



STATE BOARD OF EQUALIZATION

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Interim Executive Director

July 15, 2011

Dear Tribal Leaders and Interested Parties:

Enclosed are the Agenda, Issue Paper, and Revenue Estimate for the July 26, 2011 Business Taxes Committee meeting. This meeting will address the proposed amendments to Regulation 1616, *Federal Areas*, regarding sales to governments of officially recognized Indian tribes.

If you are interested in other topics to be considered by the Business Taxes Committee, you may refer to the "Business Taxes Committee" page on the Board's Internet web site (<http://www.boe.ca.gov/meetings/btc2011.htm>) for copies of Committee discussion or issue papers, minutes, a procedures manual, and a materials preparation and review schedule arranged according to subject matter and meeting date.

Thank you for your input on these issues and I look forward to seeing you at the Business Taxes Committee meeting at **10:00 a.m. on July 26, 2011** in Room 121 at the address shown above.

Sincerely,

Jeffrey L. McGuire, Deputy Director
Sales and Use Tax Department

JLM:lh

Enclosures

cc: (all with enclosures)

Honorable Jerome E. Horton, Chairman, Fourth District

Honorable Michelle Steel, Vice Chair, Third District

Honorable Betty T. Yee, Member, First District (MIC 71)

Senator George Runner (Ret.), Member, Second District (MIC 78)

Honorable John Chiang, State Controller, c/o Ms. Marcy Jo Mandel (via e-mail)

(Via E-mail)

Mr. Robert Thomas, Board Member's Office, Fourth District

Mr. Neil Shah, Board Member's Office, Third District

Mr. Tim Treichel, Board Member's Office, Third District

Mr. Alan LoFaso, Board Member's Office, First District

Ms. Mengjun He, Board Member's Office, First District

Mr. Lee Williams, Board Member's Office, Second District

Mr. James Kuhl, Board Member's Office, Second District

Ms. Natasha Ralston Ratcliff, State Controller's Office

Ms. Kristine Cazadd

Mr. Randy Ferris

Mr. Robert Tucker

Mr. Bradley Heller

Ms. Susanne Buehler

Mr. Geoffrey E. Lyle

Ms. Leila Hellmuth

Mr. Bradley Miller

Mr. Robert Wilke

AGENDA — July 27, 2011 Business Taxes Committee Meeting
Proposal to Amend Regulation 1616, *Federal Areas*, Regarding Sales to Governments of Officially
Recognized Indian Tribes

<p>Action 1 — Staff Recommendation</p> <p>Add paragraph (G) to Subdivision (d)(4)</p>	<p>(d) INDIAN RESERVATIONS. (4) SALES BY OFF-RESERVATION RETAILERS.</p> <p style="text-align: center;"><u>(G) Property Used in Tribal Self-Governance.</u> Sales and use tax does not apply to sales of <u>tangible personal property to 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:</u></p> <ol style="list-style-type: none"> <u>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;</u> <u>2. The property is purchased by the tribal government for use in tribal self-governance, including the governance of tribal members, the conduct of inter-governmental relationships, and the acquisition of trust land; and</u> <u>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.</u> <p><u>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.</u></p>
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Issue Paper Number 11-005



- Board Meeting
- Business Taxes Committee
- Customer Services and Administrative Efficiency Committee
- Legislative Committee
- Property Tax Committee
- Other

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

I. Issue

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

II. Alternative 1 - Staff Recommendation

Staff recommends the Board approve and authorize publication of proposed amendments to Regulation 1616, *Federal Areas*. This recommendation is generally supported by tribal leaders and interested parties that participated in the interested parties meeting process. Staff recommends amending subdivision (d) to clarify that a limited exemption from sales and use taxes exists for sales to, and purchases by, a tribal government of an officially recognized Indian tribe if:

- The tribal government does not have a reservation² on which to conduct tribal government business or the principal place where the tribal government meets to conduct tribal business cannot be on the tribe's reservation because the reservation lacks a building in which they can meet or the reservation lacks essential utility services, or lacks mail service from the United States Postal Service;
- The property is purchased for use in tribal self-governance, including the governance of tribal members, the conduct of inter-governmental relationships, and the acquisition of trust land; and
- The property is delivered to the tribal government and ownership of the property transfers at the principal place where the tribal government meets to conduct tribal business.

