STATE OF CALIFORNIA

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February 18, 2000

Honorable Kenneth O. Reimers, Assessor
County of Butte
25 County Center Drive
Oroville, CA 95965-3382

ATTN: Donald C. Willis

Re: Taxation of Native American Property

Dear Mr. Willis:

This is in reply to your letter to Chief Counsel Timothy W. Boyer dated December 20, 1999 regarding the taxation of real property and personal property held by Native American tribes and tribal members both on and outside of reservations.

As discussed further below, it is our opinion that lands held in trust for Indian tribes and tribal members are immune from real property taxation. (Letter Question #1.) However, if tribes or individual members own lands in fee, even within the boundaries of a reservation, then the lands will be subject to real property taxes. (Letter Questions #2, 5, and 8.) The treatment of personal property taxation is similar. If personal property or business personal property is located on land held in trust, then such property will be immune from taxation. However, personal property and business personal property located on lands held in fee by Indian tribes and tribal members will be subject to taxation. (Letter Questions #3, 4, 6, 7, and 9.)

Law and Analysis—Real Property

1. Real Estate Owned in Trust for a Federally-Recognized Tribe (Letter Question #1) and

2. Real Estate Owned in the Name of a Federally-Recognized Tribe Acquired from Private Ownership (Letter Question #2) and

3. Real Estate Owned by a Tribal Member of a Federally-Recognized Tribe Acquired from Private Ownership (Letter Question #5) and

4. Homes Sold by a Federally-Recognized Tribe on Lands Outside of the Reservation to Tribal Members (Letter Question #8)

BACKGROUND

Over the last 150 years, the Federal government's policy regarding the allotment of lands to Indians has evolved. In the late nineteenth century, the prevailing national policy of segregating lands for the exclusive use and control of Indian tribes gave way to a policy of allotting land to Indians individually. Because of problems associated with this policy, e.g., the loss of land by Indian allottees by fraud or by sale, compromising Congress' purpose of the assimilation of Indians into society at large, Congress sought to resolve these problems with the Indian General Allotment Act of 1887 (known as the "Dawes Act"). (Although other statutes were also enacted for the allotment of Indian lands, the Indian General Allotment Act of 1887 was the primary means utilized by Congress for allotting Indian lands.)

The Indian General Allotment Act of 1887 empowered the President to allot most tribal lands nationwide without the consent of the Indian nations involved. Section 5 of the Act, 25 USCS § 348[1], restricted immediate alienation or encumbrance of property by providing that each allotted parcel would be held by the United States in trust for at least 25 years before a fee patent, free of any encumbrance, would be issued to an Indian allottee. Section 6 of the Act, 25 USCS § 349, as amended by the Burke Act of 1906, provides that upon the expiration of the trust period and the receipt of a patent in fee, an allottee would be subject to state jurisdiction. Section 6 also provides that the Secretary of the Interior could issue an allottee a fee patent prior to the expiration of the 25-year trust period without subjecting the allottee to state jurisdiction, however, all restrictions as to sale, encumbrance, and taxation of the allotted land would be removed.

The policy of allotment came to an end in 1934 with the passage of the Indian Reorganization Act. With this statute, Congress halted further allotments and extended indefinitely the existing periods of trust applicable to already allotted, but not yet fee-patented, Indian lands and provided for restoring unallotted surplus Indian lands to tribal ownership and for acquiring land, on behalf of tribes, within or without existing reservations. The Indian Reorganization Act, however, imposed no restraints on the ability of existing Indian allottees to alienate or encumber their fee-patented lands.

ANALYSIS

As a result of this varied history of statutes regarding the ownership of lands by Indians, there are a variety of manners in which individual Indians or tribes may "own" realty, including the following: (1) land held in trust for tribes as reservations; (2) land allotted to individual Indians but held in trust for a period of time; (3) fee-patented land owned by individual Indians or by tribes within reservation boundaries, acquired either (a) prior to enactment of the Indian

[1] 25 USCS § 348 provides in part "Upon the approval of the allotments provided for in this Act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period. . . . "

General Allotment Act of 1887, or (b) as a result of the Indian General Allotment Act of 1887; (4) fee-patented land owned by individual Indians or by tribes within reservation boundaries sold to non-Indians and later reacquired from non-Indians; and (5) land owned by individual Indians or tribes outside of reservation boundaries acquired from non-Indians.

According to 25 USCS § 465, enacted as part of the 1934 Indian Reorganization Act, when the Secretary of the Interior takes title to land in the name of the United States in trust for an Indian tribe or an individual Indian, the land or rights acquired shall be exempt from state and local taxation. 25 USCS § 465 provides in part:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

> Title to any lands or rights acquired pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title 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.

The United States Supreme Court has stated that state and local governments cannot tax reservation land "`absent cessation of jurisdiction or other federal statutes permitting it.'" County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U.S. 251, 258 (quoting Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973)). The Supreme Court went on to state that it had consistently declined to find that Congress has authorized such taxation unless it had "`made its intention to do so unmistakably clear.'" Yakima at 258 (quoting Montana v. Blackfeet Tribe, 471 U.S. 759, 765 (1985)).

