

[Home](#)

[Practice Areas](#)

[Jurisdictions](#)

[Cases & Codes](#)

[News](#)

[CLE](#)

[Market Center](#)

[Research a Lawyer](#)

[Federal Law](#)

[State Law](#)

[Case Summaries Search](#)

[U.S. Code](#)

[Newsletters](#)

[Click Here For Funds Now. FirmFinance](#)

LawFinance/group Inc.

WE DO WHAT BANKS

## Resources by Jurisdiction

- [View enhanced case on Westlaw](#)
- [KeyCite this case on Westlaw](#)

 [Click for Printable ve](#)

<http://laws.findl>

[Cases citing this case: Supreme Court](#)

[Cases citing this case: Circuit Courts](#)

## U.S. Supreme Court

**RAMAH NAVAJO SCHOOL BD. v. BUREAU OF REVENUE, 458 U.S. 83**

**458 U.S. 832**

**RAMAH NAVAJO SCHOOL BOARD, INC., ET AL. v. BUREAU OF REVENUE OF NI  
APPEAL FROM THE COURT OF APPEALS OF NEW MEXICO**

**No. 80-2162.**

**Argued April 28, 1982**

**Decided July 2, 1982**

*Held:*

Federal law pre-empts New Mexico's tax imposed on the gross receipts that appellant non-Indian const received from appellant tribal school board for the construction of a school for Indian children on the r Mountain Apache Tribe v. Bracker, [448 U.S. 136](#), controlling. Pp. 836-847.

(a) In view of the federal and tribal interests arising from Congress' broad power to regulate triba Indian Commerce Clause, Art. I, 8, cl. 3, and from the semi-autonomous status of Indian tribes, t

authority over commercial activity on an Indian reservation may be pre-empted by federal law, or with the tribe's ability to exercise its sovereign functions. Traditional notions of tribal sovereignty, recognition and encouragement of such sovereignty in congressional Acts promoting tribal independent economic development, inform the pre-emption analysis. Ambiguities in federal law should be construed against and federal pre-emption is not limited to those situations where Congress has explicitly announced its intent to pre-empt state activity. Pp. 837-839.

(b) Federal statutes (particularly the Indian Self-Determination and Education Assistance Act) and regulations governing school construction on the reservation, and the Bureau of Indian Affairs' review of subcontracting agreements between the Indian organization, which is viewed as the general contractor, and the non-Indian firm that actually constructs the facilities. The direction and supervision provided by the comprehensive federal regulatory scheme for the construction of Indian schools leave no room for a burden sought to be imposed by New Mexico. There is no merit to the contention that the state tax is pre-empted merely because the federal statutes and regulations do not specifically express the intention to pre-empt state authority. The interest asserted by the State relating to its providing services to the non-Indian organization off the reservation is not a legitimate justification for a tax whose ultimate burden falls on the organization. Nor is the State's purpose in imposing the tax pursuant to a general desire to increase revenue sufficient to justify the additional burdens thereby imposed on the [458 U.S. 832, 833] comprehensive federal scheme regulating the creation and maintenance of educational opportunities for Indian children and on the federal policy of encouraging Indian self-sufficiency in the area of education. Pp. 839-845.

(c) Pre-emption analysis in this area need not be modified by applying a new approach relying on the Commerce Clause. Existing pre-emption analysis governing this type of case provides sufficient protection for state courts and also allows for more flexible consideration of the federal, state, and tribal interests at issue.

95 N. M. 708, 625 P.2d 1225, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, BLACKMUN, and O'CONNOR, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which WHITE and STEVENS, JJ., joined. Post, p. 847.

Michael P. Gross argued the cause for appellants. With him on the briefs were Carl Bryant Rogers and

Deputy Solicitor General Claiborne argued the cause for the United States as amicus curiae urging reversal. With him on the brief were Solicitor General Lee, Assistant Attorney General Dinkins, Elinor Hadley Stillman, Edward M. Tamm, and Maria A. Iizuka.

Jan Unna, Special Assistant Attorney General of New Mexico, argued the cause for appellee. With him on the brief were Jeff Bingaman, Attorney General, and Gerald B. Richardson, Assistant Attorney General. \*

[ [Footnote \\*](#) ] Briefs of amici curiae urging reversal were filed by George P. Vlassis and Katherine Ott for the Indians; and by Richard W. Hughes for the Pueblo of Santa Ana. Helena S. Maclay and Deirdre Bogert for the Attorneys General of Montana, Leland T. Johnson, Assistant Attorney General of Washington, Warren E. Hearnes, Assistant Attorney General of Minnesota, Mark V. Meierhenry, Attorney General of South Dakota, and Richard H. Bryan, Attorney General of Nevada, filed a brief for the State of Montana et al. as amici curiae urging affirmance. Briefs of amici curiae were filed by George Deukmejian, Attorney General, and Neal J. Gobar, Deputy Attorney General, for the State of California; and by Arthur Lazarus, Jr., for the Association of American Indian Affairs, Inc. [458 U.S. 832, 834]

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 of an Indian construction company received from a tribal school board for the construction of a school for an Indian reservation. The New Mexico Court of Appeals held that the gross receipts tax imposed by the State of New Mexico is permissible. Because the decision below is inconsistent with *White Mountain Apache Tribe v. Bracker* (1980) (White Mountain,) we reverse.

