



STATE BOARD OF EQUALIZATION

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Interim Executive Director

April 22, 2011

Dear Tribal Leaders and Interested Parties:

Staff has reviewed comments received in response to our March 9, 2011, meeting with tribal leaders and interested parties regarding the proposed amendments to Regulation 1616, *Federal Areas*. After considering the comments and information provided to date, staff is recommending more amendments to Regulation 1616.

Enclosed is the *Second Discussion Paper* on this subject. This document provides the background, a discussion of the issue and explains staff's recommendation in more detail. Also enclosed for your review is a copy of the proposed amendment to Regulation 1616 (Exhibit 1).

A second meeting with tribal leaders and interested parties is scheduled for **May 11, 2011 at 10:00 A.M. in Room 122** to discuss the proposed amendments to Regulation 1616. If you are unable to attend the meeting but would like to provide input for discussion at the meeting, please feel free to write to me at the above address or send a fax to (916) 322-4530 before the May 11, 2011 meeting. If you are aware of other persons that may be interested in attending the meeting or presenting their comments, please feel free to provide them with a copy of the enclosed material and extend an invitation to the meeting. If you plan to attend the meeting on May 11, 2011, or would like to participate via teleconference, I would appreciate it if you would let staff know by contacting Mr. Bradley Miller at (916) 319-9924 or by e-mail at Brad.Miller@boe.ca.gov prior to May 9, 2011. This will allow staff to make alternative arrangements should the expected attendance exceed the maximum capacity of Room 122 and to arrange for teleconferencing.

Any comments you may wish to submit subsequent to the May 11, 2011 meeting must be received by **June 3, 2011**. They should be submitted in writing to the above address. After considering all comments, staff will complete a formal issue paper on the proposed amendments to Regulation 1616 for discussion at the **Business Taxes Committee meeting** scheduled for **July 27, 2011**. Copies of the formal issue paper will be mailed to you approximately ten days prior to this meeting. Your attendance at the July Business Taxes Committee meeting is welcomed. The meeting is scheduled for **9:30 a.m.** in Room 121 at 450 N Street, Sacramento, California.

Please be aware that a copy of the material you submit may be provided to other parties. Therefore, please ensure your comments do not contain confidential information.

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We look forward to your comments and suggestions. Should you have any questions, please feel free to contact Ms. Leila Hellmuth, Supervisor, Business Taxes Committee Team at (916) 322-5271.

Sincerely,

Susanne Buehler, Chief
Tax Policy Division
Sales and Use Tax Department

SB: bem

Enclosures

cc: (all with enclosures)

Honorable Jerome E. Horton, Chairman, Fourth District
Honorable Michelle Steel, Vice Chair, Third District
Honorable Betty T. Yee, Member, First District (MIC 71)
Senator George Runner (Ret.), Member, Second District (MIC 78)
Honorable John Chiang, State Controller, c/o Ms. Marcy Jo Mandel

(Via E-mail)

Mr. Robert Thomas, Board Member's Office, Fourth District
Mr. Neil Shah, Board Member's Office, Third District
Mr. Tim Treichelt, Board Member's Office, Third District
Mr. Alan LoFaso, Board Member's Office, First District
Ms. Mengjun He, Board Member's Office, First District
Mr. Lee Williams, Board Member's Office, Second District
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Mr. Randy Ferris
Mr. Bradley Heller
Mr. Robert Tucker
Mr. Todd Gilman
Ms. Laureen Simpson
Mr. Robert Ingenito Jr.
Mr. Bill Benson

Mr. Stephen Rudd
Mr. Kevin Hanks
Mr. Jason Parker
Mr. Geoffrey E. Lyle
Ms. Leila Hellmuth
Mr. Bradley Miller
Mr. Robert Wilke

SECOND DISCUSSION PAPER

Proposal to Amend Regulation 1616, *Federal Areas*, Regarding Sales to Governments of Officially Recognized Indian Tribes

I. Issue

Should Sales and Use Tax Regulation 1616, *Federal Areas*, be amended to clarify that a limited tax exemption exists for sales to and purchases by a tribal government of an officially recognized¹ Indian tribe under specific circumstances?

II. Staff Recommendation

After reviewing the submissions from tribal leaders and interested parties and discussing proposed amendments to Regulation 1616 at the meeting on March 9, 2011, staff agrees with some of the revisions suggested by tribal leaders and interested parties and is recommending that they be incorporated. Therefore, staff proposes to amend Regulation 1616, subdivision (d), as provided in Exhibit 1. The proposed amendments clarify that a limited exemption from sales and use taxes exists for sales to, and purchases by, a tribal government of an officially recognized Indian tribe if:

- The tribal government does not have a reservation on which to conduct tribal government business, or the principal place where the tribal government meets to conduct tribal business cannot be on the tribe's reservation because the reservation lacks a building in which they can meet or the reservation lacks essential utility services, or lacks mail service from the United States Postal Service;
- The property is purchased for use in tribal self-governance, including the governance of tribal members, the conduct of inter-governmental relationships, and the acquisition of trust land; and
- The property is delivered to the tribal government and ownership of the property transfers at the principal place where the tribal government meets to conduct tribal business.

Such a limited exemption would appropriately acknowledge the sovereignty of officially recognized Indian tribes, ensure that both landless Indian tribes and tribes with land that lacks essential meeting facilities can exercise their rights to self-governance without interference from sales and use taxes, and ensure the proper administration of California's sales and use taxes.

¹ For purposes of this discussion paper, an Indian tribe is officially recognized if it is recognized by the federal government or the State of California. In addition to federally recognized tribes, California has recognized the Juaneno Band of Mission Indians as the aboriginal tribe of Orange County and recognized the Gabrielinos as the aboriginal tribe of the Los Angeles Basin through the adoption of Assembly Joint Resolution (AJR) 48 and AJR 96, respectively.

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Should the Board adopt the proposed amendments to Regulation 1616, staff anticipates working with officially recognized landless Indian tribes and tribes whose trust land lacks essential meeting facilities to conduct tribal business to establish a Board-approved list of their principal places of tribal business. This list would be posted on the Board's American Indian Tribal Issues web page to assist retailers in determining whether they can accept a proffered exemption certificate from the government of an officially recognized Indian tribe in good faith.

III. Other Alternative(s) Considered

An alternative suggested by the Agua Caliente Band of Mission Indians (Exhibit 2) is to not adopt proposed amendments to Regulation 1616.