Based on the above Supreme Court opinions and 25 USCS § 465, it is the opinion of Board legal staff that any land held in trust by the Department of Interior through the Bureau of Indian Affairs for tribes or for 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 (Article XIII, Section 1 of the California Constitution). As such, land held in trust for tribes as reservations and land held in trust for individual Indians would not be subject to property taxation.

If land is owned by a tribe or by an individual Indian in fee, however, the immunity from taxation no longer applies. The United States Supreme Court in County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U.S. 251 (1992), held that the Indian General Allotment Act of 1887 permitted a county to impose an ad valorem tax on reservation land patented in fee pursuant to the Act and owned by reservation Indians or by the tribe itself. This case involved the Yakima Indian Nation which had a reservation in southeastern Washington.

Eighty percent of the reservation's land was held in trust for the benefit of the tribe or its members. The balance of the reservation's land was owned in fee by individual Indians and non-Indians, as a result of patents distributed during the allotment era, and by the Yakima Indian Nation itself. Pursuant to Washington law, Yakima County imposed an ad valorem levy on taxable real property in the county.

The Supreme Court found that

> Liability for the ad valorem tax flows exclusively from ownership of realty on the annual date of assessment. . . . The tax, moreover, creates a burden on the property alone. . . . The Court of Appeals held, . . . and we agree, that this ad valorem tax constitutes "taxation of land" within the meaning of the General Allotment Act and is therefore prima facie valid. 502 U.S. 251, 266.

The Court's rationale for its decision was based upon Section 6 of the Indian General Allotment Act of 1887 (25 USCS § 349), as amended by the Burke Act of 1906. 25 USCS § 349 provides that

> 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 Supreme Court's rationale was that state tax laws were among the laws to which Indian allottees became subject under Section 6 upon the expiration of the trust period. By specifically mentioning immunity from land taxation as one of the restrictions that would be removed upon conveyance of the land in fee, Congress manifested a clear intention to permit states to tax Indian lands. 502 U.S. 251, 259. The Court went on to state that

> . . . when Congress, in 1934, while putting an end to further allotment of reservation land, . . . chose *not* to return allotted land to pre-General Allotment Act status, leaving it fully alienable by the allottees, their heirs, and assigns, . . . it chose not to terminate state taxation upon those lands as well. (Emphasis in original.) 502 U.S. 251, 264.

As a result, the Court found that the Indian General Allotment Act of 1887 permitted the county to impose an ad valorem tax on reservation land patented in fee pursuant to the Act. The Court

unfortunately, however, left open the question whether the treatment of land patented in fee under a statute in force prior to the Indian General Allotment Act of 1887 would also be the same.

As a follow-up to Yakima, the United States Supreme Court in 1998 considered the taxability of land, within reservation boundaries, purchased by a tribe from non-Indians. In Cass County v. Leech Lake Band, 524 U.S. 103, 141 L.Ed.2d, 90 (1998), the Court held that state and local governments may impose ad valorem taxes on reservation land that was made alienable by Congress and sold to non-Indians by the Federal Government and later repurchased by a tribe. In this case, the Leech Lake Band of Chippewa Indians purchased parcels of land within the boundaries of the reservation that had previously been allotted and sold to non-Indians under the Nelson Act of 1889, a statute which had provided for the allotment and sale of a portion of the reservation land to non-Indians.

Relying on the Court's decision in Yakima, the Court in Cass County found that

> . . . once Congress has demonstrated (as it has here) a clear intent to subject the land to taxation by making it alienable, Congress must make an unmistakably clear statement in order to render it non-taxable. . . . The subsequent repurchase of reservation land by a tribe does not manifest any congressional intent to reassume federal protection of that land and to oust state taxing authority—particularly when Congress explicitly relinquished such protection many years before. Cass County, 141 L.Ed.2d, 90, 99-100.

This case follows the rationale of the Court's decision in Yakima, in that once property has been patented in fee, absent a specific intent by Congress to exempt the property from taxation, property will be subject to taxation pursuant to Sections 5 and 6 of the Indian General Allotment Act of 1887. As a result of Yakima and Cass County, fee-patented lands either within reservation boundaries or outside of reservation boundaries, acquired by Indians or tribes from non-Indians, are subject to property taxation. Similarly, regarding your Question #8, any homes sold outside of a reservation by a tribe to tribal members would be subject to property taxation.

Regarding your question as to what constitutes a "reservation", the United States Supreme Court in Oklahoma Tax Commission v. Potawatomi Tribe, 498 U.S. 505 (1991), while not defining this term, found that no distinction between land held in trust and reservation land. The Court stated that land held in trust by the Federal government for the benefit of Indians is validly set apart and qualifies as a reservation for tribal immunity purposes. 498 U.S. 505, 511.