## I

Approximately 2,000 members of the Ramah Navajo Chapter of the Navajo Indian Tribe live on tribal lands located in west central New Mexico. Ramah Navajo children attended a small public high school until the State closed this facility in 1968. Because there were no other public high schools reasonably available on the reservation, the Ramah Navajo children were forced either to abandon their high school education or to attend Indian boarding schools far from the reservation. In 1970, the Ramah Navajo Chapter exercised its authority under the Tribal Code, Title 10, 51 (1969), and established its own school board in order to remedy this situation. The Navajo School Board, Inc. (the Board), was organized as a nonprofit corporation to be operated exclusively by the Ramah Navajo Chapter. The Board is a Navajo "tribal organization" within the meaning of 25 U.S.C. § 2204. With funds provided by the federal Bureau of Indian Affairs (BIA) and the Navajo Indian Tribe, the Board constructed a school in the abandoned public school facility, thus creating the first independent Indian school in modern times. [458 U.S. 832, 835]

In 1972, the Board successfully solicited from Congress funds for the design of new school facilities. Public Law 92-510, Stat. 510. The Board then contracted with the BIA for the design of the new school and hired an architect. The Board contracted with the BIA for the actual construction of the new school to be built on reservation lands. The construction of this facility was provided by a series of congressional appropriations specifically earmarked for that purpose. [458 U.S. 832, 835] The contract specified that the Board was the design and building contract for the project, but could subcontract the actual construction work to third parties. The contract further provided that any subcontract agreement would have to include certain clauses governing pricing, wages, bonding, and the like, and that it was approved by the BIA.

The Board then solicited bids from area building contractors for the construction of the school, and received bids from both Indian and non-Indian firms. Each firm included the state gross receipts tax as a cost of construction in their bids, but did not itemize it separately. Appellant Lembke Construction Co. (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" on the 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 of the tax. The second contract between Lembke and the Board was executed in 1977, a clause was inserted into that contract recognizing that the Board could [458 U.S. 832, 836] litigate the validity of this tax and was entitled to an award of the tax amount.

Both Lembke and the Board protested the imposition of the gross receipts tax. In 1978, after exhausting administrative remedies, they filed this refund action against appellee New Mexico Bureau of Revenue in the New Mexico Court of Appeals. At the time of trial, the parties stipulated that the Board had reimbursed Lembke for tax payments of \$2 million. 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 federal regulation and that it imposed an impermissible burden on tribal sovereignty. The Court of Appeals affirmed. 95 N. M. 708, 625 P.2d 1225 (1980). 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 was not an unlawfully imposed burden on tribal sovereignty. The Board filed a petition for rehearing in light of this Court's intervention in *White Mountain*, supra, and *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980).

Appeals denied the petition, stating only that this case did not involve either "a comprehensive or pervasive federal regulation" or "federal regulation similar to the Indian trader statutes." App. to Juris. Statement granting discretionary review, the New Mexico Supreme Court quashed the writ as improvidently granted. 627 P.2d 412 (1981). We noted probable jurisdiction. [454 U.S. 1079](#) (1981).

## II

In recent years, this Court has often confronted the difficult problem of reconciling "the plenary power of Congress over tribal affairs within their borders with the semi-autonomous [[458 U.S. 832, 837](#)] status of Indians living on tribal land." *McClanahan v. Arizona State Tax Comm'n*, [411 U.S. 164, 165](#) (1973). Although there is no definitive answer to the question whether a State may exercise its authority over tribal members or reservation activities, we have identified the relevant federal, tribal, and state interests to be considered in determining whether a particular 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 over tribal affairs under the Indian Commerce Clause, Art. I, 8, cl. 3, and from the semi-autonomous status of tribes. [U.S., at 142](#). These interests tend to erect two "independent but related" barriers to the exercise of state authority over tribal activity on an Indian reservation: state authority may be pre-empted by federal law, or it may interfere with a 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](#) (1958)). As explained in *White Mountain*:

"The two barriers are independent because either, standing alone, can be a sufficient basis for holding that a state law is inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in important ways. The right of tribal self-government is ultimately dependent on and subject to the approval 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 be measured." *448 U.S., at [458 U.S. 832, 838]* 143 (quoting *McClanahan v. Arizona State Tax Comm'n*, *supra*).

The State's interest in exercising its regulatory authority over the activity in question must be examined in light of the appropriate weight. Pre-emption analysis in this area is not controlled by "mechanical or absolute concepts of tribal sovereignty"; it requires a particularized examination of the relevant state, federal, and tribal interests. [U.S., at 145](#). The question whether federal law, which reflects the related federal and tribal interests, pre-empts a state's exercise of its regulatory authority is not controlled by standards of pre-emption developed in other areas. *Id.*, at 144-145. The traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty by the federal government, inform the pre-emption analysis that we apply. See *id.*, at 143, and n. 10. Relevant federal statutes and treaties must be examined in light of "the broad principles 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 should be applied in those situations where Congress has explicitly announced an intention to pre-empt state activity. *Id.*, at 144-145.

In *White Mountain*, we applied these principles and held that federal law pre-empted application of the license and use fuel taxes to a non-Indian logging company's activity on tribal land. We found the federal scheme for harvesting Indian timber to be so pervasive that it precluded the imposition of additional but state taxes. *Id.*, at 148. The Secretary of the Interior (Secretary) had promulgated detailed regulations for the management of "Indian forests by the Indian people for the purpose of promoting self-sustaining communities." *Id.*, at 148. [CFR 141.3\(a\)\(3\)](#) (1979)). [[458 U.S. 832, 839](#)]

Under these regulations, the BIA was involved in virtually every aspect of the production and marketing of timber on the reservation. 448 U.S., at 145 -148. In particular, the Secretary and the BIA extensively regulated the contractual relations between the Indians and the non-Indians working on the reservation: they established the bidding procedure, set the fees to be included in every contract, and required that all contracts be approved by the Secretary. *Id.*, at 147.

