BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE PROTEST OF
CENTEX BATESON CONSTRUCTION COMPANY, INC., I.D. NO. 01-188389-00 8,
PROTEST TO ASSESSMENT NO. 1970786 No. 96-14

DECISION AND ORDER

This matter comes on for determination before Gerald B. Richardson, Hearing Officer, upon the Motion for Summary Judgment filed herein on February 20, 1996 by the Taxation and Revenue Department. Centex Bateson Construction Company, Inc. (hereinafter "Centex Bateson") was represented by Rodney L. Schlagel, Esq. of Butt, Thornton & Baehr, P.C. and by its Vice President and General Counsel, Frank J. Iuen III, Esq. The Taxation and Revenue Department (hereinafter "Department") was represented by Frank D. Katz, Chief Counsel.

Based upon the undisputed facts and the arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Centex Bateson, through a competitive bidding process, was awarded Contract No. 161-92-0027 ("the contract") by the United States Department of Health and Human Services (DHHS") on September 23, 1992.

2. Under the contract, Centex Bateson constructed a 75-bed Indian Health Service hospital, known as the "Shiprock Comprehensive Health Care Facility" ("project") at Shiprock, New Mexico.

3. The project was constructed within New Mexico and within the Navajo Reservation.

4. The project was completed as of November 18, 1994.

5. The total contract price paid Centex Bateson by DHHS, including all

modifications, was $34,531,117.

6. Under the terms of the contract, DHHS did not agree to reimburse Centex Bateson for the cost of "any New Mexico State gross receipts and compensating use excise taxes" imposed with respect to the project. The contract specifically stated that "the cost of such taxes shall not be included in the offer/contract." The contract further stated that the "Contractor shall promptly notify the contracting officer of any and all matters, correspondence, and/or enforcement efforts by the State relating to the imposition of any of the above taxes regarding this contract. The Contractor shall take action to oppose imposition of such taxes, to the extent that the Contracting Officers specifically directs the actual, necessary, reasonable, and documented costs of such directed action to be reimbursed by the Government pursuant to an equitable adjustment of the contract. Should the State of New Mexico be ultimately successful in enforcing compliance by the Contractor with any of the above taxes regarding this contract, the contract shall be equitably adjusted to account for such extra cost (and any associated interest or penalty), but without overhead or profit, provided that the Contractor has complied with the terms of this clause."

7. Centex Bateson did not pay gross receipts tax upon its receipts from constructing the project nor did it pay compensating tax on its use of property in New Mexico with regard to the project.

8. Centex Bateson did execute nontaxable transaction certificates (NTTCs) to subcontractors and suppliers during construction of the project.

9. The Department issued Assessment No. 1970786 on October 18, 1995 in the amount of $1,830,474.43 in gross receipts tax, $1,451.98 in compensating tax and $464,152.19 in interest accrued to that date. Additional interest has continued to accrue at the statutory rate.

10. Centex Bateson requested and received a sixty day extension of time, through January 16, 1996 to file a protest to Assessment No. 1970786.

11. Centex Bateson filed its protest to Assessment No. 1970786 on January 11, 1996.

DISCUSSION

The issue presented herein is whether the imposition of state taxes upon the construction of the Shiprock Comprehensive Health Care Facility on the Navajo Reservation within New Mexico is preempted by federal law. Centex Bateson contracted directly with the United States Department of Health and Human Services to build the facility. There are two lines of federal preemption authority. The general rule with regard to state taxation of federal contractors is that the federal government's immunity from state taxation does not shield it from the economic burden of nondiscriminatory state taxes applied to its contractors unless the intention to preempt the taxes has been made explicit in federal legislation. ***United States v. New Mexico***, 455 U.S. 720, 102 S.Ct. 1373, 71 L.Ed.2d 580 (1982). A distinct rule of federal preemption, which will be referred to as the Indian preemption doctrine, has evolved in cases involving state taxes imposed upon non-tribal entities for activities engaged in on Indian reservations. This doctrine can be traced from a series of Supreme Court decisions beginning with ***Warren Trading Post Co. v. Arizona Tax Comm'n***, 380 U.S.685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965), through ***Cotton Petroleum Corp. v. New Mexico***, 490 U.S. 163, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989). The Indian preemption doctrine requires an analysis and balancing of the various state, tribal and federal interests to determine whether a state tax is preempted. ***See, Blaze Construction Co. v. Taxation and Revenue Department***, 118 N.M. 647, 651-652, 884 P.2d 803, 807-808 (1984), *cert. denied,* 115 S.Ct 1359 (1995) for a discussion of the evolution of the Indian preemption test.

The Department's Motion for Summary Judgment presents the issue of whether the general federal preemption test should be applied or whether the special Indian preemption test should be applied. The Department concedes that if the Indian preemption test is appropriate that significant additional factual development would be necessary and summary judgment would therefore be inappropriate at this juncture. The Department argues, however, that the general federal preemption test should be applied and that therefore summary judgment in the

Department's favor is required.

