State of California — Board of Equalization

# Memorandum

To : Mr. Verne Walton — Date May 7, 1990

From : Ken McManigal

Subject : Taxability Of Indian-Owned Fee Lands On Indian Reservations

This is in response to your February 7, 1990 memorandum to Richard Ochsner wherein you forwarded various documents pertaining to the taxability of Indian-owned fee lands within Indian reservations and you requested our opinion in that regard. As hereinafter indicated, we are of the opinion that until such time as Congress authorizes state or local property taxation of lands of enrolled tribal members within an Indian reservation, such lands are immune from state or local property taxation.

As capsulized by Ms. Mary J. Risling in her November 1, 1989 letter to Mr. Stephen Strawn, Humboldt County Tax Collector, on page 2:

> "For many years, a number of states have taxed Indian owned fee property within reservation boundaries. Indeed, in a 1979 opinion, the Interior Solicitor's office indicated that such properties are subject to state property tax. Increasingly, however, this situation is changing. In 1988 the federal district court for the eastern district of Washington joined a number of state courts in holding that Indian owned fee lands within a reservation are not subject to state property tax. Additionally, an increasing number of state attorney general opinions have been issued which reflect the conclusion reached by the district court. Finally, in March of 1989, the Interior Solicitor's office issued its modified opinion on this question and concluded that states have no jurisdiction to tax Indian owned fee property within reservations."

As several of the documents indicate, however, the United States Supreme Court (Supreme Court) and the California appellate courts have yet to decide whether fee lands of enrolled tribal members within an Indian reservation are subject to state or local property taxation. Thus, as with all unresolved property tax matters, Article XIII, Section 1 of the California Constitution, which states, in part, that unless otherwise provided by the laws of the United States all property is

taxable, is controlling. The question is whether the laws of the United States provide "otherwise".

In Squire v. Capoeman (1955) 351 U.S. 1, 100 L Ed 883, 76 S Ct 611, the United States, holder of title to Quinaielt Indian Reservation land, contracted for the sale of the timber thereon and received, on behalf of Indians who had been allotted the land, the proceeds of sale. Plaintiff, an Indian allottee, paid a capital gains tax on the portion of the sale price allocable to his land and sought a refund thereof because the taxation of the proceeds was violative of the 25 USC Sec. 349 allotment statute:

> "At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: Provided, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: Provided further, That until the issuance of fee-simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States: And provided further, That the provisions of this Act shall not extend to any Indians in the former Indian Territory."

The District Court agreed and ordered the refund; and in affirming, the Supreme Court stated at pages 7 and 8:

> ". . .The literal language of the proviso evinces a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee. This, in turn, implies that, until such time as the patent is issued, the allotment shall be free from all taxes, both those in being and those which might in the future be enacted."

Thus, Squire v. Capoeman, supra, suggested that upon the issuance of a patent in fee to an Indian, his or her land would

be subject to state or local property taxation. Some 35 years later, however, the Supreme Court has yet to be presented with such a case and hence, has yet to so hold.

Rather, in Mescalero Apache Tribe v. Jones (1973) 411 U.S. 145, 36 L Ed 2d 114, 93 S Ct 1267, the Supreme Court considered government land leased to the Mescalero Apache Tribe as land taken in the name of the United States in trust for the Tribe and exempt from state ad valorem property taxation within the meaning of 25 USC Sec. 465. It then proceeded to conclude, in part, that personal property permanently attached to the land should likewise enjoy that immunity and not be subject to New Mexico use tax. While the Supreme Court discussed Squire v. Capoeman, supra, it did so in that part of its decision pertaining to the applicability of New Mexico's gross receipts tax to the Tribe's off-reservation business enterprise and thus, it was not called upon to and did not expand upon its earlier interpretation of section 349.

Prior to considering the scope of immunity specifically afforded by section 465 under these circumstances, the Supreme Court "decline[d] the invitation to resurrect the expansive version of the intergovernmental immunity doctrine that has been so consistently rejected in modern times." Thus, this case also eliminated the federal-instrumentality doctrine as a basis for immunizing Indians from state taxation.

At the same time, having eliminated the federal-instrumentality doctrine, in McClanahan v. Arizona State Tax Commission (1973) 411 U.S. 164, 36 L Ed 2d 129, 93 S Ct 1259, the Supreme Court proceeded from the premise that whether state taxation of Indians was permissible was dependent upon applicable treaties and federal statutes which define the limits of state power. The Supreme Court concluded that by treaty and by statute Arizona had no jurisdiction to impose its income tax on the income of Navajo Indians residing on the Navajo Reservation and whose income was wholly derived from reservation sources. While it cited Squire v. Capoeman, supra, as a previous instance in which it had construed ambiguous language as providing a tax exemption for Indians, again, the Supreme Court was not called upon to and did not expand upon its earlier interpretation of section 349.