We found that the state taxes in question would "threaten the overriding federal objective of guaranteeing that the Indians will receive . . . the benefit of whatever profit [the forest] is capable of yielding. . . ." *Id.*, at 149 (quoting *Id.* (3) (1979)). We concluded that the imposition of state taxes would also undermine the Secretary's obligations to set fees and rates for the harvesting and sale of the timber, and it would impede the "Tribes' ability to carry out the sustained-yield management policies imposed by federal law." 448 U.S., at 149 -150. Balance of power. The State asserted only "a general desire to raise revenue" as its justification for the taxes. *Id.*, at 150. In this context, this interest is insufficient to justify the State's intrusion into a sphere of activity regulated by the Federal Government. *Ibid.*

## B

This case is indistinguishable in all relevant respects from *White Mountain*. Federal regulation of the financing of Indian educational institutions is both comprehensive and pervasive. The Federal Government's involvement in the education of Indian children can be traced back to the first treaties between the United States and the Indians. Since that time, Congress has enacted numerous [458 U.S. 832, 840] statutes empowering the BIA to provide for the education both on and off the reservation. See, e. g., Snyder Act, 42 Stat. 208 (1921), 25 U.S.C. 13; Johnson Act, 48 Stat. 596 (1934), 25 U.S.C. 452 et seq.; Navajo-Hopi Rehabilitation Act, 64 Stat. 44 (1950), 25 U.S.C. 450 et seq.; Indian Self-Determination and Education Assistance Act, 88 Stat. 2203 (1975), 25 U.S.C. 450 et seq. (1975 Act). Although the early focus of the federal efforts in this area concentrated on providing federal or state facilities for Indian children, in the early 1970's the federal policy shifted toward encouraging the development of tribal controlled institutions on the reservation. See 6 Weekly Comp. of Pres. Doc. 894, 899-900 (1970) (Memorandum to President Nixon).

This federal policy has been codified in the Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. 1451 et seq., notably in the Self-Determination Act. The Self-Determination Act declares that a "major national goal 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 economic well-being." 88 Stat. 2203, as set forth in 25 U.S.C. 450a(c). In achieving this goal, Congress recognized that "parental and community control of the educational process is of crucial importance to the Indian child." 88 Stat. 2203, 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. 25 U.S.C. 450k. Pursuant to this authority, the Secretary has promulgated detailed and comprehensive regulations regarding "school construction for previously private [458 U.S. 832, 841] schools now controlled and operated by tribal or approved Indian organizations." 25 CFR 274.1 (1981). 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 contractor, and the non-Indian firm that actually constructs the facilities. See 25 CFR 274.2 (1981). The BIA must conduct preliminary on-site inspections, and prepare cost estimates for the project in cooperation with the Indian organization. 25 CFR 274.22 (1981). The Board must approve any architectural or engineering agreement having a connection with the project. 25 CFR 274.32(c) (1981). In addition, the regulations empower the BIA to require that subcontracting agreements contain certain terms, ranging from clauses relating to bonding and payment to 25 CFR 70.632 (1981), to preferential treatment for Indian workers. 25 CFR 274.38 (1981). Finally, to ensure that the BIA is fulfilling its statutory obligations, the regulations require the tribal organization to maintain records for the BIA's inspection. 25 CFR 274.41 (1981).

This detailed regulatory scheme governing the construction of autonomous Indian educational facilities comprehensive as the federal scheme found to be pre-emptive in *White Mountain*. <sup>5</sup> The direction and [458 U.S. 832, 842] by the Federal Government for the construction of Indian schools leave no room for what is sought to be imposed by the State through its taxation of the gross receipts paid to Lembke by the Board although nominally falling on the non-Indian contractor, necessarily impedes the clearly expressed federal policy of promoting the "quality and quantity" of educational opportunities for Indians by depleting the funds available for the construction of Indian schools. <sup>6</sup> [458 U.S. 832, 843]

The Bureau of Revenue argues that imposition of the state tax is not pre-empted because the federal statutes do not specifically express the intention to pre-empt this exercise of state authority. This argument is contrary to our precedents. In *White Mountain* we flatly rejected a similar argument. *448 U.S.*, at 150-151 (citing *Co. v. Arizona Tax Comm'n*, *380 U.S. 685* (1965); *Williams v. Lee*, *358 U.S. 217* (1959); and *Kennerly v. State of Montana*, *400 U.S. 423* (1971)). There is nothing unique in the nature of a gross receipts tax or in the federal policy 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 and does not bear the burden of paying this tax. Having declined to take any responsibility for the education of these children, the State is precluded from imposing an additional burden on the comprehensive federal scheme intended to promote education - a scheme which has "left the State with no duties or responsibilities." *Warren Trading Post Co. v. Arizona Tax Comm'n*, supra, at 691. <sup>7</sup> Nor has the State asserted any specific, legitimate regulatory interest to justify its gross receipts tax. The only arguably [458 U.S. 832, 844] specific interest advanced by the State is that it will receive tax revenue from Lembke for its activities off the reservation. This interest, however, is not a legitimate justification for the tax because the ultimate burden falls on the tribal organization. <sup>8</sup> 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 educational facilities on tribal lands pursuant to a contract between the tribal organization and the non-Indian contractor. 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) (1980). New Mexico has not explained the source of its power to impose this tax in this case where the "privilege of doing business" on an Indian reservation is exclusively bestowed by the Federal Government. [458 U.S. 832, 845]