Staff's proposed amendments are attached as Exhibit 2.

III. Alternative 2 - Other Alternative Considered

Do not amend Regulation 1616.

¹ For purposes of this issue paper, an Indian tribe is officially recognized if it is recognized by the federal government.

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

IV. Background

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

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

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

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

V. Discussion

Although state taxation of Indians is not generally preempted outside Indian reservations, the United States Supreme Court’s holdings suggest that state taxation of Indians outside of Indian reservations may be preempted under appropriate circumstances. For example, in *Oklahoma Tax Commission v. Sac and Fox Nation* (1993) 508 U.S. 114, 126, Justice O’Connor contemplated whether state taxation may be preempted outside of a tribe’s territorial jurisdiction, but the court refrained from resolving the issue because it was not directly before the court. Also, more recent United States Supreme Court cases

continue to indicate that states are not “generally” preempted from taxing Indians when they reside outside of reservations, but that there are some exceptions to the general rule. (See, e.g., *Wagnon v. Prairie Band Potawatomi Nation* (2005) 546 U.S. 95, 113 [quoting from *Mescalero Apache Tribe v. Jones* (1972) 411 U.S. 145, 148-149].) Therefore, it appears that state taxation of Indians outside Indian reservations may be preempted by federal law in some circumstances that have not yet been prescribed by the United States Supreme Court.

Furthermore, the United State Supreme Court has said that “there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian Reservation or to tribal members.” (*White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, 142.) Instead, the Supreme Court has said that the boundaries between state regulatory authority and tribal self-government depend upon “a particularized inquiry into the nature of the state, federal, and tribal interests at stake” in a specific context. (*Id.* at p. 145.) Therefore, Board staff has reviewed the particular facts and circumstances applicable to officially recognized California Indian tribes that do not have reservations (hereafter “landless tribes”) and their members to see whether the imposition of California’s sales tax interferes with their federally protected interests in any way that might require the tax to be preempted under federal law.

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

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

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

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

[¶] . . . [¶]

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

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Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

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

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

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

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

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

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

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

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

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

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

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

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

However, Board staff believes that federal preemption of California's taxation of officially recognized Indian tribes outside of a reservation would be limited to preempting the taxation of tangible personal property that is sold to or purchased by tribal governments for use in tribal self-governance, including, but not limited to, the governance of tribal members, the conduct of inter-governmental relationships, and the acquisition of trust land. This is because the taxation of these types of transactions, and only these types of transactions, might directly interfere with a tribe's sovereignty. In other words, other than the potential limited exemption for tribes discussed above, staff has found no persuasive authority that could establish a general exemption for off-reservation sales of tangible personal property to Indians or purchases of tangible personal property by Indians for use off-reservation.

Furthermore, Board staff believes that an exemption recognizing such preemption would need to be limited to taxes imposed on property delivered to an officially recognized Indian tribe at the principal

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

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place where the tribe's government meets to conduct tribal business so that there is some way for retailers and the State Board of Equalization to verify exempt transactions. Board staff also believes that a "principal place" test is sufficiently flexible because we recognize that federally recognized tribes may not own any real estate where their tribal governments can meet to conduct tribal business, and they may occasionally meet at more than one place during a given period.

Proposed amendments to subdivision (d) of Regulation 1616 that would codify such an exemption recognizing limited federal preemption are illustrated in Exhibit 2.

