

Testimony of Renny Fagan, Executive Director of Colorado Department of Revenue
Before the United States Senate Committee on Indian Affairs
S.2097 The Indian Tribal Conflict Resolution and Tort Claims and Risk Management
Act of 1998.

July 15, 1998

I am Renny Fagan, the Executive Director of the Colorado Department of Revenue. I appreciate the opportunity to present comments on Title I of S. 2097, concerning mediation of retail tax issues. Colorado's experience with the Southern Ute and Ute Mountain Ute tribes is that negotiated compacts can successfully resolve disputes. Therefore, the kind of mediation embodied in S. 2097 can be helpful to states and tribes. After giving some background about Colorado, I will comment on specific provisions of the bill and offer suggestions to improve the workability of the concept from the state standpoint.

Colorado's Tax Structure and Tax Issues Involving Tribes

The Department of Revenue collects over \$5 billion in income, sales, severance, estate, excise, fuel and motor vehicle taxes for the state of Colorado. We also collect about \$550 million of sales and use taxes for counties and certain cities. In addition to many other functions, the Department regulates limited stakes gaming, which Colorado voters authorized in 1991.

Colorado has a decentralized local government tax system. While the state constitution and statutes set forth property classification and assessment rules, local governments establish mill levies (except school districts) and local county assessors largely administer the property tax. In addition, Colorado has a somewhat unique constitutional provision establishing home rule cities which have sales tax authority independent from the state. Home rule cities may define their tax base, establish their tax rate, and collect and enforce their tax without state involvement. These features make Colorado's tax policy complex.

The Southern Ute and Ute Mountain Ute tribal lands are located in southwest Colorado. Over the years, the state, local governments and the tribes have dealt with tax issues. Under principles of tribal sovereignty, the state recognizes that transactions occurring on tribal land between tribal members are immune from state tax. However, we have debated whether the state and local governments can impose tax on transactions taking place on the reservation involving non-tribal members or the operation of a business owned by a non-tribal entity.

In seeking to impose tax, the state's interest is to protect the local and state tax base from erosion and to establish fairness by ensuring that like transactions are taxed in like manner. The state wishes to avoid the existence of tax havens where a differential tax rate would significantly affect purchasing decisions. Both state and local governments seek revenue to fund services widely shared by all, such as education, transportation, and law enforcement.

In claiming immunity from tax, the tribes foremost interest is to exercise and obtain recognition of their sovereign authority. They also assert that state taxation can interfere with the federal policy

of promoting tribal economic development and self-determination.

The convergence of issues such as sovereignty, competition for economic development, state constitutional restrictions on state and local tax policy and federal law make this area of tax policy complex, and one where the need to form partnerships is more important than ever.

S. 2097 Provides a Useful Method of Resolving Tax Disputes

By establishing a formal means to negotiate and mediate tax disputes, S.2097 provides a useful public policy tool. When the state and the tribes cannot informally agree on whether certain transactions are taxable, the parties often resort to litigation. As a part of the court process, we often end up negotiating a solution, but only after expending time, money, and sometimes, good will. Therefore, we see this bill as a means to formalize dispute resolution, while avoiding protracted legal conflict.

Colorado's Recent Experience With Tribal Negotiations

In recent years, the state and the Southern Ute and Ute Mountain Ute Tribes have used negotiated compacts to establish working partnerships which recognize the important interests of all parties.

A. The Southern Ute Taxation Compact

In 1996, the Southern Ute Tribe, the State and La Plata County successfully negotiated a taxation compact involving real and personal property and other taxes pertaining to oil and gas production. The dispute involved land owned or acquired in fee simple by the Tribe, and to a lesser extent, the taxation of non-Indian owned joint interests in the production wells. The State and County claimed that land previously subject to tax should continue to be taxable. The Tribe argued that the lands located within the reservation were tax exempt. The parties litigated in the federal district court for the District of Colorado. After a lengthy, complex analysis of federal allotment law and other federal statutes, the court found in favor of the Tribe. The Tenth Circuit Court of Appeals reversed, finding that since the previous non-Indian owner had paid the taxes due and since no assessment was pending against the Tribe, the case was not ripe for determination. In essence, after two years of litigation, the parties were back to the beginning,

In lieu of continuing the litigation, the parties decided to negotiate the compact. Lieutenant Governor Gail Schoettler represented the state, and the county retained Ken Salazar, the former director of the state Department of Natural Resources. They provided a view removed from the previous controversy and from the day-to-day application of tax matters. The parties set forth principles for negotiation. The Tribe's main interest was immunity from state and local taxation for the lands it owns or may acquire within the reservation regardless of whether it is held in trust. The county was concerned that tribal land acquisition would erode the county's tax base, affecting school funding and non-school services. All parties agreed that improved government-to-government relations were important for economic development, land use and environmental protection that could benefit all residents of the region.

For the duration of the compact, the state and county agreed to not to impose taxes on the real and personal property or the production activity. In return, the Tribe made a significant decision to make voluntary payments in the amount of what the taxes would be. The parties agreed upon an inventory and assessment procedure to calculate payments. The compact continues unless school or local government finance conditions change dramatically.

This taxation compact represents a good faith effort that serves the principles and financial needs of all parties. It recognizes that a partnership is more beneficial than an adversarial relationship. The compact also demonstrates that negotiation can be a successful form of dispute resolution.