The New Mexico Supreme Court has definitively ruled on the issue of which preemption test applies to the receipts of a federal contractor from activities occurring on Indian reservation lands within New Mexico in ***Blaze Construction, supra.*** Blaze Construction Company had gross receipts from constructing roads on Indian reservation lands within New Mexico pursuant to contracts with a federal agency, the Bureau of Indian Affairs. In its ruling on this issue the court stated:

> As the department correctly points out, the U.S. Supreme Court has only applied the Indian Preemption doctrine in cases where contracts were made or business was conducted directly with Indian tribes or tribal members. [Citations omitted.] In the cases at bar, Blaze and Arco contracted directly with the BIA, an agency of the federal government, rather than with an Indian tribe or with individual tribal members. *Because Blaze and Arco contracted with a federal government agency rather than with Indian tribes or tribal members, the Indian preemption doctrine is inapplicable, and Blaze and Arco are subject to state taxes, just as any other federal government contractor would be.* ***See New Mexico***, 455 U.S. at 735 & 741, 102 S.Ct at 1383 & 1386. (emphasis added) 118 N.M. at 649-650.

It is noteworthy that the federal contractors in ***Blaze Construction*** had raised an argument very similar to the argument being made herein by Centex Bateson. Blaze had argued that the United States was fulfilling its responsibilities to the Indian people with whom it had a special relationship, and as such was a sort of partner in performing integral government functions, such as road building. Centex Bateson has adopted the arguments of the United States being posited in a separate federal lawsuit wherein the United States argues that the state tax interferes with the federal government's obligation to provide health care to the Navajo Nation. The New Mexico Supreme Court rejected the argument that the BIA was a partner or agent of the Indian Tribes. ***Id.***, 118 N.M. at 650. Similar arguments about the state taxes interfering with the federal government's sovereign functioning in ***U.S. v. New Mexico*** were soundly rejected by the Court, which noted:

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.

Id., 102 S. Ct at 1382. The Court went on to note that:

> Similarly, immunity cannot be conferred simply because the state tax falls on the earnings of a contractor providing services to the Government.

Id.,102 S.Ct. at 1383. In essence, the Court found that in balancing the competing interests of state and federal government's sovereign taxing authority, the fact that the state tax burdens a federal program is simply insufficient to immunize the federal contractor from a non-discriminatory state tax. It found that the political process was uniquely adapted to striking the appropriate balance in accommodating the competing state and federal interests implicated by state imposition of taxes on federal contractors, and in the absence of explicit direction from Congress, immunity from state taxation would not be implied.

Centex Bateson's response to the Department's Motion for Summary Judgment is somewhat puzzling. It argues that this case is controlled by federal law, not state law, in apparent reference to the ***Blaze Construction*** decision by the New Mexico Supreme Court. While ***Blaze Construction*** is a state case, it applies only federal law. The issue in that case was *what* federal law applied, the standard federal preemption test or the Indian preemption test. Centex Bateson also adopted the arguments of the United States being made in separate litigation that the Indian preemption argument should be applied. This argument has been considered and addressed in the ***Blaze Construction*** case which governs its determination herein. Having determined that the federal preemption standard enunciated in ***United States v. New Mexico, supra,*** applies, that standard would dictate that no federal preemption exists unless Centex Bateson can allege material facts which would establish either evidence of explicit congressional preemption or of a discriminatory effect of New Mexico's tax. Centex Bateson has pointed to no such explicit statutory direction from Congress which would prohibit the imposition of the tax at issue herein.

Nor has Centex Bateson alleged any material facts to demonstrate that New Mexico's gross receipts tax is discriminatory in its application to federal contractors.[1] Having concluded that the standard federal preemption test is applicable herein and there being no explicit congressional directive upon which to base a conclusion that the Department's tax is preempted, it is concluded that summary judgment in favor of the Department is required and the Centex Bateson's protest to the imposition of state taxes should be denied.

CONCLUSIONS OF LAW

1. Centex Bateson filed a timely, written protest to Assessment No. 1970786 and jurisdiction lies over both the parties and the subject matter of this protest.

2. Because New Mexico's gross receipts tax has been imposed upon the receipts of a contractor who was directly under contract with an agency of the federal government and not with a tribe, tribal entity or tribal member, the Indian preemption doctrine is inapplicable and the standard federal preemption argument set forth in ***United States v. New Mexico,*** 455 U.S. 720 (1982) should be applied.

3. Centex Bateson has failed to allege material facts which would establish that New Mexico's gross receipts tax is either discriminatory, or in contravention of an express congressional enactment and therefore the tax is not preempted under the Supremacy Clause of the United States Constitution.

4. Summary judgment in favor of the Department is appropriate in this case.

[1]Presumably, if New Mexico's gross receipts tax discriminated in any way against federal contractors, that would have been established in ***U.S. v. New Mexico, supra***, and an entirely different result would have occurred in that case.

For the foregoing reasons, Centex Bateson's protest IS HEREBY DENIED.

DONE, this 26th day of April, 1996.