managing the performance of the non-tribal party under the contract, typically is both less direct and far less substantial than in cases in which a tribal entity is a party to the contract.

For example, when the BIA enters into contracts with non-tribal companies to construct or improve Indian reservation roads, tribal involvement is primarily consultative. See Transportation Equity Act, § 1115(b)(4), 112 Stat. 154-155 (to be codified at 23 U.S.C. 202(d)(2)) (beginning in year 2000, funds appropriated for Indian reservation roads shall be allocated among Tribes using formula established by committee including Indian representa-

tives);[8] 25 C.F.R. 170.4a (after BIA plans and designs road projects, and recommends projects to Tribe based on needs, Tribe establishes annual priorities for projects, subject to approval by Commissioner of Indian Affairs).[9] It is the BIA, not the Tribe, that exercises authority over the contracting and construction process. See generally 23 U.S.C. 203, 204.

By contrast, the role played by the Tribe is far greater when the Tribe itself enters into a construction contract or other contract with a non-Indian to furnish goods or services on the reservation, as the Tribe may do if it assumes responsibility for governmental programs under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.* In that Act, Congress declared its commitment to the "establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services." 25 U.S.C. 450a(b).

As part of that commitment, the Self-Determination Act requires that the Secretary of the Interior, "upon the request of any Indian tribe by tribal resolution, * * * enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction pro-

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[8] During the years when the construction at issue in the present case was planned and completed, the allocation of appropriated funds among Tribes was determined based on need criteria developed jointly by the Secretary of Transportation and the Secretary of the Interior. 23 U.S.C. 202(e) (1988). See also note 2, *supra*.

[9] If the project requires the granting of a right-of-way across Indian lands, the consent of the Tribe or individual owner is required. See page 4, *supra*.

grams." 25 U.S.C. 450f(a)(1). In other words, the Self-Determination Act permits tribal organizations to receive federal funds and use them to assume responsibility for programs that otherwise would have been administered by the Department of the Interior. See, *e.g.*, 25 C.F.R. 900.3(b)(4) ("When an Indian tribe [enters into a self-determination] contract[], there is a transfer of responsibility with the associated funding. The tribal contractor is accountable for managing the day-to-day operations of the contracted Federal programs * * *. The contracting tribe thereby accepts the responsibility and accountability to the beneficiaries under the contract with respect to use of the funds and the satisfactory performance of the programs.").[10]

Although the Secretary of the Interior retains significant oversight responsibility under the Self-Determination Act, see, *e.g.*, 25 C.F.R. 900.131, the Act provides Tribes with a considerable opportunity to exercise their inherent right of self-government and sovereignty over their reservations, and to further self-determination and economic development.[11] State taxes on contracts that a

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[10] When a tribal organization assumes responsibility for a program under a self-determination contract, its role will depend on the nature of the self-determination contract. See generally 25 C.F.R. 900.130. If the tribal organization chooses, its role can be quite extensive, and can include providing or subcontracting for the services of architects and other consultants to design projects, and of construction contractors to complete projects, 25 C.F.R. 900.130(b)(1), (c)(1) and (c)(3); administering and disbursing funds, 25 C.F.R. 900.130(b)(2) and (c)(2); directing and monitoring the work of architects, engineers, consultants, contractors, and subcontractors, 25 C.F.R. 900.130(b)(3) and (c)(4); and managing "day-to-day activities of the contract," 25 C.F.R. 900.130(c)(5).

[11] See also, *e.g.*, *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. at 336-338 (regulation of non-Indian hunting and fishing on reservation as part of economic development project).