The State's ultimate justification for imposing this tax amounts to nothing more than a general desire to collect revenue. This purpose, as we held in *White Mountain*, *448 U.S.*, at 150, is insufficient to justify the additional burden of the tax on the comprehensive federal scheme regulating the creation and maintenance of educational facilities for Indian children and on the express federal policy of encouraging Indian self-sufficiency in the area of education. The regulatory scheme precludes any state tax 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 analysis and rely on the dormant Indian Commerce Clause, Art. I, 8, cl. 3, to hold that non-reservation activities of a resident tribe are presumptively beyond the reach of state law even in the absence of comprehensive federal regulation. We are placing the burden on the State to demonstrate that its intrusion is either condoned by Congress or justified by a need to protect legitimate, specified state interests other than the generalized desire to collect revenue. We believe that adopting this approach is preferable for several reasons: it would provide guidance to the state courts on difficult 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 principal barrier to state assertions of authority; our primary federal goal is to encourage tribal self-determination and self-government; and it would place the burden on the State to articulate clearly its particularized interests in taxing the transaction and to demonstrate the benefits of the tax in assisting the taxed transaction.

We do not believe it necessary to adopt this new approach - the existing pre-emption analysis governs sufficiently sensitive to many of the concerns expressed by the Solicitor General. Although clearer rules promote the interest in simplifying litigation, our precedents announcing the scope of pre-emption analysis provide sufficient guidance to state courts and also allow for more flexible consideration of the federal interests at issue. We have consistently admonished that federal statutes and regulations relating to tribal activities must be "construed generously in order to comport with . . . traditional notions of [Indian] sovereignty and the federal policy of encouraging tribal independence." *White Mountain*, supra, at 144; see also *McClain v. State Tax Comm'n*, [411 U.S., at 174](#) -175, and n. 13; *Warren Trading Post Co. v. Arizona Tax Comm'n*, 390 U.S. 691. This guiding principle helps relieve the tension between emphasizing the pervasiveness of federal pre-emption and the federal policy of encouraging Indian self-determination. Although we must admit our disappointment that our precedents apparently gave short shrift to this principle and to our precedents in this area, we cannot and do not predict 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-determination in the area of education preclude the imposition of the [\[458 U.S. 832, 847\]](#) state gross receipts tax in this case. 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.

### Footnotes

[ [Footnote 1](#) ] On July 8, 1970, in his Message to the Congress on Indian Affairs, President Nixon referred 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).

[ [Footnote 2](#) ] See Pub. L. 93-245, 87 Stat. 1073 (1973) (amending Pub. L. 93-120, 87 Stat. 431 (1973)) (establishing the Indian Education Act and earmarking funds appropriated there for the construction of the Ramah school facility); Pub. L. 93-404, 88 Stat. 1655 (1974); Pub. L. 94-165, 89 Stat. 985 (1975); Pub. L. 95-74, 91 Stat. 293 (1977).

[ [Footnote 3](#) ] Article VI of the 1868 Treaty between the United States and the Navajo Tribe, 15 Stat. 687. "In order to insure the civilization [\[458 U.S. 832, 840\]](#) of the Indians entering into this treaty, the necessity of such measures is admitted."

[ [Footnote 4](#) ] Although these regulations did not become effective until several months after the BIA had executed the initial contracts, the Secretary and the BIA had applied similar requirements under the Johnson-O'Malley Act, 48 Stat. 596, 25 U.S.C. 452 et seq. In any event, the two subsequent agreements between the Board and Lembke, accounting for two-thirds of the total construction, were signed after the effective date of the regulations, which clearly authorize the BIA to monitor these construction agreements.

[ [Footnote 5](#) ] JUSTICE REHNQUIST asserts that the comprehensive federal regulatory scheme outlining school construction, which is the activity taxed." Post, at 851. The dissent fails to explain, how it distinguishes this case from *White Mountain*. In that [\[458 U.S. 832, 842\]](#) case, we struck down Arizona's motor carrier license tax, not because of any federal interest in gasoline, licenses, or highways, but because of these state taxes on a non-Indian contractor doing work on the reservation was pre-empted by the "comprehensive federal regulation of the harvesting and sale of tribal timber." [448 U.S., at 151](#) . We find that New Mexico is not pre-empted from imposing a tax on the construction of autonomous Indian educational institutions by

receipts tax on Lembke. JUSTICE REHNQUIST's contention that the New Mexico tax is somehow contrary to the federal interest because such taxes "are as much a normal cost of school construction as the cost of cement at 855, is also foreclosed by *White Mountain*. Surely, state use fuel and motor carrier license taxes are not the cost of harvesting and marketing timber. Yet in *White Mountain*, we concluded that these taxes impeded the federal interest in "guaranteeing Indians that they will receive . . . the benefit of whatever profit [the forest] is yielding," [448 U.S., at 149](#), despite the dissent's argument that the taxes amounted to less than 1% of the profit produced by the logging operation. Here, as in *White Mountain*, JUSTICE REHNQUIST continues to