B. Gaming Compacts

Since 1992, the state has also successfully negotiated two sets of gaming compacts with the Southern Ute and Ute Mountain Ute tribes. While S.2097 is not about gaming law, the Indian Gaming Regulatory Act requires a negotiated compact. The Department of Revenue represented Governor Roy Romer in negotiating with the tribes and their representatives. We successfully reached compacts without resort to a mediator, and did so through good faith negotiations based upon principles important to each party. For the state, Gov. Romer established the principle that tribal gaming activity and wagers should not exceed that which is permissible under Colorado's constitution or laws. For the tribes, sovereign authority and independent jurisdiction were key principles. The tribes also wanted to get the casinos open without the need for protracted litigation. These compacts also demonstrate that good faith negotiations when the parties agree upon mutually beneficial principles, can form effective partnerships between tribes and state governments.

Recommended Changes to S.2097

S. 2097 establishes a mediation-arbitration scheme of dispute resolution. If voluntary mediation efforts cannot reach settlement by using the process set forth in Section 102, then a party can invoke the Section 103 remedy which provides for a panel to form a solution for the parties. The whole process works only if parties are brought into it, and feel a compelling reason to negotiate a solution. The following are some suggestions from the state standpoint that may increase meaningful participation and make the process work better.

1. The claims subject to Panel review should be clarified and limited. Tax law is always evolving, caused by the enactment of new statutes, court interpretations and the changing nature of the economy. A taxing authority may have several different kinds of issues to resolve with any given taxpayer. Because of this dynamic situation, the definition of claims involved in the S.2097 process is important. Section 102(e)(2), found on page 14, states that:

Any claim, setoff, or counterclaim (including any claim, setoff, or counterclaim described in section 103(c)) that is not subject to a negotiated settlement under this section may be pursued by the parties or the Secretary pursuant to section 103.

It appears that this paragraph refers to those issues which the parties agreed to negotiate and could not resolve. However, the words "not subject to a negotiated settlement" could also be interpreted to mean all issues existing between the parties, even those they did not even attempt to resolve through mediation. If a panel could decide matters not negotiated, states would be reluctant to participate in any mediation at all for fear of giving the panel Aide control over matters the states are not willing to negotiate. If this construction is not the intent, we recommend on page 14, line 4, striking "is not subject to a negotiated settlement" and replacing this phrase with, "the parties included in negotiations but upon which they could not reach settlement....."

2. Clarify the definition of taxation claims under Section 103(c). The application of this section is unclear, and could be interpreted very broadly. Consistent with the above reasoning, the scope of subsection (c) should be limited to those claims that the parties have agreed to place into mediation. We recommend on page 14, line 16, striking "Any claim" and inserting, "The panel may consider any claim the parties agreed to mediate, " and, on line 2 1, after "regarding the original claim" insert "subject to mediation."

3. Change the composition of the Panel. States will be more likely to become involved in mediation if they feel the end result will be fair. If the panel decides this result, the state must have confidence that the panel will understand and fairly consider their viewpoint. As currently written, the five member panel includes three federal representatives. States may perceive that this composition is predisposed to favor the federal interest in achieving tribal self-determination or that the federal members will not appreciate state tax law principles. To avoid this perception, we recommend eliminating the judiciary and treasury representatives, leaving a three member panel made up of one federal, one state and one tribal member.

4. In addition to federal mediation, allow the parties to negotiate without a mediator or to select a non federal mediator. The bill requires a federal mediator to be involved in the negotiations between a state and a tribe. In Colorado's experience, successful good faith negotiations can be conducted without any mediator (as in the case of our gaming compacts) and when the parties choose their own representatives for negotiation (as in the Southern Ute Taxation Compact). Therefore, we recommend that Section 102(c) include a subparagraph that also gives the parties the option to negotiate without a mediator or to select their own non federal mediator or facilitator.

5. Provide for local Government involvement. In most cases, the state establishes local government powers, and therefore, the state would be the appropriate party in most tax disputes. However, Colorado's tax structure has many decentralized features. Home rule cities have autonomous tax authority. In these cases, the state could not bind the city to any tax dispute resolution. Therefore, we recommend that the bill allow for local governments to have access to the mediation process when a state may not make binding tax policy decisions for the local jurisdiction. This type of inclusion of local government would broaden the use of the dispute resolution process for tax policy matters at more levels of government.

6. The bill should define "retail taxes." The bill should define "retail taxes" to avoid one party

arguing that the tax in dispute does not fit the statutory definition, and therefore, the party has no obligation to respond to the Secretary's invitation for mediation. This definition should include not only sales and uses taxes, but also other types of consumption transaction taxes such as fuel, cigarette, alcohol or other transactions taxes levied by some states which include business privilege taxes or gross receipts transaction taxes. The committee should also consider expanding the bill to include real and personal property tax disputes. While property tax would add another dimension of complexity and necessitate local government involvement, it is also an area of contention that can be successfully mediated, as Colorado achieved with the Southern Ute tribe.

Conclusion

In recent years, Colorado has forged stronger partnerships with the Southern Ute and Ute Mountain Ute tribes by negotiating compacts. By encouraging negotiated settlements of tax disputes to replace protracted litigation, S. 2097 provides a useful public policy tool. We hope the committee will consider some of the suggested changes to make this bill more workable from the state standpoint.