Tribe or tribal organization itself enters into, whether pursuant to the Self-Determination Act or otherwise, thus necessarily present a significant risk of interference with tribal sovereignty and self-determination. It is therefore entirely appropriate that such state taxes be scrutinized under the preemption analysis that this Court has applied in that setting, and in comparable settings in which a State attempted to tax the non-Indian party to a contract entered into by a tribal organization "undertak[ing] an enterprise under the authority of federal law." *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. at 336. See *Ramah Navajo School Bd.*, 458 U.S. at 834-847 (state tax imposed upon gross receipts of non-Indian contractor selected by tribal school board pursuant to Self-Determination Act).[12]

When a State seeks to tax a non-tribal party to a contract with an agency of the United States, however, any effect on tribal sovereignty and self-government will be substantially attenuated. In that setting, it is appropriate to apply the bright-line rule adopted by this Court in *New Mexico*: States may impose taxes on contractors doing business with the United States unless the contractors have been "incorporated into the government structure," or unless Congress has foreclosed state taxation. 455 U.S. at 737.

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[12] See also, *e.g.*, *Cotton Petroleum*, 490 U.S. at 166-187 (state severance tax imposed on non-Indian lessee's production of oil and gas on reservation pursuant to lease with Tribe under Indian Mineral Leasing Act, 25 U.S.C. 396a *et seq.*); *Central Machinery*, 448 U.S. at 161-166 (state transaction privilege tax imposed on non-Indian company's on-reservation sale of farm equipment to tribal enterprise); *White Mountain Apache Tribe*, 448 U.S. at 138-153 (state motor carrier license and use fuel taxes imposed upon non-Indian logging company conducting timber operations on reservation pursuant to contract with tribal enterprise).

b. When a state tax is imposed on non-tribal parties who contract with agencies of the United States, the effect of the tax on tribal economic interests generally will be uncertain and indirect, and necessarily will be derivative of the effect of the tax on the United States. This case illustrates the point. Although the state taxes in the present case are legally incident upon Blaze, the contracts apparently provided that Blaze's contract price included all applicable state taxes. J.A. 33. This Court's cases appropriately reflect an awareness of the economic reality that such taxes are passed on to the contracting party. See *Ramah Navajo School Bd.*, 458 U.S. at 844 (although gross receipts tax was legally incident upon non-Indian contractor, "ultimate burden [of tax] falls on the tribal organization"). Cf. *White Mountain Apache Tribe*, 448 U.S. at 151 & n.15 (although motor carrier license and use fuel taxes were legally incident upon non-Indian contractor, "the economic burden of the taxes will ultimately fall on the Tribe").[13] When the contracting party is a tribal en-

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[13] There is no suggestion that the contracts at issue in the present case contained a separate line item reflecting specific state taxes, and it is apparently unclear what assumption Blaze made as to the applicability of the Arizona transaction privilege tax when submitting its bids. It is therefore also unclear whether the costs of the tax were in fact passed along to the BIA by Blaze. Nor is there any indication that Blaze would be obliged to reduce its contract price or otherwise reimburse the BIA if Blaze were to prevail in the present case. Compare *Ramah Navajo School Bd.*, 458 U.S. at 835 (non-Indian contractor "included the state gross receipts tax as a cost of construction in [its] bid[],"paid tax under protest, and agreed that tribal school board would receive any refund); *Central Machinery*, 448 U.S. at 162 (non-Indian seller included transaction privilege tax as separate item when specifying price of farm equipment); *White Mountain Apache Tribe*, 448 U.S. at 140 (non-Indian contractor paid motor carrier license and use fuel taxes under protest, and Tribe agreed to reimburse contractor for any tax liability).

tity, as in *Ramah Navajo School Board* and *White Mountain Apache Tribe*, such taxes have a direct effect on activities conducted and funds disbursed by the tribal entity.

In contrast, when the contracting party is a federal agency, as in the present case, it is the agency rather than a tribal entity to which the taxes would be passed on. In such circumstances, the ultimate effect of the taxes on tribal interests would depend in the first instance on the federal agency's response when the costs of the taxes were passed along to it. Because a third party stands between the Tribe and the contractor upon whom the tax is legally incident, any effect of the taxes on tribal interests would be both indirect and less certain.[14] That difference

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Of course, the validity of a state tax on contractors doing business with a Tribe on a reservation does not turn on proof of the precise effect of the state tax with respect to the particular transactions involved in the case. Rather, the inquiry is broader in scope, and focuses on the extent to which the tax "interferes or is incompatible with federal and tribal interests reflected in federal law." *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. at 334. With respect to the latter question, once it becomes clear that a given tax can be imposed upon contractors, the tax presumably will be passed along to the party purchasing services from the contractors. Thus, if this case involved contracts between a Tribe and Blaze, the validity of Arizona's transaction privilege tax would properly be analyzed on the premise that the costs of the tax would generally be passed on to the Tribe.

