



STATE BOARD OF EQUALIZATION

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February 26, 2016

Dear Interested Party:

Enclosed is the Second Discussion Paper on Regulation 1616, *Federal Areas*. Before the issue is presented at the Board's May 24, 2016 Business Taxes Committee meeting, staff would like to invite you to discuss the issue and present any additional suggestions or comments. Accordingly, a second interested parties meeting is scheduled as follows:

March 9, 2016
Room 122 at 10:00 a.m.
450 N Street, Sacramento, CA

If you would like to participate by teleconference, call 1-888-808-6929 and enter access code 7495412. You are also welcome to submit your comments to me at the address or fax number in this letterhead or via email at Susanne.Buehler@boe.ca.gov by March 25, 2016. Copies of the materials you submit may be provided to other interested parties, therefore, ensure your comments do not contain confidential information. Please feel free to publish this information on your website or distribute it to others that may be interested in attending the meeting or presenting their comments.

If you are interested in other Business Taxes Committee topics refer to our webpage at (<http://www.boe.ca.gov/meetings/btcommittee.htm>) for copies of discussion or issue papers, minutes, a procedures manual, and calendars arranged according to subject matter and by month.

Thank you for your consideration. We look forward to your comments and suggestions. Should you have any questions, please feel free to contact our Business Taxes Committee staff member, Mr. Michael Patno at 1-916-323-9676, who will be leading the meeting.

Sincerely,

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

SB:map

Enclosures

cc: (all with enclosures, via email and/or hardcopy as requested)
Honorable Fiona Ma, CPA, Chairwoman, Second District
Honorable Diane L. Harkey, Vice Chair, Fourth District
Senator George Runner (Ret.), Member, First District
Honorable Jerome E. Horton, Member, Third District
Honorable Betty T. Yee, State Controller, c/o Ms. Yvette Stowers (MIC 73)
Mr. Jim Kuhl, Board Member's Office, Second District
Ms. Kathryn Asprey, Board Member's Office, Second District
Mr. John Vigna, Board Member's Office, Second District
Mr. Tim Morland, Board Member's Office, Second District
Mr. Russell Lowery, Board Member's Office, Fourth District
Mr. Ted Matthies, Board Member's Office, Fourth District
Ms. Lisa Renati, Board Member's Office, Fourth District
Mr. Clifford Oakes, Board Member's Office, Fourth District
Mr. Sean Wallentine, Board Member's Office, First District
Mr. Lee Williams, Board Member's Office, First District
Mr. Brian Wiggins, Board Member's Office, First District
Mr. Cary Huxsoll, Board Member's Office, First District
Mr. Alfred Buck, Board Member's Office, First District
Ms. Kari Hammond, Board Member's Office, Third District
Ms. Shellie Hughes, Board Member's Office, Third District
Ms. Camille Dixon, Board Member's Office, Third District
Mr. Ramon Salazar, State Controller's Office (MIC 73)
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Mr. Randy Ferris (MIC 83)
Mr. David Gau (MIC 101)
Ms. Lynn Bartolo (MIC 43)
Mr. Todd Gilman (MIC 70)
Mr. Wayne Mashihara (MIC 47)
Mr. Kevin Hanks (MIC 49)
Mr. Mark Durham (MIC 67)
Mr. Robert Tucker (MIC 82)
Mr. Jeff Vest (MIC 85)
Mr. Jeff Angeja (MIC 85)
Mr. David Levine (MIC 85)
Ms. Dana Brown (MIC 85)
Ms. Casey Tichy (MIC 85)
Ms. Linda Cheng (MIC 85)
Ms. Nikki Mozdyniewicz (MIC 85)
Mr. Rick Zellmer (MIC 85)
Mr. Bradley Heller (MIC 82)
Mr. Lawrence Mendel (MIC 82)
Mr. John Thiella (MIC 73)
Ms. Kirsten Stark (MIC 50)
Mr. Marc Alviso (MIC 101)
Mr. Chris Lee (MIC 101)
Ms. Lauren Simpson (MIC 70)
Ms. Karina Magana (MIC 47)

SECOND DISCUSSION PAPER

Regulation 1616, *Federal Areas*

Issue

Whether the Board should amend Regulation 1616, *Federal Areas*, to clarify the application of tax to meals, food, and beverages sold for consumption on an Indian reservation.

Staff Recommendation

Staff proposes revisions to Regulation 1616 as provided in Exhibit 1. Staff's proposed revisions:

- Clarify that sales and use tax does not apply to sales of meals, food, and beverages by a non-Indian operating an establishment in leased space on an Indian reservation when the sales are subject to the Indian tribe's sales tax and the meals, food, and beverages are for consumption on the reservation.
- Explain that tax will apply if the meals, food, and beverages are sold for consumption off the Indian reservation.
- Make clear that sales and use tax does not apply to on-reservation sales of meals, food, and beverages by Indian retailers for consumption on an Indian reservation.

Other Alternative(s) Considered

Submissions were received from several Indian tribes and from representatives on behalf of Indian tribes in response to staff's first discussion paper regarding proposed revisions to Regulation 1616 to address exempt sales of meals, food, and beverages by non-Indian's operating establishments in Indian casinos. The submissions were generally appreciative of staff's effort to address such sales in Regulation 1616, but some of the submissions raised issues (discussed below) regarding the scope of staff's proposed revisions with some providing alternative regulatory language, see exhibits 2 through 11.

Background

In *White Mountain Apache Tribe v. Bracker* (*Bracker*),¹ the United States Supreme Court explained that federally-recognized Indian tribes retain attributes of sovereignty over both their members and their territory, as a separate people, with the power of regulating their internal and social relations, and thus far are not brought under the laws of the United States or the states in which the tribes reside. The Court also held that:

- Federal law preempts a state's authority to tax an activity undertaken on a "reservation or by tribal members"² in circumstances where the tax unlawfully infringes on the right of federally-recognized Indian tribes "to make their own laws and be ruled by them"³; and

¹ *White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136.

² 448 U.S. at p. 143.

³ 448 U.S. p. 142 [quoting from *Williams v. Lee* (1959) 358 U.S. 217, 220].

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- “[T]here 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,”⁴ and state taxation is preempted when “a particularized inquiry into the nature of the state, federal, and tribal interests at stake” indicate that, in a “specific context, the exercise of state authority would violate federal law”⁵ because it unlawfully infringes on the right of federally-recognized Indian tribes “to make their own laws and be ruled by them.”⁶

Therefore, the Board must review the particular facts and circumstances applicable to the imposition of California’s sales and use taxes on activities conducted on Indian reservations⁷ to determine whether the state, federal, and tribal interests at stake require federal preemption of the taxes under a *Bracker* analysis.

In addition, on February 25, 1987, the United States Supreme Court decided that neither the State of California nor Riverside County could regulate the bingo and card game operations of the Cabazon Band of Mission Indians and the Morongo Band of Cahuilla Mission Indians.⁸ This Court ruling, known as the Cabazon decision, set in motion a series of federal and state actions, including two ballot measures, which dramatically expanded tribal casino operations in California as well as in other states.

The Cabazon decision relied heavily on principles of tribal sovereignty established in earlier cases, including *Bracker*. In its ruling, the United States Supreme Court rejected California’s attempts to regulate tribal gambling enterprises within reservations in the absence of congressional authorization. In response to the Cabazon decision, Congress passed the Indian Gaming Regulatory Act (IGRA) in 1988.⁹ The act provides a statutory structure for federal, state, and tribal regulation of tribal gambling operations by making specified types of gaming lawful on Indian lands only if the state in which the lands are located and the Indian tribe¹⁰ having jurisdiction over the Indian lands enter into a Tribal-State Compact governing gaming activities on the Indian lands of the Indian tribe with the approval of the Secretary of the Interior.¹¹ The act provides for a Tribal-State Gaming Compact to include provisions for “the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity” and “taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities.” The act authorizes Indian tribes to enter into management contracts for the operation and management of gaming activities with the approval of the Chairman of the National Indian Gaming Commission.¹² The act declares that its purpose is to advance three principal goals:

- Tribal economic development;
- Tribal self-sufficiency; and

⁴ 448 U.S. at p. 142.

⁵ *Id.* at p. 145.

⁶ *Id.* at p. 142.

⁷ In this context, “reservation” includes reservations, rancherias, and any land held by the United States in trust for any Indian tribe or individual Indian. (Reg. 1616, subd. (d).)

⁸ *California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202.

⁹ Codified in 25 U.S.C § 2701 et seq.

¹⁰ Defined in 25 U.S.C. § 2703.

¹¹ 25 U.S.C. § 2710(d).

¹² 25 U.S.C. § 2711.

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- Strong tribal governments.¹³

The California Gambling Control Commission's (CGCC's) website at www.cgcc.ca.gov indicates that the "State of California has signed and ratified Tribal-State Gaming Compacts with 72 Indian tribes" and "[t]here are currently 60 casinos operated by 58 Tribes" in California. The CGCC's website also contains links to California's current Tribal-State Gaming Compacts, which generally require tribes operating casinos to pay the state a portion of their gaming revenues and make specified payments to be shared with non-gaming or limited gaming tribes.

Further, federal law has generally provided for Indian tribes to enter into contracts, including leases, concerning restricted Indian lands with the approval of the Secretary of the Interior.¹⁴ However, the passage of the Helping Expedite and Advance Responsible Tribal Home Ownership Act (HEARTH Act) of 2012 amended the Indian Long-Term Leasing Act of 1955¹⁵ and created a voluntary alternative land leasing process for restricted Indian lands. Under the HEARTH Act, once their governing tribal leasing regulations have been submitted to, and approved by, the Secretary of the Interior, tribes are authorized to negotiate and enter into business leases of tribal lands without further approval by the Secretary, including lands where tribal gaming activities are conducted in accordance with a Tribal-State Gaming Compact.

The new leasing regulations that interpret and explain the HEARTH Act issued by the Bureau of Indian Affairs (BIA) state that:

Subject only to applicable Federal law, activities under a lease conducted on the leased premises are not subject to any fee, tax, assessment, levy, or other charge (e.g., business use, privilege, public utility, excise, gross revenue taxes) imposed by any State or political subdivision of a State. Activities may be subject to taxation by the Indian tribe with jurisdiction.¹⁶

However, the BIA's notice that the new leasing regulations were final specifically explains that the new preemption provision is based upon the BIA's findings, after performing a *Bracker* analysis.¹⁷ It explains that, as part of its *Bracker* analysis, the BIA found that "an additional State or local tax has a chilling effect on potential lessees as well as the tribe that as a result might refrain from exercising its own sovereign right to impose a tribal tax to support its infrastructure needs. Such dual taxation can make some projects less economically attractive, further discouraging development in Indian country." In addition, the BIA found that the "additional burden of State and local taxation on lease activities would significantly affect the marketability of Indian land for economic development" and generally undermines the federal Indian leasing law's "dual purposes of supporting tribal economic development and promoting tribal self-government."

As indicated by the Board's Chief Counsel, in an October 7, 2013, memorandum to the Board, the BIA has previously explained that this preemption provision does not preempt all state

¹³ 26 U.S.C. § 2702.

¹⁴ See, e.g., 25 U.S.C. §§ 81, 85, 415.

¹⁵ 25 U.S.C. § 415.

¹⁶ 25 C.F.R. § 162.017(b).

¹⁷ 77 Fed.Reg. 72440 (Dec. 5, 2012).

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taxation on leased Indian land, but expresses the BIA's view that when determining whether a state tax is preempted on leased Indian land, the federal and tribal interests to be weighed in a *Bracker* analysis are strong. Also, more recently, in *Seminole Tribe of Florida v. Stranburg* (*Stranburg*),¹⁸ the court of appeals explained that this preemption provision represents the BIA's conclusion regarding the ultimate application of *Bracker* and the court of appeals held that it would be inappropriate for the federal courts to defer to this provision without performing its own "particularized inquiry" under *Bracker*.¹⁹

Furthermore, in *Wagnon v. Prairie Band Potawatomi Nation* (*Wagnon*),²⁰ the United States Supreme Court recognized that states and Indian tribes sometimes have concurrent jurisdiction to impose taxes and the Court held that a state tax is not preempted merely because it decreases a tribe's revenue. Also, in *Wagnon*, Justice Ruth Bader Ginsburg expressed her view, which was joined in by Justice Anthony Kennedy, that "as a practical matter" the two taxes cannot generally coexist because a double-taxed venture operates at a disadvantage and that double-taxation is an appropriate factor to consider in determining whether a state tax is preempted under a *Bracker* analysis.²¹ In addition, in *Stranburg*, the court indicated that, while double-taxation is "insufficient to support preemption" alone, it may be a factor supporting preemption when there is "extensive and exclusive federal regulation of the activities at issue."²²

Regulation 1616

Revenue and Taxation Code section 6352 provides that California sales and use tax does not apply to transactions that the state is prohibited from taxing under federal or California law. Regulation 1616 was originally adopted in 1945 as a restatement of previous sales and use tax rulings regarding transactions that involved the U.S. military. In 1978, subdivision (d) was added to the regulation to prescribe the application of tax to the sale and use of tangible personal property on Indian reservations.

Based upon the Board's historic analyses of how federal law preempts California's sales and use tax, Regulation 1616, subdivision (d)(3), currently provides that tax applies to on-reservation sales by non-Indian retailers to non-Indians and Indians not residing on the reservation, but does not generally apply to on-reservation sales to Indians residing on the reservation. The subdivision further provides that sales tax does not apply to any on-reservation sales made by Indian retailers, whether to Indians who reside on the reservation, non-Indians, or Indians who do not reside on the reservation. However, an on-reservation Indian retailer is generally responsible for collecting the use tax from non-Indians and Indians not residing on the reservation unless the on-reservation retail sale is otherwise not subject to tax. Furthermore, Regulation 1616 provides 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. Therefore, under the current provisions of Regulation 1616, subdivision (d), California sales and use tax does not generally apply to an Indian retailer's sales of meals, food, or beverages from an eating or drinking establishment on a

¹⁸ *Seminole Tribe of Florida v. Stranburg* (11th Cir. 2015) 799 F.3d 1324.

¹⁹ *Id.* at p. 1338.

²⁰ *Wagnon v. Prairie Band of Potawatomi Nation* (2005) 546 U.S. 95, 114.

²¹ *Id.* at pp. 116-117.

²² *Stranburg, supra*, at p. 1340.

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reservation for consumption on the reservation. However, tax generally applies to such sales by non-Indian retailers, unless the sales are to Indians residing on the same reservation where the sales are made.

Recent Bracker Analysis of Sales by Non-Indian Lessees

California's Indian casinos compete with Indian and non-Indian casinos in other states for tribal gaming revenue, which is specifically intended, by the federal government, to aid in the economic development of California's Indian tribes, make the tribes self-sufficient, and enable them to have strong tribal governments, as provided in the IGRA. California's Indian casinos commonly offer similar food and beverages services to their customers as are offered by casinos operated in other states, as part of their integrated casino operations, to attract and retain customers, enhance their gaming revenue, and provide additional revenue from their casino operations. The revenues from these services satisfy their financial obligations to the state and other tribes under their Tribal-State Gaming Compacts and provide additional revenue for their tribal governments, as provided for under the IGRA. Some Indian tribes impose their own sales taxes on sales of meals, food, or beverages at their casinos which again satisfies their financial obligations under their Tribal-State Gaming Compacts and supplements income for their tribal governments. The food and beverage services are sometimes operated by non-Indian retailers who are leasing space, in accordance with federal law, including the HEARTH Act, in the casinos and are required to pay the tribal sales taxes with regard to their sales of meals, food, and beverages for consumption in the Indian casinos, as intended by the IGRA and the HEARTH Act.

The Board's Legal Department recently performed a *Bracker* analysis to determine whether federal law preempts the imposition of California sales and use taxes on sales of meals, food, and beverages by a non-Indian lessee operating within a casino. The Legal Department concluded that the federal and tribal interests in preempting California's sales and use taxes outweighed the state's interest in imposing such taxes when a Tribal casino, operated under a Tribal-State Gaming Compact entered into in accordance with the IGRA, leases an establishment, such as a restaurant or bar, to a non-Indian who makes sales of meals, food and beverages on site for consumption in the tribal casino, and the sales are subject to a tribal sales tax.

Discussion

Staff met with interested parties on January 13, 2016. Based upon the discussions that took place during the meeting and input from Indian tribes and their representatives afterwards, staff agrees that it would be more appropriate and efficient to broaden the scope of staff's proposed revisions.

Exemption Expanded from an Indian Casino to an Indian Reservation

As presented in the initial discussion paper as well as during the first interested parties meeting, staff proposed regulatory revisions explaining that sales by non-Indian lessees of meals, food, and beverages are exempt from tax if the sales are made from leased space in an Indian tribe's casino and the meals, food, and beverages are sold for consumption in the casino. Staff based their proposal on a *Bracker* analysis performed by our Legal Department, which involved an Indian casino and a non-Indian lessee operating under a HEARTH Act lease. While most responses from interested parties were appreciative of staff addressing the issue in Regulation

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1616, the general consensus was that federal preemption on reservations goes beyond the boundaries of casinos.

The language in staff's initial revisions, which indicated that the consumption of meals, food, and beverages had to be within a casino to be exempt from tax, was considered too limiting by interested parties. During the January meeting, attendees stated the criteria was too narrow and explained that other types of tribally operated non-gaming ventures existed. Interested parties explained that not all California tribes have a gaming compact and that the language referring to casinos would make them ineligible for the exemption. Interested parties also identified museums, outlets malls, and zip-lines as examples of on-reservation, non-gaming ventures that could potentially have onsite establishments that sell meals, food, or beverages for on-reservation consumption.

Staff evaluated these comments and agreed that, under a *Bracker* analysis, the facts that sales of meals, food, or beverages are made on a reservation and for consumption on the reservation where the sales take place are both factors supporting a finding of federal preemption of state tax on such sales. Staff also found that the facts that such sales are made from and for consumption in a casino operated under IGRA provides further support for federal preemption, but that the application if IGRA is not critical to federal preemption. Therefore, staff agreed to expand its initial proposed revisions to include on-reservation sales of meals, food, and beverages for consumption within an Indian reservation. However, additional language is included in staff's revised proposal to clarify that tax will apply if the meals, food, and beverages are sold for consumption off the reservation. Staff believes there are circumstances where patrons could purchase meals and drinks on-reservation, but for consumption off reservation. Accordingly, a retailer operating a restaurant with a "drive-thru" feature or a "to go" menu or from a mini-mart at a gas station must keep records showing that "to go" sales are properly segregated and taxed, if they choose to sell meals, food, and beverages for consumption off a reservation. Staff revised the proposed amendments to subdivision (d)(3)(B)3 of the regulation to reflect this change.

Exemption is for Sales of Meal, Food, and Beverages

Submissions were received from Forman & Associates,²³ the Pechanga Band of Luiseño Mission Indians, and the San Manuel Band of Mission Indians regarding staff's limiting the exemption to sales of meals, food, and beverages. They contend that this limitation does not comply with federal law. Forman & Associates and the San Manuel Band of Mission Indians assert that a *Bracker* analysis supports an exemption from the imposition of a sales and use tax on all transactions by non-Indian lessees of trust land on a reservation. They concluded that sales and use tax does not apply regardless of the nature of the items sold. The Pechanga Band of Luiseño Mission Indians believe that staff's *Bracker* analysis supports a finding that state tax is preempted as to all on-reservation sales of items for consumption on the reservation and language they submitted suggests substituting the word "items" for the phrase "meals, food, and beverages."

²³ Forman & Associates serves as the legal counsel to the Bear River Band of Rohnerville Rancheria, Cachil Dehe Band of Wintun Indians of the Colusa Indian Community, Cahuilla Band of Indians, Morongo Band of Mission Indians and Soboba Band of Luiseño Indians and were requested by the tribes to send in comments on their behalf. (See Exhibit 5)

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Staff is not aware of any federal law or precedent (including 25 C.F.R. § 162.017(b) as interpreted in *Stranburg, supra*) that preempts the application of state tax to a non-Indian's sale of an item to a non-Indian for consumption outside of an Indian reservation and staff does not agree that current federal law preempts the imposition of state tax on all on-reservation sales by non-Indian lessees. Staff does agree that state tax could potentially be preempted, under a *Bracker* analysis, with regard to non-Indians' on-reservation sales of "items" solely for consumption on the reservations where the sales take place. However, Board staff is not aware of any significant items, other than meals, food, and beverages, which are generally sold for immediate consumption on a reservation. So, staff believes it would create confusion to replace "meals, food, and beverages" with "items," rather than provide clarity to non-Indian retailers.

Board staff also considers its proposed revisions to be consistent with federal law as well as the regulation's current language clarifying the application of tax to sales of meals, food, and beverages by Indian retailers. Regulation 1616, subdivision (d)(3)(A) was amended in 2002 to its current version, based on proposed revisions from former Board Members Dean Andal and Johan Klehs that were unanimously approved by the Board. The amendments included the specific reference to the sales of meals, food, and beverages by Indian retailers. Their proposal noted that although the United States Supreme Court had determined that a state *may* impose on Indians the obligation to collect use tax from non-Indians and non-tribal purchasers without violating the U.S. constitution, it concluded that the state is *not required* to impose the use tax and tax collection obligation. The proposal received a great deal of support from a number of Indian tribes and their representatives. Also, at the time, supporters indicated that the reference to meals, food, and beverages was consistent with federal law.

Indian Tribal Tax Must be Enacted for Sales and Use Tax Exemption

Submissions were received from the Pechanga Band of Luiseño Mission Indians and the San Manuel Band of Mission Indians regarding an Indian tribe imposing their own sales and use tax on meals, food, and beverages. Both tribes contend that the requirement in staff's initial revisions that a tribal tax be imposed on a non-Indian retailer's sale to a non-Indian consumer in order for the sale to be eligible for the exemption is unwarranted, and they contend that state tax is preempted in all cases, even when the tribal government elects, for its own reasons and as an exercise of its self-government, not to impose a tax or impose a "0%" tax. Citing *Bracker*, they contend that the exemption from state tax should apply regardless of whether a tribal government imposes its own tax on a sale. They requested that the reference to a tribal tax be deleted from the proposed revisions.

However, the Board's Legal Department has concluded that it is necessary for a tribe to impose a tax on on-reservation transactions between non-Indian retailers and non-Indian consumers in order for the transactions to be preempted from state tax under a *Bracker* analysis. This is because when there is no tribal tax imposed, the imposition of a state tax does not result in double taxation and does not put the non-Indian retailers at a competitive disadvantage versus off-reservation retailers.²⁴ In addition, staff's proposed revisions recognize Indian tribes' sovereign authority to impose taxes on on-reservation sales and appropriately avoids creating a chilling effect on the exercise of that authority by eliminating the potential for double taxation

²⁴ Some submissions indicated that, in the current context, double taxation is an appropriate factor to consider in determining whether a state tax is preempted under a *Bracker* analysis.

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when Indian tribes do impose taxes on non-Indian retailers' on-reservation sales of meals, food, and beverages to non-Indians for consumption on the reservation. Therefore, staff maintains that a tax must be assessed by the tribe on sales between non-Indians for the proposed exemption to apply.

Types of Leases

Submissions were received from Forman & Associates and the Rincon Band of Luiseño Indians regarding the "lease" requirement in the proposed exemption. Forman & Associates suggested that the proposed exemption should apply equally to lessees operating under HEARTH Act leases and lessees operating under leases approved under a federal regulatory process other than the HEARTH Act regulations. The Rincon Band of Luiseño Indians read the proposed exemption as only applying to lessees operating under HEARTH Act leases. Therefore, they objected to staff's perceived preference for HEARTH Act leases, and recommend that the term "lease" in the proposed exemption include all tribal commercial contracts with non-Indians for the sale of meals, food, and beverages, including, but not limited to leases approved by a tribe pursuant to tribal leasing regulations adopted under the HEARTH Act, leases approved by the BIA pursuant to 25 Code of Federal Regulations part 162, and contracts and agreements authorized under 25 United States Code section 81 et seq. (contracts generally) and section 2701 et seq. (gaming contracts).

Staff considered putting a reference to the HEARTH Act in its initial proposed revisions. However, staff did not include a direct reference to the HEARTH Act in the regulatory revisions initially proposed because the HEARTH Act is relatively new, staff was aware that Indian tribes were authorized to enter into non-HEARTH Act leases, and the Legal Department is not aware of any difference between HEARTH Act leases and other types of federally authorized Indian leases that would have a significant effect on a *Bracker* analysis. Therefore, staff concurs with Forman & Associates' and the Rincon Band of Luiseño Indians' that the term "lease" in the proposed revisions should be interpreted broadly to include all written agreements authorized under federal law under which an Indian tribe grants a non-Indian the right to operate an establishment on the tribe's reservation, and the term "lease" should not be interpreted as being limited to HEARTH Act leases.

Sales by Indian Retailers

During the January 26, 2016 interested parties meeting, Mr. Craig Houghton of Baker Manock & Jensen indicated that the unnumbered paragraph at the end of subdivision (d)(3)(A) was inconsistent with staff's new proposed language. Mr. Houghton stated that the proposed wording for new subdivision (d)(3)(B)3 states that both sales and use tax do not apply to non-Indian retailers sales of meals, food, and beverages for consumption on an Indian reservation. However, when the unnumbered paragraph in subdivision (d)(3)(A) is read together with subdivision (d)(3)(A)2, the paragraph indicates that use tax applies to Indian retailers on-reservation sales of meals, food, and beverages for consumption on the reservation, but that the use tax is not required to be collected by Indian retailers.

Staff reviewed the unnumbered paragraph at the end of subdivision (d)(3)(A) and agreed that the existing language is inconsistent with staff's proposed revisions. In addition, staff performed a further *Bracker* analysis of sales by Indian retailers and concluded that federal law does preempt the imposition of use tax on an Indian retailer's on-reservation sales of meals, food, and

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beverages to non-Indians solely for consumption on the reservation where the sales are made. Staff is therefore proposing to reword the paragraph so that it refers to sales of meals, food, and beverages by an Indian retailer with the remainder of the paragraph mirroring the new language proposed for subdivision (d)(3)(B)3. In addition, to be consistent and make referencing the paragraph easier for readers, staff now proposes to make the paragraph a separate enumerated subdivision.

Summary

Staff proposes amendments to Regulation 1616 to clarify that tax does not apply to sales of meals, food, and beverages by a non-Indian operating an establishment, in leased space on an Indian reservation, when the sales are subject to the Indian tribe's sales tax and the meals, food, and beverages are furnished for consumption on the reservation. In addition, staff proposes amendments clarifying for on-reservation Indian retailers that sales and use taxes do not apply if they sell meals, food, and beverages for consumption on an Indian reservation. Staff welcomes any comments, suggestions, and input from interested parties on this issue. Staff also invites interested parties to participate in the March 9, 2016, interested parties meeting. The deadline for interested parties to provide written responses regarding this discussion paper is March 25, 2016.

Prepared by the Tax Policy Division, Sales and Use Tax Department
Current as of 02/25/2016.

Regulation 1616, Federal Areas.

[Reference: Sections 6017, 6021, and 6352, Revenue and Taxation Code.](#)

Public Law No. 817-76th Congress (Buck Act).