[ [Footnote 6](#) ] Appellee would have us impute congressional awareness and approval of the state gross receipts tax on the appropriations bills which earmarked funds for the construction of these facilities, see n. 2, *supra*. Briefly, Appellee strains to find this awareness and approval by arguing that the same architects who prepared the bid and requests that the Board submitted to Congress also prepared the bid specifications pursuant to which it submitted its bid. However, as we have indicated, the bid specifications only required prospective bidders to include the gross receipts tax as required by law," and the submitted bids did not specify the gross receipts tax as a separate line item. So it is not clear, and the Board disputes the contention, that the Board ever intended to include the gross receipts taxes included in the construction costs of its school facilities. Furthermore, there is absolutely no [\[458\]](#) indication that Congress was even made aware of the existence of these taxes when it appropriated funds for the construction of the Ramah Navajo school. In any event, as we have noted in a related context, courts should not infer congressional intent to alter the force of existing law from an appropriations Act. Cf. *TVA v. [189](#)* -191 (1978).

[ [Footnote 7](#) ] Of course, these statutes and regulations do not prevent 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. *25 U.S.C. 458*. This case would be different if the State were actively seeking tax revenues for the construction of, or assisting in the effort to provide, adequate educational facilities for Ramah Navajo children.

[ [Footnote 8](#) ] The Bureau of Revenue invites us to adopt the "legal incidence" test, under which the legal incidence 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 of Colville Reservation*, [447 U.S. 134, 150](#) -151 (1980); *Moe v. Salish & Kootenai Tribes*, [425 U.S. 463](#) (1976). In *White Mountain*, [448 U.S., at 151](#), we found it significant that the economic burden of the asserted taxes would fall on the Tribe, even though the legal incidence of the tax was on the non-Indian logging company. Given the federal regulatory scheme at issue here, we decline to allow the State to impose additional burdens on the Tribe in its interest in fostering Indian-run educational institutions, even if those burdens are imposed indirectly through the Indian contractor for work done on the reservation.

[ [Footnote 9](#) ] In *Central Machinery Co. v. Arizona State Tax Comm'n*, [448 U.S. 160](#) (1980), we held that the federal tax 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 an Indian Tribe, notwithstanding the substantial services that the State undoubtedly provided to the off-reservation non-Indian seller. Presumably, the state tax revenues derived from Lembke's off-reservation business would be adequate to reimburse the State for the services it provides to Lembke.

[ [Footnote 10](#) ] We are similarly unpersuaded by the State's argument that the significant services it provides to 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 point is not clear. Although the State does provide services to the Ramah Navajo Indians, it receives federal funds for the construction of these services, and the State conceded at trial that it saves approximately \$380,000 by not having to pay for the Ramah Navajo children. App. 95, 105-106, 108.

JUSTICE REHNQUIST, with whom JUSTICE WHITE and JUSTICE STEVENS join, dissenting.

The Court today reproves the New Mexico Court of Appeals for failing to heed our precedents, much as a parent would rebuke a wayward child. 1 I do not think the Court of Appeals deserves the rebuke; it sees that the state court applied our precedents at least as faithfully, and coherently, as the Court itself. In its desire to do what it evidently finds quite salutary as a matter of policy, the Court finds "indistinguishable" a case that is clearly marked, and it finds "pervasively regulated" an activity that is largely free of federal regulation. It ultimately grants a dependent Indian tribal organization greater tax immunity than it accorded the sovereignty of the United States months ago in a case involving the precise state taxes at issue here.

## I

The general question presented by this case has occupied the Court many times in the recent past, and it continues to demand its attention over and over again until the Court sees fit to articulate, and follow, a consistent approach of law. This insistent question concerns the extent to which the States can tax economic activity on Indian lands within their borders. I believe the dominant trend of [\[458 U.S. 832, 848\]](#) our cases is toward treating the States' tax immunity from nondiscriminatory state taxation as a question of pre-emption, ultimately dependent on federal law. In such a framework, the tradition of Indian sovereignty stands as an independent barrier to discrimination; otherwise it serves only as a guide to the ascertainment of the congressional will.

The principles announced in *White Mountain Apache Tribe v. Bracker*, [448 U.S. 136](#) (1980), are consistently applied. 2 Thus, the Court in *White Mountain* recognized federal pre-emption as a principal barrier to the assertion of regulatory authority over tribal reservations and members, *id.*, at 142, and specifically invalidated the exercise of taxing authority on that basis, *id.*, at 148, 151, n. 15. The Court also recognized that in some instances a state law is invalid because it infringes "the right of reservation Indians to make their own laws and be ruled by them" (quoting *Williams v. Lee*, [358 U.S. 217, 220](#) (1959)). But apart from those rare instances in which the State's law directly interfere with the residual sovereignty of a tribe to govern its own members, the "tradition of tribal sovereignty provides a "backdrop" against which the pre-emptive effect of federal statutes or treaties must be assessed." [143](#).

The Court today pays homage to these principles but then promptly bestows its favors on a new analytical approach which shifts the extent of economic burden on the tribe, and not the pre-emptive effect of federal regulations, to paramount consideration. Such a shift is necessary, for the [\[458 U.S. 832, 849\]](#) Court's purported reliance on the regulations will not withstand even superficial scrutiny.