[14] In a hearing before the Arizona Department of Revenue, a contracting officer for the BIA testified about the effect of Arizona's transaction privilege tax, as applied to contracts entered into between the BIA and a road-construction contractor. J.A. 24, 33. According to the witness, a five percent state tax would result in "5% fewer roads." J.A. 33. The witness, however, did not explain in any detail the basis for that conclusion. For example, the witness did not indicate whether the BIA would have authority to consider the incidence of state taxation as it allocates highway funds among Tribes. See generally Transportation Equity Act, § 1115(b)(4), 112 Stat. 154-155 (to be codified at 23 U.S.C. 202(d)(2)) (beginning in fiscal year 2000, funds appropriated for

strongly supports the conclusion that the present case should be analyzed under the approach the Court generally applies to state taxes imposed on federal contractors, rather than the approach the Court has applied to state taxes imposed on parties dealing directly with a Tribe or tribal members on a reservation.

c. When a State seeks to tax a contractor whose contract is with a federal agency rather than with a Tribe or individual Indian, the tax necessarily does not implicate the distinctive concerns that historically arise when a State ventures into the "comprehensively regulated" area of direct commercial relations between Indians and non-Indians. *Central Machinery*, 448 U.S. at 163; see pages 15-16 & note 6, *supra*. Rather, the concern raised by state taxation of federal contractors performing services intended to benefit Indians is the same concern raised by state taxation of federal contractors in any other context: such taxes are passed through to the United States, and therefore increase the federal government's contracting costs. This Court's decision in *United States* v. *New*

Indian reservation roads shall be allocated among Tribes using formula established by committee including Indian representatives; formula shall be based in part on "cost of road construction in each Bureau of Indian Affairs area"); 23 U.S.C. 202 (authorizing Secretary of Interior and Secretary of Transportation to allocate funds for Indian reservations roads based on need); note 2, *supra* (discussing criteria for allocation under 23 U.S.C. 202).

More generally, although the tax at issue in the present case presumably will be passed on by contractors to the BIA, it is much less certain how the BIA would subsequently respond, and how tribal interests would ultimately be affected. In cases such as *Ramah Navajo School Board*, by contrast, the tax at issue was doubtless passed along to the tribal entity that was the other party to the contract, and it was less certain whether other actions of the federal government might have operated to mitigate the impact of the tax. See 458 U.S. at 842 n.6.

Mexico, however, makes clear that the latter concern does not, in itself, provide an adequate basis upon which to invalidate state taxation. 455 U.S. at 734 ("Thus, immunity may not be conferred simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy.").

d. For the foregoing reasons, when a State seeks to impose a tax on a non-tribal contractor doing business with the United States, the rule established by this Court's decision in *New Mexico* properly applies: Whether or not the taxed contract bears some relation to Indian matters, nondiscriminatory state taxes upon federal contractors are not preempted by federal law unless the contractor has been "incorporated into the government structure" or Congress has foreclosed state taxation. 455 U.S. at 737. That approach also has the virtue of simplicity. A different approach, in contrast, would require the courts to establish the point at which the connection of a federal contract to Indian matters is sufficient to displace the rule of *New Mexico*. A number of possibilities suggest themselves. For example, (1) it might suffice that the contract at issue was intended to provide benefits to Indians, in which case *New Mexico* would be inapplicable to a contract between the BIA and a private contractor for the construction of an off-reservation BIA office; (2) it might suffice that the contract at issue involved acts to be performed on an Indian reservation, in which case *New Mexico* would be inapplicable to a contract between the Department of Transportation and a non-tribal contractor for the construction of part of an interstate highway that happened to cross a reservation; or (3) it might be necessary for the contract to have both of the foregoing features, as do the contracts in the present case. Uniform application of the rule of *New Mexico* to all government contracts

would pretermit any such inquiry, and therefore would avoid introducing an additional layer of complexity into cases falling at the intersection between state taxation of federal contractors and state taxation of matters involving Indians.