The Supreme Court summarized the import of McClanahan v. Arizona State Tax Commission, supra, in Mescalero Apache Tribe v. Jones, supra, thusly at page 148:

> ". . .[I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing

> Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and McClanahan v. Arizona State Tax Comm'n, supra, lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent." (Emphasis added)

Thus, while the issue addressed was whether Arizona could impose its income tax on the reservation income of reservation Indians, the Supreme Court's pronouncement, that congressional consent was necessary for taxing reservation incomes of reservation Indians, was extended to encompass the taxing of Indian reservation lands as well. This pronouncement was often referred to in subsequent Supreme Court cases pertaining to Indians, Indians' property, and property taxation.

For example, in Moe v. The Confederated Salish and Kootenai Tribes (1976) 425 U.S. 463 48 L Ed 2d 96, 96 Ct 1634, the Supreme Court again dealt with personal property, this time personal property/motor vehicles of Indians living on the Flathead reservation. Upon consideration of applicable treaties and federal statutes, the Supreme Court concluded, in part, that Montana could not impose a personal property tax on the motor vehicles of Indians as a condition precedent for registration thereof. In so doing the Supreme Court referred back to McClanahan v. Arizona State Tax Commission, supra, at page 475 and to the Mescalero Apache Tribe v. Jones, supra, characterization of McClanahan v. Arizona State Tax Commission, supra, at page 476:

> "In McClanahan this Court considered the question whether the State had the power to tax a reservation Indian, a Navajo, for income earned exclusively on the reservation. We there looked to the language of the Navajo treaty and the applicable federal statutes 'which define the limits of state power.' 411 US, at 172, 36 L Ed 2d 129, 93 S Ct 1257. Reading them against the 'backdrop' of the Indian sovereignty doctrine, the Court concluded 'that Arizona ha[d] exceeded its lawful authority' by imposing the tax at issue. Id., at 173, 36 L Ed 2d 129, 93 S Ct. 1257. In Mescalero, the companion case, the import of McClanahan was summarized: '[I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and McClanahan v. Arizona State Tax Comm'n, supra, lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent'. 411 US, at 148, 36 L Ed 2d 114, 93 S Ct. 1267."

As to Montana's contention that the District Court failed to properly consider the effect of section 349, the Supreme Court's analysis at pages 477-479 was as follows:

> "The State relies on Goudy v. Meath, 203 US 146, 51 L Ed 130, 27 S Ct. 48 (1906), where the Court, applying the above section, rejected the claim of an Indian patentee thereunder that state taxing jurisdiction was not among the 'laws' to which he and his land had been made subject. Building on Goudy and the fact that the General Allotment Act has never been explicitly 'repealed,' the State claims that Congress has never intended to withdraw Montana's taxing jurisdiction, and that such power continues to the present.
>
> "We find the argument untenable for several reasons. By its terms section 6 (Sec. 349) does not reach Indians residing or producing income from lands held in trust for the Tribe, which make up about one-half of the land area of the reservation. If the General Allotment Act itself establishes Montana's jurisdiction as to those Indians living on 'fee patented' lands, then for all jurisdictional purposes-civil and criminal--the Flathead Reservation has been substantially diminished in size. A similar claim was made by the State in Seymour v. Superintendent, 368 US 351, 7 L Ed 2d 346, 82 S Ct 424 (1962), to which we responded: '[The] argument rests upon the fact that where the existence or nonexistence of an Indian reservation, and therefore the existence or nonexistence of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal Government.' Id., at 358, 71 L Ed 346, 82 S Ct. 424.
>
> "We concluded that '[s]uch an impractical pattern of checkerboard jurisdiction,' ibid., was contrary to the intent embodied in the existing federal statutory law of Indian jurisdiction. See also United States v. Mazurie, 419 US 544, 554-555, 42 L Ed 2d 706, 95 S Ct 710 (1975).
>
> "The State's argument also overlooks what this Court has recently said of the present effect of the General Allotment Act and related legislation of that era: 'Its policy was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservation could be

> abolished. Unallotted lands were made available to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways. See section 6 of the General Allotment Act, 24 State. 390. . . .' Mattz v. Arnett, 412 US 481, 486, 37 L Ed 2d 92, 93 S Ct 2245 (1973) 'The policy of allotment and sale of surplus reservation land was repudiated in 1934 by the Indian Reorganization Act, 48 Stat. 984, now amended and codified as 25 USC section 461 et seq.. . .'
>
> "The State has referred us to no decisional authority--and we know of none--giving the meaning for which it contends to section 6 (Sec. 349) of the General Allotment Act in the face of the many and complex intervening jurisdictional statutes directed at the reach of state law within reservation lands--statutes discussed, for example, in McClanahan, 411 US, at 173-179, 36 L Ed 2d 129, 93 S Ct 1257. See also Kennerly v. District Court of Montana, 400 US 423, 27 L Ed 2d 507, 91 S Ct 480 (1971). Congress by its more modern legislation has evinced a clear intent to eschew any such 'checkerboard' approach within an existing Indian reservation, and our cases have in turn followed Congress' lead in this area."