## II

The Court declares that "[t]his case is indistinguishable in all relevant respects from *White Mountain*." This statement is quite inaccurate. *White Mountain* involved an attempt by the State of Arizona to apply its taxes on and use fuel taxes to the logging operations of a non-Indian company doing business exclusively on the reservation. The Court concluded that application of the State's taxes was inconsistent with the pervasive federal regulatory activity subject to taxation. The Court repeatedly emphasized the comprehensiveness of the regulations:

"Under these regulations, the Bureau of Indian Affairs exercises literally daily supervision over the management of tribal timber. In the present case, contracts between [the tribal organization] and [the contractor] must be approved by the Bureau; indeed, the record shows that some of those contracts are performed by employees of the Federal Government. Bureau employees regulate the cutting, hauling, and marketing of timber [the tribal organization and the contractor]. The Bureau decides such matters as how much timber will be felled, which roads are to be used, which hauling equipment [the contractor] should

at which logging equipment may travel, and the width, length, height, and weight of loads.

"The Secretary has also promulgated detailed regulations governing the roads developed by the I Affairs. . . . On the Fort Apache Reservation the Forestry Department of the Bureau has required organization] and its contractors . . . to repair and [458 U.S. 832, 850] maintain existing Bureau and some cases to construct new logging roads. . . . A high percentage of [the contractor's] receipts are for purposes, and it has maintained separate personnel and equipment to carry out a variety of tasks and maintenance." [448 U.S., at 147](#) -148.

But the Court in *White Mountain* did not merely review the comprehensiveness of the regulations and ( that state taxes on the logging operations were pre-empted. It found, with considerable attention to special assessment of state taxes would obstruct federal policies." *Id.*, at 148.

"At the most general level, the taxes would threaten the overriding federal objective of guaranteeing that the Tribe will receive . . . the benefit of whatever profit [the forest] is capable of yielding. . . . ' 25 CFR 14. Underlying the federal regulatory program rests a policy of assuring that the profits derived from logging are inure to the benefit of the Tribe subject only to administrative expenses incurred by the Federal Government."

"In addition, the taxes would undermine the Secretary's ability to make the wide range of determinations to his authority concerning the setting of fees and rates with respect to the harvesting and sale of timber. The Secretary reviews and approves the terms of the Tribe's agreements with its contractors, sets fees for timber rendered to the Tribe by the Federal Government, and determines stumpage rates for timber to be harvested. Most notably in reviewing or writing the terms of the contracts between [the tribal organization] and federal agents must predict the amount and determine the proper allocation of all business expenses and costs. The assessment of state taxes would throw additional [458 U.S. 832, 851] factors into the federal scheme, reducing tribal revenues and diminishing the profitability of the enterprise for potential contractors."

"Finally, the imposition of state taxes would adversely affect the Tribe's ability to comply with timber management policies imposed by federal law." *Id.*, at 149-150.

As noted, the Court thinks that this case is "indistinguishable in all relevant respects from *White Mountain* and finds that "[f]ederal regulation of the construction and financing of Indian educational institutions is both broad and pervasive." *Ibid.* But the regulations on which the Court relies do not regulate school construction, but rather are taxed. They merely detail procedures by which tribes may apply for federal funds in order to carry out their construction programs.

The purpose of the regulations, which the Court quotes only in part, *ante*, at 840-841, "is to give the applicant the approval process for obtaining a contract or services from the Bureau for school construction for previously now controlled and operated by tribes or tribally approved Indian organizations . . . ." 25 CFR 274.1 (1 added). The regulations that follow explain the procedures by which tribes may obtain, complete, and file applications for federal funding or services. 274.12-274.18. As the Court observes, *ante*, at 841, the regulations also approve or disapprove plans and specifications for construction as well as construction contracts let by the tribe and treated as subcontracts of the funding contract between the tribe and the BIA. The contracts are required to include establishing a hiring preference for Indians. 274.38. And the BIA is given access to the tribe's records for the purpose of 274.41. That is the extent of the regulations.

In this case the BIA "contracted" with the School Board in order to convey federal funds for the construction of the school. [U.S. 832, 852](#) It also approved the Board's construction "subcontract" with the construction contractor. In the selection of the contractor and it played no role in regulating or supervising the actual construction. The Court concludes that this scheme, which is little more than a grant application process, "is at least as common as any federal scheme found to be pre-emptive in *White Mountain*." *Ante*, at 841. I simply cannot agree.

More important, the Court concludes in the very next sentence that "[t]he direction and supervision pro Government for the construction of Indian schools leaves no room for the additional burden sought to t State through its taxation of the gross receipts paid to Lembke by the Board." Ante, at 841-842. This st the sum total of the Court's pre-emption analysis in this case. In *White Mountain* the Court engaged in examination of the extent to which state taxes would interfere both with the Secretary's ability to carry mandate and with the tribe's ability to carry out federal policy. In the place of such careful analysis, the on ipse dixit. It does so because there is no realistic basis for concluding that the State's taxes would int "pervasive" regulatory scheme. The BIA simply does not regulate the construction activity which the S provides federal money to eligible tribes and tribal organizations and it establishes a contract-approval mechanism as a means of attempting to ensure that the money is put to the use for which it is earmarke 853]

### III

A careful reading of the Court's opinion demonstrates that the single, determinative factor in its judgme challenged state taxes have increased the financial burden of constructing a tribal school. Whether the 1 are detailed and comprehensive or largely a matter of bookkeeping is an irrelevancy, for the Court conc burden "impedes the clearly expressed federal interest in promoting the 'quality and quantity' of educat for Indians by depleting the funds available for the construction of Indian schools." Ante, at 842 (emph Court recognizes that the legal incidence of the tax is on the non-Indian contractor, but asserts that "in ' we found it significant that the economic burden of the asserted taxes would ultimately fall on the Trib even though the legal incidence of the tax was on the non-Indian logging company." Ante, at 844, n. 8.