Vending machines, sales generally, see Regulation 1574.

~~Items dispensed for 10¢ or less, see Regulation 1574.~~

(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.

(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 ~~aan~~ an 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.

3. Sales and use tax does not apply to sales of meals, food, and beverages by an Indian retailer from an establishment, such as a restaurant or bar, on an Indian reservation when the meals, food, and beverages are furnished for consumption on the Indian reservation. ~~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.

3. Sales and use tax does not apply to sales of meals, food, and beverages by a non-Indian operating an establishment, such as a restaurant or bar, in leased space, on an Indian reservation when the sales are subject to the Indian tribe's sales tax and the meals, food, and beverages are furnished for consumption on the Indian reservation. However, tax will apply if the meals, food and beverages are sold for consumption off the Indian 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, *“Sales for 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 ~~ales~~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 the storage, use, or other consumption of tangible personal property by the tribal government of an Indian tribe that is officially recognized by the United States 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 intergovernmental 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.

¹ The 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 non-commissioned 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. Paragraphs 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 sale 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.

Second Discussion Paper
Submission from Agua Caliente Band of Cahuilla Indians
AGUA CALIENTE BAND OF CAHUILLA INDIANS

Exhibit 2
Page 1 of 2



LEGAL DEPARTMENT

January 29, 2016

Susanne Buehler, Chief
Tax Policy Division, Sales and Use Tax Department
450 N Street
Sacramento, CA 94279-0092
Susanne.Buehler@boe.ca.gov

Re: Amendment to Regulation 1616 – Clarification of Application of Tax to Meals, Food, and Beverages sold for Consumption in an Indian Casino by a Non-Indian Lessee.

Dear Ms. Buehler:

On behalf of the Tribal Council of the Agua Caliente Band of Cahuilla Indians (the “Tribe”), a federally recognized Indian tribe exercising sovereign authority over the lands of the Agua Caliente Indian Reservation, I am writing to express support for the State Board of Equalization (“Board”) efforts to clarify that state tax does not apply to sales of meals, food, and beverages by a non-Indian operating an establishment, in leased space in an Indian tribe’s casino, when the sales are subject to the Indian tribe’s sales tax and the meals, food, and beverages are furnished for consumption in the casino.

The Tribe believes that the Board’s analysis of relevant case law and 25 C.F.R § 162.017 aligns with the Tribe’s position on this matter. The Tribe also believes that § 162.017 authoritatively sets forth and demonstrates the significant federal interest at stake when there is an attempt to levy state taxes on a lease, lessee, or related lease activity on tribal lands. The regulations at § 162.017 are entitled to deference and must be considered when conducting the balancing analysis required under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). For this reason, the Tribe is encouraged by the Board’s approach to the proposed clarification of Regulation 1616 and believes that this type of analysis should be applied to the full array of lease issues contemplated in 25 C.F.R. § 162.017.

The Board’s approach to the proposed regulation is also consistent with recent decisions. Recently in *Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324 (11th Cir. 2015), the Eleventh Circuit invalidated a state tax on tribal lands and agreed with conducting a *Bracker* balancing analysis and giving deference to § 162.017. That case involved a federally recognized Indian tribe’s challenge to the lawfulness of a state tax assessed against the lessees of real property within the tribe’s reservation. In reaching its conclusion, the Eleventh Circuit held that “[t]he ability to lease property is a fundamental privilege of property ownership” and that taxing the “privilege” of leasing or renting real property “is taxing a privilege of ownership” and “a right in land,” and based on *Bracker* will likely result in the invalidation of a state tax.



Susanne Buehler, Chief
Tax Policy Division, Sales and Use Tax Department
January 29, 2016
Page 2

The Tribe supports clarification of Regulation 1616 and any additional effort that recognizes tribal sovereignty.

Sincerely,

John T. Plata
General Counsel
AGUA CALIENTE BAND OF CAHUILLA INDIANS

January 13, 2016

Joint Committee on State Taxation

Comment Letter on Taxation Policy – Regulation 1616

Thank you for the opportunity to comment on the “Initial Discussion Paper on Regulation 1616, Federal Areas”. The ability of tribal communities in California to establish secure, sustainable economies are directly impacted by the siphoning-off of governmental revenue that should be going toward the services that tribal communities currently provide. The county benefit from these services is direct and substantive, yet seldom acknowledged. For some tribal communities the per capita costs of tribal governmental services is an order of magnitude above adjacent off-Reservation expenditures. The diversion of the Reservation tax base has long undermined the ability of tribal communities to establish a vibrant private sector. The ability to fund economic development infrastructure from the subsequent collection of tax revenues is, unfortunately, still a long way from realization for Reservations.

The proposed amendment to Regulation 1616 is a strong and welcome step in the right direction. It will allow the private sector the capability of funding essential governmental services on the Reservations without the competitive disadvantage of double taxation. This also comports with the leasing regulations explaining the HEARTH Act, as noted in the discussion paper.

An equally important aspect of this recognition of the governmental need for taxation is the Sales tax for fixed facilities. While the new leasing regulations of the Bureau of Indian Affairs affirm the activities conducted on the premises are not subject to State taxation, they are not explicit in including the initial construction of fixed facilities on tribal lands. Therefore, the investment by non-tribal entities into the infrastructure of the Reservation is subject to State/local sales tax, even though these are fixed facilities which rely on the governmental services of the Reservation for their protection. This would be a logical component of the proposed amendment to Regulation 1616 and could be subject to the same parameters to ensure that tribal taxes meet or exceed the level of the State.

The Bracker Analysis discussion on page 4 of 5 refers to the sales, by non-Indians, in the tribal casino as preempted by a tribal sales tax. We believe the scope is inadequate and the preemption of tribal sales tax should be applied to consumption on tribal lands not solely a tribal casino. Ideally, a case could be made for all taxes generated on tribal lands being utilized for Reservation specific services. Sales tax, property tax, income tax and corporate taxes are the cornerstone of funding for governments throughout the nation. An expectation of equivalency for tribal communities should come as no surprise and is essential if tribal communities are to successfully establish diverse, sustainable economies.

We will be submitting more extensive comments by the January 29th, 2016 deadline.

Ralph Goff, Chairman
Campo Kumeyaay Nation

Cody Martinez, Chairman
Sycuan Band of the Kumeyaay Nation



JOINT COMMITTEE ON STATE TAXATION

California State Board of Equalization

January 29, 2016

Dear BOE:

Thank you for the opportunity to comment on the "Initial Discussion Paper of Regulation 1616, Federal Areas" and to expand on our initial comments submitted on January 13th, 2016. As noted in our January 13th comments, there are many areas of intrusion into tribal economies that have a direct, negative effect on the ability of tribal communities to establish a sustainable economic base that provides the direct resources to cover governmental operations that most communities take for granted.

It is important to understand the obstacles placed before tribes by current tax policy and how it hinders the access to revenue for basic governmental services, protecting the public, creating a dynamic private sector and attracting investment into the Indian nations of California. Currently, millions of dollars a year are collected from workers, businesses, transactions, leases and property on Indian Reservations. This is money that could be going to the Reservation infrastructure, services, education and government operations. For tribes with no gaming or marginal gaming operations the diversion of the tax base off the Reservation can destroy the viability of the businesses before it even gets started. For those with gaming, it is the single biggest obstacle to diversification and the establishment of a secure Reservation based economy beyond gaming.

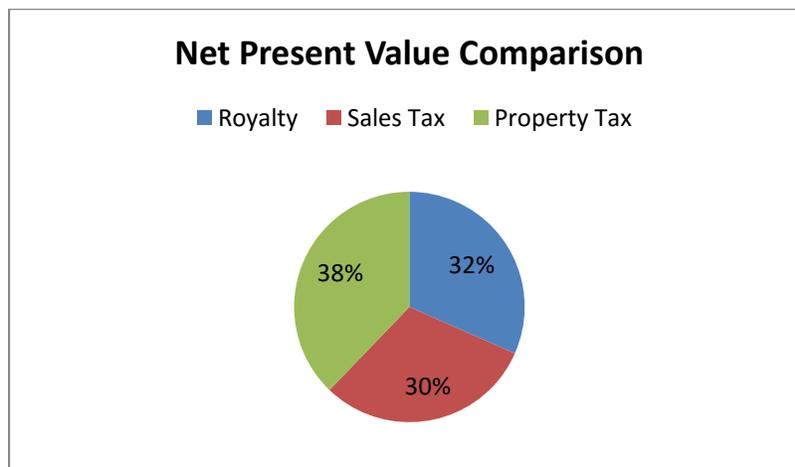
To get a better understanding of the nature of these topics consider the following data from San Diego County.

San Diego County Indian nations currently provide seven full time paid fire departments that provide a service beyond the Reservation boundaries. To provide an equivalent service, San Diego County would have to spend \$21,000,000 per year. Despite the fact that these services are being provided, the property taxes derived from Reservation based properties in excess of \$500,000 per year is assessed by the County without any provision for Reservation based taxes offsetting the County.

Millions of dollars annually are drawn from sales on Reservations. These are from facilities owned by non-Indians on the Reservations. Yet it is the Indian nation that provides the infrastructure for these

retail establishments. Indian nation public works, environmental protection, emergency services, planning, infrastructure all are made possible by the tribal community. While any other community in California would look to the tax revenue to offset the governmental expenditures, it can only be done by double taxation on the Reservation, thereby putting the tribal economy at a competitive disadvantage. These non-Indian establishments are further assessed for personal property and possessory interest for the value of their lease. Here again, without consideration for the tribal government services.

At times, major tribal developments are simply scrapped over the loss of this tax revenue. Consider the Shu'luuk Wind Project on the Campo Indian Reservation. The Campo Indian Reservation has a good to excellent quality of wind resources. It is readily accessible by Interstate 8 and has access into the major transmission lines crossing the region from Imperial County. A major investment of 350 million dollars from outside investors was proposed that would have directly benefited the residents of San Diego County with 160 Megawatts of clean, renewable energy. Due to the eligibility requirements for federal tax incentives, tribal government could not be an owner of the facility. But by turning to private sector ownership, the diversion of revenue from sales, possessory interest and personal property to the State and County reduced the benefit to the tribe to less than 1/3. In terms of net present value, the following chart shows the breakdown of benefit from the proposed Shuluuk Wind.



Since over 2/3 of the revenue stream would have been diverted to the County and State, while the Campo Band would still be providing almost all the governmental services, the project was voted down in a general vote. San Diego Gas & Electric has brought in out-of-County and Mexican sources to meet its' renewable energy mandate.

Currently, tribal economies are radically skewed toward tribal government ownership. The ability to attract private sector investment is undermined when charging for governmental services through taxation results in double taxation of the tribal economies. This is not unique to California. Just this month the President of the Navajo Nation addressed the Arizona legislature and called on lawmakers to stop the taxation of non-Indian businesses on the Navajo Nation which he characterized as killing the Navajo Nation economy. Other States are more enlightened. New Mexico returns sales taxes collected

on Reservation lands to the tribal governments. Utah allows Navajo Nation property taxes to offset county property tax.

The use tax collection methodology is also skewed against tribes. Businesses located on Reservations within California are expected to collect sales tax on purchases, but for sales that occur out-of-State, it is the responsibility of the individual to self-report. The fact that this self-reporting rarely occurs is evidenced by the massive retail establishments just across the neighboring state borders. So businesses on Reservations within California are treated as in-State for the purpose of collecting the sales tax, but the Reservation jurisdiction is considered out-of-State when it comes to dividing the tax revenue with local governments.

Some Indian Nations have successfully negotiated specific accords regarding cigarettes taxes, where equivalent tribal taxes ensure that the playing field is equal, while allowing the Indian Nation to realize the benefit of the governmental revenue.

An evaluation of tax policy and public benefit in San Diego County was conducted in 2015 which encapsulates some of the range of these community impacts and some of the dramatic inequities which impact tribal economies.

California Indian Reservations are as integrated into the California economy as any city or county. More so than Military Reservations which are often prized as the economic backbone in many regions. Taxes going to tribal governments are not a loss to local governments when looked at from the big picture of benefits to residents and visitors to the State. Tribes also provide a wide range of social services to the public including gyms, playgrounds, after school programs, organized athletics, health clinics and access to federal commodity programs. In many of the rural areas of the State, the Indian facilities are the only service.

Thanks again for the opportunity to weigh-in on this important matter.

Ralph Goff, Chairman
Campo Kumeyaay Nation

Cody Martinez, Chairman
Sycuan Band of the Kumeyaay Nation

Attachment: ***Quantification of the Public Benefit of Indian Economies in San Diego County, California, June 2015***

Quantification of the Public Benefit of Indian Economies in San Diego County, California

June 1, 2015

Created for:
The Sycuan Band of the Kumeyaay Nation



Prepared by:

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Acknowledgements

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San Diego County Assessor's Office

and

The staff and Council of the Sycuan Band of the Kumeyaay Nation

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1. Executive Summary

The establishment of a viable, adaptable, long-term economy is the goal of any responsible government. For Indian Nations in California, these goals have been undermined by overt and covert actions of neighboring governments. At times, these actions have been clearly intended to target Indian Reservations. Other times, misperceptions of tribal economies have been intertwined with stereotyped beliefs to justify policies that rise to the level of being punitive.

Attracting private sector capital investment in an economy can bring many layers of benefits. These range from the direct benefits of jobs and profit to the benefits of turnover in the local economy through suppliers and other commerce. Tax revenue to the local government is a given in any comprehensive evaluation of the economy. How taxes are assessed, acquired, allocated, waived defines the character of a community.

This paper gives a brief overview of the historical context of economic challenges to Indian Nations, current studies, taxation policy and spillover benefits to the off-Reservation communities. The use of government revenues to fund services on-Reservation is compared with off-Reservation methodologies. Per household comparisons of funding for government services are also compared.

State officials often invoke their respect for tribal sovereignty and a government-to-government policy in dealing with Indian Nations. The following empirical data show many areas of opportunity to demonstrate that respect by their actions.

2. Introduction

San Diego County is host to more Indian Reservations than any other county in the United States. They are represented by 17 distinct governments which exercise primary land use planning authority for over 5% of the land base in the County. San Diego County, itself, is a large economy. The operating budget for this County of 3 million people is larger than 12 States¹. Over the last 15 years several studies and analyses have been conducted which attempted to quantify the costs and benefits of Indian gaming to the local and State economies. These studies have focused primarily on flow of money by characterizing the casinos and/or tribes as businesses operating within the County and State. Indian Nations are more than businesses operating within the State, however, as political jurisdictions within the County, Indian nations have many of the same governmental obligations as the surrounding County. Further, the impacts of current State taxation policy, water law and access to infrastructure directly undermine the ability of tribal governments to meet these obligations. The long-term opportunity costs to Indian Nations, by these policies over the last 165 years, are a continuing issue that has never been truly quantified.

Historical Setting

In 1850, California became a State of the United States. The first Sheriff of San Diego County, Agostin Herazsthy, began to illegally² collect taxes from the Indian people in the County. By 1851, these actions had precipitated a rebellion of Indian people under the leadership of the Cupa leader Antonio Garra. The “Garra Uprising” was suppressed by military action and ultimately resulted in the execution of Garra. Herazsthy’s action was the first of a

¹ National Association of State Budget Officers

² This collection was later determined to be illegal by the Grand Jury.

recurring pattern of intrusions by the U.S. and subordinate governments into the economic sovereignty of Indian nations in the area now referred to as California.

The Treaty of Guadalupe Hidalgo ended the U.S.-Mexican War in 1848. The majority of the California Indian population had retained their identity through the Spanish and Mexican periods and sought to continue their distinct existence under assertion of the American political system and law. From 1851 to 1852, the United States negotiated 17 treaties with the Indian Nations, which established their reserved political identity over approximately 7 million acres within California. However, due to the political climate of pre-Civil War Washington, lobbyists from the State were successful in getting the Senate to kill ratification in Committee. This fact was hidden from the Indian Nations while State sanctioned militias set out to exterminate the native communities in widespread programs. By 1870 the killings dropped off, in no small part due to the fact that the non-Native society desired the surviving population of Indians for a source of labor and most of the desired lands had been cleared of native people. Starting in 1870, scattered small Reservations were created under Presidential Executive Orders ultimately resulting in over 100 Reservations in California.

Although geographically much smaller than the original treaty reservations negotiated with the United States, these reservations retained the authority and legal identity of the larger reservations of other States. A key component of this identity is the concept of tribal sovereignty. Tribal sovereignty recognizes Indian Nations have a relationship with the federal government that is separate and apart from the State-federal relationship, as defined in the Constitution. This relationship has had many sad chapters in the past, with federally sanctioned acts of forced religious conversion, children removed to government boarding schools, cultural destruction and fostering government dependency. However, this relationship has also served as a principle part of self-determination and self-sufficiency. These territories represent a multi-generational investment of Indian peoples into their continued existence within the framework of the U.S. Constitution.

Throughout these periods individuals and communities have worked to establish economic and political self-sufficiency. Most of these efforts ultimately failed in light of the inability of the Indian communities to control their political jurisdiction to the level that most American communities take for granted. Government sponsored programs sought to “guide” Indian nations to agriculture or ranching, often without consideration for the viability of the land for such purposes. Indian labor was used widely in the more successful off-Reservation agriculture and ranching, as well as supplying labor for many urban and domestic industries. Boarding schools and church sponsored industrial schools sought to train and educate Indian people to give up their Indian identity to facilitate assimilation into the dominant society. As the California infrastructure was developed in the 20th century little regard was afforded the Reservations. Highways were seldom routed near Reservation lands, water transport systems were constructed and resources allocated with no consideration for the future Reservation needs, the same for the development of the regional energy grid. The ability of Indian nations to address these issues was constrained by the dependence on the U.S. Bureau of Indian Affairs which, in it’s role as representing the federal trust responsibility to Indian nations, was expected to look out for the Indian interests.

In 1975, the Indian Self-Determination Act was passed, allowing Reservation governments to assume the federal responsibilities for administering programs on the Reservations. Indian people began to take a more direct role in seeking equity in public works projects. As Reservations began to assume a more direct role in determining their self-interest, gaming was one of the successes found by some of the communities as a path to economic independence. Almost immediately, however, as the tribes began to utilize the powers of governmental self-

sufficiency, the courts began to encroach on the power of the tribes to control their economic identity. Sales tax, property tax, gasoline tax, income tax and severance tax, all received support by the courts for State assessments on the commerce on Reservation lands. This evolution of State encroachment into the tribal economies is critical to the understanding of contemporary Reservation economics.

3. Previous Studies

Previous studies have focused on the benefits of tribal government gaming as a business within the State of California. However, this is not what gaming is. Gaming is a business operating within some of the sovereign Indian Nations which are themselves within the State of California.

Study 1 – Update on Impacts of Tribal Economic Development Projects in San Diego County, April 2003, San Diego County

This study prepared by County staff acknowledged a wide variety of governmental services provided by tribal governments to their jurisdiction. The benefit to the non-tribal members from these services and the offsets to County service provision were not quantified.

The off-Reservation impacts primarily mentioned law enforcement, fee-to-trust applications and road impacts. There is extensive discussion of traffic impacts on existing roads and the quantification of a “fair share” contribution for the tribes. No efforts are made to balance benefits to the County from tribal services in the equation.

Biological resources are mentioned from the perspective that Native governments were not included in the Multiple Species Conservation Planning (MSCP) and general County planning process involving endangered species. Impacts to Reservations are dismissed ostensibly because the County states that the MSCP and County planning does not cover tribal lands. However, there is discussion in context of tribes pursuing land in fee-to-trust applications. There is no discussion of the impacts to tribal development from having habitats situated adjacent to lands on the Reservation.

This analysis was clearly intended to support County efforts at maximizing their position in negotiations with gaming tribes for compensation related to off-Reservation impacts.

Study 2- Center for California Native Nations, An Impact Analysis of Tribal Government Gaming in California, University of California, Riverside, January, 2006

This was a statewide study that quantified the impacts of gaming to Reservation and nearby populations over a wide variety of economic indicators. The impact analysis was a straightforward empirical collection of data regarding effects on income, income distribution, employment, education, public assistance and other topics. By analyzing census tract data from 1990 and 2000 the study was readily able to demonstrate the positive effects on poverty, employment and education.

Study 3- Economic Impact Study, Measuring the Economic Impact of Indian Gaming on California, Beacon Economics, 2012

Beacon Economics published their study in 2012 covering a much broader range of benefits to the State from a wide range of effects not included in previous studies. These include an

analysis of the multiplier effect, secondary spending and employment by tribal governments, employment, crime, state and local tax revenue, governmental service benefits and revenue sharing. The linkages between tribal government gaming operations and local economies are diverse and extensive. The benefits for state and local economies are clearly portrayed.

While this study incorporated far more of the economic considerations than previous studies, the difficulty in generalizing over a statewide area prevented quantifying many of the local effects on a county by county basis.

4. Taxation

As sovereign nations, Tribal governments provide many of the same services we find in most any political jurisdiction. These services do not end with tribal members, but continue to the residents, transients and employees within the jurisdiction. Additionally, persons living near the reservation may also utilize services or facilities provided directly by the tribal government or a consortium of tribal governments.

This report initiates a quantification of the value of the governmental services provided by tribal governments in San Diego County. This will be done on the basis of the replacement costs of commensurate services if provided by the State or local governments. While it includes fire protection, education, health care facilities, environmental protection and other direct services, only the fire protection will be examined in detail.

The current taxation policy at both the State and federal level create disparities in opportunities for tribes to develop diverse economic bases. In particular, the range of governmental services and incentives provided by the State tax base compared with the taxes originating on tribal lands are grossly misaligned. There is also an analysis of the hidden tax of tribal governmental services paid for out of tribal cash flow with a quantification and comparison.

The purpose of taxation

Adam Smith is generally considered the father of modern economic thought in the English speaking world. In "The Wealth of Nations" (1776) he established the maxims of taxation as involving equity, certainty, convenience and efficiency. Of course, the world of Adam Smith was considerably different than the modern social order, yet it's important to understand the underpinnings of our modern tax structure.

Monies collected by the government are, first and foremost, used to provide governmental services such as national defense, public order, public works and providing the framework for commerce. Many other applications of tax law are used to meet more social purposes such as stabilizing the economy, redistributing wealth, encouraging and discouraging particular behaviors. Tax policy can be used more directly in the arena of economic development to encourage the growth of certain sectors of production. In the 20th century, the range of governmental services has grown with expansion into health care, education, unemployment benefits and social security.

Drawing the line for what is deemed "government responsibilities" is the great debate of the day as political parties line up on different sides debating whether, and to what extent, these responsibilities exist.

Creating Self-sustaining Economies on Indian Reservations

Through the control of the tax base the State or local governments can create beneficial economic conditions in zones they deem appropriate. In most cases this involves lowering the direct revenue to the governments in return for the benefits of indirect expansion of the tax base and the creation of jobs. The reason that this is so essential to any government is that control of the tax base gives the State and local governments the ability to respond to changing conditions, fund governmental services, provide incentives to commerce and enhance opportunities to the community. The benefit of this type of control is readily apparent in many areas of the State where special zones have resulted in an expansion of the opportunities to the population and, ultimately, greater revenues. These revenues then go to fund the services on which the communities depend.

One type of political jurisdiction in California does not benefit from commensurate powers; these are the California Indian Nations. Even though they fulfill the role of County and even State government in many ways to the people living or working in their jurisdiction, State and County taxation on the private sector runs virtually unfettered in California Indian country.

California is home to over 100 federally recognized Indian Nations, the largest in the lower 48 states. Historically, when compared nationally, California Native Nations have received the least of federal assistance, even when adjusted to per capita standards. In addition, California has been subjected to radical efforts to terminate or undermine sovereignty through laws like Public Law 280³ and the Rancheria Act of 1958⁴.

One bright spot for many Indian Nations has been the ability to take advantage of gaming. In fact, a handful of tribes have benefitted to the level that they have been able to transform their economies. Sadly, however, this is not the case for the vast majority of the Indian Nations. Further, even tribes that have successful gaming have, in many cases, not been able to create a self-sustaining economy within their geographical land base that is not directly tied to the economic health of their casino.

As sovereign nations within a nation, Indian Nations are captive to the economic policies of the United States. Monetary and fiscal policies are set by the United States and Indian nations must necessarily adjust to conditions over which they have little control.

The benefit of gaming may ultimately prove to be unsustainable. In California, the monopoly on slot machines is regularly challenged by potential competitors in the off-Reservation communities. Internet gaming, and multi-player alternatives to slot machines are targeting younger crowds and may eventually squeeze out slot machines in the 21st century. Even tribes with highly profitable gaming operations are recognizing the importance of diversification in their economic base.

The relatively high profit margin on gaming can be a two-edged sword. First, the profit margin allows Indian gaming to exist in areas that would probably fold if subject to direct competition from population centers. Second, it masks the importance of control of the tax base for most economic enterprises. In many gaming negotiations, the issues of taxation on future tribal enterprises on tribal land are not even considered. This is also often true for land being taken into trust through the fee-to-trust process. The result is that when Indian nations do accrue monies for investment it does not usually find its way back into the Reservation economy or into investments on other Reservations (with the occasional exception of gaming). Assessments of off-Reservation impacts in State gaming compacts almost never incorporate the on-Reservation impacts of State and County tax base intrusion to the Reservation economy.

³ Public Law 83-280

⁴ California Rancheria Termination Act of 1958, Public Law 85-671

For California tribes, these are pressing obstacles to developing self-sustaining economies. In this report, the role of taxation in undermining the ability of Indian Nations to create a competitive advantage on Indian lands is explored.

Indian Nations as Political States

“An unlimited power to tax involves, necessarily, a power to destroy,” 17 U.S. 327 (1819) Daniel Webster, *McCulloch v. Maryland*.

“That the power of taxing it by the States may be exercised so as to destroy it, is too obvious to be denied”, and “That the power to tax involves the power to destroy...[is] not to be denied”, Chief Justice John Marshall, 1819, *McCulloch v. Maryland*.

In writing his opinion, Chief Justice Marshall elaborated that “a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and preserve”. Chief Justice Marshall’s Court is most widely known to scholars of Indian law for the three cases known as the “Marshall Trilogy”⁵ that established the relationship of Indian nations to the United States as domestic, dependent, sovereign nations. The underlying premise has been that the Congress has plenary power over the Indian nations. The result of this assumption of plenary power has been the direct intrusion of federal and, indirectly, state statutes into taxation, civil and criminal jurisdiction, hunting and fishing, water rights and religion.⁶

Conversely, the Marshall Trilogy also provided some protection from direct intrusion from States in *Worcester v. Georgia*, 31 U.S. (6Pet.) 515 (1832):

“The Cherokee nation... is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the consent of the Cherokees themselves or in conformity with treaties and with the acts of Congress.” Chief Justice John Marshall

Over the intervening decades federal Indian law has evolved around the earlier established principles of State-Indian nation separation and the plenary power of Congress. The modern principles governing State intrusion into the tribal tax base started with *Williams v. Lee*, 358 U.S. 217 (1959) which held that state laws cannot interfere with the right of a Tribe to make its own laws and be governed by them but allowed intrusion in some cases.⁷

History of Major Tax Legislation

From the creation of most of the Reservations in California (c. 1870-1910), Indian commerce was dominated by federally administered programs under the Bureau of Indian Affairs and its predecessors. BIA representatives made purchases through the federal procurement process

⁵ Marshall Cases: *Johnson v. M'Intosh* (1823), *Cherokee Nation v. Georgia* (1831), *Worcester v. Georgia* (1832).