II. THE OTHER GROUNDS FOR PREEMPTION ASSERTED BY RESPONDENT IN THE COURT OF APPEALS ARE WITHOUT MERIT

In the court of appeals, Blaze contended that Arizona's transaction privilege tax interferes with "three distinct federal policies." Pet. App. 12. Blaze did not contend, however, that any provision of federal law expressly provides that Arizona may not impose its transaction privilege tax in the circumstances of the present case. Under the rule of *New Mexico*, Blaze's contention is necessarily unavailing. 455 U.S. at 737. In any event, Blaze's claims of interference with federal policies are exaggerated.

A. There is no merit to Blaze's contention (Pet. App. 12-13, 15) that permitting Arizona to impose its transaction privilege tax on Blaze's contracts with the BIA would offend principles reflected in regulations implementing the Self-Determination Act. See 25 C.F.R. 271.4(d) and (e) (1996).[15] According to Blaze, the cited regulations "ex-

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[15] The cited provisions were in effect at the time of the contracts at issue in the present case, see, *e.g.*, 25 C.F.R. 271.4 (1986), but were eliminated in 1996 as unnecessary in light of new regulations promulgated to implement the Self-Determination Act. See 61 Fed. Reg. 49,059, 49,059-49,060 (1996) (new regulations codified at 25 C.F.R. Pt. 900 (1997)). In pertinent part, 25 C.F.R. 271.4(d) (1986) provided that "it is the policy of the [BIA] to leave to Indian tribes the initiative in making requests for contracts and to regard self-determination as including the decision of an Indian tribe not to request contracts." Section 271.4(e) (1986) provided in pertinent part that "[i]t is the policy of the [BIA] not to impose sanctions on Indian tribes with regard to contracting or not contracting."

press a federal policy in favor of leaving entirely to Indian tribes, free of sanction, the decision whether to apply for contracts with the BIA to plan, conduct or administer BIA programs." Pet. App. 13. Moreover, Blaze argued (*ibid.*), permitting state taxation of contractors who contract with the BIA, but precluding such taxation as to contracts entered into by a Tribe,[16] would interfere with that federal policy, by pressuring Tribes to enter into self-determination contracts in order to avoid the effect of state taxation on the availability of federal funds to perform the services in question.

Blaze reads far more into the cited regulations than can reasonably be found there. The regulations simply reflect the BIA's then-current policy of not itself attempting to influence Tribes' decisions as to whether to enter into self-determination contracts.[17] Nothing in the

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[16] As the court of appeals indicated (Pet. App. 13), the Arizona Department of Revenue conceded that it could not have taxed the contracts at issue if they had been entered into by a tribal entity. See Plaintiff's Statement of Facts in Support of Motion for Summary Judgment, Exh. B, at 1 (Arizona Department of Revenue originally sought to collect tax with respect to other contracts Blaze entered into with tribal housing authorities, but subsequently "agree[d] that the receipts from these projects are not subject to the Arizona privilege tax"). See also Arizona Transaction Privilege Tax Ruling 95-11 (Arizona Tax Ruling), at 3 (Ariz. Dep't of Revenue Apr. 21, 1995), Ariz. St. Tax Rep. (CCH) ¶ 300-192 ("The gross proceeds derived from construction projects performed on Indian reservations by non-affiliated Indian or non-Indian prime contractors are not subject to the imposition of Arizona transaction privilege tax under the following conditions: 1. The activity is performed for the tribe or a tribal entity for which the reservation was established.").