IV. Background

Regulation 1616 was originally adopted in 1945 as a restatement of previous rulings. In 1978, subdivision (d) was added to the regulation to prescribe the application of sales and use tax to the sale and use of tangible personal property on Indian Reservations.² In 2002, Regulation 1616, subdivision (d)(3)(A)2 was amended to provide that "Indian retailers selling meals, food or beverages at eating and drinking establishments are not required to collect use tax on the sale of meals, food or beverages that are sold for consumption on an Indian reservation."

More recently, Board staff has been working closely with tribal leaders and interested parties to revise [Publication 146](#), *Sales to American Indians and Sales on Indian Reservations*, to clarify the proper application of sales and use tax to specific transactions involving Indians. This has consisted of holding several meetings with tribal leaders and interested parties to seek input regarding necessary revisions to the publication. Additionally, tribal leaders and interested parties have submitted written comments regarding revisions to the publication they deem necessary. Board staff has incorporated many of the suggestions provided by tribal leaders and interested parties into the pending draft of the publication. However, some suggestions have not been incorporated since the suggestions are inconsistent with the current language of Regulation 1616.

² In this context, the term "reservation" refers to all land that is considered "Indian country" as defined by 18 U.S.C. § 1151, which provides that "the term 'Indian country' . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." (See, e.g., Sales and Use Tax Annotation 305.0024.250 (8/26/1996).)

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One issue that has been repeatedly raised by tribal leaders and interested parties is the different tax consequences associated with the application of tax to sales of tangible personal property to landless tribes and their members within this state, as opposed to sales of tangible personal property to landed Indian tribes and their resident members in Indian country. Regulation 1616, subdivision (d) currently provides that sales tax does not apply to sales of tangible personal property made to Indians that reside on a reservation if the property is delivered to the Indian purchaser and ownership to the property transfers to the Indian purchaser on the reservation. However, sales tax applies if the property is delivered off the reservation or if the ownership to the property transfers to the purchaser off the reservation. Therefore, sales of tangible personal property to landless tribes are generally subject to sales tax since the landless tribes do not have reservations where they can receive delivery of tangible personal property and transfer ownership of the property.

A second issue, which was raised at the March 9, 2011, meeting, was the different tax consequences associated with the application of use tax to purchases of tangible personal property by tribal governments of officially recognized Indian tribes that can exercise their rights to self-governance on their reservations and purchases by tribal governments of officially recognized Indian tribes that cannot exercise their rights to self-governance on their reservations because their reservations are remote and lack a building or essential utilities that make it impractical for the tribal governments to meet on their reservations and govern their tribes from their reservations. This is because Regulation 1616, subdivision (d) provides that sales tax does not apply to sales of tangible personal property to Indians if the property is delivered to the purchaser and ownership to the property transfers to the purchaser on the reservation. However, subdivision (d) also provides that use tax applies to property purchased by an Indian if the property is used in California more than it is used on the Indian's reservation within the first twelve months following delivery.

V. Discussion

Although state taxation of Indians is not generally preempted outside Indian country, the United States Supreme Court's holdings suggest that state taxation of Indians outside of Indian country may be preempted under appropriate circumstances. For example, in *Oklahoma Tax Commission v. Sac and Fox Nation* (1993) 508 U.S. 114, 126, Justice O'Connor contemplated whether state taxation may be preempted outside of a tribe's territorial jurisdiction, but the court refrained from resolving the issue because it was not directly before the court. Also, more recent United States Supreme Court cases continue to indicate that states are not "generally" preempted from taxing Indians when they reside outside of Indian Country, but that there are some exceptions to the general rule. (See, e.g., *Wagnon v. Prairie Band Potawatomi Nation* (2005) 546 U.S. 95, 113 [quoting from *Mescalero Apache Tribe v. Jones* (1972) 411 U.S. 145, 148-149].) Therefore, it appears that state taxation of Indians outside Indian country may be preempted by federal law in some circumstances that have not yet been prescribed by the United States Supreme Court.

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Furthermore, the United State Supreme Court has said that “there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian Reservation or to tribal members.” (*White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, 142.) Instead, the Supreme Court has said that the boundaries between state regulatory authority and tribal self-government depend upon “a particularized inquiry into the nature of the state, federal, and tribal interests at stake” in a specific context. (*Id.* at p. 145.) Therefore, Board staff has reviewed the particular facts and circumstances applicable to officially recognized landless California Indian tribes to see whether the imposition of California’s sales tax interferes with their interests in any way that might require the tax to be preempted under federal law.

First, Board staff found that all three branches of the federal government have recognized Indian tribes’ interests in tribal sovereignty and the attributes of such sovereignty. The United States Supreme Court has long recognized that Indian tribes retain “attributes of sovereignty over both their members and their territory.” (*Bracker, supra*, 448 U.S. at p. 142.) Moreover, Congress, in 1995, declared that “(1) there is a government-to-government relationship between the United States and each Indian tribe; (2) the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government; (3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes; and (4) Indian tribes possess the inherent authority to establish their own form of government.” (25 U.S.C. § 3601.) Additionally, the United States Department of Justice (DOJ) conducts its Indian affairs under a June 1, 1995, policy memorandum regarding Indian Sovereignty (DOJ Memorandum),³ in which the Attorney General recognizes similar attributes of tribal sovereignty.

Second, Board staff found that the United States Supreme Court has specifically contemplated whether a tribe’s right to self-governance is strong enough to preempt state taxation outside of the tribe’s territorial jurisdiction, but the court has not yet resolved the issue in any definitive manner. (*White Mountain Apache Tribe v. Bracker, supra*, 448 U.S. at p. 142.)

Third, Board staff found that there was a major shift in the United States’ policies towards Indians that was implemented, at least in part, by the enactment of the Indian Reorganization Act (IRA) of 1934 (Pub.L. No. 73-383 (June 18, 1934) 48 Stat. 984), which represented formal federal recognition of a unique relationship between Indian tribes’ sovereignty and land, and the federal government’s duty to help restore Indian tribes’ economic and governmental self-sufficiency, as sovereigns, through the acquisition of land. Specifically, section 5 of the IRA, which was subsequently codified (with minor amendments) as section 465 of title 25 of the United States Code, currently provides that:

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

³ The June 1, 1995, memorandum is available on the DOJ’s Web site at <http://www.justice.gov/ag/readingroom/sovereignty.htm>.

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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 this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) 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.