Officially Recognized Indian Tribes

Comments received from Agua Caliente Band of Cahuilla Indians (Exhibit 3), Santa Ynez Band of Chumash Indians (Exhibit 4), Pechanga Indian Reservation (Exhibit 5), and the California Tribal Business Alliance (Exhibit 6) objected to extending the proposed exemption to Indian tribes recognized by the state, but not recognized by the United States. Comments received from the California Valley Miwok Tribe (Exhibit 9) expressed support for including an exemption for all recognized tribes. Previously proposed amendments had provided that the exemption would apply to sales to and purchases by tribal governments of Indian tribes that are recognized by either the United States or the State of California. However, based upon the comments received, the proposed amendments have been clarified to limit the exemption recognizing federal preemption to purchases by tribal governments of Indian tribes that are recognized by the United States. The provisions that would have provided an exemption for purchases by tribal governments of state recognized Indian tribes were removed.

Indian Organizations

Comments received from the Rincon Band of Luiseno Indians (Exhibit 7) requested that the proposed amendments also cover sales to, and the storage, use, or other consumption of tangible personal property by, an Indian organization, as that term is currently defined in Regulation 1616, subdivision (d)(2). Staff believes the proposed amendments to Regulation 1616 would provide a limited exemption for sales to, and the storage, use, or other consumption of tangible personal property by, an Indian organization because subdivision (d)(2) expressly provides that "Indian organizations are entitled to the same exemption as are Indians." Following the successful adoption of the proposed amendments to Regulation 1616, clarification regarding this issue will be incorporated into Publication 146.

12-Month Test Period

Comments received from the Rincon Band of Luiseno Indians (Exhibit 7) requested that the 12-month test period provisions be removed from the proposed amendments to Regulation 1616 because the Rincon Band of Luiseno Indians does not believe that there is a statutory basis for the test period. Even though this request is outside the scope of the regulatory amendments approved for this Business Taxes Committee topic, staff considered the suggestion and concluded that there is authority for the 12-month test and that it is necessary to incorporate a 12-month test into the proposed amendments for the proper administration of the Sales and Use Tax Law. Revenue and Taxation Code section 6202 provides that any person purchasing tangible personal property from a retailer for use in this state is liable for payment of the use tax, unless an exemption or exclusion applies, and the proposed amendments only provide an exemption for property that is purchased for use in tribal self-governance. Therefore, when property is purchased for nonexempt use in California and for exempt use in tribal self-governance, a test period is necessary to determine whether the property qualifies for an exemption because the property is used primarily for exempt purposes rather than nonexempt purposes. Furthermore, Revenue and Taxation Code section 6248 specifically provides for a 12-month test period in determining whether a vehicle, vessel, or aircraft is purchased for use in this state and there are 12-month test period provisions contained elsewhere in the existing text of subdivision (d) of Regulation 1616. Therefore, staff continues

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to believe it is reasonable to include a 12-month test period in the proposed amendments to Regulation 1616.

Reservation Based Value

Comments received from Big Sandy Rancheria (Exhibit 8) requested that Regulation 1616 include additional amendments to address “value added” activity for on-reservation sales by Indians. The comments included a cite to *California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202 (superseded by statute in *New York v. Shinnecock Indian Nation* (2007) 523 F. Supp. 2d 185), as authority for the additional amendments.

The comments acknowledge that Regulation 1616 does provide that “Indian retailers selling meals, food or beverages at eating and drinking establishments are not required to collect use tax on the sale of meals, food or beverages that are sold for consumption on an Indian reservation” and indicate that Big Sandy Rancheria believes this language should extend to other products in which there is “value added” on the reservation. Although meals, food or beverage sold by an Indian retailer may have value added on the reservation, the basis for the limited exemption from the obligation to collect use tax provided for sales of meals, food or beverage is not the “value added” on the reservation.

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

VI. Alternative 1 - Staff Recommendation

Staff recommends the Board approve and authorize publication of the proposed amendments to subdivision (d) of Regulation 1616, as illustrated in Exhibit 2.