⁶ The determination of the Marshall Court that Congress has plenary power over Indian nations has been challenged by many researchers, of recent note is Mark Savage, “Native Americans and the Constitution: The Original Understanding,” *American Indian Law Review*, 1991, Vol. 16, No. 1, p. 57, “The Great Secret About Federal Indian Law—Two Hundred Years in Violation of the Constitution—And the Opinion the Supreme Court Should have Written to Reveal it.” *N.Y.U. Review of Law and Social Change*, 1993, Vol. 20, No. 2, p.343, and Steve Newcomb, “Pagans in the Promised Land”, 2008.

⁷ It should be noted that a major law granting criminal and some civil jurisdiction to certain States (including California) was Public Law 83-280. The Supreme Court held that this law did not give authority for the State to tax the on-reservation activities of tribes or tribal members. *Bryan v. Itasca County*, 426 U.S. 373 (1976), and *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

on behalf of the programs administered on the Indian lands⁸. Individual entrepreneurs worked primarily in traditional crafts and marketed their wares in public gatherings or through retail middlemen. Since most exchanges occurred on the Reservations and involved such small amounts, State sales tax collection on sales to non-Indians was ignored. Large scale commercial operations were mainly managed by the BIA through contracts or leases. Monies collected were then allocated to individuals through the Indian monies accounts. The greatest source of revenue to Indian people in San Diego County, until the 1950s, was by supplying labor to the off-Reservation community. As such, Indian laborers were subject to the taxes assessed on all employees in the off-Reservation economy.

Williams v. Lee, 358 US 217 (1959) – In this case the sovereignty of Worcester v. Georgia (1832) was determined by the Supreme Court as having been altered over the years making the intrusion of States into the Reservations something that is no longer totally barred. There was also a reaffirmation that Indian nations have the right to make their own laws and be governed by them.

This case therefore established one of two principle considerations regarding State jurisdiction on Indian lands; the prohibition of state law that interferes with the rights of self-government. This came to be known as the infringement bar to State regulatory authority on Indian lands.

So, in 1959, the Supreme Court, simply based on the passage of time, opened the door to a broad level of encroachment by the States with no clear cut boundaries or definitions of what, or how, this was to occur in a fair, equitable manner or what was considered an interference with the rights of self-government.

Preemption was the second test for asserting State power on Indian lands.

Understandably, additional cases came before the court seeking clarification of the infringement and preemption language. Some significant cases were:

Infringement Cases

1973 McClanahan v. State Tax Commission of Arizona

1976 Bryan v Itasca County

1980 White Mountain Apache Tribe v. Bracker

1980 Washington v. Confederated Tribes of Colville Indian Reservation

1985 Montana v. Blackfoot Tribe

1987 California v. Cabazon Band of Mission Indians

Federal Preemption Cases

1965 Warren Trading Post Co. v. Arizona State Tax Commission

1983 New Mexico v. Mescalero Apache Tribe

1989 Cotton Petroleum v. New Mexico

1989 Hoopa Valley Tribe v. Nevins

1995 Oklahoma Tax Commission v. Chickasaw Nation

For a summary of each of these cases see Appendix D

⁸ These programs were primarily agricultural

5. California Taxation and Indian Nations

Sales and Use Taxes

California's sales tax system is allocated based on the specific city or county where the sale took place (or a situs-based system). For individual Indians, the sales tax is not applied if the person accepts delivery on the Reservation or if the sale is to a tribal member on their Reservation. But for most other sales that occur on-Reservation, the State asserts a sales tax⁹.

Local governments utilize their control of sales tax to provide incentives for businesses to locate or expand into their communities. These can take the form of tax rebates or tax sharing agreements. These types of incentives became so lucrative for local communities that an active program of luring auto dealers and big-box retailers from other communities resulted in legislation in 1999 and 2003 to restrict the practice.¹⁰ Even with these restrictions in place, there is still significant potential for creating comparative advantage for retailers by luring sales offices or encouraging the creation of a buying company in the jurisdiction offering the greatest incentive. In recent years, California has sought to promote renewable energy manufacturing by exempting the industry from sales tax for equipment purchased for use in the State. Other exemptions have sought to encourage research and development in targeted industries.¹¹

The California Statewide Sales and Use Tax is 7.25 percent and is collected by the California Board of Equalization. The base rate is composed of a state portion and a local portion for cities and counties. The local portion is 1 percent of the tax (or about 12% of the total revenue). San Diego County's rate is 8.0 percent.

If a non-Indian government is purchasing from a registered retailer or seller who must pay a use tax, the non-Indian government can issue a Use Tax Direct Payment Permit that will allow the use tax to be routed directly to the jurisdiction in which the first functional use of the tangible personal property occurs, rather than being allocated by the countywide process. This mechanism is not available to tribal governments. In fact, a non-Indian company doing business on the Indian Reservation must pay use tax on a vehicle lease to the local non-Indian jurisdiction, the routing of the tax is only to the local County and does not recognize Indian governments.

Of the 7.25 percent Statewide base sales tax, 3.9375 percent goes directly to the State's General Fund, 0.25 percent goes to pay off State Economic Recovery Bonds, and 3.0625 goes to County and City general funds or non-discretionary programs. None of this funding goes to Indian nation governments.¹² Most importantly, retail activities are one of the great arenas for entrepreneurs. Tribally based retail sales offer little competitive advantage for the Indian people as hosts.

Capital intensive projects often require the combination of many investors. Only a few Indian governments have the resources for a large scale investment. Often, lucrative projects may rely on incentives in the form of tax credits and accelerated depreciation. Normal treatment of sales tax is based on the ultimate use of the product. However, even if the use of a product is

⁹ Food purchased and consumed on site is not subject to State assertions.

¹⁰ Chapter 462, Statutes of 1999 (AB178 Torlakson), Chapter 781, Statutes of 2003 (SB114 Torlakson)

¹¹ The skewing of land use planning preferences to garner lucrative sales tax generation can have a detrimental effect on the housing sector as governments steer away from developments which bring higher costs for governmental services and less discretionary revenue.

¹² Occasionally, the State may award a grant to a Native government from non-discretionary funds for a State program that benefits the general community.

completely on an Indian Reservation, the sales tax is assessed by the State if the ownership is non-Indian¹³.

Case Studies

Consider the following two projects on Indian Reservations in San Diego County. One is a capital intensive investment, the other a large scale retail operation.

Campo Kumeyaay Wind

A common strategy for communities to establish an economic base is through the attraction of capital intensive projects. These large scale investments can provide long-term dividends through stable commitments to the local economy. They can also provide a substantial short term stimulus to the local economy. The Kumeyaay Wind project involved approximately 75 million dollars of investment brought into the Campo Indian Reservation to develop a 50 megawatt wind energy facility. If 2/3 of the cost of the development was subject to sales tax, that represents a diversion of \$4,000,000 from the Campo Indian Reservation. Of that, San Diego County benefits from a local government share of \$1,906,250. None of this revenue was shared with the Campo tribal government.

Viejas Outlet Center

There are many businesses operating at the Viejas outlet center which rely on the Reservation to provide governmental services such as emergency response, environmental health protection and essential infrastructure to ensure the viability of their businesses. Since the possessory interest¹⁴ tax is calculated from the net sales we can estimate the sales by using a 30% mark up on net sales to derive a gross sales value. Applying the County 8% sales tax yields the following estimate:

Table 1 Tax Yield from Viejas Outlet Center

2013	2012	2011	2010	2009
\$1,595,322	\$1,293,113	\$1,363,059	\$1,401,608	\$1,540,908

Table 2 The local share of the split on the sales tax¹⁵:

2013	2012	2011	2010	2009
\$749,801	\$607,763	\$640,638	\$658,756	\$724,226

So, while the State treats sales on Reservations as in-State for purposes of determining the assessment of a sales tax. The political jurisdiction that is creating the business conditions that allow the wealth creation (Viejas) is treated as a non-State jurisdiction for purposes of dividing the tax yield. Were the outlet center to be located across State lines, there would be no attempt to collect sales or use tax from individual purchasers of such merchandise. At the least, Viejas deserves the local share of the sales tax. At the most, Viejas deserves the entire tax yield. Viejas currently gets neither.

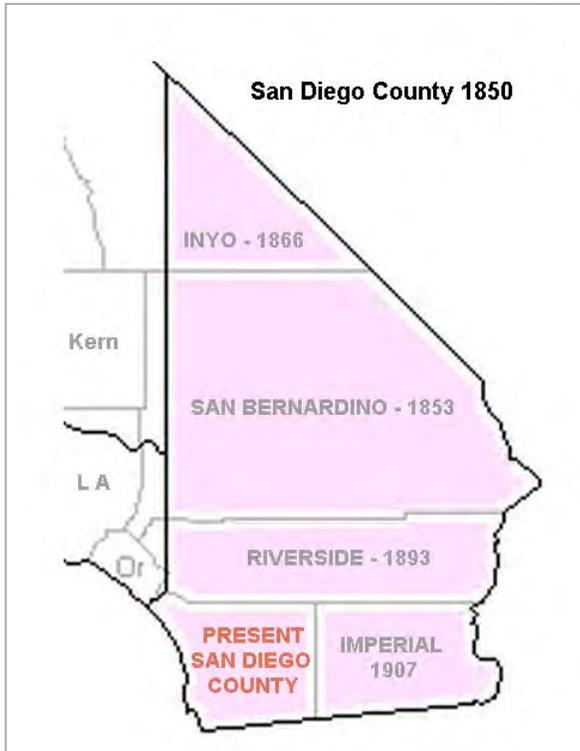
¹³ Non-Indian in this case means "not from the Reservation in question".

¹⁴ See Possessory Interest section.

¹⁵ Based on 3.8125% of the County 8.0% sales tax rate.

Taxation in valuation of jurisdictional lands & fee-to-trust

Fee-to-trust is the primary path for Reservations seeking to consolidate lands in their historical territories. It is not a transfer of wealth¹⁶, rather a transfer of jurisdictional authority. San Diego County is no stranger to jurisdictional transfer. Most of the original County has been



transferred through the creation of Inyo, San Bernardino, Riverside and Imperial Counties. With that transfer went the governmental responsibilities for the citizens and businesses operating within the new counties. Cities, also, assume responsibilities from Counties when they decide to incorporate. Eighteen cities have followed that path in San Diego County, yet when Indian nations seek to utilize the fee-to-trust process they encounter significant obstacles which invariably come down to substantial payments being demanded by the County to withdraw County objections to the transfer.

In the Treaty of Santa Ysabel (January 7, 1852) and the Treaty of Temecula (January 5, 1852), representatives from the Kumeyaay, Cahuilla, Cupa and Luiseno nations convened in the Kumeyaay and Luiseno territories to sign treaties of peace and friendship with the U.S. treaty commissioners.

In return for surrendering claim to the coastal and desert regions, Reservation land comprising 20% of present San Diego County was negotiated.

Lobbyists and the California congressional delegation fought against ratification of the Treaty, and it was secretly placed under seal, while the Indian Nations were not informed of this action. Indian Nations could have filed claims under the Land Claims Act of 1851 but, believing that land claims had been settled by treaty, no Indian Nations filed claim within the two year time limit. Instead, decades later, small Reservations were created through Executive Orders at a tiny fraction of the original negotiated size. In 1905, the U.S. Senate's injunction of secrecy was lifted and the unratified treaties came to light.

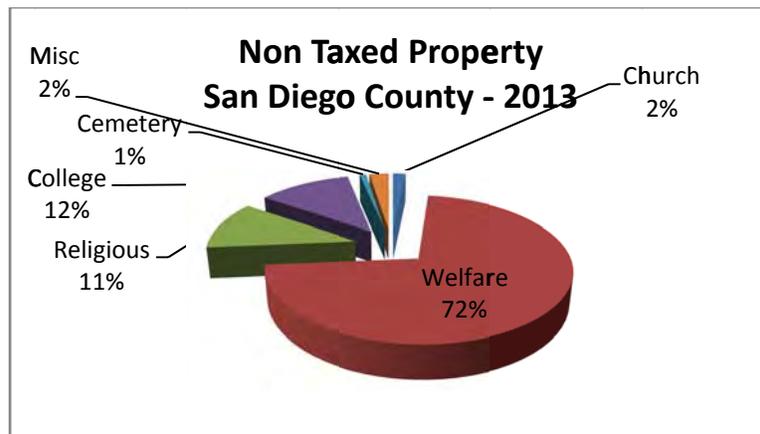


¹⁶ The purchase of the property is the transfer of wealth.

Indian people began to organize for redress and were finally able to bring suit. In 1928, the U.S. Congress passed a jurisdictional act allowing for the Attorney General of the State of California to represent the Indians in California in a lawsuit for monetary compensation for lands taken from the Indians in California. This suit, and a subsequent suit in the 1940s, for all of the land in California, ultimately resulted in a few hundred dollars of individual compensation, at less than \$1.50 per acre. California Indian people were left to their own devices to acquire enough of a land base to ensure future viability of their communities.¹⁷

Currently, the tribal land base is 5% of San Diego County. Tribes have worked hard to secure an economic future for their communities. The fact of the secretly unratified Treaties and the subsequent settlement is the recognition that all the Reservation lands of San Diego County should never have been considered a part of the tax base of the County. As tribes now work to reacquire their land base they are ironically (and unfairly) subjected to spurious arguments that they are depriving the County of *its* tax base when, in fact, the opposite has been the truth.

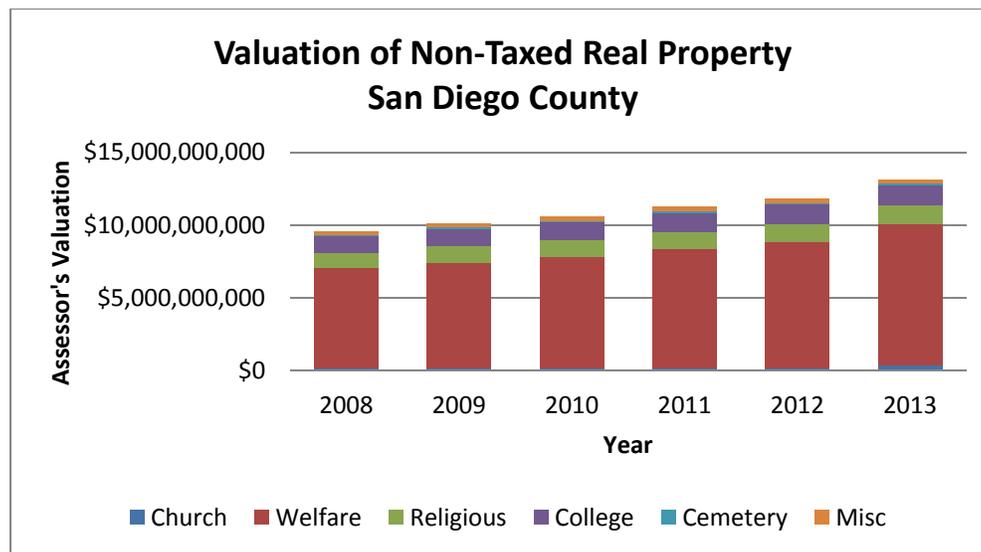
To reacquire the land involves payments many orders of magnitude higher than the settled costs from taking land from Indians. This is despite the fact that most land that Indian tribes take into trust is not subsequently developed. As recent studies have demonstrated, the wealth-building of Reservations spills over into the surrounding communities resulting in increasing employment and higher property values. Commerce with Reservation businesses has a well-documented effect on increasing the surrounding tax base, yet this increase in property values, and the subsequent increased tax collection, does not translate into increased governmental revenue to the tribes.



As a point of fact, San Diego County has over 13 billion dollars of fee lands that are currently under some form of exemption from property tax. From 2012 to 2013 this category of land increased over 1.2 billion dollars. These lands are not producing property tax, yet responsibility for governmental services still resides with the County. This is far different than the transfer of

¹⁷ In point-of-fact that the Indian nations in the geographical area now called California had never ceded or relinquished their original territories at the time of the 1928 jurisdictional act. Nothing is ceded or relinquished by an Indian nation by an unratified treaty. In 1928, the traditional territories still rightfully belonged to the Indian nations in the geographical area of California. It would appear that the United States and the state of California were using the 1928 jurisdictional act to create the erroneous presumption that traditional territories of the Indian nations had been legally ceded.

jurisdiction to the Reservations which is accompanied by a reduction of County responsibilities.¹⁸



Against this backdrop, the acquisition of property by Indian tribes should be considered trivial in any fair evaluation. Further, if we compare the case of exempt property and the continuing responsibilities of the County for protecting properties that produce no taxes, then the fee-to-trust jurisdictional transfer is a net gain for the County.

Possessory Interest

In 1969, the Agua Caliente Band of Mission Indians brought suit against the County of Riverside, California to stop efforts to collect possessory interest tax on tribal leases. (Agua Caliente Band of Mission Ind. v. County of Riverside, 306 F.Supp.279 (1969)) The tribe had leased significant lands of their Reservation to individual non-Indians for the purpose of housing. This ended with the establishment of the State right to tax the value of a lease of Indian land even though the land is under federal jurisdiction. The tax on the value of the lease was established essentially at the same rate as a tax on the real property itself would have been. The level of County and City governmental services was an intrinsic part of the decision, but subsequent court cases established the right of off-Reservation governments to tax without consideration of services provided.¹⁹

¹⁸ Welfare here refers to tax exempt non-profits 501(c)(3) who qualify under the “welfare” exemption category, section 23701(d) of the Revenue and Taxation Code, State of California.

¹⁹ Most notably, Cotton Petroleum Corporation v. New Mexico, 109 S.Ct. 1698 (1989) to which the Supreme Court eliminated any “test” of the services provided or preemption, thus opening the door to full taxation regardless of services provided.

Table 3 2013 Possessory Interest Tax Assessed Value²⁰

Reservation	ZIP codes	Assessed Value
Viejas	91901	\$14,437,307
Campo	91905 & 91906	\$ 2,521,402
Pala	92059	\$ 533,712
Rincon/San Pasqual ²¹	92082	\$ 485,259
Pauma	92060	\$ 60,890
Total		\$18,038,570

The end result is that Counties can, and do, intrude into the tax base of the Reservations for property owned by non-Indians. One of the largest private sector initiatives in San Diego County was the establishment of the outlet center on the Viejas Indian Reservation. While the tribal government funded the creation of the center and provides governmental services such as fire, medical aid and environmental health, the County draws property tax from each of the non-Indian owned businesses in the center. The Kumeyaay Wind project on the Campo Indian Reservation is also a major generator of this form of property tax. In both cases, County involvement in initiating and supporting these commercial enterprises was negligible, yet revenues that should go to the tribal government are redirected to the County.

Personal Property Taxes

Arguably one of the most commonly heard phrases regarding Indian tribes is, “Indians don’t pay taxes”. Most often this is in reference to the fact that Indian lands, because of their sovereign status and the role of the federal government as the trustee of the lands, prevents their being taxed by local off-Reservation governments. But this is a limited protection and, in fact, there are many occasions where the property tax from sovereign tribal lands is both disproportional and regressive.

Before looking at the sources of property tax, one should look at the definition and use of property tax. In a general sense, the term property tax is usually used to describe an ad valorem tax on real property. (Although, technically, even income tax could be considered a type of property tax).²² Property tax in California is assessed on the combined value of the property and property improvements (fixed improvements). Personal property is also assessed but through a separate system, usually involving registrations such as automobiles and boats. Property tax is allocated based on several factors. First, shares of property tax are allocated to local jurisdictions within a County based on their share of the property tax generation prior to the passage of Proposition 13 in 1978. This allocation system was designed after the constitutional maximum of 1 percent was set to avoid disruptions to local government services. The allocation system was later modified to allow for community growth.

Most casinos have a combination of purchased and leased slot machines. These machines have most of their value because of their location on the Reservation. In fact,

²⁰ San Diego County Assessor

²¹ The County Assessor lists both Reservations collectively because of the shared ZIP code.

²² Legal Information Institute

Table 4 2013 Personal Property Assessed Valuations on Gaming Equipment

San Diego County Casino	ZIP	Personal Property of Lessors
Sycuan Casino	92019	\$ 736,402
Viejas Casino and Turf Club	91901	\$ 368,486
Pala Casino Spa and Resort	92059	\$ 368,865
Santa Ysabel Band Resort and Casino	92070	\$ 192,511
Barona Valley Ranch Resort and Casino	92040	\$1,232,290
Golden Acorn Casino	91906	\$ 825,382
The La Posta Casino	91905	\$1,263,926
Casino Pauma	92061	\$1,296,807
Harrahs Rincon Casino	92082	\$1,252,541
Valley View Casino and Hotel	92082	\$1,246,444
Total		\$8,783,654

off-Reservation they would be illegal to operate as a gambling device. Even though the value comes from being on the Reservation in a government gaming business that can only exist on a Reservation and governmental services are directly provided by the tribal government, the County collects personal property tax on the lessor.

Personal property and fixed improvements are generally not tracked by their location on or off-Reservation lands. Non-Indians simply pay the taxes to the County or risk having legal action taken against them. This makes it difficult to determine how much of this type of assessment is currently occurring on property within the Reservations. There are however, two places where it was possible to extract the specific data; the Viejas Outlet Mall (on Viejas Reservation) and Kumeyaay Wind (on Campo Reservation).

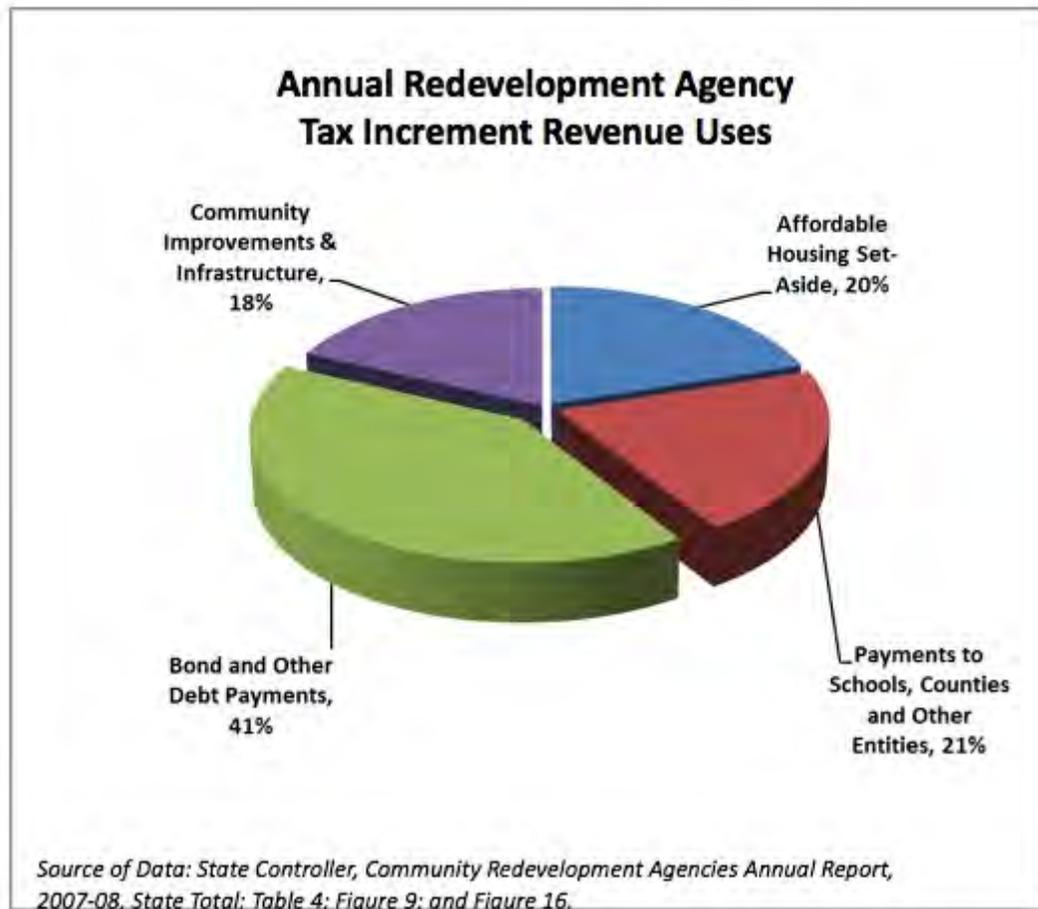
Table 5 Examples of Personal Property and Fixed Improvements Assessed Value

Reservation	Facility	Pers. Prop.	Fixed Improv.	Total Assessed
Campo	Kumeyaay Wind	\$ 125,636	\$49,849,686	\$49,975,322
Viejas	Outlet Center	\$ 883,380	\$ 547,304	\$ 1,430,681
Total		\$1,009,016	\$50,396,990	\$51,406,003

In total, over 60 million dollars in assessed value of property and possessory interest, generates over \$600,000 in revenues to the County annually. This figure is most likely considerably higher and could be better documented if proper jurisdictional tracking of asset locations were enacted by the State or County.

Redevelopment

California Redevelopment Agencies are organizations first created in 1945. They were proposed to fix up blighted, decayed areas, to create an increase in the property tax of the area. The Redevelopment Agency would take a portion of the increased property tax value to pay for the investment in the blighted area and then use the incremental tax revenues as shown in the following chart:



Redevelopment agencies took about 12% of the property tax revenue in the State, (\$5.7 billion), in 2008-2009. In some counties nearly 25% of all property tax went to the redevelopment agencies.

While cities and counties could form redevelopment agencies for the purposes of capturing up to 25% of the property tax increases that result from economic development, Indian tribes did not have this option. The State ordinance that authorizes the creation of redevelopment agencies (SECTION 33300-33302) does name Indian tribes as eligible. However, the requirement that redevelopment agencies have a general plan in compliance with State law infringes directly upon tribal sovereignty. This undermined the ability of tribes to take advantage of this instrument because it would force tribes to subject themselves to off-Reservation land use planning which at best is ignorant of tribal interests and at worst is inimical to them. Despite the lack of access to this instrument for economic development, a portion of the revenue from Reservations goes toward retiring the debts accrued by these non-tribal redevelopment agencies.

Gasoline Tax

California charges both excise tax and sales tax on gasoline sales. Excise tax is assessed at the State and Federal level and amounts to 0.357 cents per gallon. Revenue from the State tax is supposed to go to transportation projects but in recent years the State government has authorized itself to dip into the funds for other purposes. State and local sales tax start at the

minimum of 7.25%. There are also other minor taxes and fees that are part of the overall gasoline tax.

One argument used against tribes sharing in gasoline tax is that most of the gasoline that is purchased will be used in driving on California highways. Yet this argument fails to take into consideration that other populations avoid California taxation while driving on California roads without repercussions. These include the thousands of vehicles who fill up in Mexico prior to entering California. In addition, thousands of vehicles each day top off before crossing the State line from neighboring states. It's a small matter to compare the number of gas stations on both sides of the California borders to see how lucrative these neighboring populations find this trade. For gas stations on Indian Reservations sales are considered by the State to be internal for the purpose of collecting tax, yet external for the purpose of spending the tax money on projects on tribal lands.