Thus, Board staff noted that the Department of the Interior “has had discretionary authority to take title to land, in the name of the United States, in trust for the benefit of Indian tribes” since 1934. (44 S.D. L. Rev. 681, 685.) And, when that discretion is exercised, the Secretary of the Interior accepts a fiduciary duty over the trust land and “the land is freed from federal and state taxes.” (*Id.* at p. 682.) In other words, a clear connection exists between tribal self-governance, the acquisition of trust land, and the preemption of state taxation.

In addition, Board staff noted that the Department of the Interior’s discretion to acquire land for the benefit of Indian tribes creates a tension between Indian tribes and nontribal governments: “Indian tribes need and are entitled to have lands taken into trust. Non-tribal governments are interested in keeping such lands on their tax rolls.” (44 S.D. L. Rev. 681, 682.) Moreover, inherent in this federal discretion is the principle that one of the functions of a landless Indian tribe’s government is to petition the Secretary of the Interior to acquire lands in trust for the tribe so that the tribe will have territorial boundaries in which to exercise its sovereignty. As a result, Board staff found that California’s taxation of sales to, and purchases by, landless federally recognized Indian tribes of tangible personal property for use by their tribal governments in applying to the Secretary of the Interior for the acquisition of trust lands could be viewed as interfering with their tribal sovereignty. And, the interference with their tribal sovereignty might support the conclusion that the imposition of sales or use tax on such transactions would be preempted by federal law.

Fourth, Board staff reviewed the present status of California’s landless Indian tribes and found that the Bureau of Indian Affairs (BIA) provides the following information with respect to their status:

While the history of the Federal-Indian relationship in California shares some common characteristics with that of Native people elsewhere in the United States, it is different in many aspects. It includes the unprecedented magnitude of non-native migration into California after the discovery of gold in 1848, nine days before the signing of the Treaty of Guadalupe Hidalgo; the Senate’s refusal to ratify the 18 treaties negotiated with California tribes during 1851-52; and the lawless nature of California’s settlement after the Treaty of Guadalupe Hidalgo, including State sanctioned efforts to “exterminate” the indigenous population.

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Under pressure from the California Congressional delegation, the United States Senate not only refused to sign the 18 treaties that had been negotiated, but they also took extraordinary steps to place the treaties under seal. Between the un-ratified treaties and the Land Claims Act of 1851, most California Indians became homeless.

Major shifts in federal Indian policy at the national level during the late 19th century exacerbated the Indian problems in California. Passage of the General Allotment Act in 1887 opened part of the limited lands in California to non-Indian settlement. In 1905 the public was finally advised of the 18 un-ratified treaties. Citizens sympathetic to the economic and physical distress of California Indians encouraged Congress to pass legislation to acquire isolated parcels of land for homeless California Indians. Between 1906 and 1910 a series of appropriations were passed that provided funds to purchase small tracts of land in central and northern California for landless Indians of those areas. The land acquisitions resulted in what has been referred to as the Rancheria System in California.

In 1934, with the passage of the Indian Reorganization Act (IRA), the reconstituting of tribal governments included the BIA's supervision of elections among California tribes, including most of the Rancheria groups. Although many tribes accepted the provisions of the IRA, few California tribes benefited economically from the IRA because of the continuing inequities in funding of Federal Indian programs.

Beginning in 1944, forces within the BIA began to propose partial liquidation of the Rancheria system. Even the limited efforts to address the needs of California Indians at the turn of the century and again through passage of the IRA were halted by the federal government when it adopted the policy of termination. California became a primary target of this policy when Congress slated forty-one (41), California Rancherias for termination pursuant to the Rancheria Act of 1958.

During the past quarter century, judicial decisions and settlements have restored 27 of the 38 Rancherias that were terminated under the original Rancheria Act. Additional tribes have since then been restored as a result of Acts of Congress.

This brief history only begins to explain why the Pacific Regional Office is unique. California tribes today continue to develop their tribal infrastructure as a result of not having the same opportunities that have been provided to other native groups throughout the Country. California has a large number of aboriginal native populations who are not currently recognized by the United States which presents [its] own list of problems.⁴

⁴ Text available at <http://www.bia.gov/WhoWeAre/RegionalOffices/Pacific/WeAre/index.htm>.

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Therefore, Board staff concluded that these unique circumstances, recognized by the BIA, indicated that the federal courts could decide that federal law must preempt California's taxation of landless Indian tribes in a manner that may not be applicable in other states where these unique circumstances are not present in order to prohibit California from directly interfering with the self-governance of officially recognized landless Indian tribes in California.

Board staff is also aware that the federal government does hold land in trust for some officially recognized Indian tribes, which is not suitable for their tribal governments to meet and exercise their rights to self-governance due to the lack of adequate meeting facilities, essential utility services, or mail service on the tribes' lands. As a result, the governments of these tribes are currently unable to exercise their rights to self-governance without interference from California's sales and use tax in the same manner as landless Indian tribes. Therefore, Board staff concluded that the federal courts could decide that California's taxation of tribes with trust land that is not suitable for conducting tribal government business must also be preempted when it interferes with those tribes' rights to self-governance, similar to the preemption of California's taxation of officially recognized landless tribes.

However, Board staff believes that federal preemption of California's taxation of officially recognized Indian tribes outside of a reservation would be limited to preempting the taxation of tangible personal property that is sold to or purchased by tribal governments for use in tribal self-governance, including the governance of tribal members, the conduct of inter-governmental relationships, and the acquisition of trust land. This is because the taxation of these types of transactions, and only these types of transactions, might directly interfere with a tribe's sovereignty. In other words, other than the potential limited exemption for tribes discussed above, staff has found no persuasive authority that could establish a general exemption for off-reservation sales of tangible personal property to Indians or purchases of tangible personal property by Indians for use off-reservation.

Furthermore, Board staff believes that an exemption recognizing such preemption would need to be limited to taxes imposed on property delivered to an officially recognized Indian tribe at the principal place where the tribe's government meets to conduct tribal business so that there is some way for retailers and the State Board of Equalization to verify exempt transactions. Board staff also believes that a "principal place" test is sufficiently flexible because we recognize that tribes may not own any real estate where their tribal governments can meet to conduct tribal business, and they may occasionally meet at more than one place during a given period.

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Indian Organizations

Comments received from the Rincon Band of Luiseno Indians (Exhibit 3) requested that the proposed amendments also cover sales to, and purchases by, an Indian organization, as that term is currently defined in Regulation 1616 (d)(2). Staff believes the proposed amendments to Regulation 1616 would provide a limited exemption for sales to an Indian organization because subdivision (d)(2) expressly provides that “Indian organizations are entitled to the same exemption as are Indians.” Upon successful completion of formal rulemaking for Regulation 1616, clarification regarding this issue will be incorporated into Publication 146.