The Court in *White Mountain* did indeed note that "the economic burden of the asserted taxes will ultir Tribe." [448 U.S., at 151](#). But in a footnote immediately following that sentence, which is today ignore declared:

"Of course, the fact that the economic burden of the tax falls on the Tribe does not by itself mean emptied, as *Moe v. Salish & Kootenai Tribes*, [425 U.S. 463](#) (1976), makes clear. Our decision to c pre-emptive effect of the comprehensive federal regulatory scheme, which . . . leaves no room fo burdens sought to be imposed by state law." *Id.*, at 151, n. 15.

Despite its references to the supposed "comprehensive and pervasive" regulatory scheme in this case, tl chosen to bar the State from taxing Lembke's gross receipts principally because the tax imposes an indi burden on the tribal organization. As the Court in *White Mountain* recognized, our precedents undenial insufficient basis for the recognition of an Indian tax immunity. See *Washington v. Confederated Tribe Reservation*, [447 U.S. 134, 156](#) (1980) ("Washington does not infringe the right of reservation Indians laws and be ruled by them,' . . . merely because the result of imposing its taxes will be to deprive the Ti which they currently are receiving"); *Moe v. Salish & Kootenai Tribes*, [425 U.S. 463, 481-482](#) (1976) cigarette sales from Indians to non-Indians because the legal incidence of the tax was on the consumer) *Tribe v. Jones*, [411 U.S. 145, 156-157](#) (1973) (refusing to imply tax immunity despite economic burde enterprise). <sup>4</sup> Even under the [\[458 U.S. 832, 855\]](#) modified form of pre-emption doctrine applicable to sta reservation activities, there must be some affirmative indication that Congress did not intend the State t sovereign power challenged in the suit. Until today, the mere fact that the asserted power will impose a on a tribal endeavor has not provided that affirmative indication.

I do not disagree with the Court's judgment that congressional enactments such as the Indian Financing Self-Determination and Education Assistance Act embody a federal policy encouraging the developme controlled educational institutions. But it is a considerable leap to infer from that policy the independe state laws which might increase the cost of such an endeavor are to be considered null and void. It is pe

that Congress favored Indian education, but also contemplated that all costs of obtaining that end would be in that fashion. State taxes are as much a normal cost of school construction as the cost of cement and labor. Tax was included in the bids submitted to the Board by the construction contractors, and it apparently was also included in the funding requests submitted by the Board to Congress. The Board cannot be faulted for attempting to stretch construction funds as far as possible, but that is a woefully inadequate basis for interfering with the sovereignty of the State of New Mexico.

#### IV

A short three months ago, this Court considered whether the State of New Mexico could impose its gross receipts tax on private contractors that conduct business with the Federal Government. [U.S. 832, 856](#) The Court concluded that tax immunity was appropriate in only one circumstance: "when the levy falls on the Union or an agency or instrumentality so closely connected to the Government that the two cannot realistically be separated as separate entities, at least insofar as the activity being taxed is concerned." *United States v. New Mexico* (1982). In reaching this conclusion, we held that "immunity may not be conferred simply because the tax is levied by the United States, or even because the Federal Government shoulders the entire economic burden of the tax; if the legal incidence of the tax is on the contractor, it is to be considered valid, absent specific congressional authorization." *Id.*, at 738 as "the contractors can realistically be considered entities independent of the United States." *Id.*, at 738

In this case, as in *United States v. New Mexico*, the legal incidence of the New Mexico tax is on the private contractor, not on the entity whose status might be the source of a tax immunity. And, as in *United States v. New Mexico*, *Lembke* is a separate taxable entity completely independent of the tribal school board. Were the tax immunity no greater than that of the United States, it seems plain that New Mexico's tax would have to be upheld against the gross receipts of the non-Indian contractor. But the Court reaches a different conclusion because it finds that the tax imposes an economic burden on the Tribe's effort to build a school with federal funds. Thus, the Court holds that "an Indian Tribe, whose sovereignty 'exists only at the sufferance of Congress and is subject to complete control by the United States, or even because the Federal Government shoulders the entire economic burden of the tax; if the legal incidence of the tax is on the contractor, it is to be considered valid, absent specific congressional authorization." *United States v. Wheeler*, [435 U.S. 313, 323](#) (1978), greater immunity from state taxes than is enjoyed by the United States on whom it is dependent. [6](#)

For these reasons, I dissent from the Court's judgment.

[ [Footnote 1](#) ] "Although we must admit our disappointment that the courts below apparently gave short shrift to the principle and to our precedents in this area, we cannot and do not presume that state courts will not follow and the spirit of our decisions in the future." *Ante*, at 846.

[ [Footnote 2](#) ] Nevertheless, the Solicitor General has again suggested that on-reservation activities affecting the tribe should be considered presumptively beyond the reach of state law by operation of the "principle of tribal sovereignty." *United States as Amicus Curiae* 17-24. The same suggestion was urged, and rejected, in *White Mountain*. No more appealing in this case.