Income Tax

Income taxes are a significant part of the Reservation tax base that is taken without any revenue sharing arrangement. Because of the small population base on most California Reservations, it is quite common to have a work force of non-Indians that is many times the population of the Indian nation. For Indian people working on their own Reservation, State income tax is not applied. For anyone else, income tax is taken from the Reservation workers without any consideration for the governmental services being provided by the tribe to those persons within the Reservation jurisdiction. There is no reciprocity. Many Indian people live on the Reservations and work off-Reservation. They pay income tax to the State and there is no revenue sharing arrangement with the tribal government.

Individual and corporate income taxes are the largest source of revenue to the State budget. The California income tax system consists of ten brackets with a top rate of 13.3% with 2014-2015 expenditures represent about \$106.8 bn.²³ 73% is transferred to local governments and schools. These intergovernmental revenues represent 57.78% of the statewide county budgets. Of this, transfers from the State General Fund represent about 35% of the total, (approx.. 17.5 bn).²⁴

Here again, Reservations are considered internal to the State for purposes of assessing an income tax. Persons who live in California and work in Arizona pay income taxes to Arizona.²⁵ The reverse is also true, yet when people live in California in the off-Reservation community and work on the Reservation they pay taxes to the State, the same as if they worked off-Reservation. Thus, California collects the income tax, however, when it comes to allocating money from the general fund to local jurisdictions, Reservations are treated as non-State entities. Some tribes may be eligible for certain State programs if they meet the definitions of targeted populations in non-discretionary programs. This is a far lower status than that held by Counties and Cities in the revenue allocation methodology of the State.

For tribal members, oftentimes their families include non-tribal members. For taxation purposes, California considers Indian people who are not members of their resident Reservation to the same as non-members. The largest county expenditures statewide are for public protection, public assistance, health and sanitation and general services. While some of these services are directly utilized by tribal members, most of them are duplicative of services already

²³ 2013-2014 California State Controller

²⁴ Counties Annual Report, 2014

²⁵ California does count out-of-State income in determining the tax bracket.

provided on the Reservations. Reservations engage in planning, environmental health & protection, regulation and permitting for housing and trade. Very few services are exclusive to tribal members, most of them are also utilized by families, residents, employees and visitors. This puts Indian tribal governments in the position of generating tax revenue for programs and assistance of the State for which they are ineligible. Tribes also pay for some of these same programs and assistance through the general tribal revenue stream. Essentially, this diversion from the revenue stream is a tax in all but name. Therefore, tribal economies end up being doubly taxed for an equivalent level of services.

6. Indirect Benefits

Many tribal programs have served as a training ground for workers who go on to work for Cities, Counties and the State, with the skills they gained or developed by working for tribal programs. This has been a bonus to many of these off-Reservation communities by providing them with a local or regional source of skilled labor. Though most of this information is anecdotal, it is repeated consistently, and include emergency services managers and personnel, environmental program managers and tribal leadership.

7. Gaming Business Benefits

The intent of this report is to focus on the status of Indian Nations as political jurisdictions within California and San Diego County. It is worth noting, however, that previous studies which focused on gaming as an industry within the State (and nationally, for that matter) show substantial positive effects.

An economic analysis of the Chumash Casino in Santa Barbara County showed that for every 10 jobs created on the Reservation, four jobs were supported in the region. For every \$10 in output from the Casino, \$4 in output was generated in the local economy.²⁶

Nationally, Indian gaming accounts for 628,000 jobs either directly in gaming or in spending in the local economy. More jobs were created outside of gaming than within the gaming operations.²⁷

“Casinos and their related operations can have a positive impact on a local economy for several reasons. First, hotels, casinos, spas, restaurants, entertainment venues, golf courses, conference centers, and other amenities all require staffing to provide service. This provides employment opportunities for local workers—especially given that the vast majority of employees of these operations are non-tribal members. Second, casino operations have wider-reaching impacts on the broader regional economies in which they operate.”²⁸

To get a more concrete picture of the business benefits of gaming in California, the U.C. Riverside and CNIGA/Beacon studies (see Section 3) are definitely worth studying.

8. Public Services

Many of the programs and services on the Reservations are open to non-member residents of the Reservation and the local community. Several health clinics and satellite clinics service a large percentage or even a majority of non-members. Recreational facilities such as gyms and

²⁶ The California Economic Forecast, Economic Impact of the Chumash Casino Resort on the County of Santa Barbara, 2008

²⁷ National Indian Gaming Commission, 2010

²⁸ CNIGA, Beacon Economics

athletic fields are often open to intramural programs that bring in many off-Reservation County residents. Finally, many educational programs from head start to high school classes are partially or fully funded on Reservations and include off-Reservation people.

Reservations are also subject to State/County co-jurisdiction under Public Law 280²⁹ for criminal and some civil acts. This authority is often used as a justification for intrusion into the Reservation tax base. Yet based on recent data, the “per household” costs of law enforcement in the unincorporated areas of San Diego County is \$23.4 million or \$140.12 per household.³⁰ This cost is more than offset from the increase in property values attributed to the Reservation economy alone.

Another example of the financial benefit to San Diego County, is the capital investment and operating costs for fire protection. Several Reservations operate full-time paid fire departments. Others operate volunteer departments. A large proportion of the responses are in the off-Reservation community. Whether on a first-call or a mutual aid, these Reservation fire departments add a level of protection to the off-Reservation community that would cost the County a considerable amount to duplicate. Consider the following data from the 2008 San Diego County Operational Plan:

Table 6

Rural District	Population Served	Households Served	Budget	Cost per Household
Alpine	13,790	5,151	\$ 3,365,514	\$ 653.37
Lakeside	57,740	21,037	\$12,435,590	\$ 591.13
North County	45,000	16,071	\$13,170,674	\$ 819.53
Rural	36,500	7,200	\$ 3,489,442	\$ 484.64
Valley Center	22,000	6,600	\$ 2,900,000	\$ 439.39

The Alpine Fire Department recently completed Station 17 in March 2006. We can use the figures from that department to run a comparison.

Alpine Fire Department services 27.5 square miles of unincorporated eastern San Diego County. Station 17 completed March 2006, represents \$5,358,465 in capital assets. The annual costs of operation are: 2012/2013 – \$3,170,169, 2013/2014 – \$3,149,844

²⁹ Public Law 83-280, 1953 authorized criminal and some civil jurisdiction on Indian lands in California and some other states.

³⁰ San Diego County Operational Plan 2008-2010

Table 7

Station	Primary – Type 1 Engine	Type 2/3 Brush	Command Veh.	Other	Households ³¹	Equivalent Cost per household ³²
Alpine	2	1	5		5,151	\$ 653 ³³
Reservations with full time departments providing off-Reservation coverage						
Campo Res.	1	1	2	water tender	231	\$10,823
Barona Res.	1, 1 reserve	1	2	ambulance, 2 medic trucks, utility, rescue	228	\$10,965
Pala Res.	1	1	4	ladder truck, 2 tenders	325	\$ 7,692
Rincon Res.	2	1	2	medic	296	\$ 8,446
San Pasqual Res.	1, 1 reserve	2	2		196	\$12,755
Sycuan Res.	1	2	2	2 adv. Life support	103	\$24,272
Viejas Res.	1			2 ambulances	112	\$22,321

If San Diego County were to duplicate the Reservation services covered by these 7 Fire Departments it would involve a capital investment of over 37 MM and operating costs of over 21.7 MM per year. This also represents considerably more in household investment than even the highest cost per household in the off-Reservation community.

9. Conclusions

American Indian people in California have one of the most tragic histories of any indigenous group in the present day United States. Negative experiences at the hands of Spanish and Mexican forces paled in comparison to the government sponsored genocide at the hands of American California. Not only were whole populations exterminated, but the remnants were subject to political and economic suppression that continued through most of the 20th century. The rise of gaming in the 1980s afforded a rare reversal of fortune for some of the Reservations. This respite, however, has not allowed the types of diversification and wealth-sharing with less fortunate tribes that would be possible if Reservations controlled their economies as comparable non-Indian jurisdictions.

Economic inequities in California run the gamut from the lack of recognition of the benefits enjoyed by non-Indians from tribal government services to the direct extraction of economic benefit from tribal economies through taxation.

Solutions are probably not going to be of one type for the over 100 recognized Indian Nations in the State. There are, however, many approaches that could be generalized for different

³¹ US Census Bureau, 2006-2010 American Community Survey (estimate)

³² For the Reservations, an annual operating cost of \$2.5 million is divided by the number of Reservation households.

³³ 2008 data, San Diego County Operational Plan

classes of tribal economies. Agreements could be reached that recognize the role of Indian Nations as governments providing services that benefit more than just tribal members.

Important data, such as the personal property tax drawn from Reservations should be made available to policy makers, but this can only happen if the County Assessors are required to gather such information from the taxpayers.

A fair relationship with Indian Nations will result in a minor impact on a statewide scale, yet the positive impact to Indian communities could be dramatic. After 165 years, perhaps the time has come.

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San Diego County Indian Nations

Source: Univ. of San Diego (<http://www.sandiego.edu/nativeamerican/reservations.php>)

Barona Band of Mission Indians

1095 Barona Road
Lakeside, CA 92040
(619) 443-6612

Barona Fire Department (www.baronafire.com/)

(619) 390-2794

Ken Kremensky, Fire Cf.

Bob Pfohl, Division Cf.

Cal Smith, Asst. Cf.

1112 Baron Rd.
Lakeside, CA 92040

Campo Band of Kumeyaay Indians

36190 Church Road
Campo, CA 91906
(619) 478-9046

Campo Fire Department (<http://www.crfpd.info/CONTACTS.php>)

(619) 478-2371

Steven Cuero, Chief

Rex Hypes. Ops Cf.

Capitan Grande Band of Mission Indians

Alpine, CA 92001

Cuyapaipe Band of Mission Indians

4054 Willows Road
Alpine, CA 91901
(619) 445-6315

Inaja - Cosmit Band of Indians

1040 East Valley Parkway
Escondido, CA 92025
(760) 747-8581

Jamul Indian Village

P.O. Box 612
Jamul, CA 91935
(619) 669-4785

La Jolla Band of Indians

22000 Highway 76
Pauma Valley, CA 92061
(760) 742-1297

La Posta Band of Mission Indians

P.O. Box 1120
Boulevard, CA 91905
(619) 478-2113

Los Coyotes Band of Mission Indians

P.O. Box 189
Warner Springs, CA 92086

Manzanita Band of the Kumeyaay Nation

P.O. Box 1302
Boulevard, CA 91905
(619) 766-4930

Mesa Grande Band of Mission Indians

P.O. Box 270
Santa Ysabel, CA 92070
(760) 782-3818

Pala Band of Mission Indians

P.O. Box 50
Pala, CA 92059
(760) 742-3784

Pauma/Yuima Band of Mission Indians

1010 Reservation Rd.
P.O. Box 369
Pauma Valley, CA 92061
(760) 742-1289

Pauma Fire Department (<http://paumatribes.com/pauma-fire-department.html>)

(760) 742-1488
Carlos Camarena, Fire Capt.
Greg Mendoza, Fire Capt.
Stan Vigil, Fire Capt.
800 Pauma Reservation Rd.

Rincon Nation of Luiseño Indians

P.O. Box 68
Valley Center, CA 92082
(760) 749-1051

Rincon Fire Department

(760) 297-2300
Michael Fisher, Fire Cf.
33485 Valley Center Rd.
Valley Cntr, CA 92082

San Pasqual Band of Indians

P.O. Box 365
16150 Kumeyaay Way
Valley Center, CA 92082
(760) 749-3200

San Pasqual Fire Department (<http://www.sanpasqualbandofmissionindians.org/fire-department>)

(760) 749-7542
Harold L. Rodriguez, Fire Cf.
Nick Alvarado, Fire Capt.
Keith Becker, Fire Capt.

Santa Ysabel Band of Diegueño Indians

P.O. Box 130
Santa Ysabel, CA 92070
(760) 765-0846

Sycuan Band of the Kumeyaay Nation

Tribal Government Office

1 Kwaaypaay Court
El Cajon, CA 92019
(619) 445-2613

Sycuan Fire Department (www.sycuantribe.org/departments/fire-department/) & (www.sycuanfire.com/)

(619) 445-2893
Hank Murphy, Fire Cf.
Randy Sandoval, Fire Cf.
Mitch Villalpando, Dpty Cf. Ops
5459 Dehesa Road
El Cajon, CA 92019

Viejas Band of Kumeyaay Indians

Viejas Tribal Office

1 Viejas Grade Road
Alpine, CA 91901
(619) 445-3810

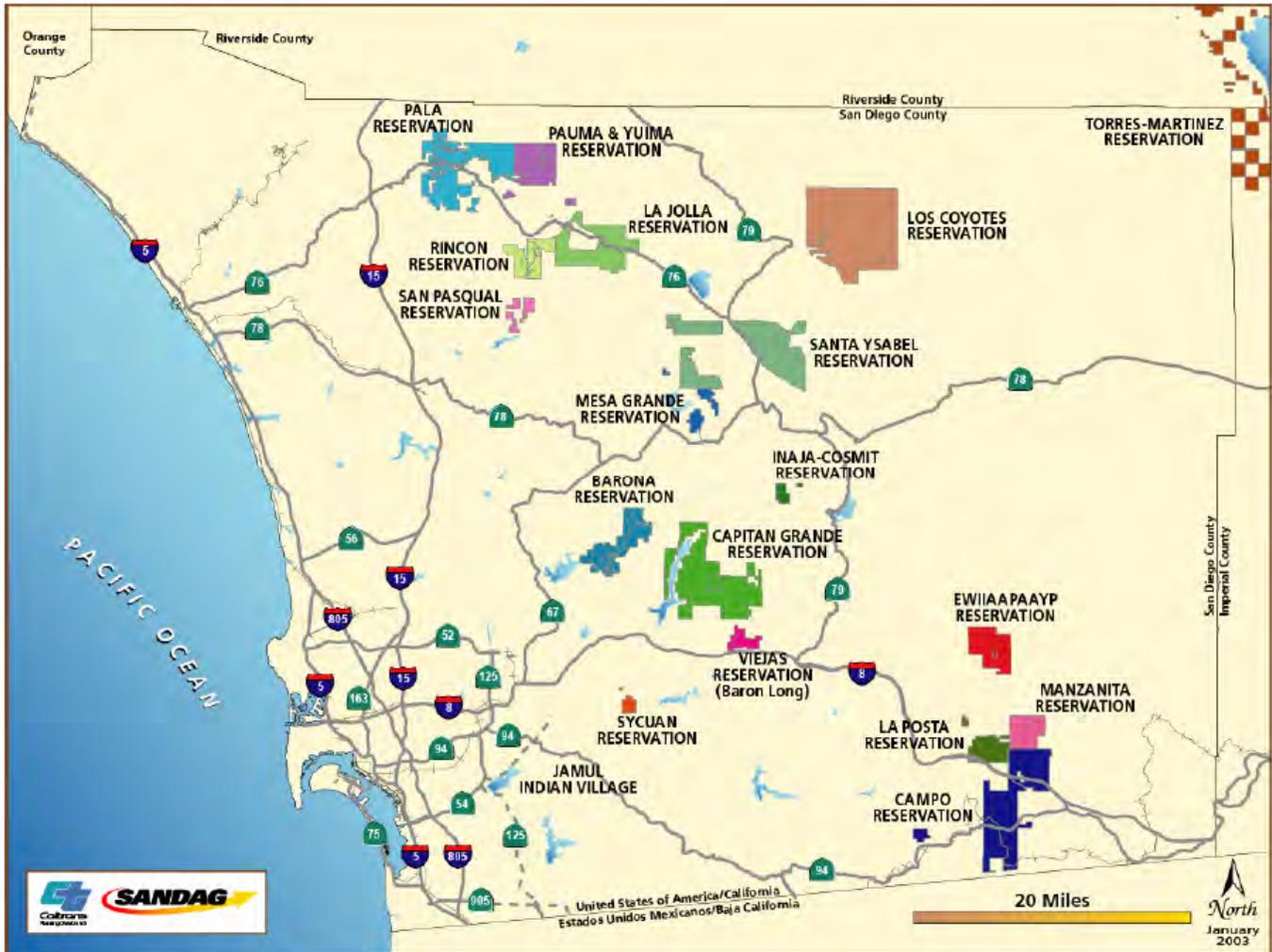
Viejas Fire Department (<http://usfiredept.com/viejas-fire-department-23929.html>)

(619) 659-2376
Don Butz, Fire Cf.
1 Viejas Grade Rd
Alpine, CA
91901-1605

Appendix A: Data Sets

For a copy of the data sets in Excel format send a request to tipaay26@gmail.com

Appendix B: San Diego County Reservations



Appendix C

	Barona Reservation, CA		Campo Indian Reservation, CA		Pala Reservation, CA		Rincon Reservation, CA		San Pasqual Reservation, CA		Sycuan Reservation, CA		Viejas Reservation, CA	
	Estimate	Margin of Error	Estimate	Margin of Error	Estimate	Margin of Error	Estimate	Margin of Error	Estimate	Margin of Error	Estimate	Margin of Error	Estimate	Margin of Error
Total	228	+/-68	231	+/-80	325	+/-69	296	+/-74	196	+/-44	103	+/-62	112	+/-38

Source: U.S. Census Bureau, 2006-2010 American Community Survey

Appendix D

Tax Case Summaries

The evolution of tax law against tribal sovereignty started with the expansion of the federal role beyond the Constitutional requirements by the Marshall Courts opinion in the 1820s in *Cherokee v Georgia* (need cite). That opinion allowed the federal government to regulate much more than commerce with the Indians under the principle of “domestic, dependent sovereign nation”. It also allowed the authority of the U.S. to be used within Indian lands without conferring the rights of the Constitution to the individual Indians. The following are some of the more recent examples of case law that have defined the powers of taxation on tribal lands.

Williams v. Lee, 358 U.S. 217 (1959)

Williams, a Non-Indian General Store operator on the Navajo Reservation, brought a claim in an Arizona state court against a Navajo couple, the Lees, for monies due on a credit account. The Lees moved to dismiss, arguing that the tribal court, rather than the state court, had jurisdiction over the matter. The Arizona Supreme Court ruled in favor of Williams, finding that Arizona courts had civil jurisdiction over suits filed by non-Indians against Indians, even when the transaction giving rise to the suit occurred on tribal lands, because Congress had never expressly forbid it.

The U.S. Supreme Court unanimously declared that absent an act of Congress mandating jurisdiction, a tribal court had jurisdiction over matters *if* a state action would infringe on the rights of Indians to make their own laws and be governed by them (right created by Congress’ ratification of the 1868 Treaty of Peace Between the Navajo Indian Tribe and the United States). In this case, the Supreme Court held, the fact that Williams was not Indian was immaterial; “[h]e was on the Reservation, and the transaction with an Indian took place there,” and “to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs, and hence would infringe on the right of the Indians to govern themselves.” 358 at 223.

McClanahan v. State Tax Commission of Arizona, 411 US 164 (1973)

McClanahan, an enrolled Navajo, lived on the Navajo Reservation and earned all her income on the Navajo Reservation, but the State of Arizona taxed her income. She sued, on behalf of herself and others similarly situated, demanding a refund of the state taxes and a declaratory judgment that such taxation was unlawful. The Arizona Supreme Court found that

exercising concurrent state jurisdiction was permitted, so long as it didn't interfere with tribal self-governance, and taxing an individual Indian did not interfere with Navajo self-governance.

The U.S. Supreme Court ruled in favor of McClanahan, explaining that the *Williams v. Lee* test dealt primarily with *non-Indian* actions on reservation lands and this case involved an Indian earning income and living on a reservation. 411 U.S. 179. Notwithstanding that the tax did not infringe on the Indians' right to govern themselves, since no non-Indians were involved, the State did not have the power to tax McClanahan's income.

Despite the holding in McClanahan's favor, the Court took a shot at tribal sovereignty, explaining that "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption," 411 U.S. at 172, citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and the lands within the Navajo Reservation are "within the exclusive sovereignty of the Navajos *under general federal supervision*." 411 U.S. at 174-75 (emphasis added).

Bryan v. Itasca County, 426 US 373 (1976)

Bryan, a member of the Minnesota Chippewa Tribe, sued Itasca County and the State of Minnesota, asserting that they had no authority to tax his personal property (a mobile home) located on land held in trust by the United States for tribal members. The Minnesota Supreme Court ruled in favor of the State, because P.L. 280's specific exclusion of state civil jurisdiction over property *held in trust* by the U.S. meant, conversely, that the State had the power to tax property *not held in trust* by the U.S.

After reviewing congressional reports and testimony related to P.L. 280, the Supreme Court determined that Congress, in enacting P.L. 280, did not intend to confer general civil regulatory powers to the states but, rather, to allow for the application of state civil and criminal laws in state court proceedings involving actions arising on reservations that did not have an organized judicial system. 426 U.S. 379-390. After (1) considering the special relationship between Indians and the federal government, (2) applying the "vital canon" of statutory construction that "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians," and (3) not finding any express congressional intent authorizing the taxation, the Court held that the State of Minnesota did not have the authority to tax Indian property located on the Reservation, whether held in trust or not.

White Mountain Apache Tribe v. Bracker, 448 US 136 (1980)

The White Mountain Apache Tribe and a logging company it did business with filed suit against the State of Arizona, claiming that the State's imposition of its motor carrier license tax and fuel tax on the logging company, for business conducted wholly within the reservation, violated federal law. The Arizona Court of Appeals determined that since the federal regulatory scheme governing tribal timber and roads did not "occupy the field," and the federal interests involved did not preclude state taxation, the State's imposition of taxes on the logging company did not unlawfully infringe on tribal self-government. 448 U.S. at 141.

The Supreme Court reversed, explaining that there are "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members" and the existence of either one blocks a state's authority. 448 U.S. at 142-43. The first barrier is raised when federal law preempts state regulation and the second barrier, unlawful infringement "on the right of reservation Indians to make their own laws and be ruled by them," is ultimately "dependent on and subject to the broad power of Congress." *Id.* Applying the federal preemption analysis, the Court held that the federal government's regulation of the activities involved was so pervasive that it left "no room" for Arizona's taxation and the State's interest in raising revenue did not outweigh the many federal policies involved. 448 U.S. at 148-49.

Washington v. Confederated Tribes of Colville Indian Reservation, 447 US 134 (1980)

A consolidation of cases between Washington State and the Confederated Tribes of the Colville Reservation, Makah, Lummi, and the Confederated Bands and Tribes of the Yakima Indian Nation, involving the State's taxation of non-Indians for a variety of on-reservation activities and the taxation of Indians for off-the-reservation activities, led to this opinion. A three-judge panel of the U.S. District Court (required for injunctions against the State) ruled in favor of the tribes, finding that (1) the State's cigarette taxes did not apply to on-reservation transactions because of preemption and infringement on tribes' right to self-governance; (2) the State's retail sales tax could be applied to the sale of goods (other than cigarettes) to Non-Indians; (3) record-keeping requirements for all exempt and non-exempt sales could not be imposed upon the tribes; (4) the State could not tax vehicles owned by tribes or their members; and (5) the State's assumption of civil and criminal jurisdiction over the Makah and Lummi Tribes was unconstitutional.

The Supreme Court's opinion upon appeal, using the term non-member rather than non-Indian throughout, set forth the following:

A tribe has the power to tax transactions that significantly involve either the tribe or its members, absent an overriding federal interest or a congressional mandate otherwise (447 U.S. at 152-154). Thus, the tribes have the power to tax non-member purchases on their reservation.

Tribes have an interest in raising revenue, which is an aspect of self-governance, and a tribe's "interest is strongest when the revenues are derived from value generated on the reservation" by tribal activities and "the taxpayer is the recipient of tribal services" (447 U.S. at 156-157). In regard to the cigarette tax, the "value" being generated (exemption from State taxation of cigarettes) was to non-members and occurred off the reservation. 447 U.S. at 155. The tribes' taxing ordinances, even though they are subject to federal approval, do not evidence a congressional intent to preempt the State from taxing the sales of cigarettes and other goods to non-members. 447 U.S. at 156. There is no infringement on a tribe's power to regulate tribal enterprises when the State "simply imposes its tax on sales to nonmembers," there is no conflict between the tax schemes, and one does not oust the other. 447 U.S. at 158-59. The State's taxation of cigarette sales to non-members is permissible.

In *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976), the Supreme Court determined that if the state tax is valid, a state may place "minimal burdens on Indian businesses to aid in collecting and enforcing that tax." 425 U.S. at 465. Even though the record-keeping requirements imposed by Washington State in this case appear more burdensome than what was requested in *Moe* (placing a stamp on cigarette packs), the requirements apply, absent proof from the tribes that the requirements are invalid.

The State's taxation of non-member Indians is not preempted by federal statutes since there is no demonstration of a congressional intent to exempt non-member Indians and the taxation does not infringe on a tribe's self-governance since non-member Indians "stand on the same footing as non-Indians" on reservations. 447 U.S. at 160-61.

The State's off-reservation seizure of cigarette shipments bound for the reservation is justified when a tribe has refused "to fulfill collection and remittance obligations which the State has validly imposed." 447 U.S. at 161-62. The Court pointed out that it did not consider and expressed no opinion on whether the State could actually *enter* a reservation and seize cigarettes intended for sale to non-members.

The State's assessment of motor vehicle, mobile home, camper, and travel trailer excise taxes against Indians residing on the reservation for the use of such vehicles off the reservation was not permitted. The Court hinted that if the State assessed the excise tax against the Indian's

actual off-reservation use of the vehicle, rather than on a percentage of the vehicle's fair market value, there might be a different outcome. 447 U.S. at 163-64.

The State had criminal and civil jurisdiction over the Colville, Lummi, and Makah Tribes based on the Court's decision in *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979).

Montana v. Blackfeet Tribe of Indians, 471 US 759 (1985)

The Blackfeet Tribe filed suit against the State of Montana to stop the State's taxation of the Tribe's royalties from oil, gas, and other mineral leases on the Tribe's land. The U.S. Supreme Court held that the State's taxation was not allowed because Congress did not *clearly* consent to a state's taxation of royalties from leases on tribal lands. A provision specifically allowing state taxation in a previous version of the statute governing leases on tribal lands was not incorporated into the latest version of the statute, which was silent on the issue of state taxation, simply because the latest statute contained a general repealer clause (repealed all prior provisions *inconsistent* with the latest statute). In order to be seen as clearly consenting, Congress must *explicitly* allow states to have taxing power over tribes.

California v. Cabazon Band of Mission Indians, 480 US 202 (1987)

The Cabazon and Morongo Bands of Mission Indians had gaming operations on their reservations that were subject to tribal ordinances and regulations approved by the Secretary of the Interior, open to the public, and "played predominantly by non-Indians coming onto the reservations." 480 U.S. 205. California and Riverside County, under P.L. 280, sought criminal jurisdiction over the gaming because it violated several of the State's and County's restrictions on gambling.