12-Month Test Period

Comments received from the Rincon Band of Luiseno Indians (Exhibit 3) requested that the 12-month test period provisions be removed from the proposed amendments to Regulation 1616 as there is no statutory basis for the test period. However, staff believes that there is authority for the 12-month test and that it is necessary to incorporate a 12-month test into the proposed amendments for the proper administration of the Sales and Use Tax Law. This is because Revenue and Taxation Code section 6202 provides that any person purchasing tangible personal property from a retailer for use in this state is liable for payment of the use tax and the proposed amendments only provide an exemption for property that is purchased for use in tribal self-governance. Therefore, when property is purchased for use in California and for use in tribal self-governance, a test period is necessary to determine whether the property qualifies for an exemption because the property is used for tribal self-governance more than it is used in California. Furthermore, Revenue and Taxation Code section 6248 specifically provides for a 12-month test period in determining whether a vehicle, vessel, or aircraft is purchased for use in this state and there are 12-month test period provisions contained elsewhere in the existing text of Regulation 1616. Therefore, staff continues to believe it is reasonable to include a 12-month test period in the proposed amendments to Regulation 1616.

Reservation Based Value

Comments received from Big Sandy Rancheria (Exhibit 4) requested that Regulation 1616 include additional amendments to address “value added” activity for sales by Indians in Indian country. The comments included a cite to *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), as authority for the additional amendments.

The comments acknowledge that Regulation 1616 does provide a limited exemption for sales of meals, food or beverages to non-Indians for consumption on an Indian reservation, and believes this exemption should extend to other products in which there is “value added” on the reservation. Although meals, food or beverage sold by an Indian retailer may have value added on the reservation, the basis for the limited exemption provided for sales of meals, food or beverage is because the meals, food or beverage are consumed on the reservation. Since the meals, food or beverage are consumed in Indian country, the application of the California use tax is not applicable.

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The Board has previously adopted amendments to Regulation 1616 that would have recognized an exemption for “value added” or “reservation based value.” However, the amendments were rejected by the Office of Administrative Law (OAL) due to necessity, clarity and consistency concerns. As OAL has rejected these amendments previously, and they are beyond the scope of the proposed amendments currently under consideration, staff is not including provisions addressing reservation based value in the current proposed amendments to Regulation 1616.

VI. Summary

Staff proposes amendments to subdivision (d) of Regulation 1616, as illustrated in Exhibit 1, to clarify that a limited exemption from sales and use taxes exists for sales to and purchases by tribal governments of an officially recognized Indian tribe under specific circumstances. Tribal leaders and interested parties are welcome to submit comments or suggestions on the issues discussed in this paper, and are invited to participate in the meeting scheduled for May 11, 2011.

Prepared by the Tax Policy Division, Sales and Use Tax Department

Current as of 04/21/2011

Regulation 1616. FEDERAL AREAS.

Reference: Sections 6017, 6021, Revenue and Taxation Code.
Public Law No. 817-76th Congress (Buck Act).
Vending machine sales generally, see Regulation 1574
Items Dispensed for 10¢ or less, see Regulation 1574
Additional reference: Section 6352, Revenue and Taxation Code.

(a) IN GENERAL. Tax applies to the sale or use of tangible personal property upon Federal areas to the same extent that it applies with respect to sale or use elsewhere within this state.

(b) ALCOHOLIC BEVERAGES. Manufacturers, wholesalers and rectifiers who deliver or cause to be delivered alcoholic beverages to persons on Federal reservations, shall pay the state retailer sales tax on the selling price of such alcoholic beverages so delivered, except when such deliveries are made to persons or organizations which are instrumentalities of the Federal Government or persons or organizations which purchase for resale.

Sales to officers' and non-commissioned officers' clubs and messes may be made without sales tax when the purchasing organizations have been authorized, under appropriate regulations and control instructions, duly prescribed and issued, to sell alcoholic beverages to authorized purchasers.¹

(c) SALES THROUGH VENDING MACHINES. Sales through vending machines located on Army, Navy, or Air Force installations are taxable unless the sales are made by operators who lease the machines to exchanges of the Army, Air Force, Navy, or Marine Corps, or other instrumentalities of the United States, including Post Restaurants and Navy Civilian Cafeteria Associations, which acquire title to and sell the merchandise through the machines to authorized purchasers.

For the exemption to apply, the contracts between the operators and the United States instrumentalities and the conduct of the parties must make it clear that the instrumentalities acquire title to the merchandise and sell it through machines leased from the operators to authorized purchasers.

¹The following is a summary of the pertinent regulations which have been issued:

(a) GENERAL. Air Force Regulation 34-57, issued under date of February 9, 1968, Army Regulation 210-65, issued under date of May 4, 1966, and Navy General Order No. 15, issued under date of May 5, 1965, authorize the sale and possession of alcoholic beverages at bases and installations subject to certain enumerated restrictions.

(b) AIR FORCE. Air Force Regulation 34-57, Paragraph 5, permits commissioned officers' and noncommissioned officers' open messes, subject to regulations established by commanders of major air commands to sell alcoholic beverages to authorized purchasers at bars and cocktail lounges, and provides that commanders will issue detailed control instructions. Paragraph 8 and 9 require commanders of major air commands to issue regulations relative to package liquor sales and to procurement of alcoholic beverages, respectively.

(c) ARMY. Army Regulation 210-65, Paragraph 9, provides that major commanders are authorized to permit at installations or activities within their respective commands the dispensing of alcoholic beverages by the drink or bottle. Paragraph 11 of AR 210-65 provides that when authorized by major commanders as prescribed in Paragraph 9, AR 210-65, officers' and non-commissioned officers' open messes may, subject to regulations prescribed by the commanding officer of the installation or activity concerned, dispense alcoholic beverages by the drink, and operate a package store.

(d) NAVY. Navy General Order No. 15 provides that commanding officers may permit, subject to detailed alcoholic beverage control instructions, the sales of packaged alcoholic beverages by officers' and noncommissioned officers' clubs and messes and the sale and consumption of alcoholic beverages by the drink in such clubs and messes.

(d) INDIAN RESERVATIONS.