Thus, section 349 was eliminated as a basis of jurisdiction to impose a personal property tax upon the personal property of Indians residing on an Indian reservation.

Soon after, in Bryan v. Itasca County (1976) 426 U.S. 373, 48 L Ed 2d 710, 96 S Ct 2102, the Supreme Court again dealt with personal property, this time personal property/mobile home of an enrolled tribal member situated on the Leach Lake reservation. Relying upon McClanahan v. Arizona State Tax Commission, supra, and Moe v. The Confederated Salish And Kootenai Tribes, supra, the Supreme Court concluded that Itasca County could not impose a personal property tax on the mobile homes. Section 349 having been eliminated as a possible authority for taxing reservation Indians, the Supreme Court addressed Itasca County's contention that the grant of civil jurisdiction to the states conferred by 28 USC Sec. 1360 was a congressional grant of power to tax reservation Indians except insofar as taxation was expressly excluded by the terms of the statute and concluded that it was not:

> "Piecing together as best we can the sparse legislative history of section 4 (Sec. 1360), subsection (a) seems to have been primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private

> citizens, by permitting the courts of the States to decide such disputes; . . . . This construction finds support in the consistent and uncontradicted references in the legislative history to 'permitting' 'State courts to adjudicate civil controversies' arising on Indian reservations, HR Rep No. 848, pp. 5, 6 (emphasis added), and the absence of anything remotely resembling an intention to confer general state civil regulatory control over Indian reservations. In short, the consistent and exclusive use of the terms 'civil causes of action,' 'aris[ing] on,' 'civil laws. . .of general application to private persons or private property,' and 'adjudica[ion],' in both the Act and its legislative history virtually compels our conclusion that the primary intent of section 4 was to grant jurisdiction over private civil litigation involving reservation Indians in state court." (pp. 383-385)

Accordingly, with respect to the taxation of personal property of enrolled tribal members situated on a tribal reservation, it is clear that absent any congressional grant of power to tax, such personal property is immune from state or local property taxation. And we are not aware of any subsequent congressional grant of power to tax such property.

While the Supreme Court and the California appellate courts have yet to decide whether fee lands of enrolled tribal members within an Indian reservation are subject to state or local property taxation, several of the various documents you forwarded, relying upon the above-mentioned cases and/or language therefrom, have concluded that they are not:

1. Battese v. Apache County (1981) Ariz. 630 P. 2d 1027

2. March 31, 1982, Idaho Deputy Attorney General's Memorandum

3. March 14, 1983, Oregon Assistant Attorney General's Opinion

4. April 11, 1985, North Dakota Attorney General's Opinion No. 85-12.

5. March 20, 1989, United States Department of the Interior Associate Solicitor's Memorandum to Field Solicitor, Twin Cities.

The most authoritative of these, of course, is the Arizona Supreme Court case of Battese v. Apache County, supra. In that case, Arizona sought to tax two lots and improvements located within the boundaries of the Navajo reservation, surrounded by Indian trust lands, and owned by enrolled members of the Navajo tribe. The members/owners had acquired the properties from successors in interest of the original non-Indian homesteader

who had received his patent therefor from the United States government in 1909. While the properties had bordered the then existing Navajo reservation in 1902 when the homestead entry commenced, they were within the boundaries of the enlarged Navajo reservation when acquired.

Relying upon McClanahan v. Arizona State Tax Commission, supra, Mescalero Apache Tribe v. Jones, supra, and Moe v. Confederated Salish and Kootani Tribes, supra, personal property tax and income tax cases, the court concluded at page 1028:

> "Today the exemption of Indian lands and Indian income from state taxation is based upon the doctrine of federal preemption. . . ."

The court then quoted from Moe v. Confederated Salish and Kootenai Tribes, supra, at page 1029:

> ". . .In Mescalero, the companion case, the import of McClanahan was summarized: '[I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and McClanahan v. Arizona State Tax Commission, supra, lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent.' 411 U.S., at 148, 93 S. Ct., at 1270, 36 L. Ed. 2d, at 119." (Emphasis added).

Thus, the court held at page 1029:

> ". . .The relevant cases which have applied the McClanahan analysis, discussed infra, exemplify the position that the property's status as trust, non-trust, and/or fee-patented land, is not determinative of the property's status as exempt from state taxation. The exemption applies if the subject property is owned by enrolled Navajo tribal members and is located within the present physical boundaries of the Navajo reservation."