[ [Footnote 3](#) ] The Court ignores other distinctions between this case and *White Mountain*. For example, the contractor in the latter case, although a non-Indian corporation, operated exclusively to harvest timber on the reservation and conducted no off-reservation activities whatsoever. See [448 U.S., at 139](#). The contractor in this case is a contractor doing business throughout the State of New Mexico, and enjoying state services to the same extent as any commercial enterprise in [\[458 U.S. 832, 853\]](#) New Mexico. The Court dismisses this factor with the state tax revenues derived from *Lembke's* off-reservation business activities are adequate to pay for the services it provides to *Lembke*." *Ante*, at 844, n. 9. The Court's "presumptions," however, are not to be considered judgment of the state taxing authority. Indeed, in assessing the validity of a state tax, the Court has previously recognized that the State's interests are strongest when the taxpayer is the recipient of state services. See *Washington v. Confederated Tribes of Colville Indian Reservation*, [447 U.S. 134, 157](#) (1980). To the e

are relevant, the Court has inverted the one that ought to apply. Another distinction is also relevant. The White Mountain was the exploitation of natural resources located on the reservation and devoted to the enjoyment of reservation Indians. Indeed, over 90% of the total profits generated by tribal enterprises v Tribe's logging operations. [448 U.S., at 138](#). In this case, the state taxes diminish, not the income generated for its own preservation and welfare, but federal funds appropriated by Congress for the purpose of such tribal funds are devoted to this endeavor, and congressional appropriations were based on funding required gross receipts tax as part of the estimated construction cost.

[ [Footnote 4](#) ] In other areas of tax immunity, the Court has steadfastly refused to assess the validity of the economic burdens it imposes if [\[458 U.S. 832, 855\]](#) those burdens are nondiscriminatory and comport with the Commerce Clause. See *United States v. New Mexico*, [455 U.S. 720](#) (1982) (state taxation of federal contractors); *United States v. Fresno*, [429 U.S. 452](#) (1977) (state taxation of Federal Government); *New York v. United States*, [326 U.S. 572](#) (1945) (federal taxation of state government); *Michelin Tire Corp. v. Wages*, [423 U.S. 276](#) (1976) (state taxation of exports).

[ [Footnote 5](#) ] We recognized one possible exception to this general rule: "In the case of a sales tax . . . entity serving as a federal procurement agent can be so closely associated with the Government, and so integral a part of its role in the purchase, as to make the sale - in both a real and a symbolic sense - a sale to the United States. If the purchasing agent has not otherwise been incorporated into the Government structure." [455 U.S., at 742](#) is no basis for arguing that Lembke has acted merely as a purchasing agent for the Board or the BIA.

[ [Footnote 6](#) ] Of course, the Court purports to rest its decision on the pre-emptive effect of federal law. The exclusion of federal contractors from state taxes is also dependent on "generalized notions of federal supremacy." *New Mexico*, supra, at 730. The critical question, both in *United States v. New Mexico* and in this case, is whether the Court examines to determine whether the State has exceeded limits imposed by the Supremacy Clause. I think it is evident that in the area of federal tax immunity the Court has required evidence of more than economic burdens before it will invalidate a state tax as applied. As this case demonstrates, tribal tax immunity requires a greater showing than the fact of economic burdens on a federally supported tribal endeavor. Since both burdens derive from precisely the same source - the supremacy of federal law - I find the Court's decision today inexplicable. I find the abandonment of the notion that the economic - as opposed to the legal - incidence of the tax is relevant to maintain that federal tax immunity is designed to insulate federal operations from the effects of state taxes. *United States v. New Mexico*, supra, at 735, n. 11. [\[458 U.S. 832, 858\]](#)

#### Sponsored Links

**FirmFinance™**: provides revolving and term loans of up to \$25 million dollars, based on the collateral value of your portfolio of active cases.

**U.S. Legal Forms, Inc.**: \*\*Over 36,000 Legal Forms\*\* Stop Reinventing the Wheel each time you draft a letter. Save Time and Money! Visit [USLegalforms.com](http://USLegalforms.com) Today!

**Online Legal Document Services**: Let LegalZoom take care of your legal document preparation. Incorporation, Trademark Searches, and more.

**AbacusLaw**: Complete law office software for time, billing, accounting, calendars, clients and cases. Quick use. Free demo!

**Tab3 and PracticeMaster**: Reliable billing and practice management software for solo to mid-sized firms. Customer satisfaction is over 95%

Ads by Google

#### **Delphi Consultant**

Delphi consulting and contract programming  
[meridian-technical.com](http://meridian-technical.com)

**[Delphi Developers](#)**

Websites, programming, consulting 1-877-278-5644 - Free Estimates  
[ArtLogic.com](#)

**[The Bar Exam Source](#)**

Find free information on the bar exam and bar prep in your state.  
[www.legal-definitions.com](#)

**Sponsored Links**

**[LexisNexis Time Matters 8.0](#)**

Use Time Matters 8.0 and exceed client expectations with a complete view of your practice.

**[LexisNexis PCLaw](#)**

- LexisNexis® PCLaw™ & LexisNexis® PCLawPro provide integrated Time Billing, Accounting, and Practice Management software for law firms.

**[LexisNexis PCLaw](#)**

- LexisNexis® PCLaw™ & LexisNexis® PCLawPro provide integrated Time Billing, Accounting, and Practice Management software for law firms.

**[LexisNexis Time Matters 8.0](#)**

Use Time Matters 8.0 and exceed client expectations with a complete view of your practice.

**[Take Your CLE Online!](#)**

More than 17,000 hours, from the leading national, state, and local CLE providers! START NOW!

---

[Help](#) | [Site Map](#) | [Contact Us](#) | [Media Kit](#) | [About Us](#) | [FindLaw Local](#) | [Disclaimer](#) | [Privacy Policy](#)