The U.S. Supreme Court first determined that just because violations of civil regulatory laws could lead to criminal prosecution, did not mean that the State or the County could assert criminal jurisdiction under P.L. 280 over a tribes' gaming operations. In regard to the State and the County asserting *civil* jurisdiction over the tribes' gaming operations, the Court stated that the "[d]ecision in this case turns on whether state authority is preempted by the operation of federal law." 480 U.S. 216. The preemption analysis "is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Id.* citing to *NM v. Mescalero*. The Court held that the State's and County's interest in "preventing the infiltration of the tribal games by organized crime," did not outweigh the compelling federal and

tribal interests involved and would “impermissibly infringe on tribal government.” 480 U.S. 220-222.

Warren Trading Post Co. v. Arizona Tax Commission, 380 US 685 (1965)

Warren Trading Post, a business on the Navajo Reservation, operated under a license granted by the Commissioner of Indian Affairs pursuant to 25 USC § 261. After Arizona imposed a 2% tax on its sales, Warren Trading Post challenged Arizona’s right to tax transactions occurring on the reservation but the Arizona Supreme Court upheld the taxation.

The U.S. Supreme Court stated, based on Congress’ regulation of commerce with the Indians and the “all-inclusive regulations and statutes authorizing” trade with Indians, “Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders.” 380 U.S. at 690. “[S]ince federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax.” 380 U.S. at 691.

New Mexico v. Mescalero Apache Tribe, 462 US 324 (1983)

The State of New Mexico asserted that its hunting and fishing regulations applied to non-Indians on the Mescalero Apache Tribe Reservation, despite the comprehensive hunting and fishing regulations adopted by the Tribe (applicable to Indians and non-Indians alike and approved by the Secretary of the Interior) and the many conflicts between the State’s and the Tribe’s regulations. The Mescalero Tribe filed suit against New Mexico and prevailed in the lower courts.

The U.S. Supreme Court held that, in the absence of any justifying state interest, the federal interest in “tribal self-sufficiency and economic development,” preempted New Mexico’s hunting and fishing laws, pointing out that “tribes retain any aspect of their historical sovereignty not ‘inconsistent with the overriding interests of the National Government’,” (citing to *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980)) and part of that retained sovereignty is “the power of regulating their internal and social relations” (citing to *U.S. v. Kagama*, 118 U.S. 375 (1886)),. 462 U.S. at 344.

Cotton Petroleum Corp. v. New Mexico, 490 US 163 (1989)

Cotton Petroleum Corp leased tribal lands from the Jicarilla Apache for the production of oil and gas. The State of New Mexico imposed severance taxes on Cotton Petroleum for its on-reservation production. Cotton Petroleum sued claiming that the State did not have authority to

impose the tax. The U.S. Supreme Court held that the State could tax Cotton Petroleum for its on-reservation production because (1) Congress had not expressly, or impliedly, *forbid* state taxation of non-Indian lessees, (2) Congress did not indicate any intent in the tribal leasing acts to preempt state taxation and the State had an interest in the activities being taxed since it regulated the location and mechanical integrity of the on-reservation wells, (3) the State's taxation on activity already taxed by the Tribe did not constitute an unlawful multiple tax, since each government's tax was non-discriminatory, and (4) tribes may not be treated as "states" for tax apportionment purposes.

Hoopa Valley Tribe v. Nevins, 881 F.2d 657 (1989)

The State of California tried to tax non-Indians' purchase of tribal timber. The U.S. Supreme Court held that federal law preempted such taxation, despite the *Cotton Petroleum* decision, because, in this case the Court explained, the State did not have a strong enough interest in the activity being taxed.

Oklahoma Tax Commission v. Chickasaw Nation, 515 US 450 (1995)

The Chickasaw Nation filed suit against the State of Oklahoma, claiming that the State did not have the authority to impose its motor fuels tax on tribally owned retailers and its income tax on tribal members' income earned on the reservation when the tribal member lived off the reservation. The Supreme Court found that the State could not tax the tribally-owned retailers, using the same standard expressed in *Montana v. Blackfeet* – a state cannot tax reservation lands or reservation Indians without express congressional authorization, adding in a "legal incidence test" to determine who the tax actually falls upon. (The Court hinted that if the State clearly shifted the tax burden off the Tribe, the taxation would not be preempted.) The income, earned on the reservation, of tribal members living off the reservation could be taxed by the State based on the principle that a jurisdiction may tax *all* of the income of its residents.



January 12, 2016

State Board of Equalization
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Susanne.Buehler@boe.ca.gov

Dear Chairman Horton and Members of the Board:

On behalf of the Federated Indians of Graton Rancheria (FIGR) I would like to thank the Board for considering this needed revision to Regulation 1616. FIGR was the first Tribe to have our tribal business leasing statute approved after the passage of the Helping Expedite and Advance Responsible Tribal Home Ownership Act (HEARTH Act) of 2012, and was also the first Tribe to use this newly-confirmed tribal authority to promote our economic and governmental interests by contracting with third-party vendors to provide food and beverage services to our casino patrons.

Being the pioneer Tribe in this aspect of tribal sovereignty, we understand the relative interests involved and how application of these leasing statutes can promote not only tribal well-being but also that of the broader local community, which can now have a greater opportunity to participate in the benefits these tribal enterprises generate. Being a pioneer created risks and expenses for FIGR, as well as for the State, that the proposed revision would eliminate for other tribes that want to follow this path. We believe, as do the authors of the proposed revision, that tribal and federal interests **always** prevail under a *Bracker*-style analysis when non-Indian lessees at a tribal casino provide food and beverage services to patrons and there is no need for such tribal leases to be subject to a case-by-case examination.

By eliminating the uncertainty, costs and delays that a case-by-case examination generates, the Board will promote California's small business economy and reduce its own costs. We believe, as would our vendors, that this revision not only benefits California's Indian Tribes that operate casinos, but that the proposed revision will inevitably extend economic opportunity to small local food vendors. We also know that a blanket exception will reduce the California's administrative and interest costs (if refunds are required) and would benefit the state indirectly when non-Indian vendors pay their California income or corporate taxes on their reservation-based income.

Our sole criticism of the proposed revision is that it does not go far enough. The proposed language still may result in other Tribes needing to privately petition for determination that a reservation restaurant operating pursuant to a HEARTH Act lease and located within a tribally-owned and operated commercial facility that serves meals, food and beverages for consumption on site must be exempted from state sales and use taxes. The proposed revision specifically limits the rule only to leased eating and drinking establishments located within Indian casinos, rather than within any Indian commercial premises.

However the factors that militate granting an exception when such facilities operate within casinos would apply with equal force to other tribally operated commercial facilities.

We therefore urge you to not only adopt the reasoning of the proposed revision but amend it to apply to all relevant HEARTH Act food and beverage lessees that conduct business within a tribally operated and owned commercial facility located within Indian Country, whether it be a casino or some other form of economic activity such as a resort, hotel or commercial center. Such a revision should be adopted because it comports with Supreme Court's holding in *Bracker*, promotes tribal, state and local economies, reduces costs and uncertainties for all parties and provides an important source of tribal taxes that are sorely needed to support a broad range of services to all reservation residents and visitors.

I appreciate your consideration of these comments.

Sincerely,



Greg Sarris, Chairman
Federated Indians of Graton Rancheria

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January 29, 2016

VIA E-MAIL (Susanne.Buehler@boe.ca.gov) & FACSIMILE (916-322-4530)

Susanne Buehler
State Board of Equalization
450 N Street
P.O. Box 942879
Sacramento, CA 94279-0092

Re: Comments on the Initial Discussion Paper on Proposed Revision to Board of Equalization Regulation 1616: Federal Areas

Dear Ms. Buehler:

Forman & Associates serves as legal counsel to the Bear River Band of Rohnerville Rancheria ("Bear River" or "Tribe"), which has requested that we submit on its behalf the following comments on the proposed revisions to Board of Equalization ("BOE") Regulation 1616 which were the subject of an interested parties meeting on January 13, 2016. While the Tribe is encouraged by the efforts of the BOE to amend the regulation to conform in part to the current state of the law regarding state jurisdiction over activities in Indian country, the proposed revision does not bring the state into full conformity with federal regulatory and U.S. Supreme Court limitations on its taxing jurisdiction. It is the position of the Tribe that the state's sales tax jurisdiction is preempted as to all sales by retailers operating under leases of trust land, not just non-Indian retailers operating in casinos. By broadening the scope of proposed change to the regulation, the BOE would save time and effort by avoiding the need for future amendments. Broadening the regulation would benefit tribes and their lessees by bringing certainty to the costs of doing business on reservations, which would enhance tribal ability to achieve economic self-sufficiency.

The Tribe offers the following comments to the proposed change:

1. The State's Analysis of its Taxing Jurisdiction Is Too Narrow in Scope.

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Bracker addressed the question of state jurisdiction over non-Indian activities on Indian reservations by creating a balancing test to determine whether state jurisdiction is preempted. The test requires a particularized inquiry into the relevant state, federal and tribal interests, and then balancing those interests. The relevant factors include the comprehensiveness of federal regulation of the taxed activity, the identity of the entity which bears the burden of the tax, the purpose of the tax, and the relationship between the taxing entity and the provision of governmental services to the taxpayer. See, e.g., *Ramah Navajo School Board, Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 843-45 (1982).

The test adopted by the Court differs from traditional federal preemption analysis and created a two-pronged test for determining when state jurisdiction on Indian reservations is preempted. Either prong of this test can suffice to preempt state jurisdiction: first, whether the imposition of jurisdiction is preempted by federal law; and second, whether the imposition of jurisdiction, in this instance taxing authority, interferes with the rights of a tribe to govern itself. The state had previously opined that the Helping Expedite and Advance Responsible Tribal Home Ownership Act (HEARTH Act) of 2012, and the subsequent revisions to federal leasing regulations applicable to trust lands, did not itself have preemptive effect. (See October 7, 2013 Memorandum from BOE Chief Counsel to BOE). In the instant analysis, the staff does not identify any other federal law that would serve as the basis for meeting the first prong of *Bracker*.

The staff's analysis concludes that California's taxing authority over casino-based non-Indian retailers selling food and beverages for on-reservation consumption and subject to tribal tax is preempted because the exercise of such authority would interfere with the right of the tribes to govern themselves. This finding is based on the strong federal and tribal interests represented by the stated purposes of the Indian Gaming Regulatory Act (IGRA) and related gaming compacts, and federal leasing regulations, including the HEARTH Act regulations, which state, "Subject only to applicable Federal law, the leasehold or possessory interest is not subject to any fee, tax, assessment, levy or other charge imposed by any State or political subdivision of a State." 25 C.F.R. Sec. 162.017(c). The staff determined that these federal and tribal interests outweigh the state's own interest in the collection of sales and use taxes for these on-reservation transactions, and the Tribe agrees with that determination.

The downside for the staff in performing a particularized analysis of such a narrow question is that it necessitates an ongoing series of particularized inquiries in circumstances differing incrementally from the casino context. By proposing a broader regulatory change, the

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BOE could save itself the time required by such analyses and can bring much-needed certainty to the economic development activities of tribes outside of the casino retail environment.

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This analysis of the federal and tribal interests in this single facet of economic activity in Indian country ignores the fact that the imposition of state sales and use taxes on the activities of non-Indian lessees engaged in commerce in Indian country outside the premises of tribal casinos and subject to tribal tax interferes with the right of tribes to govern themselves and impedes federal and tribal interests in tribal economic self-sufficiency.

The BOE has the opportunity to delineate a broad category of retail activity by non-Indian lessees of trust land that would be exempt from state sales and use tax based on a *Bracker* analysis. Based on the factors noted above as relevant to the balancing test, the imposition of state sales and use tax would always be preempted, and there would be no need for a particularized factual inquiry when:

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2. The non-Indian lessee of trust lands is operating pursuant to a lease approved by a federal regulatory process other than HEARTH Act regulations and the lessee is subject to tribal taxation. To subject lessees to state taxation would infringe upon the tribe's ability to govern by placing lessees of tribal trust lands at a competitive disadvantage, thus inhibiting tribal ability to engage in non-casino economic development; and

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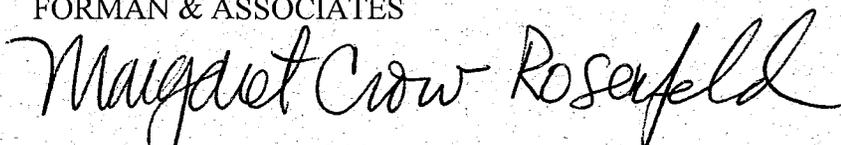
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While the proposed amendment acknowledges that pursuant to IGRA, dozens of California tribes have made substantial investments in on-reservation gaming facilities that attract non-Indian retailers to those facilities pursuant to leases, it is equally true that tribes have made comparable investments in creating other business environments drawing people to their reservations to engage in retail activity to further the tribe's economic development and self-sufficiency. For this reason, the BOE should expand the scope of the exemption from state sales and use tax to encompass all non-Indian retailers operating on leased trust land and subject to tribal taxation.

Bear River appreciates the opportunity to raise these issues with the Board, and looks forward to providing further feedback through its representatives at the meeting scheduled for March.

Very truly yours,

FORMAN & ASSOCIATES



Margaret Crow Rosenfeld

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Re: Comments on the Initial Discussion Paper on Proposed Revision to Board of Equalization Regulation 1616: Federal Areas

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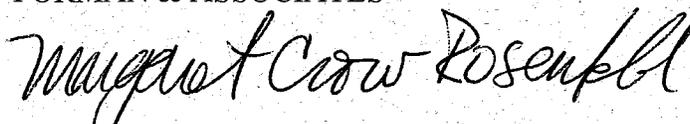
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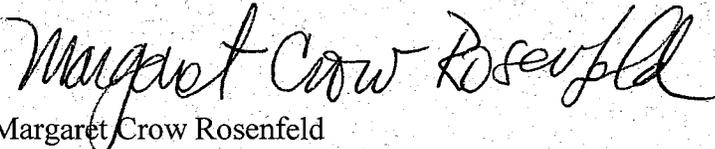
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Re: Comments on the Initial Discussion Paper on Proposed Revision to Board of Equalization Regulation 1616: Federal Areas

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Forman & Associates serves as legal counsel to the Morongo Band of Mission Indians ("Morongo" or "Tribe"), which has requested that we submit on its behalf the following comments on the proposed revisions to Board of Equalization ("BOE") Regulation 1616 which were the subject of an interested parties meeting on January 13, 2016. While the Tribe is encouraged by the efforts of the BOE to amend the regulation to conform in part to the current state of the law regarding state jurisdiction over activities in Indian country, the proposed revision does not bring the state into full conformity with federal regulatory and U.S. Supreme Court limitations on its taxing jurisdiction. It is the position of the Tribe that the state's sales tax jurisdiction is preempted as to all sales by retailers operating under leases of trust land, not just non-Indian retailers operating in casinos. By broadening the scope of proposed change to the regulation, the BOE would save time and effort by avoiding the need for future amendments. Broadening the regulation would benefit tribes and their lessees by bringing certainty to the costs of doing business on reservations, which would enhance tribal ability to achieve economic self-sufficiency.

The Tribe offers the following comments to the proposed change:

1. The State's Analysis of its Taxing Jurisdiction Is Too Narrow in Scope.

The Initial Discussion Paper on Proposed Revision to Board of Equalization Regulation 1616: Federal Areas analyzes the narrow question of "whether federal law preempts the

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imposition of California sales and use taxes on sales of meals, food, and beverages by such a non-Indian lessee" operating in tribal casinos. The staff concludes, after a particularized analysis pursuant to *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), that California is preempted from imposing sales or use tax on these particular retailers for sales for consumption on-reservation when such sales are subject to tribal tax.

Bracker addressed the question of state jurisdiction over non-Indian activities on Indian reservations by creating a balancing test to determine whether state jurisdiction is preempted. The test requires a particularized inquiry into the relevant state, federal and tribal interests, and then balancing those interests. The relevant factors include the comprehensiveness of federal regulation of the taxed activity, the identity of the entity which bears the burden of the tax, the purpose of the tax, and the relationship between the taxing entity and the provision of governmental services to the taxpayer. See, e.g., *Ramah Navajo School Board, Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 843-45 (1982).

The test adopted by the Court differs from traditional federal preemption analysis and created a two-pronged test for determining when state jurisdiction on Indian reservations is preempted. Either prong of this test can suffice to preempt state jurisdiction: first, whether the imposition of jurisdiction is preempted by federal law; and second, whether the imposition of jurisdiction, in this instance taxing authority, interferes with the rights of a tribe to govern itself. The state had previously opined that the Helping Expedite and Advance Responsible Tribal Home Ownership Act (HEARTH Act) of 2012, and the subsequent revisions to federal leasing regulations applicable to trust lands, did not itself have preemptive effect. (See October 7, 2013 Memorandum from BOE Chief Counsel to BOE). In the instant analysis, the staff does not identify any other federal law that would serve as the basis for meeting the first prong of *Bracker*.

The staff's analysis concludes that California's taxing authority over casino-based non-Indian retailers selling food and beverages for on-reservation consumption and subject to tribal tax is preempted because the exercise of such authority would interfere with the right of the tribes to govern themselves. This finding is based on the strong federal and tribal interests represented by the stated purposes of the Indian Gaming Regulatory Act (IGRA) and related gaming compacts, and federal leasing regulations, including the HEARTH Act regulations, which state, "Subject only to applicable Federal law, the leasehold or possessory interest is not subject to any fee, tax, assessment, levy or other charge imposed by any State or political subdivision of a State." 25 C.F.R. Sec. 162.017(c). The staff determined that these federal and tribal interests outweigh the state's own interest in the collection of sales and use taxes for these on-reservation transactions, and the Tribe agrees with that determination.

The downside for the staff in performing a particularized analysis of such a narrow question is that it necessitates an ongoing series of particularized inquiries in circumstances differing incrementally from the casino context. By proposing a broader regulatory change, the

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BOE could save itself the time required by such analyses and can bring much-needed certainty to the economic development activities of tribes outside of the casino retail environment.

2. *A Bracker Analysis Supports an Exemption from Imposition of State Sales and Use Tax on All Transactions by Non-Indian Lessees of Trust Land on Reservations.*

The staff's analysis of the proposed change focuses only on retail activity at casinos, relying upon IGRA and state gaming compacts as strong evidence of the federal interest in this one form of tribal economic development and recognizing the obvious tribal interest in both economic development revenues generally and in the use of those revenues to meet gaming compact obligations to the state, surrounding communities, and non-gaming tribes.

This analysis of the federal and tribal interests in this single facet of economic activity in Indian country ignores the fact that the imposition of state sales and use taxes on the activities of non-Indian lessees engaged in commerce in Indian country outside the premises of tribal casinos and subject to tribal tax interferes with the right of tribes to govern themselves and impedes federal and tribal interests in tribal economic self-sufficiency.

The BOE has the opportunity to delineate a broad category of retail activity by non-Indian lessees of trust land that would be exempt from state sales and use tax based on a *Bracker* analysis. Based on the factors noted above as relevant to the balancing test, the imposition of state sales and use tax would always be preempted, and there would be no need for a particularized factual inquiry when:

1. The non-Indian lessee of trust lands is operating pursuant to a lease approved under tribal or federal leasing regulations, because even if the language in the tribal or federal regulation is not itself sufficient to trigger federal preemption, subjecting non-Indian lessees to state taxation in addition to tribal taxation interferes with the ability of the tribe to govern itself. The staff has already acknowledged that the federal interest expressed in 25 C.F.R. § 162.017(c) represents a strong factor in favor of tribal and federal interests in the balancing test. The tribe's own comprehensive regulatory scheme for leasing land for purposes including economic development would be infringed if the potential non-Indian lessee were subject to taxation from both the state and tribal governments; or

2. The non-Indian lessee of trust lands is operating pursuant to a lease approved by a federal regulatory process other than HEARTH Act regulations and the lessee is subject to tribal taxation. To subject lessees to state taxation would infringe upon the tribe's ability to govern by placing lessees of tribal trust lands at a competitive disadvantage, thus inhibiting tribal ability to engage in non-casino economic development; and

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3. In instances where the tribe provides the primary governmental services to the non-Indian lessee, the balancing test always would shift in favor of the tribal interest because the tribal taxation scheme supporting the direct or indirect provision of governmental services would be infringed by imposition of state taxes the revenue from which would not support services to the taxpayer. When services such as such as fire protection, public safety, road maintenance, water, sewage disposal/treatment and/or other utilities are provided by the tribe, either directly or indirectly through compensation to surrounding non-tribal governments or agencies, and the non-Indian lessee is subject to tribal taxation, imposition of state taxation is preempted.

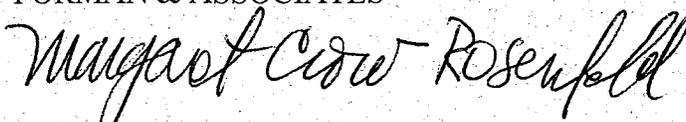
The United States Supreme Court has held that the on-reservation sale of goods that have been manufactured on the reservation or that derive their value from tribal investments in on-reservation ventures, are not properly subject to state tax. See, e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219-20 (1987) (holding that California was preempted from exercising jurisdiction over Tribes' on-reservation activities the value of which was generated by the Tribes themselves: "... the Tribes are not merely importing a product onto the reservations for immediate resale to non-Indians."); *Bracker*, 448 U.S. 136, 145 (1980) (holding that the preemptive power of tribal interests is "strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services").

While the proposed amendment acknowledges that pursuant to IGRA, dozens of California tribes have made substantial investments in on-reservation gaming facilities that attract non-Indian retailers to those facilities pursuant to leases, it is equally true that tribes have made comparable investments in creating other business environments drawing people to their reservations to engage in retail activity to further the tribe's economic development and self-sufficiency. For this reason, the BOE should expand the scope of the exemption from state sales and use tax to encompass all non-Indian retailers operating on leased trust land and subject to tribal taxation.

Morongo appreciates the opportunity to raise these issues with the Board, and looks forward to providing further feedback through its representatives at the meeting scheduled for March.

Very truly yours,

FORMAN & ASSOCIATES



Margaret Crow Rosenfeld

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January 29, 2016

VIA E-MAIL (Susanne.Buehler@boe.ca.gov) & FACSIMILE (916-322-4530)

Susanne Buehler
State Board of Equalization
450 N Street
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Sacramento, CA 94279-0092

Re: Comments on the Initial Discussion Paper on Proposed Revision to Board of Equalization Regulation 1616: Federal Areas

Dear Ms. Buehler:

Forman & Associates serves as legal counsel to the Soboba Band of Luiseño Indians ("Soboba" or "Tribe"), which has requested that we submit on its behalf the following comments on the proposed revisions to Board of Equalization ("BOE") Regulation 1616 which were the subject of an interested parties meeting on January 13, 2016. While the Tribe is encouraged by the efforts of the BOE to amend the regulation to conform in part to the current state of the law regarding state jurisdiction over activities in Indian country, the proposed revision does not bring the state into full conformity with federal regulatory and U.S. Supreme Court limitations on its taxing jurisdiction. It is the position of the Tribe that the state's sales tax jurisdiction is preempted as to all sales by retailers operating under leases of trust land, not just non-Indian retailers operating in casinos. By broadening the scope of proposed change to the regulation, the BOE would save time and effort by avoiding the need for future amendments. Broadening the regulation would benefit tribes and their lessees by bringing certainty to the costs of doing business on reservations, which would enhance tribal ability to achieve economic self-sufficiency.

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The United States Supreme Court has held that the on-reservation sale of goods that have been manufactured on the reservation or that derive their value from tribal investments in on-reservation ventures, are not properly subject to state tax. See, e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219-20 (1987) (holding that California was preempted from exercising jurisdiction over Tribes' on-reservation activities the value of which was generated by the Tribes themselves: "... the Tribes are not merely importing a product onto the reservations for immediate resale to non-Indians."); *Bracker*, 448 U.S. 136, 145 (1980) (holding that the preemptive power of tribal interests is "strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services").

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Soboba appreciates the opportunity to raise these issues with the Board, and looks forward to providing further feedback through its representatives at the meeting scheduled for March.

Very truly yours,

FORMAN & ASSOCIATES


Margaret Crow Rosenfeld



January 29, 2016

VIA FACSIMILE: (916) 322-4530

Ms. Susanne Buehler, Chief
Tax Policy Division (MIC 92)
Board of Equalization
450 N Street
PO Box 942879
Sacramento, CA 94279-0092

Re: Comments to Initial Discussion Paper- Regulation 1616, *Federal Areas*

Dear Ms. Buehler,

I am writing you to on behalf of the Dry Creek Rancheria, Band of Pomo Indians regarding your letter dated December 18, 2015 and the accompanying Initial Discussion Paper, Regulation 1616, *Federal Areas*. We would first like to express our appreciation for the opportunity to work with the BOE in developing tax guidelines that are in keeping with federal Indian law. BOE's willingness to solicit and implement comments provided by tribal representatives is noteworthy.

We have reviewed the Initial Discussion Paper (the "Proposal") and although we think the language is an improvement on the Regulation, it is our view that the Proposal is incomplete and would benefit from additional language, as set forth herein.

BOE's Proposed change to Regulation 1616:

(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.

3. California sales and use tax does not apply to sales of meals, food, and beverages by a non-Indian operating an establishment such as a restaurant or bar, in leased space, in an Indian tribe's casino, when the sales are subject to the Indian tribe's sales tax and the meals, food and beverages are furnished for consumption in the casino.

Discussion Regarding State Taxation in Indian Country

As a general principle of federal law, states lack jurisdiction to tax Indian tribes or an individual Indians living in Indian country without specific authorization from Congress. The Commerce Clause of the United States Constitution states that "The Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."¹ This doctrine was first articulated by the United States Supreme Court in *Worcester v. Georgia*,² which held that Indian nations were "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States."³

In 1953, during a period when the United States' policy towards Indian tribes was one of termination and assimilation, Congress exercised its power to grant six enumerated States, including California, limited criminal jurisdiction over individual Indians in Indian country, and civil adjudicatory jurisdiction over causes of action involving Indians and arising in Indian country by enacting Public Law 83-280 (commonly referred to as "Public Law 280" or "P.L. 280"), 18 U.S.C. Sec. 1162, 28 U.S.C. Sec. 1360. Specifically, it granted six states – Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin – limited jurisdiction to enforce against individual Indians in Indian country state criminal laws of general application, and to adjudicate civil causes of action arising in Indian country and involving Indians.⁴ P.L. 280 did not grant states jurisdiction over tribes themselves, did not abrogate inherent tribal sovereign immunity, and expressly barred state adjudication of the ownership or right to possession of trust lands. P.L. 280 has been interpreted by the courts as *not* giving states or local non-tribal governments jurisdiction to enforce civil regulatory laws against Indians or Indian Tribes in Indian country.⁵

When considering the scope of California's jurisdiction to tax California Indian tribes, P.L. 280 provides an important part of the "backdrop" of the Indian sovereignty doctrine. The

¹ U.S.C.A Const. art. 1, §8, cl.3.

² 31 U.S. (6Pet.) 515 (1832).

³ *Id.* At 557.