(1) IN GENERAL. Except as provided in this regulation, tax applies to the sale or use of tangible personal property upon Indian reservations to the same extent that it applies with respect to sale or use elsewhere within this state.

(2) DEFINITIONS. For purposes of this regulation “Indian” means any person of Indian descent who is entitled to receive services as an Indian from the United States Department of the Interior. Indian organizations are entitled to the same exemption as are Indians. “Indian organization” includes Indian tribes and tribal organizations and also includes partnerships all of whose members are Indians. The term includes corporations organized under tribal authority and wholly owned by Indians. The term excludes other corporations, including other corporations wholly owned by Indians. “Reservation” includes reservations, rancherias, and any land held by the United States in trust for any Indian tribe or individual Indian.

(3) SALES BY ON-RESERVATION RETAILERS.**(A) Sales by Indians.**

1. Sales by Indians to Indians who reside on a reservation. Sales tax does not apply to sales of tangible personal property made to Indians by Indian retailers negotiated at places of business located on Indian reservations if the purchaser resides on a reservation and if the property is delivered to the purchaser on a reservation. The purchaser is required to pay use tax only if, within the first 12 months following delivery, the property is used off a reservation more than it is used on a reservation.

2. Sales by Indians to non-Indians and Indians who do not reside on a reservation. Sales tax does not apply to sales of tangible personal property by Indian retailers made to non-Indians and Indians who do not reside on a reservation when the sales are negotiated at places of business located on Indian reservations if the property is delivered to the purchaser on the reservation. Except as exempted below, Indian retailers are required to collect use tax from such purchasers and must register with the Board for that purpose.

Indian retailers selling meals, food or beverages at eating and drinking establishments are not required to collect use tax on the sale of meals, food or beverages that are sold for consumption on an Indian reservation.

(B) Sales by non-Indians.

1. Sales by non-Indians to Indians who reside on a reservation. Sales tax does not apply to sales of tangible personal property made to Indians by retailers when the sales are negotiated at places of business located on Indian reservations if the property is delivered to the purchaser on a reservation. The sale is exempt whether the retailer is a federally licensed Indian trader or is not so licensed. The purchaser is required to pay use tax only if, within the first 12 months following delivery, the property is used off a reservation more than it is used on a reservation.

2. Sales by non-Indians to non-Indians and Indians who do not reside on a reservation. Either sales tax or use tax applies to sales of tangible personal property by non-Indian retailers to non-Indians and Indians who do not reside on a reservation.

(C) Resale Certificates. Persons making sales for resale of tangible personal property to retailers conducting business on an Indian reservation should obtain resale certificates from their purchasers. If the purchaser does not have a permit and all the purchaser's sales are exempt under paragraph (d)(3)(A) of this regulation, the purchaser should make an appropriate notation to that effect on the certificate in lieu of a seller's permit number (see Regulation 1668, “Resale Certificates”).

(4) SALES BY OFF-RESERVATION RETAILERS.

(A) Sales Tax - In General. Sales tax does not apply to sales of tangible personal property made to Indians negotiated at places of business located outside Indian reservations if the property is delivered to the purchaser and ownership to the property transfers to the purchaser on the reservation. Generally ownership to property transfers upon delivery if delivery is made by facilities of the retailer and ownership transfers upon shipment if delivery is made by mail or carrier. Except as otherwise expressly provided herein, the sales tax applies if the property is delivered off the reservation or if the ownership to the property transfers to the purchaser off the reservation.

(B) Sales Tax - Permanent Improvements - In General. Sales tax does not apply to a sale to an Indian of tangible personal property (including a trailer coach) to be permanently attached by the purchaser upon the reservation to realty as an improvement if the property is delivered to the Indian on the reservation. A trailer coach will be regarded as having been permanently attached if it is not registered with the Department of Motor Vehicles. Sellers of property to be permanently attached to realty as an improvement should secure exemption certificates from their purchasers (see Regulation 1667, "Exemption Certificates").

(C) Sales Tax - Permanent Improvements - Construction Contractors.

1. Indian contractors. Sales tax does not apply to sales of materials to Indian contractors if the property is delivered to the contractor on a reservation. Sales tax does not apply to sales of fixtures furnished and installed by Indian contractors on Indian reservations. The term "materials" and "fixtures" as used in this paragraph and the following paragraph are as defined in Regulation 1521 "Construction Contractors."

2. Non-Indian contractors. Sales tax applies to sales of materials to non-Indian contractors notwithstanding the delivery of the materials on the reservation and the permanent attachment of the materials to realty. Sales tax does not apply to sales of fixtures furnished and installed by non-Indian contractors on Indian reservations.

(D) Use Tax - In General. Except as provided in paragraphs (d)(4)(E) and (d)(4)(F) of this regulation, use tax applies to the use in this state by an Indian purchaser of tangible personal property purchased from an off-reservation retailer for use in this state.

(E) Use Tax - Exemption. Use tax does not apply to the use of tangible personal property (including vehicles, vessels, and aircraft) purchased by an Indian from an off-reservation retailer and delivered to the purchaser on a reservation unless, within the first 12 months following delivery, the property is used off a reservation more than it is used on a reservation.

(F) Leases. Neither sales nor use tax applies to leases otherwise taxable as continuing sales or continuing purchases as respects any period of time the leased property is situated on an Indian reservation when the lease is to an Indian who resides upon the reservation. In the absence of evidence to the contrary, it shall be assumed that the use of the property by the lessee occurs on the reservation if the lessor delivers the property to the lessee on the reservation. Tax applies to the use of leased vehicles registered with the Department of Motor Vehicles to the extent that the vehicles are used off the reservation.

(G) Property Used in Tribal Self-Governance. Sales and use tax does not apply to sales of tangible personal property to and purchases of tangible personal property by the tribal government of an Indian tribe that is officially recognized by either the United States or the State of California if:

1. The tribal government's Indian tribe does not have a reservation or the principal place where the tribal government meets to conduct tribal business cannot be its Indian tribe's reservation because the reservation does not have a building in which the tribal government can meet or the reservation lacks one or more essential utility services, such as water, electricity, gas, sewage, or telephone, or mail service from the United States Postal Service;

2. The property is purchased by the tribal government for use in tribal self-governance, including the governance of tribal members, the conduct of inter-governmental relationships, and the acquisition of trust land; and

3. The property is delivered to the tribal government and ownership of the property transfers to the tribal government at the principal place where the tribal government meets to conduct tribal business.

The purchase of tangible personal property is not exempt from use tax under this paragraph if the property is used for purposes other than tribal self-governance more than it is used for tribal self-governance within the first 12 months following delivery.