Law and Analysis—Personal Property

5. Personal Property Located on Real Estate, Acquired from Private Ownership, Owned in the Name of a Federally-Recognized Tribe (Letter Question #3)

6. Business Property Leased to a Tribe on Real Estate, Acquired from Private Ownership, Owned in the Name of a Federally-Recognized Tribe (Letter Question #4)

7. Business Property, Located Off of the Reservation, Owned by a Federally-Recognized Tribe (Letter Question #6)

8. Business Personal Property, Located at his Home, Owned by a Tribal Member (Letter Question #7)

9. Business Personal Property, Located Off of the Reservation, Owned by a Tribal Member (Letter Question #9)

The general rule that applies to personal property taxation was stated by the United States Supreme Court in Bryan v. Itasca County, 426 U.S. 373 (1976). The Court held that personal property owned by an Indian residing on reservation land held in trust and used on that land is not subject to personal property tax. The treatment of personal property, including business personal property, for purposes of taxation then is consistent with the treatment of real property for purposes of taxation. As such, personal property not located within reservation land held in trust will be subject to personal property taxation.

In Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), the United States Supreme Court held that a state could impose a gross receipts tax on a ski resort operated by a tribe on off-reservation land that the tribe had leased from the Federal government. The Court emphasized that the tribe operated the ski resort on land located outside of the boundaries of the reservation. In addition, no part of the ski resort enterprise, including buildings and equipment, were located within the boundaries of the reservation. The Court stated that absent express law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state laws, including tax laws that would be applicable to all citizens of the state. As such, any personal property owned by Indians or tribes outside of reservation land held in trust would be subject to personal property taxation. In addition, personal property taxation would also apply to the leased property mentioned in your Question #4, as such property would be located upon land purchased from private ownership.

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

Very truly yours,

/s/ Anthony S. Epolite

Anthony S. Epolite
Tax Counsel

ASE:jd
precednt/genexemp/00/03ase

cc: Mr. Richard Johnson, MIC:63
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May 27, 1992

Honorable R. Gordon Young
Assessor, County of San Bernardino
Hall of Records
172 West Third Street
San Bernardino, CA 92415-0310

Attn: Mr. Adolfo Porras
Assistant Assessor

Re: Fort Mojave Indian Tribe - Exempt and Nonexempt Properties

Dear Mr. Porras:

This is in response to your letter of March 22, 1992, to Mr. Les Sorensen, Chief Counsel, in which you request our opinion as to whether certain properties owned by the Fort Mojave Indian Tribe that are leased to sign companies are exempt from property taxation. For the reasons explained below, we conclude that the described properties are not exempt.

The properties are currently outside the boundaries of the Indian reservation and have never been a part of the reservation. The nearest border of the reservation is approximately three-to-four miles from the subject properties. The properties were conveyed by grant deeds to the Fort Mojave Indian Tribe instead of to the United States of America in Trust for the Fort Mojave Indian Tribe. The properties are leased to sign companies for the placement of freeway signs.

The United States Supreme Court in McCurdy v. United States (1924) 264 US 484, 68 L.Ed 801, emphasized that lands are not taxable by a state while held in trust for Indians by the United States.

The United States Supreme Court in Mescalero Apache Tribe v. Jones (1973) 411 US 145, 36 L.Ed 2d 114, held that a state could impose a gross receipts tax on a ski resort operated by a tribe on off-reservation land that the tribe leased from the federal government. The Court emphasized that the tribe operated a ski resort on land located outside the boundaries of the tribe's

reservation. Also, no part of the ski resort enterprise, buildings, and equipment was located within the existing boundaries of the reservation. The Court stated that absent express law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state laws, including tax laws that would be applicable to all citizens of the state.

In Oklahoma Tax Com. v. Potawatomi Tribe (1991) 498 US ____, 112 L.Ed 2d 1112, the United States Supreme Court repeated that the test for determining whether land is Indian country does not turn upon whether the land is denominated a "reservation" or "trust land" held by the federal government for the benefit of the Indians. "Rather, we ask whether the area has been validly set apart for the use of the Indians as such, under the superintendence of the Government." (Id at 112 L.Ed 2d 1121). The Court held that a state can tax sales of cigarettes to nontribal members at a tribe's convenience store, but that the state could not, because of sovereign immunity, force the tribe to collect the tax.

In this matter, the properties are neither currently part of a reservation nor have ever been part of a reservation. Also, the properties are not "trust land" held by the federal government for the benefit of the Fort Mojave Indian Tribe.

On a "reservation" and "trust land", states have no jurisdiction to tax Indian Tribes or members, their property or their activities unless jurisdiction has been specifically granted by Congress. Once the territorial boundaries of a "reservation" or "trust land" are crossed and the Tribes or members have left the "reservation" or "trust land", however, status as an Indian Tribe has no effect on a state's taxing jurisdiction. Therefore, the properties in question are subject to state taxation laws to the same extent as are the properties of any other property owners.

Our intention is to provide courteous and helpful responses to inquiries such as yours. Suggestions that help us accomplish this goal are appreciated.

Very truly yours,

Carl J. Bessent

Carl J. Bessent
Staff Counsel

CJB:te
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