[17] The new regulations implementing the Self-Determination Act differ in important respects from the earlier regulations cited by the court of appeals. Specifically, the new regulations reflect the view that Tribes should be encouraged, though not required, to enter into self-determination contracts. See 25 C.F.R. 900.3(b)(3) ("The rules contained

regulations suggests an affirmative intent to sweep away every principle of state law that might influence Tribes as they make that choice.

B. Blaze also contended in the court of appeals (Pet. App. 13-14) that upholding Arizona's tax would undermine the purposes of the Buy Indian Act, 25 U.S.C. 47. Blaze's reasoning was as follows: (1) under the Buy Indian Act, the BIA gives preference to Indian-owned contractors when awarding contracts to construct or improve Indian reservation roads, Pet. App. 13; (2) the BIA "is not permitted to accord preferences based on bidders' affiliation with the tribe that controls the reservation where the work would be done," *ibid.*; (3) Arizona conceded that its tax could not lawfully have been imposed if the BIA had awarded its contracts to contractors who were affiliated with the Tribe on whose reservation the construction was performed, *ibid.*;[18] and (4) if Arizona can impose its tax upon other Indian-owned contractors, but not on tribal contractors, tribal contractors will be able to underbid other Indian-owned contractors, thereby in effect receiving a preference that the BIA is not permitted to confer, *id.* at 13-14.

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herein are designed to facilitate and encourage Indian tribes to participate in the planning, conduct and administration of those Federal programs serving Indian people."), 900.3(b)(5) (decision to enter into self-determination contract and decision not to do so are "equal expressions of self-determination"), 900.3(b)(8) ("It is the policy of the Secretary that the contractability of programs under this Act should be encouraged."), 900.4(c) (regulations should not be construed as requiring Tribes to enter into self-determination contracts).

[18] See Arizona Tax Ruling, note 16, *supra*, at 3 ("Arizona's transaction privilege tax does not apply to business activities performed by businesses owned by an Indian tribe, a tribal entity or an individual tribal member if the business activity takes place on the reservation which was established for the benefit of the tribe.").

It is not entirely clear that federal law would forbid the BIA from granting a preference based in part on a contractor's affiliation with the Tribe on whose reservation the contract was to be performed.[19] Even if federal law did preclude the BIA from basing a preference on tribal status, that would not imply that federal law superseded any state law that might have the incidental effect of providing a competitive advantage to contractors bidding to perform work on their own tribal reservations.

C. Finally, Blaze contended (Pet. App. 12) that Arizona's tax is "incompatible with the federal and tribal interest in channeling all available funding toward building and improving reservation roads." Precisely the same could be said of any state tax that falls upon a federal contractor being paid with federal funds appropriated for a particular purpose. This Court's decision in *New Mexico* makes clear that a State is not foreclosed from imposing a tax on a federal contractor simply because the tax will likely increase the federal government's contracting costs. 455 U.S. at 734, 735 n.11.[20]

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[19] In the court of appeals, Blaze relied solely upon language in a Senate report. See Resp. C.A. Br. 13 (citing S. Rep. No. 4, 100th Cong., 1st Sess. 83 (1987)). The provision to which that language relates, however, states only that "nothing in this section shall preclude the preferential employment of Indians living on or near a reservation on projects and contracts on Indian reservation roads." 23 U.S.C. 140(d). The general contract language the BIA uses when requiring its contractors to give an Indian preference provides that the preference is to be given "regardless of tribal affiliation." 48 C.F.R. 1426.7002(a), 1452.226-70, 1452.226-71. When work is to be performed on an Indian reservation, that general contract language may be supplemented "by adding specific Indian preference requirements of the Tribe on whose reservation the work is to be performed." 48 C.F.R. 1426.7005.

[20] When the State imposes a tax on a contractor who contracts directly with a Tribe, the tendency of the tax to deplete tribal resources is a significant though not necessarily dispositive factor in determining

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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whether the state tax is preempted. See *Cotton Petroleum*, 490 U.S. at 179-180; *Ramah Navajo School Bd.*, 458 U.S. at 844 & n.8; *White Mountain Apache Tribe*, 448 U.S. at 151 & n.15.