A. Description of Alternative 1

Alternative 1 clarifies that a limited exemption from sales and use tax exists for sales of tangible personal property to and the storage, use, or other consumption of tangible personal property by tribal governments of federally recognized Indian tribes if:

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

B. Pros of Alternative 1

The proposed amendments will recognize federal preemption of California’s sales and use taxes in narrow, specific circumstances where their application would directly interfere with a tribal government of a federally recognized Indian tribe’s exercise of its tribe’s right to self-governance.

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C. Cons of Alternative 1

Retailers of tangible personal property would be required to verify that the address where property is delivered qualifies as the principal place where the tribal-government purchaser meets to conduct tribal business in order to substantiate the exemption.

D. Statutory or Regulatory Change for Alternative 1

No statutory change is required. However, staff's recommendation does require adoption of amendments to Regulation 1616.

E. Operational Impact of Alternative 1

Staff will incorporate the provisions of the amendments into publication 146, *Sales to American Indians and Sales in Indian Country*, if they are successfully adopted. Additionally, staff will work with the Bureau of Indian Affairs and tribal leaders to maintain, on the Board's website, an accurate listing of each address outside of Indian country that qualifies as a principal place where the tribal government of a federally recognized Indian tribe meets to conduct business.

F. Administrative Impact of Alternative 1

1. Cost Impact

The workload associated with publishing the regulation and outreach efforts are considered routine. Any corresponding costs would be absorbed within the Board's existing budget.

2. Revenue Impact

None. See Revenue Estimate (Exhibit 1).

G. Taxpayer/Customer Impact of Alternative 1

The overall impact of the proposed amendments to taxpayers and consumers is minimal.

H. Critical Time Frames of Alternative 1

Implementation will begin 30 days following approval of the amended regulation by OAL.

VII. Other Alternatives

A. Description of Alternative

Do not revise Regulation 1616.

B. Pros of Alternative

The Board would avoid the workload involved with processing and publicizing the revised regulation.

C. Cons of Alternative

The Board would continue to impose sales tax on all off-reservation sales of tangible personal property to tribal governments and impose use tax on all tangible personal property purchased by a tribal government for storage, use, or other consumption outside of a reservation. Also, not revising the regulation may result in confusion regarding the application of tax to sales of tangible personal property to tribal governments of federally recognized Indian tribes.

D. Statutory or Regulatory Change for Alternative

None.

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E. Operational Impact of Alternative

None.

F. Administrative Impact of Alternative

1. Cost Impact

None.

2. Revenue Impact

None. See Revenue Estimate (Exhibit 1).

G. Taxpayer/Customer Impact of Alternative

Minimal.

H. Critical Time Frames of Alternative

None.

Preparer/Reviewer Information

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

Current as of: July 11, 2011

REVENUE ESTIMATE

STATE OF CALIFORNIA
BOARD OF EQUALIZATION

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

Alternative 1 - Staff Recommendation

Staff recommends the Board approve and authorize publication of proposed amendments to Regulation 1616, *Federal Areas*. This recommendation is generally supported by tribal leaders and interested parties that participated in the interested parties meeting process. Staff recommends amending subdivision (d) to clarify that a limited exemption from sales and use taxes exists for sales to, and purchases by, a tribal government of an officially recognized Indian tribe if:

- The tribal government does not have a reservation¹ on which to conduct tribal government business or the principal place where the tribal government meets to conduct tribal business cannot be on the tribe's reservation because the reservation lacks a building in which they can meet or the reservation lacks essential utility services, or lacks mail service from the United States Postal Service;
- The property is purchased for use in tribal self-governance, including the governance of tribal members, the conduct of inter-governmental relationships, and the acquisition of trust land; and
- The property is delivered to the tribal government and ownership of the property transfers at the principal place where the tribal government meets to conduct tribal business.

Alternative 2 - Other Alternative Considered

Do not amend Regulation 1616.