AGUA CALIENTE BAND OF CAHUILLA INDIANS
TRIBAL COUNCIL

RICHARD M. MILANOVICH CHAIRMAN • JEFF L. GRUBBE VICE CHAIRMAN
KAREN A. WELMAS SECRETARY/TREASURER • VINCENT GONZALES III MEMBER • ANTHONY J. ANDREAS III MEMBER

March 23, 2011

Susanne Buehler
Chief, Tax Policy Division
Sales and Use Tax Department
State Board of Equalization
PO Box 942879
Sacramento, CA 94279-0092

RECEIVED
MAR 29 2011
TAX POLICY DIVISION

RE: Regulation 1616, *Federal Areas*

Dear Ms. Buehler,

The Agua Caliente Band of Cahuilla Indians ("Tribe") appreciates the Board of Equalization's ("BOE") continued outreach to tribal governments in crafting changes to regulations that impact Indian tribes and their members. Currently, the BOE proposes to amend Regulation 1616, creating a limited sales and use tax exemption for specified sales to and purchases by officially recognized landless Indian tribes. Although the proposed changes are well intended, as discussed below, the premise upon which the change is based is flawed and the BOE should decline to adopt the draft language.

The proposed changes to Regulation 1616 would exempt officially recognized landless tribes from payment of sales and use tax on certain items delivered to the tribe's principal place of conducting tribal business. The draft language defines eligible landless tribes as those officially recognized by either the federal or state government. However, California has no "state recognized" tribes. Instead, there exist two non-binding, California Assembly Joint Resolutions passed in support of two tribes seeking federal recognition. These Resolutions are not connected to any codified process for unrecognized tribes to establish formal government to government relationships with the State and, within the context of taxation, are meaningless.



Page 2 of 2

RE: Regulation 1616, Federal Areas

As recognized in the Initial Discussion Paper, tax exemptions for tribes are rooted in their existence as formally recognized, sovereign governments. Because California has no codified process for unrecognized tribes to seek formal recognition, it is impermissible for the BOE to grant tax exemptions to any unrecognized tribe. Accordingly, the Agua Caliente Band of Cahuilla Indians urges the BOE to not adopt the proposed changes to Regulation 1616.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard M. Milanovich".

Richard M. Milanovich
Chairman, Tribal Council
**AGUA CALIENTE BAND OF
CAHUILLA INDIANS**

TC-11451-03-11

Rincon Band of Luiseño Indians

PO Box 68 • Valley Center • CA 92082 • (760) 749-1051 • Fax: (760) 749-8901



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APR 3 2011

AUDIT & INFORMATION

Mr. Jeffrey L. McGuire
Deputy Director
Sales and Use Tax Department
State Board of Equalization
P O Box 942879
Sacramento, CA 94279-0044
Fax 916-322-0187

March 31, 2011

Comments of Rincon Band of Luiseno Indians Regarding Board of Equalization Proposal to Amend Regulation 1616, *Federal Areas*, Regarding Sales to Landless Tribes¹

Dear Mr. McGuire,

The Rincon Band of Luiseno Indians submits these comments in response to the Board of Equalization (the "BOE") letter, dated February 3, 2011, circulating the Initial Discussion Paper – Proposal to Amend Regulation 1616, *Federal Areas*, Regarding Sales to Landless Tribes (the "Amendments") and consultation meeting with tribal leaders on March 9, 2011.

The Amendments are intended to provide a limited exemption for tangible personal property that is sold to or purchased by landless Indian tribes for use by their

¹The Rincon Band continues to have a number of disagreements with the State regarding taxation policy and interpretation of cases regarding the incidence and applicability of state taxes. In submitting these comments and participating in this process, the comments of the Rincon Band of Luiseno Indians should neither be construed to bind the Band to any position that concedes state authority to any tax in any context nor should they be considered a complete inventory of all issues and concerns regarding BOE's position on taxation on Indian lands. Further, the comments shall not in any way be interpreted as acquiescence to or agreement with the revised Draft, nor in any way be interpreted as a waiver of the Tribe to contest any position the State may take regarding applicability of state or local taxes to Indian lands, Indian enterprises, or goods and services provided on Indian lands.

Rincon Band of Luiseno Indians

Bo Mazzetti
Tribal Chairman

Stephanie Spencer
Vice Chairwoman

Charlie Kolb
Council Member

Steve Stallings
Council Member

Kenneth Kolb
Council Member

BOE Initial Discussion Paper Reg. 1616
March 23, 2011
Page 1

tribal governments in the governance of tribal members or for the acquisition of trust land. The BOE staff believes taxation of these types of transactions might interfere with tribal sovereignty and further believes that the exemption would need to be limited to taxes imposed on property delivered to an officially recognized landless Indian tribe at a principal place where the landless tribe's government meets to conduct tribal business so that there is some way for retailers and the State Board of Equalization to verify exempt transactions by landless tribes. The BOE staff has formulated a "principal place" test that recognizes that landless tribes may not own any real estate where their tribal government can meet to conduct tribal business, and that may occasionally meet at more than one place during a given period.

The proposed Amendments to Regulation 1616(d) provides a limited exemption from sales and use tax for sales to and purchases by officially recognized landless Indian tribes of tangible personal property for use by their tribal governments in the governance of tribal members or for the acquisition of trust land. The proposed language of the Amendment provides,

(G) Officially Recognized Landless Indian Tribes. Sales tax does not apply to sales of tangible personal property to a landless Indian tribe that is officially recognized by either the United States or the State of California when the property is purchased for use by the tribal government in the governance of tribal members or for the acquisition of trust land, and the property is delivered to the tribe and ownership of the property transfers to the tribe at the principal place where the landless tribe's government meets to conduct tribal business. Use tax does not apply to the use of tangible personal property purchased by a landless Indian tribe from a retailer and delivered to the tribe at the principal place where the landless tribe's government meets to conduct tribal business unless, within the first 12 months following delivery, the property is used for purposes other than the landless tribe's governance of its tribal members or acquisition of trust land more than it is used for the landless tribe's governance of its tribal members or acquisition of trust land.