As to the state's contention that McClanahan v. Arizona State Tax Commission, supra, and other cases were distinguishable because the original "non-Indian fee-patented" title removed the Batteses' land from those being included within the term "Indian reservation lands," for tax exemption purposes, the court stated at page 1029 also:

> ". . .The language used in the Acts and authorities mentioned to describe the lands which have been reserved to

> the Indians, and accordingly removed from state jurisdiction, includes 'reservation lands,' 'Indian property,' 'property within the exterior boundaries of a reservation,' 'property within the limits of a reservation,' and 'Indian country,' as defined in 18 U.S.C. section 1151(a) for criminal jurisdictional purposes. We conclude that the Batteses' property comes within those lands Congress intended to be exempt from state taxation."

See also Estate of Johnson (1981) 125 Cal.App. 3d 1044, wherein the District Court of Appeal discussed Mescalero Apache Tribe v. Jones, supra, McClanahan v. Arizona State Tax Commission, supra, Moe v. The Confederated Salish and Kootenai Tribes, supra and Bryan v. Itasca County, supra, when considering California's imposition of its inheritance tax upon the intestate transfer of fee patent real property of a deceased, formerly enrolled tribal member situated on the Hoopa Valley reservation. In concluding that neither section 6 (Sec. 349) of the General Allotment Act nor section 4 (§ 1360) of Public Law 280 conferred jurisdiction on California to impose its inheritance tax upon the intestate transfer of non-trust reservation real property from one reservation Indian to another, the court stated at pages 1049 and 1050:

> "Here, as in Moe, the reservation is composed of both trust and fee lands. Although the present case involves an inheritance tax while Moe involved a cigarette sales tax and personal property taxes, we deem this a distinction without a difference, for, in each case, a distinction based upon the fee or trust status of land would undermine the territorial integrity of a reservation. . . ."

Such was the case even though the land in the hands of the deceased, formerly enrolled tribal member had been subject to local property taxation:

> "[3]Appellant maintains that, because lands held by fee patent are subject to property taxes, the intestate transfer of a fee patentee's property should also be subject to inheritance tax. Whether such lands are subject to a property tax (see, e.g. Chatterton v. Lukin (1945) 116 Mont. 419 [154 P. 2d 798] cert. den. 325 U.S. 880 [89 L. Ed. 1996, 65 S Ct 1572]; United States v. Spaeth (D. Minn. 1938) 24 F. Supp.465), however, is not the issue, for an inheritance tax is not a tax upon the property itself but rather upon its transfer. . . ." (p. 1050)

Note, however, that Chatterton v. Lukin, supra, and United States v. Spaeth, supra, in addition to being cases decided by

courts of inferior jurisdiction, are well prior to Mescalero Apache Tribe v. Jones, supra, etc, discussed herein above.

In sum, in spite of the absence of an express Supreme Court or California appellate court determination as to whether fee lands of enrolled tribal members within an Indian reservation are subject to state or local property taxation, the principle that absent any congressional grant of power to tax, property of enrolled tribal members situated on an Indian reservation is immune from such taxation, developed in the above-mentioned personal property and income tax cases, has been discussed by the Supreme Court in terms of the taxing of Indian reservation lands as well and construed by the Arizona Supreme Court and others as applying to lands of enrolled tribal members situated on an Indian reservation. While it remains to be seen whether this is an accurate construction and application of the principle as applied to Indian lands, given the history and cases pertaining to the taxation of Indians over the years, we believe that it is. And in this regard, we are not aware of any congressional grant of power to tax lands of enrolled tribal members within an Indian reservation.

Accordingly, we conclude that the language of Article XIII, section 1 of the California Constitution should be construed and applied together with the federal principle that absent any congressional grant of power to tax, lands of enrolled tribal members within an Indian reservation are not subject to state or local property taxation. Absent such grant, the laws of the United States, in effect, preclude state or local taxation. In our view then, until such time as Congress authorizes state or local property taxation of lands of enrolled tribal members within an Indian reservation, the California Constitution recognizes that such lands are immune from such property taxation.

We are returning the documents which you forwarded herewith.

JKM:mw
3219H

Attachments

cc: Mr. John Hagerty
Mr. Gene Palmer
Ms. Rose Marie Carlos
Mr. Joe Nicosia

State of California Board of Equalization

# Memorandum

To : Mr. Verne Walton Date May 22, 1990

From : Ken McManigal

Subject: Taxability of Indian-Owned Fee Lands On Indian Reservations

Reference is made to my May 7, 1990 memorandum to you, summarized in your May 14, 1990 letter to Humboldt County Treasurer-Tax Collector Stephen A. Strawn thusly:

> "Accordingly, we conclude that the language of Article XIII, section 1 of the California Constitution should be construed and applied together with the federal principle that absent any congressional grant of power to tax, lands of enrolled tribal members within an Indian reservation are not subject to state or local property taxation. Absent such grant, the laws of the United States, in effect, preclude state or local taxation. In our view then, until such time as Congress authorizes state or local property taxation of lands of enrolled tribal members within an Indian reservation, the California Constitution recognizes that such lands are immune from such property taxation."