⁴ See 28 U.S.C. § 1162 (transferring criminal jurisdiction); 18 U.S.C. § 1360 (transferring limited civil jurisdiction); see also *Bryan v. Itasca County*, 426 U.S. 373, 379 (1976). The law gave the six states little choice in accepting the congressional delegation, which is why they are called "mandatory states." The original enactment only targeted five states, including California; Alaska was added later by amendment in 1958. The statute also exempted certain Indian reservations because their judicial and law enforcement systems "function[ed] in a reasonably satisfactory manner." S. Rep. No. 699, at 6 (1953); 18 U.S.C. § 1162 (a) exempting the Annette Islands in Alaska, the Red Lake Reservation of Minnesota, and the Warm Springs Reservation of Oregon). Other states were given the opportunity to opt-in to P.L. 280, with tribal consent.

⁵ See, *Santa Rosa Band of Indians v. Kings County*, 532 F. 2d 635, 662 (9th Cir. 1975).

Supreme Court interpreted P.L. 280's reach in *Bryan v. Itasca County*.⁶ The Court specifically addressed whether P.L. 280 granted taxing authority to states, including the very important historical background of the United States' dealings with Indian tribes. The Court held that Public Law 280 did not grant States the authority to impose taxes on reservation Indians.⁷

Specifically, a unanimous Court held that Public Law 280 did not change the status quo after the Court's prior decisions in *Mescalero Apache Tribe v. Jones*,⁸ and *McClanahan v. Arizona State Tax Commission*⁹ that states had no authority to tax Indians "absent Congressional consent."¹⁰

After acknowledging this Nation's history with regard to its dealings with Indian tribes, the United States Supreme Court has opined that:

"[I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan v. Arizona State Tax Comm'n, supra*, lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent."¹¹

Discussion Regarding Federal Pre-Emption

With regard to State taxation principles, the State and its taxing agencies generally assume that all residents, property and sales within in the State are taxable unless there is a state law exemption from the tax. The Proposal includes a new reference to Revenue & Taxation Code 6352, which greatly improves Regulation 1616, and appropriately directs the State tax entities to a legal source when evaluating whether a tax may be preempted by federal law. The reference cites to the following text:

6352. There are exempted from the taxes imposed by this part the gross receipts from the sale of and the storage, use, or other consumption in this State of tangible personal property the gross receipts from the sale of which, or the storage, use, or other consumption of which, this State is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State.

We support the inclusion of Section 6352 into Regulation 1616 and assert that it requires the BOE to recognize arguments set forth in this letter.

Application of *White Mountain Apache Tribe v. Bracker*

⁶ *Bryan v. Itasca County*, 426 U.S. 373 (1976).

⁷ *Id.* Pp. 426 U. S. 379-393.

⁸ *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

⁹ *McClanahan v. Arizona State Tax Comm'n*,

¹⁰ *Bryan*, at 426 U.S. 373, 377.

¹¹ *Bryan*, at 426 U.S. 373, 377, citing *Mescalero Apache Tribe v. Jones, supra*, at 148.

We further agree and support the BOE's brief analysis in the Proposal finding that the *Bracker* decision requires the Board to review the particular facts and circumstance applicable to the imposition of California's sales and use taxes on activities conducted on Indian reservations to determine whether the state, federal, and tribal interests at state require federal preemption of the taxes. We further agree that with the analysis of the Board's Legal Department that the federal and tribal interests in preempting California's sales and use taxes outweighed the state's interest in imposing such taxes when a tribal casino, operated under a Tribal-State Gaming Compact entered into in accordance with IGRA, leases a restaurant or bar to a non-Indian who makes sales of meals, food and beverages on site for consumption in the tribal casino and where the sales are subject to a tribal sales tax. We assert that the Board's conclusion that the State is preempted from taxing the sales of food and beverages sold for consumption on the reservation by a non-Indian lessee in the Tribe's casino is proper and well-reasoned.

However, we also assert that the Proposal is overly narrow because the same tribal and federal interests would be present where a Tribe enters into a business site lease for a bar or restaurant on its reservation pursuant to a Secretarial approved Leasing Code under the "Helping Expedite and Advance Responsible Tribal Homeownership Act of 2012" or the "HEARTH Act of 2012". Pub. L. No. 112-151, 126 Stat. 1150. (2012). We ask the Board to consider expanding its *Bracker* analysis above to include this other important federally-preempted category of leases, which are not always located in a tribal casino.

Dry Creek Rancheria Tribal Land Leasing Code

In January 2012, the United States Congress passed legislation, the "HEARTH Act of 2012" that authorizes federally-recognized Indian tribes to lease restricted Indian lands for public, religious, educational, recreational, residential, business and other purposes requiring the grant of long term leases without prior express approval from the Secretary of Interior. Pub. L. No. 112-151, 126 Stat. 1150. (2012). On April 4, 2014, the Secretary of the Interior formally approved the Dry Creek Rancheria, Band of Pomo Indians Tribal Land Leasing Code pursuant to the HEARTH Act. A copy of the BIA press release regarding the approval of the Leasing Code is attached for your reference.

The Dry Creek Rancheria Tribal Land Leasing Code ("Leasing Code") implements the HEARTH Act by establishing a tribal land leasing program that is consistent with federal leasing regulations. The Leasing Code establishes a process whereby the Tribe, through its Board of Directors and other designated tribal entities could negotiate a lease of land or space on tribal trust lands, initiate and complete an environmental review process and bring a final leasing proposal to the Tribal Council for final review and ratification before it can be executed. Some important provisions of the Proposed Leasing Code and the HEARTH Act are:

- 1) Lease terms for up to 25 years (with up to 2 additional renewal terms);
- 2) Does not allow for tribal approval of a lease for the exploration, development or extraction of any mineral resources;
- 3) Requires the development of an Environmental Report and publication of that report by the Tribe in a local publication to provide for public comment;
- 4) Public comments would be addressed in the tribal environmental review process.

The primary purpose of the Leasing Code to bring leasing matters under tribal authority rather than the Bureau of Indian Affairs (“BIA”). The BIA has little, if any funding for staff to review and approve leases and therefore most leases of trust land in California can take years to approve, if they are approved at all. The Tribe’s General Council, composed of over 1100 tribal members determined that the HEARTH Act leasing program is consistent with the Tribe’s long-term goals of bringing additional lands into trust for governmental, housing and economic development purposes.

The HEARTH Act requires the Secretary of Interior to either approve or disapprove any submission of tribal leasing regulations no later than 120 days after they are submitted and provides that the Secretary supply written documentation describing the basis for any disapproval. The process of developing the Leasing Code took over one year of working with United States solicitors and leasing staff in the BIA’s central office. The Leasing Code now provides an important mechanism for economic development of tribal trust lands and is therefore of utmost importance to the Tribe.

In a recent case interpreting the HEARTH Act, *Seminole Tribe of Florida v. State of Florida*,¹² the State of Florida was attempting to impose two different taxes on tribal lands: a “rental tax” on businesses leasing property from the Tribe; and, a “utility tax” on electricity delivered to the Tribe’s lands. The Court held that Florida’s rental tax was preempted by federal laws governing leasing on Indian lands (it also invalidated the utility tax because the legal incidence of the tax fell on the Tribe).

The Court held that both the HEARTH Act and the BIA’s new leasing regulations preempt state taxes on the use of tribal property. The Department of the Interior published those new regulations in November 2012, which include this provision:

162.017 What taxes apply to leases approved under this part?

- (a) Subject only to applicable Federal law, permanent improvements on the leased land, without regard to ownership of those improvements, are not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Improvements may be subject to taxation by the Indian tribe with jurisdiction.
- (b) Subject only to applicable Federal law, activities under a lease conducted on the leased premises are not subject to any fee, tax, assessment, levy, or other charge (e.g., business use, privilege, public utility, excise, gross revenue taxes) imposed by any State or political subdivision of a State. Activities may be subject to taxation by the Indian tribe with jurisdiction.
- (c) Subject only to applicable Federal law, the leasehold or possessory interest is not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Leasehold or possessory interests may be subject to taxation by the Indian tribe with jurisdiction. See attached pages of 25 C.F.R. Part 162.

¹² *Seminole Tribe of Florida v. State of Florida*, United States District Court, Southern Florida, Civil Action No. 12-62140, (2014).

(c) Subject only to applicable Federal law, the leasehold or possessory interest is not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Leasehold or possessory interests may be subject to taxation by the Indian tribe with jurisdiction. See attached pages of 25 C.F.R. Part 162.

The Court noted the importance of this new provision, and its impact on the preemption analysis under *Bracker*: “Unlike in *Cotton Petroleum* or *Bracker*, this Court now has the benefit of the comprehensive analysis performed by the Secretary of the Interior showing how tribal interests are affected by state taxes on leases of restricted Indian land.”¹³

The Court cited numerous passages from the Preamble to the new leasing regulations and noted, “[t]he Court finds the Secretary’s preemption analysis thorough and persuasive.”

The Dry Creek Rancheria Leasing Code has virtually the same Preamble as the Seminole Tribe’s Leasing Code and therefore, it does seem apparent that Tribe’s Leasing Code, as set forth in the HEARTH Act, requires a similar analysis under *Bracker*. Consequently, we assert that the Board should amend its Proposal to amend Regulation 1616 to include the following language:

Dry Creek Rancheria’s Proposed change to Regulation 1616:

(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.

3. California sales and use tax does not apply to sales of meals, food, and beverages by a non-Indian operating an establishment such as a restaurant or bar, in leased space, in an Indian tribe’s casino, when the sales are subject to the Indian tribe’s sales tax and the meals, food and beverages are furnished for consumption in the casino.

4. California sales and use tax does not apply to sales of meals, food, and beverages by a non-Indian operating an establishment such as a restaurant or bar, under a business site lease pursuant to the Helping Expedite and Advance Responsible Tribal Homeownership Act of 2012” or the “HEARTH Act of 2012”, Pub. L. No. 112-151, 126 Stat. 1150. (2012), on a reservation, and the meals, food and beverages are furnished for consumption within that site.

It is our position that it is within the Tribe’s discretion whether it will assess a tribal tax, as that decision is one that requires careful balancing. The *Seminole* court noted, “If Florida’s

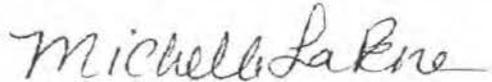
¹³ Id at page 4.

Rental Tax does not apply, an entity leasing tribal land will have additional money in its pocket – money that would then be available to the Tribe, either through negotiated higher rent or through a tribal tax.” We assert that the HEARTH Act was passed and the 25 C.F.R Part 162 support the Tribe’s right to determine how best to leverage the financial terms so that the Tribe can achieve the highest benefit from a business site lease.

Conclusion

On behalf of the Dry Creek Rancheria, Band of Pomo Indians, we appreciate the leadership and initiative the BOE has shown in drafting and circulating the Initial Discussion Paper. We look forward to continued dialogue on this important matter and we hope to answer any remaining questions that the Legal Department may have regarding this letter. Please contact me at (916) 442-9906 or by email at michelle@lapenalaw.com if you have any questions.

Respectfully,



LAPENA LAW CORPORATION
Michelle LaPena



OFFICE OF THE SECRETARY
U.S. Department
of the Interior

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News Release

Office of the Assistant Secretary – Indian Affairs

FOR IMMEDIATE RELEASE
April 10, 2014

CONTACT: Nedra Darling
202-219-4152

Assistant Secretary Washburn Approves Four HEARTH Act Applications to Help Spur Economic Development in Tribal Communities

Dry Creek Rancheria, Jamestown S’Klallam, Mohegan, and Wichita and Affiliated Tribes join eight others already cleared to process economic development leases without BIA approval

WASHINGTON, D.C. -- Assistant Secretary – Indian Affairs Kevin K. Washburn today approved leasing regulations submitted by four federally recognized tribes, restoring their authority to control the leasing of their trust lands and promoting their self-determination and economic development. This streamlined process for restoring tribal leasing authority is consistent with the objectives of the Helping Expedite and Advance Responsible Tribal Homeownership Act, or HEARTH Act.

“Thanks to the HEARTH Act, more tribes have been empowered to take over leasing on their lands,” Assistant Secretary Washburn said. “Tribal governments are the drivers of economic self-sufficiency and prosperity on their reservations and in their communities. The HEARTH Act restores their ability to directly control how their lands can and should be used for the good of their people, now and in the future.”

The four tribes, submitted requests for Secretarial approval of their leasing regulations, are: Dry Creek Rancheria Band of Pomo Indians in California, Jamestown S’Klallam Tribe in Washington State, Mohegan Indian Tribe of Connecticut, and Wichita and Affiliated Tribes in Oklahoma. Each tribe plans to authorize leases for general economic development.

The HEARTH Act was signed by President Obama in July 2012. It restores the authority of federally recognized tribes to develop and implement their own laws governing long-term leasing of federal Indian trust lands for residential, business, renewable energy and other purposes, which greatly expedites the approval of leases for homes and small businesses in Indian Country. Upon one-time approval of its regulations by the Department of the Interior, a tribe may process land leases without having to first gain approval from the Bureau of Indian Affairs (BIA).

The Assistant Secretary's action brings to 12 the number of tribes who have had their tribal leasing regulations approved under the Act. The others are: Federated Indians of Graton Rancheria, California (Feb. 1, 2013); Pueblo of Sandia, New Mexico (March 14, 2013); Pokagon Band of Potawatomi Indians, Michigan (April 11, 2013); Ak-Chin Indian Community, California (Nov. 10, 2013); Santa Rosa Band of Cahuilla Indians, California (Nov. 10, 2013); Citizen Potawatomi Nation, Oklahoma (Nov. 25, 2013); Ewiiapaayp Band of Kumeyaay Indians, California (Dec. 10, 2013); and Kaw Nation, Oklahoma (Dec. 13, 2013).

In November 2012, the Department announced new regulations resulting from a comprehensive reform of the BIA's antiquated regulations governing its process for approving surface leases on lands held in trust by the Federal Government for Indian tribes and individuals. As trustee, Interior manages about 56 million surface acres in Indian Country.

The new regulations streamlined the leasing approval process on Indian land, spurring increased homeownership and expediting business and commercial development, including renewable energy projects.

The Assistant Secretary – Indian Affairs oversees the BIA, which is headed by a director who is responsible for managing day-to-day operations through four offices – Indian Services, Justice Services, Trust Services and Field Operations. These offices directly administer or fund tribally based infrastructure, law enforcement, social services, tribal governance, natural and energy resources, and trust management programs for the nation's federally recognized American Indian and Alaska Native tribes and villages through 12 regional offices and 85 agencies.

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[4310-6W-P]

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 162

[Docket ID: BIA-2011-0001]

RIN 1076-AE73

Residential, Business, and Wind and Solar Resource Leases on Indian Land

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Final rule.

SUMMARY: The Bureau of Indian Affairs (BIA) is revising its regulations addressing non-agricultural surface leasing of Indian land. This rule adds new subparts to part 162 to address residential leases, business leases, wind energy evaluation leases, and wind and solar development leases on Indian land, and removes the existing subpart for non-agricultural leases.

DATES: This rule is effective on [INSERT DATE 30 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Elizabeth Appel, Acting Director, Office of Regulatory Affairs & Collaborative Action, (202) 273-4680; elizabeth.appel@bia.gov.

SUPPLEMENTARY INFORMATION:

States' political relationship with Indian tribes. Tribes have a sovereign interest in achieving and maintaining economic self-sufficiency, and the federal government has an established policy of encouraging tribal self-governance and tribal economic self-sufficiency. A tribe-specific preference in accord with tribal law ensures that the economic development of a tribe's land inures to the tribe and its members. Tribal sovereign authority, which carries with it the right to exclude non-members, allows the tribe to regulate economic relationships on its reservation between itself and non-members. See, generally, *Equal Employment Opportunity Commission v. Peabody Western Coal Company*, No. 2:01-cv-01050 JWS (D. Ariz., Oct. 18, 2012) (upholding tribal preferences in leases of coal held in trust for the Navajo Nation and Hopi Tribe, but also citing with approval the use of such preferences in business leases). These regulations implement the established policy of encouraging tribal self-governance and tribal economic self-sufficiency by explicitly allowing for tribal employment preferences.

162.16 (PR 162.014) – BIA Compliance with Tribal Laws

- Restrict when BIA will defer to tribal law by changing “making decisions regarding leases” to “making the decision to approve or disapprove the proposed lease.” We did not incorporate this change because BIA will defer to tribal law in decisions regarding leases beyond just the approval decision.

162.17 (PR N/A) – What Taxes Apply (New Section)

All tribal commenters supported proposed provisions clarifying that improvements on trust or restricted land are not taxable by non-tribal entities; however, many tribes requested clarification regarding other taxation arising in the context of leasing Indian land. For this reason, we separated this topic into its own section and

moved it from the residential, business, and WSR leasing subparts to subpart A. This section now addresses not only taxation of improvements on leased Indian land, but also taxation of the leasehold or possessory interest, and taxation of activities (e.g., excise or severance taxes) occurring or services performed on leased Indian land.

Tribes have inherent plenary and exclusive power over their citizens and territory, which has been subject to limitations imposed by Federal law, including but not limited to Supreme Court decisions, but otherwise may not be transferred except by the tribe affirmatively granting such power. *See, Cohen's Handbook of Federal Indian Law*, 2012 Edition, § 4.01[1][b]. The U.S. Constitution, as well as treaties entered into between the United States and Indian tribes, executive orders, statutes, and other Federal laws recognize tribes' inherent authority and power of self-government. *See, Worcester v. Georgia*, 31 U.S. 515 (1832); *U.S. v. Winans*, 198 U.S. 371, 381 (1905) (“[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them -- a reservation of those not granted.”); *Cohen's Handbook of Federal Indian Law*, 2012 Edition, § 4.01[1][c] (“Illustrative statutes... include [but are not limited to] the Indian Civil Rights Act of 1968, the Indian Financing Act of 1974, the Indian Self-Determination and Education Assistance Act of 1975... [and] the Tribe Self-Governance Act... In addition, congressional recognition of tribal authority is [also] reflected in statutes requiring that various administrative acts of... the Department of the Interior be carried out only with the consent of the Indian tribe, its head of government, or its council.”); *Id.* (“Every recent president has affirmed the governmental status of Indian nations and their special relationship to the United States”).

With a backdrop of “traditional notions of Indian self-government,” Federal courts apply a balancing test to determine whether State taxation of non-Indians engaging in activity or owning property on the reservation is preempted. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). The *Bracker* balancing test requires a particularized examination of the relevant State, Federal, and tribal interests. In the case of leasing on Indian lands, the Federal and tribal interests are very strong.

The Federal statutes and regulations governing leasing on Indian lands (as well as related statutes and regulations concerning business activities, including leases, by Indian traders) occupy and preempt the field of Indian leasing. The Federal statutory scheme for Indian leasing is comprehensive, and accordingly precludes State taxation. In addition, the Federal regulatory scheme is pervasive and leaves no room for State law. Federal regulations cover all aspects of leasing:

- Whether a party needs a lease to authorize possession of Indian land;
- How to obtain a lease;
- How a prospective lessee identifies and contacts Indian landowners to negotiate a lease;
- Consent requirements for a lease and who is authorized to consent;
- What laws apply to leases;
- Employment preference for tribal members;
- Access to the leased premises by roads or other infrastructure;
- Combining tracts with different Indian landowners in a single lease;
- Trespass;
- Emergency action by us if Indian land is threatened;

- Appeals;
- Documentation required in approving, administering, and enforcing leases;
- Lease duration;
- Mandatory lease provisions;
- Construction, ownership, and removal of permanent improvements, and plans of development;
- Legal descriptions of the leased land;
- Amount, time, form, and recipient of rental payments (including non-monetary rent), and rental reviews or adjustments;
- Valuations;
- Performance bond and insurance requirements;
- Secretarial approval process, including timelines, and criteria for approval of leases;
- Recordation;
- Consent requirements, Secretarial approval process, criteria for approval, and effective date for lease amendments, lease assignments, subleases, leasehold mortgages, and subleasehold mortgages;
- Investigation of compliance with a lease;
- Negotiated remedies;
- Late payment charges or special fees for delinquent payments;
- Allocation of insurance and other payment rights;
- Secretarial cancellation of a lease for violations; and
- Abandonment of the leased premises.

The purposes of residential, business, and WSR leasing on Indian land are to promote Indian housing and to allow Indian landowners to use their land profitably for economic development, ultimately contributing to tribal well-being and self-government. The legislative history of section 415 demonstrates that Congress intended to maximize income to Indian landowners and encourage all types of economic development on Indian lands. See Sen. Rpt. No. 84-375 at 2 (May 24, 1955). Assessment of State and local taxes would obstruct Federal policies supporting tribal economic development, self-determination, and strong tribal governments. State and local taxation also threatens substantial tribal interests in effective tribal government, economic self-sufficiency, and territorial autonomy. The leasing of trust or restricted land is an instrumental tool in fulfilling “the traditional notions of sovereignty and □ the federal policy of encouraging tribal independence.” *Bracker*, 448 U.S. at 145 (citing *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164, 174-75 (1973)). The leasing of trust or restricted lands facilitates the implementation of the policy objectives of tribal governments through vital residential, economic, and governmental services. Tribal sovereignty and self-government are substantially promoted by leasing under these regulations, which require significant deference, to the maximum extent possible, to tribal determinations that a lease provision or requirement is in its best interest. See Joseph P. Kalt and Joseph William Singer, *The Native Nations Institute for Leadership, Management, and Policy & The Harvard Project on American Indian Economic Development, Joint Occasional Papers on Native Affairs, Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule*, No. 2004-03 (2004) (“economically and culturally, sovereignty is a key lever that provides American Indian communities with institutions

and practices that can protect and promote their citizens interests and well-being [and] [w]ithout that lever, the social, cultural, and economic viability of American Indian communities and, perhaps, even identities is untenable over the long run”).

Another important aspect of tribal sovereignty and self-governance is taxation. Permanent improvements and activities on the leased premises and the leasehold interest itself may be subject to taxation by the Indian tribe with jurisdiction over the leased property. The Supreme Court has recognized that “[t]he power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management.” *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982). State and local taxation of lessee-owned improvements, activities conducted by the lessee, and the leasehold interest also has the potential to increase project costs for the lessee and decrease the funds available to the lessee to make rental payments to the Indian landowner. Increased project costs can impede a tribe’s ability to attract non-Indian investment to Indian lands where such investment and participation are critical to the vitality of tribal economies. An increase in project costs is especially damaging to economic development on Indian lands given the difficulty Indian tribes and individuals face in securing access to capital. A 2001 study by the U.S. Department of the Treasury found that Indians’ lack of access to capital and financial services is a key barrier to economic advancement. U.S. Dept. of the Treasury, Community Development and Financial Institutions Fund, *The Report of the Native American Lending Study* at 2 (Nov. 2001). Along the same line, 66 percent of survey respondents stated that private equity is difficult or impossible to obtain for Indian business owners. *Id.*

In many cases, tribes contractually agree to reimburse the non-Indian lessee for the expense of the tax, resulting in the economic burden of the tax ultimately being borne directly by the tribe. Accordingly, the very possibility of an additional State or local tax has a chilling effect on potential lessees as well as the tribe that as a result might refrain from exercising its own sovereign right to impose a tribal tax to support its infrastructure needs. Such dual taxation can make some projects less economically attractive, further discouraging development in Indian country. Economic development on Indian lands is critical to improving the dire economic conditions faced by American Indians and Alaska Natives. The U.S. Census Report entitled *We the People: American Indians and Alaska Natives in the United States*, issued February 2006, documented that a higher ratio of American Indians and Alaska Natives live in poverty compared to the total population, that participation in the labor force by American Indians and Alaska Natives was lower than the total population, and that those who worked full-time earned less than the general population.

162.017(a). Subject only to applicable Federal law, permanent improvements on trust or restricted land are not taxable by States or localities, regardless of who owns the improvements. Permanent improvements are, by their very definition, affixed to the land. Accordingly, a property tax on the improvements burdens the land, particularly if a State or local government were to attempt to place a lien on the improvement. Numerous provisions in the regulations address all aspects of improvements, requiring the Secretary to ensure himself that adequate consideration has been given to the enumerated factors under section 415(a). These include the height, safety, and quality of improvements; provisions requiring the lease to address ownership, construction, and removal of

improvements; provisions imposing due diligence requirements on the construction of improvements, and provisions requiring plans of development for business and WSR leases. *See, e.g.*, 162.314 through 162.316, 162.414 through 162.416, 162.514 through 162.516, and 162.543 through 162.545. In addition, the regulations require the BIA to comply with tribal law, including tribal laws regulating improvements, when making decisions concerning leases of trust or restricted land. *See* 162.016. State and local taxation of improvements undermine Federal and tribal regulation of improvements.

162.017(b). Subject only to applicable Federal law, activities conducted under a lease of trust or restricted land that occur on the leased premises are not taxable by States or localities, regardless of who conducts the activities. An example of this principle is in the trading business where the courts have held that taxation of such activities is preempted by the Indian Trader Statutes, *see* 25 U.S.C. 261, and the all-inclusive regulations under them, *see* 25 CFR 140.1-.26. Federal statutes and regulations are “sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for State laws imposing additional burdens upon traders.” *Warren Trading Post Co. v. Arizona State Tax Comm’n*, 38 U.S. 685, 690 (1995) (precluding imposition of State sales taxes); *Central Machinery Co. v. Arizona State Tax Comm’n*, 448 U.S. 160 (1980) (preemption applies even if vendor is not licensed as long as goods or services are traded to a tribe or its members in a transaction occurring predominately on the reservation). As a general matter, myriad activities on leased lands related to economic development, infrastructure building, and governmental operations provide important revenue and services to the tribal economy and the generation of economic activity on leased land is an essential component of tribal self-

sufficiency. State and local taxation undermines that important objective of federal regulation of the leasing of Indian lands. This subsection, like 162.017(a), is intended to achieve the dual purposes of supporting tribal economic development and promoting tribal self-government. The additional burden of State and local taxation on lease activities would significantly affect the marketability of Indian land for economic development, as noted above in the introductory paragraphs. In addition, tribes, as sovereigns, have inherent authority to regulate zoning and land use on Indian trust and restricted land, and the regulations require BIA to comply with tribal laws relating to land use. See 162.016. Such regulation is undermined by State and local taxation.

162.017(c). Subject only to applicable Federal law, the leasehold or possessory interest itself is not taxable by States or local governments. The ability of a tribe or individual Indian to convey an interest in trust or restricted land arises under Federal law, not State law; Federal legislation has left the State with no duties or responsibilities for such interests, even recordation (25 U.S.C. 5); and the leasehold interest is exhaustively regulated by this rule, as noted above. For example, a leasehold interest may not be conveyed, mortgaged, assigned, or subleased without Secretarial approval, with limited exceptions. Compelling Federal interests in self-determination, economic self-sufficiency, and self-government, as well as strong tribal interests in sovereignty and economic self-sufficiency, are undermined by State and local taxation of the leasehold interest.

Nothing in these regulations is intended to preclude tribes, States, and local governments from entering into cooperative agreements to address these taxation issues, and in fact, the Department strongly encourages such agreements.