Background, Methodology, and Assumptions

¹ In this context, the term "reservation" refers to all land that is considered "Indian country" as defined by 18 U.S.C. § 1151, which provides that "the term 'Indian country' . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." (See, e.g., Sales and Use Tax Annotation 305.0024.250 (8/26/1996).)

Alternative 1 – Staff Recommendation

We would expect the revenue impacts of this amendment to Regulation 1616 to be negligible. Many tribes have lands, and the ones that do not have lands tend to be relatively small. Furthermore, under current law tribes without lands can cooperate with tribes that do have lands and take possession in Indian country of goods they purchase exempt of sales and use taxes. Since the regulation only makes it more convenient for tribes to make such tax exempt purchases, we would expect little revenue impact.

Alternative 2 - Other Alternative – do not revise Regulation 1616

There is nothing in the Alternative 2 that would impact sales and use tax revenue.

Revenue Summary

Alternative 1 – staff recommendation has a negligible revenue impact.

Alternative 2 – alternative 2 does not have a revenue impact.

Preparation

Mr. Joe Fitz, Research and Statistics Section, Legislative and Research Division, prepared this revenue estimate. Mr. Robert Ingenito, Chief, Research and Statistics Section, Legislative and Research Division and Ms. Susanne Buehler, Chief Tax Policy Division, Sales and Use Tax Department, reviewed this revenue estimate.

Current as of July 11, 2011.

Regulation 1616. FEDERAL AREAS.

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

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

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

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

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

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

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

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

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

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

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

(d) INDIAN RESERVATIONS.

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

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

(3) SALES BY ON-RESERVATION RETAILERS.

(A) Sales by Indians.

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

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

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

(B) Sales by non-Indians.

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

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

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

(4) SALES BY OFF-RESERVATION RETAILERS.

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

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

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

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

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

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

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

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

(G) Property Used in Tribal Self-Governance. Sales and use tax does not apply to sales of tangible personal property to and 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 inter-governmental relationships, and the acquisition of trust land; and

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

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



AGUA CALIENTE BAND OF CAHUILLA INDIANS
TRIBAL COUNCIL

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

March 23, 2011

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

RECEIVED
MAR 29 2011
TAX POLICY DIVISION

RE: Regulation 1616, *Federal Areas*

Dear Ms. Buehler,

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

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



Page 2 of 2

RE: Regulation 1616, Federal Areas

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

Sincerely,

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

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

TC-11451-03-11

**AGUA CALIENTE BAND OF CAHUILLA INDIANS
TRIBAL COUNCIL****RICHARD M. MILANOVICH CHAIRMAN • JEFF L. GRUBBE VICE CHAIRMAN
VINCENT GONZALES III SECRETARY/TREASURER • ANTHONY J. ANDREAS III MEMBER • SAVANA R. SAUBEL MEMBER**

June 2, 2011

**Susanne Buehler
Chief, Tax Policy Division
Sales and Use Tax Department
State Board of Equalization
PO Box 942879
Sacramento, CA 94279-0092****RE: Regulation 1616, *Federal Areas***

Dear Ms. Buehler,

As a follow up to our March 23, 2011, letter, the Agua Caliente Band of Cahuilla Indians ("Tribe") reemphasizes its position that the California State Board of Equalization ("BOE") should decline to adopt the proposed amendment to Regulation 1616, creating a limited sales and use tax exemption for sales to landless "state recognized" tribes. As noted in the Tribe's earlier letter, California has no "state recognized" tribes. In fact, the closest to state recognition the BOE can cite are two non-binding, California Assembly Joint Resolutions passed in support of two tribes seeking federal recognition. Under this framework, only two unrecognized tribes stand to benefit from the proposed regulation change, which as discussed in earlier correspondence, is impermissible in the context of the law, regarding Indian tribes and taxation. Further, the history of California's native population makes it impossible for the BOE to develop and enforce a bright line test of what additional tribes might benefit from the proposed tax exemption.