Notwithstanding the Supreme Court's analysis and language in Mescalero Apache Tribe v. Jones (1973) 411 U.S. 145, 36 L Ed. 2d 114, 93 S Ct 1267, McClanahan v. Arizona State Tax Commission (1973) 411 U.S. 164, 36 L Ed 2d 129, 93 S Ct 1259, and Moe v. The Confederated Salish and Kootenai Tribes (1976) 425 U.S. 463, 48 L Ed 2d 96, 96 S Ct 1634, eliminating 25 USC Sec. 349 as a basis of jurisdiction to impose a personal property tax upon the personal property of Indians residing on an Indian reservation, the United States Court of Appeals, Ninth Circuit, has recently held in its amended opinion in Confederated Tribes and Bands of the Yakima Nation v. County of Yakima, et al., No. 88-3926, copy attached, that 25 USC Sec. 349 manifests Congress' 'unmistakably clear' intent to permit states to tax fee patented land owned by members of the Yakima Nation and located within the reservation. If and when this decision becomes final, Section 349 will be authority for state or local property taxation of lands of enrolled tribal members within an Indian reservation. Until then, we suggest that you inform anyone seeking information in this regard that Confederated Tribes and Bands of the Yakima Nation, supra, v. County of Yakima, et al., currently

permits local property taxation of lands of enrolled tribal members within an Indian reservation.

It is not known whether the Confederated Tribes and Bands of the Yakima Nation will permit the decision to become final or petition the United States Supreme Court for hearing. We will keep you advised.

JKM:mw
3283H

Attachment

cc: Honorable Raymond J. Flynn
Humboldt County Assessor
Mr. Earl L. Lucas
State Controller's Office
Mr. John Hagerty
Mr. Gene Palmer
Ms. Rose Marie Carlos
Mr. Joe Nicosia

`STATE OF CALIFORNIA

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July 10, 2003

Honorable Charles W. Leonhardt, Assessor
Plumas County Assessors Office
520 Main St., Room 205
Quincy, CA 95971-9114

**Re: Improvements on Indian Trust Lands**

Dear Mr. Leonhardt:

This is a response to your letter of July 9, 2002 to Assistant Chief Counsel Kristine Cazadd in which you requested an opinion about assessment of structures that have been constructed upon lands which are jointly held in trust by the federal government and in patented fee. We apologize for the delay in responding to your inquiry, however, other Board prescribed matters have occupied our time. The general rule is that improvements are either subject to tax or not depending on the nature of the underlying real property. For the reasons set forth below, we conclude that improvements on land held in fee by Indian persons, are subject to tax. Improvements on land held in trust for Indians by the United States government are exempt from tax because the state lacks jurisdiction to assess federal land.

In your letter and our recent conversation, you provided facts as follows: structures have been constructed upon certain allotted lands that are owned in part by an individual Indian in fee simple and with the remainder held in trust by the United States government for other related Indian family members. Family member A owns an undivided $28/270^{th}$ interest in patented fee simple and the balance of the interests are held in trust. A base year value has been established and is currently assessed on the fee simple land. Family member A previously constructed a dwelling and related improvements that were exempted from assessment on unspecified grounds. It is unclear whether these improvements are located on A's land held in fee or on trust land. Additional dwelling structures have been constructed by other family members and have not yet been either assessed or exempted. It is possible that some improvements may benefit the fee owner but are located on trust land. Finally, you believe that a non-tribal Indian or a non-Indian lessee may occupy one or more of the dwellings.

The owners of the land contend that all of the improvements are exempt because they are "on Indian lands." You have inquired how to determine whether the real property, "additional occupancies [lessees] and improvements" are taxable and what criteria, if any, are utilized to determine whether an exemption would apply. You have also asked how to determine the identities of the occupants, i.e. whether they are one of the allottees, another tribal member, or a non-Indian.

## Law and Analysis

It is well settled that, unless federal law expressly waives immunity, a state has no jurisdiction over Indian-owned property located on a reservation for taxation purposes. McLanahan v. Arizona State Tax Comm'n (1973) 411 U.S. 164, 169. Pre-emption is grounded in the Indian Commerce Clause, Article 1, section 8, clause 3 of the United States Constitution which grants Congress broad powers to regulate Indian tribal affairs. White Mountain Apache Tribe v. Bracker (1980) 448 U.S. 136, 142. However, federal law does permit some state and local taxation under certain circumstances.

The principles governing the question of taxation of Indian lands are set forth in several U.S. Supreme Court decisions which have established the boundaries of state authority to tax real and personal property owned by Indians or located on reservation land. The taxing authority must be weighed against the historical backdrop that the Indian tribes "were once independent and sovereign nations, and that their claim of sovereignty long predates that of our own government." McLanahan v. Arizona State Tax Comm'n (1973) 411 U.S. 164, 173. Statutes imposing duties or burdens on Indians will be construed liberally in favor of the Indians. Montana v. Blackfeet Tribe (1987) 471 U.S.759. Thus any determination of taxability must be carefully made.