COMMENTS ON PROPOSED CHANGES TO REGULATION 1616

Dear Members of the Board of Equalization:

On behalf of the Federated Indians of Graton Rancheria, a federally-recognized Indian tribe, we submit these comments and support the proposed changes. The Tribe also urges the Board to adopt additional language that would appropriately extend the reach of these changes to other tribal leaseholders that sell food and beverages to nonIndians for on-reservation consumption.

The Federated Indians of Graton Rancheria supports the proposed amendments to regulation 1616, Federal Areas, but feel the categorical exemption from sales and use taxes on sales of food and beverages by nonIndians should also include any sales by a nonIndian when they are operating an establishment pursuant to a tribal lease approved by the tribe under tribal regulations submitted to and approved by the Secretary of the Interior pursuant to 25 U.S.C. 415, also known as the HEARTH Act. While we believe there are other circumstances where imposition of state sales and use taxes on reservation sales by nonIndians to nonIndians are pre-empted, the currently proposed exemption and our proposed addition comprise clear examples of preempted sales by nonIndians.

The change proposed by the Board applies to nonIndian lessees operating within a tribal casino whether or not the lease has been approved by the tribe under tribal regulations or it is a lease adopted pursuant to the HEARTH Act. Our proposed addition would extend this treatment to food and beverage sales by and to nonIndians whenever the nonIndian is operating their establishment under a lease that's been approved by the tribe pursuant to its HEARTH Act regulations and where the tribe imposes its own sales or use taxes on such sales whether or not the establishment is located within the tribe's casino.

In the Initial Discussion Paper prepared by the Tax Policy Division, Sales and Use Tax Department, staff rely on *White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136 in analyzing where the balance of federal, tribal and state interests lies and determined that within the context presented, the result would always favor the tribal interests. We submit the same result would always apply to

HEARTH Act leases; in essence the HEARTH Act substitutes for the place held by the Indian Gaming Regulatory Act in the Initial Discussion Paper.

The Tribe's interests are identical whether the leasehold is located in or out of a tribe's gaming establishment. All tribes want to receive lease revenues, they want to be able to impose their taxes without subjecting nonIndians to double taxation, they need and want to provide tax-funded services to reservation residents and visitors, they want to improve tribal and local economies, they want convenience and clarity for their lessees when they collect sales taxes, and they want to increase eating and entertainment opportunities available to reservation residents and visitors.

The state's interests appear to be identical in both lease scenarios. The state does not want tribes marketing, directly or indirectly, a sales tax exemption to the detriment of non-reservation residents and also would like to receive sales and use tax revenues. Because the exception only applies when there is a tribal sales tax, there is no marketing of a sales tax exemption and there's a level playing field for nonIndian restaurant owners operating on leased tribal lands and nonIndian restaurant owners operating on private land. While there is a potential loss of additional state tax revenues, we believe our proposed change would actually increase overall state tax revenues. By extending the exception as we propose, the number of nonIndians operating reservation businesses on tribal land will inevitably increase and unlike Indian business owners, Indian employees or tribes, they will be subject to state income taxes.

We also submit that the federal interest in not having a state sales tax imposed in this situation is at least as strong under the HEARTH Act as it is under Indian Gaming Regulatory Act. For one, the Indian Gaming Regulatory Act was designed to reign in tribal sovereignty over gaming on reservations while increasing the role of states and the federal government. The HEARTH Act reduces the role of the federal government in favor of promoting increased tribal sovereignty over activities occurring on tribal trust lands. In particular, the regulations adopted by the Secretary of the Interior provide:

§ 162.017 What taxes apply to leases approved under this part?

(a) Subject only to applicable Federal law, permanent improvements on the leased land, without regard to ownership of those improvements, are not subject to any fee, tax, assessment, levy, or other charge imposed by any

State or political subdivision of a State. Improvements may be subject to taxation by the Indian tribe with jurisdiction.

(b) Subject only to applicable Federal law, activities under a lease conducted on the leased premises are not subject to any fee, tax, assessment, levy, or other charge (e.g., business use, privilege, public utility, excise, gross revenue taxes) imposed by any State or political subdivision of a State. Activities may be subject to taxation by the Indian tribe with jurisdiction.

(c) Subject only to applicable Federal law, the leasehold or possessory interest is not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Leasehold or possessory interests may be subject to taxation by the Indian tribe with jurisdiction.

This federal regulation was adopted in the same spirit and for the same reasons that the proposed change to regulation 1616 was drafted; to avoid a case-by-case Bracker analysis that would discourage the formation of these leases. See discussion at 77 Fed. Reg. 72446 et. seq.

Citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980), and the balancing test articulated by the Supreme Court, the BIA explains that “the Federal statutes and regulations governing leasing on Indian lands occupy and preempt the field of Indian leasing.” 77 Fed. Reg. 72447. With specificity, the BIA provides that the “Bracker balancing test requires a particularized examination of the relevant State, Federal, and tribal interests. In the case of leasing on Indian lands, the Federal and tribal interests are very strong. The Federal statutes and regulations governing leasing on Indian lands (as well as related statutes and regulations concerning business activities, including leases, by Indian traders) occupy and preempt the field of Indian leasing. The Federal statutory scheme for Indian leasing is comprehensive, and accordingly precludes State taxation. In addition, the Federal regulatory scheme is pervasive and leaves no room for State law.” *Id.* The revised regulations and therefore tribal leases address and encompass the full scope of leasing tribal lands. The following is a list of areas covered in tribal leasing as noted in Part 162.017 (77 Fed. Reg. 72447):

- Whether a party needs a lease to authorize possession of Indian land;
- How to obtain a lease;

- How a prospective lessee identifies and contacts Indian landowners to negotiate a lease;
- Consent requirements for a lease and who is authorized to consent;
- What laws apply to leases;
- Employment preference for tribal members;
- Access to the leased premises by roads or other infrastructure;
- Combining tracts with different Indian landowners in a single lease;
- Trespass;
- Emergency action by us if Indian land is threatened;
- Appeals;
- Documentation required in approving, administering, and enforcing leases;
- Lease duration;
- Mandatory lease provisions;
- Construction, ownership, and removal of permanent improvements, and plans of development;
- Legal descriptions of the leased land;
- Amount, time, form, and recipient of rental payments (including non-monetary rent), and rental reviews or adjustments;
- Valuations;
- Performance bond and insurance requirements;
- Secretarial approval process, including timelines, and criteria for approval of leases;
- Recordation;
- Consent requirements, Secretarial approval process, criteria for approval, and effective date for lease amendments, lease assignments, subleases, leasehold mortgages, and subleasehold mortgages;
- Investigation of compliance with a lease;
- Negotiated remedies;
- Late payment charges or special fees for delinquent payments;
- Allocation of insurance and other payment rights;
- Secretarial cancellation of a lease for violations; and
- Abandonment of the leased premises.

As noted, there is no room for State law interference or application. Furthermore, Part 162.016 provides that even the United States will defer to tribal law in the area of leasing of Indian trust and restricted lands. Part 162.016 provides: “Unless contrary to Federal law, BIA will comply with tribal laws in making decisions regarding leases, including tribal laws regulating activities on leased land under tribal jurisdiction, including, but not limited to, tribal laws

relating to land use, environmental protection, and historic or cultural preservation.” While the Initial Discussion Paper Regulation 1616 limited its analysis to tribal casinos, the federal analysis is broader and encompasses all aspects of tribal leasing, as should the Board’s analysis.

In fact, the federal analysis includes the impact of dual jurisdictional taxation and concludes “State and local taxation of lessee-owned improvements, activities conducted by the lessee, and the leasehold interest also has the potential to increase project costs for the lessee and decrease the funds available to the lessee to make rental payments to the Indian landowner. Increased project costs can impede a tribe’s ability to attract non-Indian investment to Indian lands where such investment and participation are critical to the vitality of tribal economies. An increase in project costs is especially damaging to economic development on Indian lands given the difficulty Indian tribes and individuals face in securing access to capital.” 77 Fed. Reg. 72448 (citing to 2001 U.S. Department of Treasury study findings “that Indians lack of access to capital and financial services is a key barrier to economic advancement” U.S. Dept. of the Treasury, Community Development and Financial Institutions Fund, The Report of the Native American Lending Study at 2 (Nov. 2001). Moreover, state and local government taxation “has a chilling effect on potential lessees as well as the tribe that as a result might refrain from exercising its own sovereign right to impose a tribal tax to support its infrastructure needs. Such dual taxation can make some projects less economically attractive, further discouraging development in Indian Country.” Id. Once again, taxation by the State or local governments significantly interferes with tribal sovereignty and self-governance. “The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management.” *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982).

While we understand that the Board may not yet be inclined to adopt as broad an exception as is contained in the federal regulations, in accord with the Board’s request that commentators provide additional draft language we urge you to extend the exception as proposed to the limited additional exception contained in our proposed paragraph 4 that follows draft paragraph (3) reprinted below.

Current Draft Paragraph 3:

[California sales and use tax does not apply to sales of meals, food, and beverages by a nonIndian operating an establishment, such as a restaurant or bar, in leased space, in an Indian tribe’s casino, when the sales are subject to the Indian tribe’s sales tax and the meals, food, and beverages are furnished for consumption in the casino.](#)

Additional Paragraph 4:

California sales and use tax does not apply to sales of meals, food, and beverages by a nonIndian operating an establishment, such as a restaurant or bar, located on tribal trust property leased pursuant to tribal regulations approved by the Secretary of the Interior pursuant to the Helping Expedite and Advance Responsible Tribal Home Ownership Act (HEARTH Act) of 2012, when the sales are subject to the Indian tribe's sales tax and the meals, food, and beverages are furnished for consumption on the tribe's reservation.

Yours truly,

/S/ Michael S. Pfeffer

Michael S. Pfeffer, Partner
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Attorneys for the Federated Indians of the
Graton Rancheria



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January 29, 2016

Via Email Susanne.Buehler@boe.ca.gov

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

Re: Pechanga Band of Luiseño Mission Indians' Comments on Initial Discussion Paper on Regulation 1616

Dear Ms. Buehler:

The Pechanga Band of Luiseño Mission Indians hereby submits its comments on the BOE's Initial Discussion Paper on Regulation 1616, December 18, 2015. We thank the BOE and its staff for engaging in meaningful government-to-government discussions in advance of changing California State regulations in ways that affect Indian Tribes. We believe that such discourse facilitates the adoption of policies that accurately reflect and uphold applicable law.

As BOE staff aptly recognized, Regulation 1616 does not currently comply with applicable federal law relating to non-Indian sellers who lease, and make sales in and on, facilities on Indian lands. The new subsection proposed in staff's recent draft is thus a positive development. However, as explained below the draft provision is unduly narrow. Our comments suggest alternative language that we believe accurately reflects and implements the requirements of federal law and provide legal analysis supporting those suggestions.

Proposed Language

In order to fully comply with applicable federal law, Regulation 1616(d)(3)(B)(3) should read as follows:

California sales and use tax does not apply to sales ~~of meals, food, and beverages~~ by a non-Indian operating an establishment, such as a shop, restaurant or bar, in leased space, on an Indian tribe's Reservation easine, when the items sold sales are subject to the Indian tribe's sales tax and the ~~meals, food, and beverages~~ are furnished for consumption and/or use on the tribe's Reservation easine.

We explain each of these proposed changes below.

Legal Analysis

The draft regulation currently contains three limitations that we believe must be removed to achieve compliance with federal law.

1. The Exemption Should Not be Limited to Food/Beverage Items

The draft regulation would apply the exemption only to sales of food and beverages – but not to other items intended for local consumption and/or use – in Indian country. This limitation is unwarranted. The exemption should apply to the sale of all items intended for local consumption or use.

As you know, the incidence of California’s use tax is on consumers. When a consumer purchases an item intended for local use (and uses that item) in Indian country, California use tax does not apply because use occurs in Indian country and not in California’s exclusive taxing jurisdiction. Since no use tax is due under these circumstances, non-Indian sellers of such items are not required to collect the use tax from their customers. This exemption from the use tax applies with regard to all items intended for local consumption or use, and not just to food/beverages.

As to California sales tax, the tax’s incidence is on sellers. Therefore when a non-Indian seller sells items (including food and beverages) to non-Indians in Indian country, a question arises whether the State’s sales tax applies to that seller. In answering this question, the nature of the items sold is immaterial. If the seller is exempt from State sales tax, the exemption applies regardless of the nature of the items sold.

Taken together, the two principles outlined above require that because sales of items intended for immediate consumption are exempted from sales and use tax when executed in Indian country by a seller operating in leased space, the exemption must apply uniformly for all such items. There is no basis in law for distinguishing between food/beverages and other items – examples of which might include single-use hand gel containers, single-use tissue packets, or other single-use personal hygiene products – similarly intended for immediate local consumption. Accordingly, Regulation 1616 should be revised as proposed above to ensure that the exemption from sales/use tax applies to all items, and not just food/beverages, sold for immediate local consumption in Indian country.

2. The Exemption Should Not Be Limited to Outlets Located in a Tribal Casino

As currently worded, the draft regulation applies the exemption to sales made at outlets located “in an Indian tribe’s casino” and to items intended for consumption “in the tribe’s casino.” Limiting the exemption to sales made in venues located in a casino is both not practicable and legally unwarranted. The exemption properly applies to sales made by non-Indian vendors at leased premises located anywhere in Indian country.

The practical problems that arise from use of the term “casino,” while not determinative, are nonetheless noteworthy. The term “casino” is far too narrow to achieve the outcome staff intended it to achieve. “Casino” generally connotes a venue used for gaming activities. To the extent “casino” refers to a gaming floor, its use in the draft regulation cannot, by definition, achieve the goal of exempting food and beverage sales from tax because venues like restaurants are almost never located in the very same space in which gaming occurs. While many casinos include bars on the gaming floor, most casino restaurants and some casino bars are separated from the gaming floor. Sometimes they are adjacent to the floor but often they are removed from it. In some cases these venues are physically detached from the gaming floor but are nonetheless an integral part of the casino. Restaurants and bars intended to operate in conjunction with a Tribal casino may be found in Tribal hotels, golf courses, or similar venues intended to serve casino patrons, draw additional casino patrons, and expand (by diversifying) Tribal governmental revenue. In this respect all such venues are an integral part of the Tribal casino and all, presumably, should come within the regulation’s scope. However, unless the term “casino” is explicitly defined to include all ancillary facilities, it is far too narrow to achieve the outcome the draft regulation aims to achieve.

More importantly, however, the exemption from State taxation cannot be limited to sales occurring in a Tribe’s casino because federal law precludes California from taxing sales made by non-Indians in leased venues *anywhere in Indian country*. Thus, the revision to Regulation 1616 cannot limit the tax exemption to venues located in casinos. The exemption must, under federal law, apply to sales made in leased venues located *anywhere* on a Tribe’s “Reservation” as that term is defined in Regulation 1616(d)(2). The following paragraphs explain the legal reasoning underlying this conclusion.

The leading case in this regard is *White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, in which the Supreme Court established two separate grounds for the preemption of State taxation of non-Indians in Indian country. The Supreme Court held that such State taxes are preempted if (1) they “... unlawfully infringe ‘on the right of reservation Indians to make their own laws and be ruled by them’”¹; or (2) “the exercise of such authority [is] preempted by federal law.”² Each of these grounds is independently sufficient to preempt State tax. When, as contemplated here, a non-Indian seller leases space from an Indian Tribe in Indian Country and sells items intended for immediate local consumption on those premises, *both* grounds exist and the State is precluded from taxing the sale. We discuss each of these grounds for preemption separately.

¹ *White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, 142 (quoting *Williams v. Lee*, (1959) 358 U.S. 217, 220).

² *Id.*

Unlawful infringement of Tribal self-government: *Bracker*'s first ground for preemption asks whether permitting the State to tax the transactions at issue here would infringe on Tribes' lawmaking and self-government rights. It would.

An Indian Tribe's right to make its own laws and be ruled by them includes its right to subject lessees of property in Indian country to Tribal regulations. Such regulations might include, for example, limitations on the lessees' use of the premises, hours of operation, standards for upkeep, Tribal employment preferences, and minimum patron age requirements. They would also include the lessee's obligation to pay any tax the Tribe may impose. In exercising its taxing authority the Tribe retains discretion to determine what tax rate, if any, to apply to its lessee's sales. Absent such discretion – including the discretion to impose no tax at all – the Tribe is not truly free to make its own laws and be ruled by them.

Permitting the State to tax the lessee's activities under such circumstances infringes on Tribes' lawmaking and self-government rights because any tax imposed by the State would, as a practical matter, detract from the Tribes' ability to impose their own tax. Vendors are unlikely to want to lease space in a location that subjects them to double taxation. Tribes will thus be forced to reduce their own taxes in the face of applicable State tax. Failure to do so would likely result in an inability by the Tribe to lease its venues. Either way, the State's actions impermissibly infringe the Tribe's right to make its own laws and govern itself under its own discretion. Accordingly, the State tax is preempted under the first *Bracker* ground.

Balancing of State, Tribal and Federal Interests: The second ground for preemption articulated in *Bracker* involves what is known today as the *Bracker* balancing test. *Bracker* requires that every time a State seeks to tax the activities of non-Indians in Indian country, the court make a "particularized inquiry into the nature of the state, federal and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law."³ In other words, the court weighs the relative interests of the State, the Tribe, and the Federal government, and determines which interests are strongest. When Tribal and Federal interests in the activity outweigh State interests, the State tax is preempted.

The Supreme Court has consistently held that when the federal government enacts a regulatory scheme that applies pervasively to the activity at issue⁴ and/or when "the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of Tribal services,"⁵ Federal and Tribal interests will outweigh State interests and preempt the State tax. Non-Indian leases of establishments in Indian country are subject to extensive federal regulation at 25 C.F.R. part 162. The Federal government regulates

³ *White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, 145. See also *Cotton Petroleum Corp. v. New Mexico* (1989) 490 U.S. 163, 176.

⁴ *Ramah Navajo School Bd., supra*.

⁵ *Washington v. Confederated Tribes of the Colville Indian Reservation* (1980) 447 U.S. 134, 156-157.

Susanne Buehler, Chief
Tax Policy Division
Sales and Use Tax Department
January 29, 2016
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various types of leases in Indian country including residential leases, commercial, leases and agricultural leases. The regulations that apply to business leases (at 25 C.F.R. 162 Subpart D) touch on all aspects of the lease, including the terms of the lease, options to renew, permanent improvements, due diligence, compensation, and many more. Under *Bracker*, the pervasiveness of federal regulation of business leases clearly preempts any State involvement in such leases or the activities occurring thereunder. Thus, under *Bracker*, a State may not tax the activities (including sales) of a non-Indian lessee acting on his or her leased outlet on Indian land.

In recognition of *Bracker*'s preemption of State taxation under such circumstances, 25 C.F.R. § 162.017 provides that "Subject only to applicable Federal law, activities under a lease conducted on the leased premises are not subject to any fee [or] tax ... imposed by any State.... Activities may be subject to taxation by the Indian tribe with jurisdiction." (Emphasis added.) The BIA clarified that "[t]he Federal statutes and regulations governing leasing on Indian lands . . . occupy and preempt the field of Indian leasing. The Federal statutory scheme for Indian leasing is comprehensive, and accordingly precludes State taxation. In addition, the Federal regulatory scheme is pervasive and leaves no room for State law."⁶ Thus, the Federal government maintains, correctly, that its extensive regulation of leases in Indian country fully preempts State taxation of activities conducted under such a lease on the leased land.

Supreme Court case law applying the *Bracker* test demonstrates that the Federal government's interpretation of the *Bracker* test as applied to activities occurring in leased premises in Indian country is correct. For example, in *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico* (1982) 458 U.S. 832, the Supreme Court held that New Mexico's gross receipts tax was preempted as applied to a non-Indian company operating on Indian lands because the Federal government's regulatory oversight of the activities at issue fully preempted the field. Like the State of New Mexico in *Ramah Navajo School Board*, and the State of Arizona in *Bracker*, here too the State of California may not tax sales (of items intended for local consumption) by non-Indians on their leased premises in Indian country because Federal regulation preempts the State tax.

In addition to the preemptive effect of Federal interests here, Tribal interests also weigh in favor of preemption under *Bracker*. Indian Tribes that lease venues to non-Indian retailers invariably provide their lessees with various services. Most fundamentally, the Tribe typically builds, owns and maintains the venue in which sales occur. Further, the Tribe creates the environment that allows for a customer base for the venue. In addition, the lessee's operations on Tribal land reflect on, and impact, the Tribe's own venues on its land. Thus, the Tribe's interests are directly affected by, and related to, the sales transactions executed by its non-Tribal lessee. These Tribal interests are significant. The combined weight of Tribal interests and the Federal government's extensive interest in and regulation of the field of Indian land leases outweighs the

⁶ Final Rule, Residential, Business, and Wind and Solar Resource Leases on Indian Lands, 77 Fed. Reg. 72,440, 72,447 (Dec. 5, 2013) (emphasis added).

State's interest in raising revenue and fully preempt any State taxation of non-Indian lessees transacting sales anywhere in Indian country, and not just in a casino.

In light of the above, the exemption in Regulation 1616(d)(3)(B)(3) must extend to sales made by non-Indian lessees anywhere in Indian country. It cannot be limited to sales made in leased venues located in a Tribal casino.

3. The Exemption Should Not Be Limited To Situations Where The Tribal Lessor Imposes A Tribal Tax

As currently worded, the regulation would apply an exemption only when the lessor Tribe imposes a Tribal tax on the sales at issue. This limitation is unwarranted. The exemption from State tax should apply regardless of whether or not the Tribal government imposes its own tax on the sale.

As explained above, *Bracker* holds that State tax is preempted when it impedes a Tribe's ability to "make [its] own laws and be ruled by them."⁷ A Tribe's right to "make its own laws" includes the right, long recognized under federal law, to adopt its own tax policy and enact Tribal tax laws.⁸ The decision whether to impose a tax, and if so to determine the tax rate, is within the Tribe's governmental authority. Under *Bracker* the State of California cannot interfere with the Tribe's exercise of discretion in this matter.

Accordingly, the State may not adopt a regulation that forces a Tribe to choose between (a) imposing a Tribal tax or (b) having the State tax activities the taxation of which is preempted. Federal law preempts the State from exercising either of these alternatives. Therefore, making a Tribal tax a prerequisite for application of the exemption in Regulation 1616(d)(3)(B)(3) is impermissible. The reference to a Tribal tax should be deleted.

We appreciate the opportunity to raise these important issues for your consideration.

Sincerely,



Steve Bodmer
General Counsel

⁷ *Bracker*, 448 U.S. at 142 (internal quotation omitted).

⁸ See *Kerr-McGee Corp. v. Navajo Tribe* (1985) 471 U.S. 195, 198; *Washington v. Confederated Tribes of the Colville Indian Reservation* (1980) 447 U.S. 134, 152.



Rincon Band of Luiseño Indians

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VIA EMAIL ONLY
Susanne.Buehler@boe.ca.gov

January 29, 2016

Ms. Susanne Buehler, Chief
Tax Policy Division
Sales and Use Tax Department
State Board of Equalization
P O Box 942879
Sacramento, CA 94279-0044

**Comments of Rincon Band of Luiseno Indians
Regarding Board of Equalization Proposal to
Amend Regulation 1616, *Federal Areas*, to Clarify
Application of Tax to Meals, Food and Beverages
Sold for Consumption in Indian Casinos by
Non-Indian Retailers - Initial Discussion Paper¹**

Dear Ms. Buehler,

The Rincon Band of Luiseno Indians (the “Rincon Band”) submits these comments in response to the Board of Equalization (the “Board”) review and consideration of whether to amend Regulation 1616, *Federal Areas*, to clarify the application of tax to meals, food and beverages sold for consumption in an Indian casino by an establishment that is leased by non-Indians (the “Amendment”).

The Amendment is intended to provide non-Indian lessee exemption criteria under Regulation 1616, subdivision (d), that “California sales and use tax does not apply to the sales of meals, food and beverages by a non-Indian operating an establishment, such as a restaurant or bar, in lease space in an Indian tribe’s casino, when the sales are subject to the Indian tribe’s sales tax and the meals, food, and beverages are furnished for consumption in the casino.” The Board staff are recommending that the new language be codified in a new subdivision (d)(3)(B)3.

The Rincon Band appreciates the Board’s acknowledgement and clarification of the *Bracker* analysis and the Board’s conclusion that the federal and tribal interests outweigh the state of California’s interest in imposing tax on the sales of food, meals and beverages by non-Indian lessees in an Indian

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 proposed Amendment, 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 by Indians or non-Indians on Indian lands.

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tribe's casino. However, the Rincon Band asks the Board to consider the following comments on the proposed criteria in terms of the unintended and unnecessary restrictions that they place on tribal governments with respect to the various business arrangements each sovereign may choose to establish to operate their casinos.

First, the exemption criteria in the Amendment is unnecessarily restricted to non-Indian lessees who have entered into a lease with an Indian tribe pursuant to the tribe's business leasing regulations under the HEARTH Act. The Board should recognize that many tribal governments, including the Rincon Band, already have established business relationships with non-Indian retailers that do not conform to the transactional structure proscribed by the lease criteria in the Amendment. The Rincon Band is one of only a handful of Indian tribes that have business leasing regulations approved by the Assistant Secretary of Indian Affairs pursuant to the HEARTH Act -- the vast majority of California tribes do not have Secretary-approved business leasing regulations. An additional factor that the Board should consider is the burden of cost and delay that the lease criteria places on tribes in order for the business relationship to qualify for the exemption. The HEARTH Act tribal business leasing approval process within the Bureau of Indian Affairs (the "BIA") takes approximately 18 months, at best.

We believe the Board should adopt an expansive view of tribal commercial contracts with non-Indians for the sale of food, meals and beverages in an Indian tribe's casino. There are multiple business structures, other than a HEARTH Act lease, that should be equally acceptable for purposes of the proposed exemption, including, but not limited to, leases approved by either the tribe pursuant to the HEARTH Act or the BIA pursuant to 25 C.F.R. Part 162, as well as contracts and agreements authorized by 25 U.S.C. § 81 and 25 U.S.C § 2701 *et seq.* We do not believe that the Board should dictate transactional structure in the criteria for exemption. The expressed preference for a HEARTH Act lease should not exclude other legal forms of business relationships with non-Indian retailers of food, meals and beverages in an Indian tribe's casino.

We agree with the Board that the federal policies underlying the Indian Gaming Regulatory Act (the "IGRA"), 25 U.S.C. § 2701 *et seq.*, to promote tribal economic development, tribal self-sufficiency and strong tribal governments should be a relevant consideration in balancing the federal and tribal interests in favor of the exemption. We also believe, however, that another significant factor in support of less restrictive exemption criteria is the value generated from gaming activities throughout California reservations that has created enormous economic benefits for the state and people of California in spite of the state's attempts to tax gaming operations or exact other unreasonable and illegal concessions from tribal governments.

The state of California does not provide general or specific state-services to the Rincon Reservation. The Rincon Band is the exclusive provider of governmental services to its citizens and non-Indian residents and visitors of the Rincon Reservation through the operation of programs that deliver services: health, education, seniors and elders, environmental safety, compliance and enforcement, GIS/mapping and land planning, culture and language, youth recreation, housing, utilities and public works, law enforcement, fire protection and judicial services.