In general, the Band commends the Board for addressing this issue, however, we believe the proposed Amendment is unnecessarily narrow as to the limitation on uses of tax exempt purchases and class of purchasers. First, the Band does not believe a sufficient purpose, need or legal basis exists for the BOE to impose limitations on the use of exempt purchases by tribal governments, landless or not. What is the rationale for restricting exempt purchases to uses for the governance of tribal members or for the acquisition of trust land? Does the BOE analysis change if the property purchased by a landless tribal government is for recreational, business or commercial uses? Furthermore, what types of property or circumstances are covered by tribal government purchases for the acquisition of trust land and who gets to decide whether a nexus exists between the purchase and the acquisition of trust land?

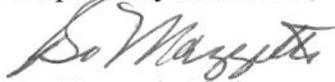
Second, the Band also believes the proposed Amendment should include an Indian Organization, as that term is defined in Regulation 1616(d)(2), of officially recognized tribes provided that the same delivery and title transfer requirements are satisfied in accordance with the proposed Amendment.

Finally, the BOE staff has acknowledged, in connection with draft Publication 146 – Sales to American Indians and Sales in Indian Country (“Publication 146”), that the 12-month use limitation lacks a statutory basis and was an exercise of Board discretion to impose a time limit on purchases. The Band understood that the Board agreed to add the 12-month test to the list of Board issues for regulatory amendments. Therefore, the continued application of the 12-month use limitation in the proposed Amendment should be deleted.

Our suggested revisions to the proposed Amendment are:

(G) Officially Recognized Landless Indian Tribes. Sales tax does not apply to sales of tangible personal property to a landless Indian tribe, or its Indian organization, that is officially recognized by either the United States or the State of California when the property is purchased for use by the tribal government in the governance of tribal members or for the acquisition of trust land, and the property is delivered to the tribe and ownership of the property transfers to the tribe at the principal place where the landless tribe’s government meets to conduct tribal business. Use tax does not apply to the use of tangible personal property purchased by a landless Indian tribe from a retailer and delivered to the tribe at the principal place where the landless tribe’s government meets to conduct tribal business unless, within the first 12 months following delivery, the property is used for purposes other than the landless tribe’s governance of its tribal members or acquisition of trust land more than it is used for the landless tribe’s governance of its tribal members or acquisition of trust land.

Respectfully Submitted,



Bo Mazzetti, Chairman
Rincon Band of Luiseno Indians



BIG SANDY RANCHERIA

March 29, 2011

Elizabeth D. Kipp
Chairperson

State Board of Equalization
Attn: Susanne Buehler
450 N. Street
P.O. Box 948279
Sacramento, California 94279-0092

Arrow Sample
Vice Chair

Lisa D. Garcia
Secretary

Re: Comments on the Board of Equalizations amendments to regulation 1616

Johnny Baty
Treasurer

Dear Ms. Buehler:

Amy Hutchins
Member-At-Large

Please accept this submission as comments made in response your February 23, 2011 invitation for comments on the Board of Equalization's ("BOE") proposed amendments to BOE Regulation 1616, Federal Areas. While Big Sandy Rancheria ("Big Sandy") applauds and welcomes the BOE's recognition that landless Indians are nonetheless sovereign, the current scope of Regulation 1616 does not accurately reflect the full limits of state jurisdiction over Indian lands and activity thereon. State jurisdiction over activities and goods that derive their value from Indian lands is extremely limited. These limits encompass much more than meals; they encompass any product or activity that derives its values from activity of Indians on Indian land. Big Sandy requests that Regulation 1616 be amended to accurately set forth the full limits of state jurisdiction over activity and products that derive their value from Indian activity conducted on Indian land.

BOE Regulation 1616(d)(3)(A)(2) provides, in part, that sales made from Indians to non-Indians are generally subject to California's use tax and the Indian retailers on the reservation are responsible for collecting this tax. Regulation 1616 exempts from this taxation "meals, food or beverages" sold by Indian retailers to non-Indians. However, an exemption limited only to "meals, food or beverages" does not accurately reflect the scope of federal law on limits of state jurisdiction to regulate reservation Indians in regard to their dealings with non-Indians on their reservation. Federal law provides a much broader exemption and it is not dependent upon the type of goods or

services provided. Instead, it is related to whether the goods or services are created by value added by the Indians on their reservation.

One of the most significant United State Supreme Court cases on this issue originated in California. In *California v. Cabazon Band Of Mission Indians*, 480 U.S. 202 (1987), the State of California was attempting to regulate under state law a bingo game being operated by the Indian tribe on its reservation in which non-Indians were playing. California claimed that it retained the inherent authority to regulate the interaction of tribes with non-Indians, even on the reservation.¹ The state argued that the tribe was doing nothing more than marketing an exemption from state law and that under prior U.S. Supreme Court precedent, it could regulate such activity. The *Cabazon* court quickly differentiated the case before it from the prior cases relied on by the state.² The tribe in *Cabazon* had not merely put a product manufactured somewhere on a shelf for re-sale. They had put in considerable time, effort and resources to create a well run business offering services to non-Indians. The Court found that the "[tribes] are generating value on the reservation through activities in which they have a substantial interest." *Cabazon*, 480 U.S. at 220. This "value added" on the reservation by the tribes ejected the state from jurisdiction to regulate such activity, even where it involved non-Indians. *Id* at 216 and 220; see also *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (holding that tribally owned and managed hunting and fishing resort on reservation was beyond state regulation). These cases stand for the proposition of federal law that where tribes create value on the reservation in a good or service offered to non-Indians on the reservation, state governments are prevented from regulating the relationship between the tribe and non-Indians in regard to that good or service.

The exemption contained in Regulation 1616(d)(3)(A)(2) simply does not accurately reflect controlling federal law on this issue. Limiting this exemption to merely food and beverages is in no way supported by federal law. This exemption is dependent upon whether the tribe has added value to the goods or activity on their reservation. The United States Department of Justice has recognized that were a tribe to manufacture cigarettes on its reservation, this activity would constitute "value added" on the reservation and the state would be without the power to regulate that activity, even where it involved non-Indians. See Letter from Mark C. Van Norman,

¹ California also claimed that Congress had given the state the power to regulate such activity through Public Law 280. This claim was utterly rejected by the Court. *Cabazon*, 480 U.S. at 207-08.

² *Moe v. Confederated Salish and Kootenai Tribe of the Flathead Reservation*, 425 U.S. 463 (1976) and *Washington v. Confederated Tribe of the Colville Indian Reservation*, 447 U.S. 134 (1980) were the cases that the state incorrectly applied in the *Cabazon* case.

Deputy Director, United States Dept. of Justice, to Barry S. Orlow (October 8, 1997) attached hereto as **Attachment 1**. Thus, it is clear that any "value added" activity falls under the rule announced in *Cabazon*.