## Federal law does not pre-empt all local property tax

1. What real property on an Indian reservation is subject to ad valorem property tax?

Real property held in fee by an individual Indian or by the tribe, as opposed to land held in trust, is subject to ad valorem property tax. Title to Indian lands is held in a variety of forms which have evolved over the last 150 years of federal law. A key change occurred with the enactment of the Indian General Allotment Act of 1887 ("Dawes Act"). The Dawes Act set a policy of dividing tribal lands into small parcels and "allotting" them to individual Indians. The Act provided that each allotment would be held by the United States in trust for at least 25 years before a fee simple patent would be issued to the allottee. [Section 5 of the Act, 25 USCS §348]. The Act was amended in 1906 (the "Burke Act") to clarify that upon expiration of the trust period and receipt of a patent in fee, Congress intended that the allottee would be subject to state jurisdiction, including taxation.

The policy of allotment ended in 1934 with the passage of the Indian Reorganization Act ("IRA")[25 USCS §461 et seq.]. The IRA stopped further allotments and extended indefinitely the existing periods of trust applicable to lands previously allotted, but not yet fee-patented. It also provided for the restoration of unallotted surplus Indian lands to tribal ownership and for acquiring land, on behalf of tribes, either inside or outside reservation boundaries. Such acquired land is held in fee, unless or until the United States agrees to grant trust status following application by the landowner. Because of the inheritance provisions of the original treaties or allotment acts, ownership of many of the allotments held in trust have become fractionated. In 1983, Congress enacted the Indian Land Consolidation Act which attempted to resolve the problem of tiny fractional interests in Indian land by, *inter alia*, providing that when an individual owner dies, an interest of 2% or less in a tract of land will escheat to the tribe.

As a consequence of the shifting Congressional policies, individual Indians or Indian tribes may own realty on or off the reservation, and may hold title in fee or the land may be held in trust by the United States for the benefit of an individual Indian or tribe. The United States Supreme Court has held that state taxation of Indian owned land must be expressly authorized by federal law and has held that property taxation of land held in fee is so authorized. [Yakima v. Confederated Tribes (1992) 502 U.S. 251, 258. ("[A]bsent cessation of jurisdiction or other federal statutes permitting it" a State may not tax reservation lands or reservation Indians, quoting Mescalero v. Apache Tribe v. Jones (1973) 411 U.S. 145 , 148)]; see also Montana v. Blackfeet Tribe (1987) 471 U.S. 759 (Congress must be "unmistakably clear" if it authorizes state taxation of Indian lands).

However, based on these and other U.S. Supreme Court opinions, and the explicit provisions of the IRA, any land held in trust by the Department of the Interior through the Bureau of Indian affairs for tribes or individual Indians is exempt from real and personal property taxation as such property is considered owned by the United States and, thus, immune from taxation. [Annotation No. 525.0030 attached]. As early as 1906, the Supreme Court found such express authority for taxation of **fee-patented land** in the Dawes Act. [Goudy v. Meath (1906) 203 U.S. 146, 149]. The Burke Act of 1906 codified the Court's decision. [See, Yakima, 502 U.S. at 264]. Therefore because the undivided fractional interest in real property owned by Family member A is held in fee, it is subject to property tax, and assignment of a base year value was appropriate [Yakima 502 U.S. 251, 270; Annotation No. 525.0013 attached]. The IRA is also current authority for exempting from state taxation lands held in trust by the United States[1]. [25 USCS §465].

## Improvements are taxable if the underlying land is taxable

2. Are improvements located on Indian lands are subject to ad valorem property tax?

Improvements[2] located on real property held in fee by an individual Indian or by the tribe, as opposed to land held in trust, are subject to ad valorem property tax. Conversely, if the improvements are upon land held in trust for an individual Indian or tribe they are exempt from local assessment and taxation. [U.S. v. Rickert, (1902) 188 US 432, 441-443; Annotation No. 525.0010 attached]. In Rickert, the Court held that to allow state taxation of improvements annexed to Indian trust land would defeat the purpose of the allotment policy. According to that policy, the allottees were expected to improve and cultivate the land. Thus, if the improvements

[1] Section 465 of the IRA is explicit and provides, in relevant part: "The Secretary of the interior is hereby authorized, in his [sic] discretion, to acquire any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments for the purpose of providing land for Indians Title to any lands or rights acquired pursuant to [this Act] shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation."

[2] "Improvements" are defined in section 105: to include:

> "(a) All buildings, structures, fixtures, and fences erected on or affixed to the land. All fruit, nut bearing or ornamental trees and vines, not of natural growth, and not exempt from taxation, except the date palms under eight years of age."

were subject to tax lien foreclosure and sale it would frustrate the policy whereby the Indians were entitled to the protection and care of the federal government.