With respect to public safety, the Rincon Band has entered into a contract with San Diego County Sheriff to provide two, full-time Special Purpose Officers on a 24-7 basis. The Rincon Band also operates the Rincon Fire Department ("RFD") which provides protection and emergency medical services as first-responders on and off the Rincon Reservation. The RFD employs 43 personnel consisting of 23 full-time and 20 reserve firefighters who operate from one fire station equipped with one Paramedic Type

1 Engine, one Type 1 105' Aerial Ladder Truck, one Type 3 Brush Engine and one Paramedic Ambulance 24/7. All RFD apparatus meet or exceed the minimum equipment and testing standards by the National Fire Protection Association and National Incident Management System. The RFD has entered into seven mutual aid agreements to centralize incident command and dispatch with Cal Fire and mutually furnish fire and medical emergency services to state, local and other tribal governments surrounding the Reservation.

The Rincon Band also has a well-developed judicial branch that serves Band members and non-Indian residents of the Rincon Reservation. The Tribal Council joined the Intertribal Court of Southern California and established the Rincon Tribal Court as the judicial arm of the Tribe to provide trial and appellate services on the Rincon Reservation pursuant to applicable Tribal Law. The Rincon Band is one of 12 tribal governments who are members of the Intertribal Court of Southern California. The Intertribal Court of Southern California employs five full-time staff and two part-time staff, including a Chief Judge, an Associate Judge, two Pro Tem Judges, Court Clerk/Administrator and Bailiff. In 2009, the Rincon Band established the Office of the Attorney General to manage the day-to-day legal affairs of the Band from the Rincon Reservation. The Rincon Band Attorney General is licensed to practice law and in good standing in the States of California, New Mexico and Oregon and is also a member of the Southern California Intertribal Court Bar. The Attorney General works closely with private law firms for specialized litigation and advice on an on-going basis. This office includes the Attorney General, a Deputy Attorney General, a full-time paralegal, one research assistant and qualified law students from ABA accredited law schools.

The cost of these and other essential governmental services provided by the Rincon Band to people on- and off-reservation should be offset and funded by tax revenue, including sales tax from value generated activities on the Rincon Reservation. The IGRA provides the state with a more than sufficient federal framework to find the federal and tribal interests outweigh the state's with respect to collection and retention of sales tax on food, meals and beverages sold at Indian casinos for consumption on the Reservation.

Respectfully Submitted,



Bo Mazzetti, Chairman
Rincon Band of Luiseno Indians

San Manuel Band of Mission Indians

January 29, 2016

Susanne Buehler, Chief
Tax Policy Division
Sales and Use Tax Department
Via email: Susanne.Buehler@boe.ca.gov

Re: Comments on Proposed Revision to Regulation 1616

Dear Ms. Buehler,

I write on behalf of the San Manuel Band of Mission Indians. This letter provides comment on, and suggested revisions to, the State Board of Equalization staff's proposed revisions to Regulation 1616, *Federal Areas*, as presented in the Initial Discussion Paper attached to your letter dated December 18, 2015. We appreciate the opportunity to comment on this issue which, as you know, implicates the sovereignty of Indian tribes throughout California.

The following comments are divided into two categories. The first set of comments, under the heading "General Comments," focuses on a number of "big picture" issues that we believe affect the proposed revisions and suggests ways to address these issues in a draft regulation. The second set of comments, under the heading "Terminological Clarification," focuses on some of the terminology used in the Initial Discussion Paper and suggests alternative terminology. To the extent you would like to follow up to discuss any of these comments, please feel free to contact Kathlene Burke at kburke@sanmanuel-nsn.gov / (909) 864-8933.

General Comments

a. Geographic Scope of Exemption

The Initial Discussion Paper proposes exempting from State taxation only those transactions occurring in leased premises that are located "in leased space, *in an Indian tribe's casino*"¹ We propose changing the words "in an Indian tribe's casino" to "on an Indian tribe's Reservation." Federal law mandates this change.

The Initial Discussion Paper asserts that when the legal incidence of a state tax is imposed on non-Indians doing business on Indian land, state tax is not categorically barred. Instead, courts apply a preemption analysis that makes a "particularized inquiry into the nature of the state, federal and tribal interests at stake, an inquiry designed to determine whether, in the

¹ STATE BD. OF EQUALIZATION, INITIAL DISCUSSION PAPER: STAFF PROPOSED REVISIONS TO REGULATION 1615, Exhibit 1, p. 2-3 (Jan. 6, 2016) (emphasis added).

specific context, the exercise of state authority would violate federal law.”² In discerning the relative strength of state, tribal and federal interests this inquiry takes into account factors such as the extent of federal regulation and control,³ the regulatory interests of states and tribes, and the provision of state or tribal services.⁴ State interests are strongest when the state has a “specific, legitimate regulatory interest” in the activity taxed.⁵ The preemptive power of federal and tribal interests is strongest when the federal government enacts a regulatory scheme that applies pervasively to the activity at issue⁶ and/or when “the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services.”⁷

When a tribe leases space on its Indian lands to non-Indian lessees, federal regulation of the lease is pervasive and, as such, preemptive of any state taxation of the lease transaction, the leasehold interest, and the activities occurring on the leased land.⁸ That state taxation is preempted under such circumstances is evidenced not only by the extensive case law dealing with preemption,⁹ but also by the Department of the Interior, Bureau of Indian Affairs (“BIA”) regulations at 25 C.F.R. 162.017 and the BIA’s interpretation of applicable federal law.

The federal regulation at 25 C.F.R. 162.017 provides in relevant part: “(b) Subject only to applicable Federal law, activities under a lease conducted on the leased premises are not subject to any fee, tax, assessment, levy, or other charge . . . imposed by any State . . . Activities may be subject to taxation by the Indian tribe with jurisdiction.”

While the Initial Discussion Paper correctly states at the top of page 3 that the BIA interprets this regulation as applying current law rather than changing it, the BIA also maintains that a proper application of the *Bracker* test would **fully preempt** state taxation of activities occurring on or in relation to leased tribal lands and to leasehold or possessory interests in such land. This is evident from the regulation’s plain language. It is also evident from the regulation’s preamble, which provides:

The Federal statutes and regulations governing leasing on Indian lands . . . occupy and preempt the field of Indian leasing. The Federal statutory scheme for Indian leasing is

² *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). This “particularized inquiry” is referred to as the “*Bracker* balancing test” or “*Bracker* analysis.” See also *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989).

³ *Ramah Navajo School Bd., v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982); *Bracker*, 448 U.S. at 136.

⁴ *Prairie Band Potawatomi Nation v. Richards*, 379 F.3d 979, 984 (2004), *rev’d on other grounds*, 546 U.S. 95 (2005).

⁵ *Ramah Navajo School Bd.*, 458 U.S. at 844; see also *Cotton Petroleum*, 490 U.S. at 186 (1989).

⁶ *Ramah Navajo School Bd.*, 458 U.S. at 844.

⁷ *Washington v. Confederated Tribes of the Colville Indian Reservation* 447 U.S. 134, 156-157 (1980).

⁸ See 25 C.F.R. 162.

⁹ *Ramah Navajo School Bd.*, 458 U.S. at 832; *Bracker*, 448 U.S. at 136.

comprehensive, and accordingly precludes State taxation. In addition, the Federal regulatory scheme is pervasive and leaves no room for State law.¹⁰

As such, although the Initial Discussion Paper asserts that the BIA regulation does nothing more than reiterate the fact that a *Bracker* test is necessary when states or local jurisdictions seek to impose their taxes on non-Indians acting on tribal land, this assertion is incorrect. The BIA regulation clarifies that the Bureau of Indian Affairs – the federal agency entrusted with implementing the federal government’s policy regarding Indian tribes – takes the position that state and local taxation of any interest in Indian land, and any activity occurring under that lease, is **fully preempted** under *Bracker*.

Supreme Court case law is in accord. For example, in *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, the Supreme Court precluded the State of New Mexico from imposing a gross receipts tax on a non-Indian company operating on Indian lands. The Court reasoned that the federal government’s regulatory oversight of the activities at issue fully preempted state involvement. The Court found that the State’s justification for imposing its own tax “amount[ed] to nothing more than a general desire to increase revenues,” a purpose the Court deemed insufficient to permit the tax.¹¹

Here, too, the State of California is precluded from taxing activities occurring on leased Indian lands even when the acting entity – here the restaurant or bar operator – is a non-Indian because the federal government’s comprehensive regulation of the land lease preempts such taxation. Whether the leased premises are in a casino or elsewhere on the tribe’s Indian lands is immaterial. The fact that the premises are on Indian lands is sufficient to trigger comprehensive federal regulation of the lease, and thus to preempt any state tax.

While federal regulation of the lease is sufficient – in and of itself – to preempt state taxation, it is important to note that the other components of the *Bracker* test also support the preemption of state tax. For example, when leased premises are located on Indian lands, the tribe typically provides services relating to the premises such as maintenance and security. This provision of services by the tribe supports the preemption of state tax under *Bracker*. Similarly, tribes often impose various limitations and requirements relating to use of the leased premises either through regulation or through the lease itself. This governmental regulation of the lease similarly supports preemption of state tax. Thus, under *Bracker* and its progeny state tax is fully preempted as to all commercial activity occurring on leased Indian lands.

¹⁰ Residential, Business, and Wind and Solar Resource Leases on Indian Lands; Final Rule, 77 Fed. Reg. 72,440, 72,447 (Dec. 5, 2013); *see also* The United States’ Complaint in Intervention, *The Tulalip Tribes and the Consolidated Borough of Quil Ceda Village v. The State of Washington*, No. 2:15-cv-00940-BJR (W.D. Wa. Aug. 4, 2015).

¹¹ *Ramah Navajo School Bd.*, 458 U.S. at 845.

In light of the analysis above, we propose that the language in Regulation 1616 be revised as follows:

Revision 1: Substitute the word “reservation” where the word “casino” appears in proposed subsection 1616(d)(3)(B)(3).

As discussed above, the exemption should apply to outlets leased by non-Indian operators anywhere on a tribe’s Reservation (as defined in Regulation 1616(d)(2)). The exemption should not be limited to only those outlets located in a tribe’s casino. While an outlet’s location in a tribal casino adds another layer of federal regulation, as discussed at page 4 of the Initial Discussion Paper, state tax is preempted even without this additional layer of federal regulation. The federal government’s pervasive regulation of the lease itself suffices to preempt state taxation of the non-Indian lessee’s activities on Indian lands.

b. Substantive Scope of Exemption

The above analysis clarifies that state sales tax is preempted as to sales on Indian lands by the non-Indian lessees of such lands regardless of the nature of the items sold. When the items sold are intended for use or consumption on Indian lands, no use tax is warranted either. Thus, Regulation 1616 should not limit its exemption to food and beverage items, but instead should apply it to all sales of items sold on, and intended to be used on, Indian lands.

In light of the above, we propose that the language in Regulation 1616 be further revised as follows:

Revision 2: Substitute the word “items” where the words “meals, food, and beverages” appears in proposed subsection 1616(d)(3)(B)(3).

The exemption should extend to any sales by the non-Indian lessees (and not just food and beverage sales) provided use of the items sold is intended to occur on the Reservation. Under these circumstances California’s use tax would not apply to the purchaser because use is intended to occur on Indian lands, and the sales tax would not apply to the non-Indian seller because the sales tax is preempted under *Bracker* as outlined above.

c. The Exemption Should Apply Even if the Tribe Elects to Impose No Tribal Tax

The Initial Discussion Paper proposes to apply its exemption only when the Indian tribe imposes its own tax on the non-Indian lessee’s sales. There is no discussion in the Initial Discussion Paper of this limitation, nor is there an explanation of why staff may have proposed it. As demonstrated below, this limitation is unwarranted under applicable federal law and accordingly should be deleted. The exemption from State tax should apply regardless of whether or not the tribal government imposes its own tax on the sale.

Under the *Bracker* test, one factor contributing to the preemption of state taxation is the tax’s infringement on the right of federally-recognized Indian tribes to “make their own laws and

be ruled by them.”¹² The Supreme Court has long recognized that Indian tribes have the sovereign authority to impose their own taxes on transactions occurring on their Indian lands.¹³ The decision whether to tax a particular type of activity on Indian lands and, if so, at what rate, is an act of tribal self-government. Under *Bracker*, a state tax that impedes this exercise of self-government is preempted, and cases applying *Bracker* are in accord.¹⁴ Thus, preemption is warranted *regardless of whether the tribe elects to tax the activity at issue or elects, for its own internal reasons, not to tax that activity*. Either way, the state’s taxation of an activity the tribe elected not to tax, or to tax at a rate that differs from the state tax rate, is an intrusion by the state into the tribe’s self-government.

Accordingly, the Initial Discussion Paper’s position that state tax is only exempted when the tribe imposes its own tax on the sales at issue is in error. State tax is preempted in all cases, even when the tribal government elects, for its own reasons and as an exercise of its self-government, not to impose a tax (or, stated differently, to impose a 0% tax). Therefore, we propose that the language in Regulation 1616 be further revised as follows:

Revision 3: Delete the words “when the sales are subject to the Indian tribe’s sales tax” from proposed subsection 1616(d)(3)(B)(3).

Terminological Comments

As explained above, federal law requires that the proposed revisions to Regulation 1616 acknowledge that state tax is preempted (1) with regard to sales made by non-Indian vendors from leased premises anywhere in Indian country, and not just in premises located in casinos; (2) with regard to sales of any items intended for consumption or use in Indian country, and not just to food and beverages; and (3) whether or not the Indian tribe imposes its own tax on the sales transaction. The revisions suggested above would achieve compliance with federal law and we urge staff and the BOE to implement them. Anything less would run afoul of applicable federal law. To the extent that, notwithstanding the arguments noted above, staff elects to maintain the limitations currently (and, in our view, incorrectly) included in its proposed language, two clarifications are warranted with regard to the terms used.

First, the term “casino” as used in the proposed revision is unclear. Tribal gaming facilities often include multiple parts, including gaming areas, hotels, spas, restaurants, conference centers, and related facilities. These facilities are typically intended to operate in conjunction with one another. Food venues may be found in all parts of such facilities, both

¹² *Bracker*, 448 U.S. at 142 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)).

¹³ See *Kerr-McGee Corp. v. Navajo Tribe* 471 U.S. 195, 198 (1985) (“[T]he ‘power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management.’”) (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137(1982)); *Washington v. Confederated Tribes of the Colville Indian Reservation* 447 U.S. at 152.

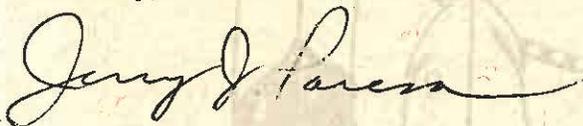
¹⁴ E.g., *Ramah Navajo School Bd.*, 458 U.S. at 837.

immediately adjacent to and also at a distance from the gaming areas. For example, one restaurant may be accessible directly from the gaming floor while another may be located one floor above, or in another part of the hotel. Nonetheless, all such food venues are an integral part of the integrated whole. We suggest that the term "casino" be defined broadly, to include all venues and facilities related to or operating in conjunction with gaming operations. Alternatively, the term "gaming facility," which is somewhat broader than the narrow "casino," may be more appropriate, provided it is defined as including all facilities related to or operating in conjunction with gaming activities.

Second, it is important to clarify that any applicable tribal tax – even at a rate lower than the comparable State tax rate – suffices to fulfill the requirement that the sale be subject to tribal tax. Tribes must remain free to exercise their sovereign discretion in imposing tax at rates that they deem appropriate. Requiring tribes to impose taxes at rates comparable to those imposed by the State would constitute an impermissible divestment of tribal sovereignty protected under federal law. This clarification could be implemented by stating that the requirement for tribal taxation is satisfied when the tribe imposes any tax on the sale at issue, regardless of the tax rate.

We appreciate the opportunity to comment on these matters and would be happy to discuss any of them further in person and/or provide further analysis.

Sincerely,



Jerry J. Paresa
Chief Executive Officer

Second Discussion Paper
Submission from Santa Ynez Band of Chumash Indians
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Exhibit 11
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BUSINESS COMMITTEE

VINCENT ARMENTA, CHAIRMAN
KENNETH KAHN, VICE CHAIRMAN
GARY PACE, SECRETARY-TREASURER
MAXINE LITTLEJOHN, COMMITTEE MEMBER
MIKE LOPEZ, COMMITTEE MEMBER

January 27, 2016

California State Board of Equalization
Susanne Buehler
450 N Street
Sacramento, California 94279

Re: Regulation 1616, Federal Areas

Dear Ms. Buehler,

On December 18, 2015, the State Board of Equalization sent a letter regarding the Initial Discussion Paper on Regulation 1616, *Federal Areas*. In it, the Board set out its position that Regulation 1616¹ should be revised to clarify that state sales and use tax “does not apply to sales of meals, food, and beverages by a non-Indian operating an establishment...in leased space, in an Indian tribe’s casino, when the sales are subject to the Indian tribe’s sales tax and the meals, food, and beverages are furnished for consumption in the casino.”

We would like to express our support for the Board’s attempt to clarify the application of Regulation 1616. However, in order to keep it in line with the Board’s intent as well as established federal law, the proposed revision should be applied not only to sales of meals, food, and beverages by a non-Indian *in an Indian tribe’s casino* but also to sales of meals, food, and beverages by a non-Indian *on tribal trust land* when the sales are subject to the Indian tribe’s sales tax.

As the Board points out, the seminal case of *White Mountain Apache Tribe v. Bracker* provides the background to determine whether a state law may be applied to an Indian reservation. Following *Bracker*, courts apply a balancing test to determine whether state taxation of non-Indians engaging in activities on a reservation are preempted. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). The *Bracker* balancing test requires a “particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.” *Id.* at 145. Below, we have set out the balancing test as required by *Bracker*.

¹ All references to Regulation 1616 apply only to the proposed revision of Regulation 1616(d)(3)(B)(3)

Federal Interests

I. Comprehensive Regulatory Scheme

Perhaps the most important factor in examining the federal interests under *Bracker* is whether there is a comprehensive federal regulatory scheme that governs the conduct sought to be taxed by the state. In *Bracker*, the Supreme Court stated that “the Federal Government’s regulation of the harvesting of Indian timber is comprehensive” and that “the Secretary has promulgated a detailed set of regulations to govern the harvesting and sale of tribal timber.” 448 U.S. at 146-147. Due to these comprehensive regulations, the Court found that the “federal regulatory scheme is so pervasive as to preclude the additional burdens sought to be imposed in this case.” *Id.* at 148. Similarly here, the preamble to the BIA’s leasing regulations state that “[f]ederal statutes and regulations governing leasing on Indian lands (as well as related statutes concerning business activities, including leases, by Indian traders) occupy and preempt the field of Indian leasing.” 77 Fed. Reg. 72447. It further provides that “[t]he Federal statutory scheme for Indian leasing is comprehensive, and accordingly precludes State taxation” and that “the Federal regulatory scheme is pervasive and leaves no room for State law.” *Id.* As they cover all aspects of leasing, the regulations provide a clear and strong statement of the federal government’s intent to broadly preempt state and local taxation in the context of Indian leasing. The leases at issue under Regulation 1616 are governed by the BIA’s leasing regulations. These leasing regulations set out a comprehensive regulatory scheme and, as such, should be applied to activities both in and out of a casino as long as such activities occur on tribal land. Therefore, this factor weighs heavily in finding preemption of state taxation.

II. Tribal Economic Development

The promotion of tribal economic development is another factor to consider when weighing the federal interests under *Bracker*. *Id.* The BIA has recognized that the purpose of business leasing on Indian land is to allow Indian landowners to use their land profitably for economic development. *Id.* Furthermore, Congress intended to maximize income to Indian landowners and encourage all types of economic development on Indian lands. *Id.* An assessment of state sales and use tax in this instance would obstruct federal policies supporting tribal economic development because it has the potential to increase project costs for the lessee and decrease the funds available to make rental payments to the Indian landowner. *Id.* at 72448. Moreover, the possibility of an additional state tax “has a chilling effect on potential lessees as well as the tribe that as a result might refrain from exercising its own sovereign right to impose a tribal tax to support its infrastructure needs. Such dual taxation can make some projects less economically attractive, further discouraging development in Indian country.” *Id.*

Some tribes lease space on tribal land, both in and outside of a casino, to non-Indian businesses that sell meals, food, and beverages in accordance with federal law, including the HEARTH Act. These same tribes impose – or would like to impose – their own sales taxes on sales of meals, food, or beverages on these non-Indian businesses to promote economic development. In order to do so, state and local taxation must be preempted for these types of activities. If state taxation is permitted in these situations, it would lead to either: a) the state solely taxing the food and beverage sales with the tribe not implementing its own tax to avoid dual taxation; or b) the food and beverage sales would be subject to dual taxation by both the tribe and the state which would make projects on Indian land significantly less

economically attractive. Either option would infringe on the federal interest of promoting tribal economic development. Therefore, the preemption of state sales and use tax as it applies to Regulation 1616 should apply to all tribal land rather than only in tribal casinos.

III. Promotion of Strong Tribal Government

The BIA has recognized a federal policy of supporting strong tribal governments and stated that the purpose of business leasing on Indian land is to allow Indian landowners to use their land profitably, which ultimately contributes to tribal self-government. *Id. at 72447*. The preamble to the leasing regulations notes that subsection 162.017(b) is “intended to achieve the dual purpose of supporting tribal economic development and promoting self-government.” *Id. at 72448*. One aspect of tribal sovereignty and self-governance is the power of the tribe to levy its own tax on activities on leased tribal land. *Id.* This is the case under Regulation 1616 as tribes could implement a tribal tax for meals, food, and beverages sold by a non-Indian on tribal land. However, drawing a distinction on meals, food, and beverage sales on tribal land in a casino as opposed to outside of a casino for purposes of state sales tax would undermine the federal policy of promoting strong tribal governments and interfere with the tribes ability to be governed by their own laws.

Tribal Interests

The tribal interests in applying the balancing test under *Bracker* are similarly aligned with the federal interests set out above. Tribes clearly have a strong interest in economic development as well as promoting a strong tribal government. Therefore, the arguments discussed under the federal interests apply equally here as well. However, tribes have the additional interest in generating revenues to support tribal self-sufficiency and tribal well-being. It is important to note that the legislative history of 25 U.S.C. 415 “demonstrates that Congress intended to maximize income to Indian landowners.” *Id. at 72447*.

In an attempt to generate revenue, some tribes lease space on tribal land, both in and outside of a casino, to non-Indian businesses that sell meals, food, and beverages in accordance with federal law, including the HEARTH Act. These same tribes impose – or would like to impose – their own sales taxes on sales of meals, food, or beverages on these non-Indian businesses to provide additional revenue for their tribal governments. In order to maximize income to Indian landowners, state and local taxation must be preempted for these types of activities. If state taxation is permitted in these situations, it would dissuade tribes from implementing their own taxes as this would subject businesses to dual taxation which would deter businesses from locating onto tribal land. Therefore, in order to generate the most revenue for Indian landowners under Regulation 1616, the preemption of state sales and use tax should apply to all tribal land – both in and outside of tribal casinos.

State Interests

At this point in the proceedings, the Board has not set forth the State’s interests for purposes of performing a *Bracker* analysis. However, case law and the BIA’s leasing regulations have provided some guidance as to the weight of the state’s interests under *Bracker*. The Supreme Court has stated “a State seeking to impose a tax on a transaction between a Tribe and nonmembers must point to more than its general interest in raising revenues.” *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 at 336

(1983). Similarly, the Court in *Bracker* also held that a general desire to raise revenue, without a responsibility or service that justifies the assertion of the taxes imposed, is not a sufficient state interest to permit the state's intrusion into the federal regulatory scheme. *Bracker* 448 U.S. at 150. Under *Bracker* and its progeny, if a state or local government does not provide services to the lessee at the leased property, if there is a tenuous connection between the tax and the services provided, or if the state or local government merely points to a general interest in raising revenue, then the state or local tax should be preempted.

Conclusion

At the outset, it is significant to note that the BIA leasing regulations plainly state that “[i]n the case of leasing on Indian lands, the Federal and tribal interests are very strong.” *Fed. Reg. at 72447*. In this instance, we are tasked with balancing the Federal, tribal and state interests to determine whether preemption of state sales and use tax as it applies to non-Indians selling meals, food, and beverages on tribal land, should be limited to sales taking place in an Indian casino or instead should be applied to all tribal land.

In looking at the interests set out above, the federal and tribal interests are numerous. Under *Bracker*, the finding that there is a comprehensive federal regulatory scheme that governs the conduct sought to be taxed by the state is a crucial factor in weighing the federal interests. The leases at issue in this case are governed by the leasing regulations promulgated by the BIA and these regulations set out a comprehensive regulatory scheme that leaves no room for state law as the regulations cover all aspects of leasing. Therefore, any lease to a non-Indian that falls under Regulation 1616 should be applied to all such sales whether they occur in or out of an Indian casino.

Additionally, the federal interests of promoting tribal economic development as well as strong tribal governments would be obstructed by the assessment of state and local taxes. By not preempting state sales and use tax to all tribal lands under Regulation 1616, tribes would be faced with the dubious option of: a) not exercising their own taxing authority as they would not want to deter business by subjecting them to dual taxation; or b) subject businesses to dual taxation, which the BIA acknowledged would have a “chilling effect on potential lessees.” *Id. at 72448*. Either of these options cuts against economic development. Taxation is an important aspect of tribal sovereignty and self-governance and this strong federal and tribal interest is promoted by preempting state sales and use tax for purposes of Regulation 1616 whether such sales are made within an Indian casino or not.

Finally, as acknowledged above, the State interests here have not been revealed. However, with respect to the application of Regulation 1616, a state sales tax would not provide any services to the lessee at the leased property as all sales of meals, food, and beverages would be taking place exclusively on tribal land. This weighs against a finding that state taxation should be allowed. Moreover, a general interest in raising revenue is not sufficient standing alone to justify the state tax.

From a common sense standpoint, preempting state sales and use tax for purposes of Regulation 1616 on all tribal land – as opposed to only in tribal casinos – makes sense. If the revision is accepted as currently drafted, it could lead to the untenable situation in which two non-Indian businesses, both engaging in the sales of meals, food, and beverages, and both of whom are on tribal trust land would be treated differently for purposes of state taxation, where the only distinction is that one is located inside a

casino and the other is not. In some instances, the two non-Indian businesses could be adjacent to each other on the same parcel of trust land yet be inequitably treated with respect to state taxation laws.

Accordingly, it is our position that a *Bracker* analysis weighs in favor of finding that federal law preempts the imposition of state sales and use taxes on sales of meals, food, and beverages by a non-Indian lessee on *any tribal trust land*. Therefore, Regulation 1616, subdivision (d) should be revised to provide that California sales and use tax does not apply to sales of meals, food, and beverages by a non-Indian operating an establishment in a leased space, on tribal trust land, when the sales are subject to the Indian tribe's sales tax.

Chumash representatives were present at the first interested parties meeting held on January 13, 2016, and we would like to express our appreciation for the Board's openness to hearing the suggestions and comments from the various parties who attended.

Sincerely,

A handwritten signature in black ink, appearing to read 'Vincent Armenta', with a stylized flourish at the end.

Vincent Armenta,
Tribal Chairman