The Initial Discussion Paper captures the history of tribes in California, but fails to include the very important fact that in addition to those tribes terminated under the California Rancheria Act or other federal legislation, there are entities, asserting tribal



RE: Regulation 1616, Federal Areas
Page No. 2

status, that were never federally recognized. In fact, a review of the ⁴⁵ or so currently unrecognized California tribes shows that only 6 of these were terminated under the California Rancheria Act. Accordingly, the BOE, in the absence of state law, establishing a recognition process, cannot rely on the termination era statutes in determining what tribes should benefit from the proposed change. To further compound the problem, those tribes that were not previously federally recognized are self-identifying, which would require BOE staff to craft regulations to determine which groups could legitimately take advantage of the tax exemption.

Because there is no codified process in California for unrecognized tribes to gain state recognition, your regulatory body should decline to in essence, create new law. Further, the history and status of the numerous unrecognized tribes in California creates a new burden on BOE staff to determine what tribes should benefit from the proposed tax exemption. Accordingly, the Agua Caliente Band of Cahuilla Indians again urges the BOE to not adopt the proposed changes to Regulation 1616.

Sincerely,

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

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

RMM: lf
TC-11465-06-11

* Although the Bureau of Indian Affairs does not maintain a list of unrecognized tribes, Humboldt State University, among other academic institutions, endeavors to document such entities. The Humboldt State list is available to the public at <http://sos.nativeweb.org/caunrectribes.html>.



**AGUA CALIENTE BAND OF CAHUILLA INDIANS
TRIBAL COUNCIL**

RICHARD M. MILANOVICH CHAIRMAN • JEFF L. GRUBBE VICE CHAIRMAN
VINCENT GONZALES III SECRETARY/TREASURER • ANTHONY J. ANDREAS III MEMBER • SAVANA R. SAUBEL MEMBER

June 28, 2011

Brad Miller
SUTD Regulations & Legislation Specialist
Business Taxes Committee
State Board of Equalization
P. O. Box 942879
Sacramento, CA 94279-0092

RE: Regulation 1616, *Federal Areas*

Dear Mr. Miller,

On June 22, 2011, you followed up with me, regarding the Agua Caliente Band of Cahuilla Indians' written comments opposing the proposed amendments to Regulation 1616. Specifically, you inquired as to whether the Tribe would continue in its opposition to the proposed change if the language were revised to limit the sales tax exemption to landless, federally recognized tribal governments.

Because the Tribe's opposition to the proposed change is rooted in the fact that there is no codified process for unrecognized tribes to seek formal State recognition, the proposal to limit the exemption to federally recognized tribes does indeed address our concerns. Consequently, if the language were so revised, the Tribe would have no opposition to amending Regulation 1616.

The Tribe appreciates the Board of Equalization's sincere willingness to work with tribal governments on these changes and the Tribe looks forward to seeing the revised proposed changes to Regulation 1616.

Sincerely,

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

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TAX POLICY DIVISION

RECEIVED
JUL 07 2011



Santa Ynez Band of Chumash Indians

P.O. Box 517 • Santa Ynez, CA 93460
805-688-7997 • Fax 805-686-9578
www.santaynezchumash.org

BUSINESS COMMITTEE
Vincent Armenta, *Chairman*
Richard Gomez, *Vice Chairman*
Kenneth Kahn, *Secretary/Treasurer*
David D. Dominguez, *Committee Member*
Gary Pace, *Committee Member*

June 3, 2011

Board of Equalization
Tax Policy Division (MIC 92)
P O Box 942879
Sacramento, CA 94279-0092
Attention: Mr. Bradley Miller:

RE: Regulation 1616 proposed amendments

Dear Mr. Miller:

The Santa Ynez Band of Chumash Indians must respectfully disagree with your position that there are "State Recognized" Tribes in the State of California. We are aware of no State statute providing for State recognition but we do appreciate the efforts of the State of California to provide services for various tribal organizations in addition to federally recognized Tribal governments.