However, the view that permanent improvements are subject to taxation on the same basis as the underlying real property was reaffirmed in 1973 by the United States Supreme Court in Mescalero. The Supreme Court examined a use tax imposed by a state on an improvement (a ski lift) to property outside the reservation, leased by an Indian tribe from the United States for operation of a ski resort. In that case, the improvements at issue were held to be exempt because they were located on land owned by the federal government (albeit outside the reservation) and used in an exempt purpose by the tribe as authorized by the IRA. Notably, the Court commented in dicta that if these permanent improvements were on the tribe's tax-exempt land, they "would certainly be immune from the State's ad valorem property tax" because use of the permanent improvements is "so intimately connected" with the land. Thus, "an explicit provision relieving the latter of state tax burdens must be construed to encompass an exemption for the former." Mescalero, 411 U.S. 145, 158.

Your facts pose a rather unique challenge in that the fee interest is part of an undivided allotment otherwise held in trust. Because the fractional fee interest has not been partitioned, there is not a clear and direct ownership connection between any of the improvements and a particular ownership interest in the underlying land. Your office is unable to identify and link a particular structure to any particular ownership interest based on its location within the allotted land. Although we recognize the difficulty in assessing undivided ownership interests in both land and improvements, we suggest that the advice published in Letter to Assessors Nos. 85/85 and 86/04 may be of some assistance in this regard.

3. Is it possible to attribute ownership of an improvement (dwelling) to the owner of an undivided fee interest in the entire parcel of land?

Yes, Section 2188.2 permits assessment of improvements to one who is not the owner of the underlying land. Section 2188.2 provides, in relevant part:

> Whenever improvements are owned by a person other than the owner of the land on which they are located, the owner of the improvements or the owner of the land may file with the assessor a written statement before the lien date attesting to their separate ownership, in which event the land and improvements shall not be assessed to the same assessee….

The California Court of Appeals has held that an assessment of improvements to a lessee was valid even though the land was assessed to the landlord and he owned the improvements. Valley Fair Fashions, Inc. v. Valley Fair, 245 Cal.App.2d 614 (1st Dist. 1966). The Court construed Section 405 as specifically authorizing assessment to one who possesses or controls, but does not own, the property. [245 Cal. App.2d at 616]. The Court also rejected a tenant's argument that Section 2188.2 requires assessment of improvements to the landowner in the absence of a written statement of separate ownership. The section "in no way modified section 405, which continues specifically to authorize assessment to the party possessing or controlling the property." [245 Cal. App.2d at 617; see also T.M. Cobb Co. v. County of Los Angeles, 16 Cal. 3d 606, 626 (1976). The decisions in neither case appear to rest on the lessor-lessee status of the parties.

Therefore, the Courts have found that section 405 provides an assessor with discretion to determine that a dwelling is "possessed" or "controlled" by a person who is not the owner of the underlying land. If the assessor determines that a particular improvement located on land held jointly by different individuals with undivided fractional interests is, in fact, owned by one of those individuals, the assessor may separately assess the improvement and that individual's interest in the land. Based on the case law and section 405, it is our opinion that if Family member A owns the dwelling at issue in your facts, pursuant to section 2188.2 the assessor may assess that structure to Family member A and his taxable fee simple interest in the underlying land. (See also 4/7/94 Eisenlauer opinion, enclosed.)

**Non-Indian lessees of exempt Indian land may be subject to possessory interest tax**

4. Are non-tribal Indians or non-Indian occupants of dwellings on exempt tribal lands subject to property tax?

Yes, a non-tribal Indian or non-Indian who leases exempt tribal lands, or improvements thereon, may be subject to property tax on the value of the possessory interest. [Agua Caliente Band of Mission Indians v. County of Riverside (1971 9th Cir.) 442 F.2d 1184, 1186].

Section 107(a) defines a possessory interest as "Possession of, claim to, or right to possession of land or improvements that is independent, durable and exclusive of rights held by others in the property, except when coupled with ownership of the land or improvements in the same person." The Ninth Circuit Court of Appeals held that a possessory interest tax is valid even on lands held in trust for Indians. The Court described a possessory interest tax as a tax on the use of property and is different from tax on property itself. Therefore, it is permissible unless federal law explicitly forbids it. [Agua Caliente, 442 F.2d 1184, 1186].

The Court of Appeals conceded that Indian lands held in trust are an instrumentality of the United States and states cannot tax the United States without consent of Congress. However, an individual Indian or tribe, as beneficial owner of trust land, is entitled to no more protection than the United States itself and a possessory interest tax is permissible on lessees of property of the federal government. [Agua Caliente, 442 F. 2d 1184, 1186 citing United States v. City of Detroit (1958) 355 US 466 (holding that the city could impose a possessory interest tax on a lessee of federal land); see also Annotation No. 525.0017 attached].

