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November 9, 2000

Honorable Kenneth Bunch
Lassen County Assessor
220 South Lassen Street, Suite 4
Susanville, CA 96130-4324

RE: ***Non-Indian Held Possessory Interests in Indian Lands***

Dear Mr. Bunch:

This letter is in response to your request to Larry Augusta at the Northern Assessors' Conference to review and analyze the validity of the attached memo from attorney David Rapport. The memo argues that federal preemption prevents the state from imposing tax on the possessory interests of non-Indian lessees of tribe-owned housing. [1] We disagree with his conclusion that the federal Indian leasing statutes preempt state taxation of non-Indian possessory interests and dispute his analysis of federal court precedent. In our opinion, although any regulation or taxation of non-Indian activity on Indian trust land must be analyzed in terms of its impact on tribal sovereignty and self-sufficiency, the federal Indian leasing statutes do not automatically preempt the state from imposition of a possessory interest tax on a non-Indian lessee of tribe-owned residential property.

As Mr. Rapport's memo concedes, Ninth Circuit precedent dealing specifically with the question of whether a county can impose a possessory interest tax on a non-Indian lessee of Indian land holds that it can, and those cases have not been reversed. (See Agua Caliente Band of Mission Indians v. County of Riverside (1971) 442 F.2d 1184 and Fort Mojave Tribe v. County of San Bernadino (1976) 543 F.2d 1253.) Mr. Rapport argues, however, that subsequent Supreme Court and Ninth Circuit decisions have essentially nullified the precedential effect of those decisions by ratcheting up the preemptive effect of federal statutes dealing with Indian land. In our opinion, his analysis exaggerates the impact of the cases he cites and ignores subsequent and more pertinent cases that go the other way.

Background

[1] The memo does not state whether the leases at issue are leases of housing on the rancheria or housing owned in fee by the rancheria outside the boundaries of the trust lands. We are assuming that the housing is within the boundaries of the rancheria and is either land held in trust by the United States for the rancheria or land subject to a restriction in alienation imposed by the United States. (See 25 USC section 1360.) There is also no information in the memo regarding the involvement of tribe members in the leasing operation, in administration and/or maintenance, whether Indians inhabit any part of the housing, or how important the housing enterprise is to tribal economics. We are assuming there is some minimal tribal involvement and benefit but that the rental operation is not the primary revenue generator of the rancheria and that the tenant population is primarily non-Indian.

In the past two decades, the U.S. Supreme Court has issued over 15 decisions dealing with the application of state regulations and taxes to transactions and activities of non-Indians on Indian lands. The test for determining whether a state tax or regulation of non-Indians on Indian land is preempted by federal statute "… is flexible and sensitive to the particular facts and legislation involved and requires a particularized examination of the relevant state, federal, and tribal interests, including tribal sovereignty and independence." (Cotton Petroleum Corporation v. New Mexico (1989) 430 US 163.).

In the case of taxation of retail sales to non-Indians, unlike cases involving application of state regulatory systems that often have a direct impact on tribal activities and decision-making, the court has consistently upheld the application of the taxes. (Washington v. Confederated Tribes of the Colville Indian Reservation (1980) 447 US 134, California State Board of Equalization v. Chimehuevi Tribe (1985) 474 US 9, Oklahoma Tax Commission v. Citizen Band of Potawatomu Indian Tribe of Oklahoma (1991) 498 US 505.) The court has consistently noted that the legal incidence of the tax on sales to non-Indians does not fall on the tribe or its members. Cases involving other types of taxes on non-Indians operating on Indian land, such as timber taxes, severance taxes on oil and gas, excise and transaction privilege taxes, have been more affected by the changes in the composition of the court and the specific nature of the activities being taxed. (White Mountain Apache Tribe v. Bracker (1980) 448 US 136; Central Machinery Company v. Arizona State Tax Commission (1980) 448 US 160, Cotton Petroleum Corporation v. New Mexico (1989) 430 US 163.) There are no Supreme Court cases dealing with ad valorem taxation of non-Indian possessory interests on Indian land.

In general, however, the approach of the federal courts in considering the application of state taxes imposed on the activities and possessory interests[2] of non-Indians on Indian lands is to carefully weigh the interests of the federal and state governments together with the tribe's interest in sovereignty and self-sufficiency.

Analysis

Mr. Rapport argues that, like federal regulation of Indian-owned timber resources, the federal Indian leasing statutes constitute a comprehensive federal regulatory scheme that leaves no room for state taxation – even if the incidence of the tax falls on non-Indians. However, the cases cited in support of his argument, White Mountain Apache Tribe v. Bracker (1980) 448 US 136 (holding pervasive federal regulation of harvesting and sale of Indian timber preempted state application of license and fuel tax on non-Indian logging company) and Segundo v. City of Rancho Mirage (1987) 813 F2d 1387 (holding conflict with Indian sovereignty and specific provisions of federal Indian leasing statute and regulation precluded application of local rent control ordinance to non-Indian lessees), are easily distinguishable from the matter at issue (see enclosed McManigal letter, dated May 8, 1992) and have been clarified, and in a sense superceded by the US Supreme Court case of Cotton Petroleum Corporation v. New Mexico , supra, ("Cotton").