The current Regulation 1616 simply does not accurately reflect the scope of federal exemptions on state regulation of "value added" reservation activity. As California has now amended Regulation 1616 to properly recognize the sovereignty of landless Indians, it should take this opportunity to properly recognize the scope of the "value added" exemption in this amendment process. Please contact me to discuss, or if you would like more information or analysis on this issue.

Sincerely,

A handwritten signature in cursive script, appearing to read "Elizabeth Callahan".



U. S. Department of Justice

Office of Tribal Justice

Washington, D.C. 20530

OCT 3 1987

Barry A. Crlow, Esq.
Office of Chief Counsel
U.S. Treasury Department
Bureau of Alcohol, Tobacco & Firearms
650 Massachusetts Ave., N.W.
Washington, DC 20226

Dear Mr. Crlow:

You have asked for our views concerning the application of state taxes to cigarette sales by the Omaha Indian Tribe, where the Tribe manufactures the cigarettes and sells them to both Indian and non-Indian consumers at retail outlets on its reservation.

In the special area of state taxation, the Supreme Court has a per se rule that absent congressional authorization, states may not tax Indian tribes or tribal members within tribal territory. County of Yakima v. Yakima Indian Nation, 502 U.S. 251, 258 (1992). The Supreme Court has explained the rationale for this rule:

The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes. As a corollary to this authority, and in recognition of the sovereignty retained by Indian tribes even after the formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory.

Montana v. Blackfeet Indian Tribe, 471 U.S. 759, 764 (1985). Thus, states may not tax cigarette sales to tribal members within tribal territory. Mog v. Salish & Kootenai, 428 U.S. 453 (1976).

On the other hand, the Supreme Court has held that Indian tribes may not "market an exemption" from state taxation to non-Indians. Thus, non-Indians who purchase prepackaged cigarettes from tribal retailers are ordinarily subject to non-discriminatory state cigarette taxes. Washington v. Colville, 447 U.S. 134, 135 (1980). The Court explained:

It is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have significant interests.

Id. The Supreme Court has affirmed this rule in a number of cases.

Barry Orlow, Esq.
Bureau of Alcohol, Tobacco & Firearms
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In contrast, based on the federal policies promoting tribal self-determination and economic self-sufficiency, where Indian tribes generate value on their reservations, the goods or services provided to non-Indians are generally exempt from state regulation or taxation. For example, in New Mexico v. Mescalero Apache Tribe, 462 U.S. 321 (1983), the Supreme Court held that the State could not regulate non-Indian hunters patronizing a tribal hunting and fishing enterprise within tribal territory. The Court explained:

The Tribe has engaged in a concerted and sustained undertaking to develop and manage the reservation's wildlife and land resources specifically for the benefit of its members. The project generates funds for essential tribal services and provides employment for members who reside on the reservation. This case is thus far removed from those situations, such as on-reservation sales outlets which market to non-members goods not manufactured by the tribe or its members, in which the tribal contribution to an enterprise is de minimis. The tribal enterprise in this case clearly involves "value generated on the reservations by activities involving the Tribe."

462 U.S. at 340. Accordingly, the State could not assess state license fees on the non-Indian hunters.

Similarly, in California v. Cabazon Band of Indians, 480 U.S. 202 (1987), the Supreme Court held that California had no authority to regulate Indian gaming because state regulation would interfere with tribal self-government. The Court explained:

[T]he Tribes are not merely importing a product onto the reservations for immediate resale to non-Indians. They have built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide. . . . [T]he Cabazon and Morongo Bands are generating value on reservation through activities in which they have a substantial interest.

480 U.S. at 219-220. Thus, because Indian gaming is a tribal activity that generates reservation value it was not subject to state law.

Applying these precedents to the situation of the Omaha Indian Tribe, where the Tribe manufactures cigarettes for resale to Indian and non-Indian consumers at retail outlets on its reservation, it

Barry Orlow, Esq.
Bureau of Alcohol, Tobacco & Firearms
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is fairly clear that the State may not tax or regulate the Tribe's cigarette business within tribal territory.

The Contraband Cigarette Trafficking Act, 18 U.S.C. §§ 2341 et seq., imposes record keeping requirements, on persons engaged in shipping, distribution or sale of cigarettes in excess of 50,000 per transaction. The Act also prohibits knowing transportation, possession, receipt, sale, or purchase of contraband cigarettes. The Act defines contraband cigarettes by reference to payment of "applicable" state taxes. 18 U.S.C. § 2341(2).

The Act has been held to apply to cigarette transactions by Indian transporters and retailers, where cigarettes are otherwise subject to state taxation. United States v. Baker, 61 F.3d 1476 (9th Cir. 1995). In passing the Act, however, the Conference Committee was clear that it did not intend to change the existing case law to extend state taxation authority in tribal territory. H.R. Conf. Rep. 95-1778, 95th Cong., 2nd Sess (1978); 1978 WL 8548 (Leg. Hist.). The Conference Committee Report explains:

Some concern was expressed in the course of the conference that the definition of "contraband cigarettes" inadvertently extinguished rights of certain Indians and Indian tribes under current law to engage in the commercial sale of cigarettes within Indian country free of state taxation. The phrase "applicable state cigarette taxes" makes it clear that this legislation is not intended to affect transportation or sale by Indians or Indian tribes acting in accordance with legally established rights. The Conference do not intend that this bill address the current exemption from state taxation of cigarette sales on Indian reservations and nothing in this bill is intended to affect this or any other immunity from state tax held by any Indian or Indian tribe.

1978 WL 8548 at 8. Clearly, the Act does not affect the right of the Omaha Indian Tribe to sell cigarettes which it manufactures on-reservation to non-Indians at retail outlets on-reservation. Thus, because sales of such cigarettes are based on reservation generated value they would not be subject to state taxation.¹

¹ In contrast, were the Tribe to sell its cigarettes outside the reservation, then absent a contrary treaty provision, the Act would apply because state taxation of the cigarettes would not be preempted in regard to transactions outside of the reservation. See Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450, 463-464 (1995).

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Harry Orlow, Esq.
Bureau of Alcohol, Tobacco & Firearms
Page 4

As you know, we have consulted with the Associate Solicitor for Indian Affairs in the Department of the Interior, and he is in agreement with our conclusion. If you have any further questions, we would be happy to discuss them with you.

Sincerely,



Mark C. Van Norman
Deputy Director