When land is held in trust by the United States, it is held for the use and benefit of the identified individual Indian or Indian tribe. [25 USCS §348]. It follows, therefore, that the real property tax exemption only applies to the individual tribal Indian or the particular Indian tribe. Thus, a possessory interest held by an individual tribal Indian or the particular Indian tribe would also be exempt from that tax. By clear implication, if the possessory interest is owned or controlled by either a non-tribal Indian or non-Indian then the law provides no exemption. [Agua Caliente, 442 F.2d at 1187].

The test is a factual one: Who has "possession of, claim to, or right to possession of land or improvements that is independent, durable and exclusive of rights held by others in the property" and is not among the owners or beneficiaries of the land trust held by the United States? Based on the foregoing analysis, it is our opinion that if a non-tribal Indian or non-Indian has a possessory interest in a dwelling or other structure on the allotted land, then they would be subject to a property interest tax and a separate assessment may be made under Section 2190.

5. How does an assessor determine whether property owned by Indians is taxable?

Although we have no legal expertise in the area of Indian law, we provide the following information for your consideration. The Indian status of an individual Indian can generally be verified by a tribal identification card issued by either the tribe or the Bureau of Indian Affairs. In the alternative, the tribe may issue a letter which verifies the Indian's individual membership in the tribe and/or the individual's residence on Indian lands. You could match the letter with an additional photo identification. With regard to Indian organizations, a letter from the tribe verifying that the organization is formed under tribal authority and is owned by that Indian tribe has been considered acceptable. In the case of an Indian corporation, the BOE has also reviewed the articles of incorporation. [Sales and Use Tax Annotation 305.0023.400 (8/5/97). These methods of verification may be used provided that the individual Indian or Indian tribe will cooperate with the assessor.

It is important to note that a problem may arise if the individual or organization does not respond or cooperate with an inquiry by an assessor for identification and verifying documents. While the assessor is authorized to request the information, the assessor may lack authority to enforce such a request to an individual Indian or a tribe on the reservation. Both the Ninth Circuit Court of Appeals and the U.S. Supreme Court have held that states may impose certain sales or transaction taxes on non-Indians on the reservation. [Washington v. Confederated Tribes, 447 U.S. 134 (1980) (upheld state sales taxes on purchases by non-tribal members, as well as state recordkeeping requirements for the tax); Yavapai-Prescott Indian Tribe v. Scott, 117 F.3d 1107 (9th Cir. 1997) (state can impose business transaction tax on sales by non-Indians to non-Indians on the reservation)]. The Washington v. Confederated Tribes case, which upholds recordkeeping by tribes as to taxes borne by non-Indians, logically implies some ability of the state to obtain the records it is allowed to require. On the other hand, when approving the state's seizure of unstamped contra band cigarettes in transit to the reservation, the Court noted it was "significant" that the seizure occurred off the reservation where state power is "considerably more expansive' than within reservation boundaries. [447 U.S. 134, 162].

The view that states are very limited in enforcing a records request on a reservation was enhanced by the Ninth Circuit Court of Appeals in Bishop Paiute Tribe v. County of Inyo. [291 F.3d 549 (9th Cir. 2002) cert. granted 123 S.Ct. 618 (2002]. The Court of Appeals found that a county sheriff had no authority to execute a state court search warrant on the reservation for casino employment records related to an investigation by the state into welfare fraud. The tribe had sued a county, a county district attorney, and a sheriff, asserting sovereign immunity from state processes. The case was reversed and remanded in May 2003 by the U.S. Supreme Court [123 S.Ct. 1887 (2003)]. The Court's order was directed at determining whether the tribe had any standing to bring an action for damages against a state official for violating the tribe's sovereign immunity. The Court's remand requests a finding of whether any express federal law gives rise to a tribal action for declaratory and injunctive relief from a state's criminal process. This action leaves the law currently unclear.

The final outcome of the Bishop Paiute case might not resolve your question. The facts involved a criminal investigation as opposed to a tax inquiry and, therefore, the state's interest in obtaining records for a criminal investigation would be higher and may be governed specifically by existing federal law. The remand decision does not expressly reverse the reasoning that execution of the warrant is improper, nor does it address whether an individual Indian may

qualify as a "person" who can assert standing to claim a violation of his or her rights by turnover of records. This is a case to watch in an evolving area.

Therefore, it is our opinion that you should request an individual Indian, or Indian tribe, or Indian organization for documentation of their status as an Indian or Indian entity, as well as residence on Indian land. Appropriate types of documentation were discussed above. However, if you do not receive cooperation from the Indian or tribe, then the county may have no legal jurisdiction to enforce the request, leaving it to assessor discretion as to whether taxable interests exist.

The views expressed in this letter are only advisory in nature; they represent the analysis of the legal staff of the Board of Equalization based on present law and the facts set forth herein, and are not binding on any person or public entity.

Sincerely,

*/s/ Melanie M. Darling*

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Senior Tax Counsel

Enclosures: Annotation Nos. 525.0010, 525.0013, 525.0017
LTA Nos 85/85, 86/04
Eisenlauer Letter 4/7/94

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Prec/Indian Lands/03/01md.doc

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