The Court in Cotton upheld a state severance tax on a non-Indian lessee of oil and gas on a reservation. The court held that, although federal regulation of oil and gas leases on Indian land

[2] To our knowledge, there are no possessory interest tax cases more recent than the Ninth Circuit cases cited in the memo –both of which upheld the application of the possessory interest tax to non-Indian leases of Indian land.

under a 1938 federal act was extensive, it was not "exclusive", and the possibility that taxing the lessee would interfere with federal policy of encouraging Indian economic development was too indirect and speculative to support a claim of preemption. The Court distinguished Bracker by noting the that the logging roads in that case were built, maintained and policed exclusively by the federal government and the tribe and by pointing to the extensive record evidence that the economic burden of the tax ultimately fell on the tribe.

The statute and regulations covering leasing of Indian land (25 USC section 415; 25 25 CFR 160 et seq) are even less extensive or exclusive than those pertaining to the oil and gas leases in Cotton, and the impact on Indian self-determination of a possessory interest tax on non-Indian lessees of rancheria housing would appear to be even less onerous than the severance tax allowed in Cotton.

Contrary to Mr. Rapport's contention, recent Ninth Circuit decisions involving state taxes imposed on non-Indian lessees of Indian lands have found no preemption by section 415. (See Gila River Indian Community v. Waddell (1996) 91 F3d 1232, upholding application of "transaction privilege tax" on the sale to non-Indians of tickets and concessionary items at sports and entertainment events conducted on reservation land by non-Indian lessees, and Salt River Pima-Maricopa Indian Community v. State of Arizona (1995) 50 F.3d 734, cert, den. 516 U.S. 868, upholding state tax on retail sales and rentals to non-Indian subtenants.) The court in Gila River methodically analyzed the state, federal and tribal interests and rejected as unsubstantiated the arguments of the lessees and the tribe that tribal involvement in the events was so extensive and revenues from them were so significant that imposition of the tax would interfere with tribal sovereignty and self sufficiency.

Most importantly, in addressing the specific issue of the preemptive effect of section 415, the Gila River court distinguished its earlier decision in Rancho Mirage (cited by Mr. Rapport):

> The tribe also contends that the federal statutes authorizing the leasing of trust lands and the regulations governing such leasing constitute a comprehensive regulatory scheme with preemptive effect on state laws. This regulatory scheme is similarly insufficient to preempt a state tax imposed on non-Indians for transactions with other non-Indians. Although Segundo v. City of Rancho Mirage [citation omitted] recognized that conflicting state and tribal regulations of the use of land may result in the preemption of state rules, it also recognized that this conflict does not apply to 'the field of taxation where the laws of both State and Tribe may be enforced simultaneously.' …Thus the Tribe's argument that the mere existence of federal oversight over leasing of Indian lands preempts a state tax is without support. 91 F.3d at 1237.

Conclusion

While it seems clear to us that a possessory interest tax is not preempted by the federal leasing statute, the sovereignty analysis of both the Gila River and Rancho Mirage courts is nevertheless instructive and, in our opinion, relevant to the application of a possessory interest tax to a non-Indian residential lessee of Indian land. Because of the concern for Indian sovereignty

and economic self-sufficiency, automatically imposing the tax on any non-Indian possessory interest in Indian land is no more appropriate than automatic refusal to impose the tax on the grounds of preemption. Consideration should always be given to factors such as the role, if any, of the tribe and its members in generating value for the leasing operation, the importance of the revenues produced by the leases to the economic self-sufficiency of the tribe, and the importance of state and county services such as law enforcement and the judicial system. Given the facts as we assume them to be, it appears that those factors weigh in favor of imposition of a possessory interest tax upon non-Indian lessees of the tribal property at issue in your inquiry.

The views expressed in this letter are advisory only; 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.

Feel free to call me at (916) 327-2455 if you have any additional questions on this matter.

Sincerely,

/s/ Susan Scott

Susan Scott
Tax Counsel

Enclosures:
(Memo from D. Rapport - 8/21/00)
(Letter from K. McManigal - 5/8/92)

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cc: Mr. Richard Johnson, MIC:63
Mr. David Gau, MIC:64
Mr. Charlie Knudsen, MIC:61
Ms. Jennifer Willis, MIC:70
Mr. Larry Augusta, MIC:82
Ms. Janice Thurston, MIC:82