Sincerely,

Vincent P. Armenta
Tribal Chairman



PECHANGA INDIAN RESERVATION
Temecula Band of Luiseño Mission Indians

Post Office Box 1477 • Temecula, CA 92593
Telephone (951) 770-6000 Fax (951) 695-1778

Tribal Chairman:
Mark Macarro

Council Members:
Mark Calac
Corrine Garbani
Andrew Masiel, Sr.
Russell "Butch" Murphy
Kenneth Perez
Benjamin "Ben" Vasquez

Tribal Treasurer:
Christina McMEnamin

Tribal Secretary:
Louise Burke

June 1, 2011

Susanne Buehler
Chief, Tax Policy Division
State of California Board of Equalization
450 N Street
Sacramento, CA 94279-0092

RE: Amendments to Regulation 1616, *Federal Areas*

Dear Ms. Buehler,

I write on behalf of the Pechanga Band of Luiseño Indians, a federally recognized tribal government, in response to the Board of Equalization's Second Discussion Paper regarding proposed amendments to Regulation 1616, *Federal Areas*.

We appreciate the Board's efforts to address some of the matters that impact tribal governments. However, we oppose the definition of "officially recognized" tribal governments in the language of subdivision (d) of Regulation 1616.

We strongly disagree with the notion of State recognized tribes receiving benefits and treatment similar to that of federally recognized tribes. These benefits should only be extended to federally recognized tribes.

The recognition and establishment of a federally recognized tribe should remain within the exclusive jurisdiction of the United States government. With no defined process in place to determine who is and who is not a legitimate tribe and identify its duly elected leadership, the State is ill-equipped to oversee such matters.

Accordingly, we urge the Board of Equalization to not adopt the proposed changes to Regulation 1616 as it relates to "officially" recognized tribes.

Respectfully submitted,

Mark Macarro
Tribal Chairman

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916-346-4283

C

CALIFORNIA TRIBAL
BUSINESS ALLIANCE

May 27, 2011

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

RE: Board of Equalization Proposal to Amend Regulation 1616, *Federal Areas*, Second Discussion Paper – Sales To Governments of Officially Recognized Indian Tribes (“Amendment”)

Dear Ms. Buehler:

Thank you for your dedication and ongoing effort to advance the exercise of tribal sovereignty and self-governance for Indian tribes in California by proposing the above-referenced Amendment to create a limited exemption for tangible personal property that is sold to or purchased by officially recognized Indian tribes without a reservation on which to conduct tribal government business. The California Tribal Business Alliance (CTBA) has reviewed the proposed Amendment and respectfully requests that it be revised to exclusively apply to “federally-recognized” Indian tribes.

The United States Department of Interior annually publishes a document entitled, *Indian Entities Recognized and Eligible to Receive Services From the United State Bureau of Indian Affairs*. Federal recognition establishes the federal-trust relationship between Indian tribes and the United States which is institutionalized in both the government-to-government relationship between an Indian tribe and the United States, and federal common law under the doctrine of sovereign immunity which recognizes the sovereign status of Indian tribes as lawfully vested with police powers, including powers to tax and regulate conduct within their jurisdiction free from state interference.¹ Federal recognition of Indian tribes, whether by congressional act, treaties, executive orders or acknowledgement (25 CFR 83), also entitle Indian tribes to participate in federal programs and services due to their political status as Indians.²

¹ See, Section 3.02[3], Felix Cohen – Handbook of Federal Indian Law (2005) (“Cohen”)

² Cohen, Section 3.02[9], pp. 169.



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Sacramento, CA 95814
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JUN 02 2011

TAX POLICY DIVISION

BOE Second Discussion Paper Reg. 1616
May 27, 2011
Page 2

State recognized Indian tribes have no legal relationship with the federal government and do not have any status under the United States Constitution as distinct political and legal entities. State recognized Indian tribes also lack policy powers and the authority to tax and regulate their affairs or conduct on Indian lands. For these reasons, state recognized tribes are not entitled to receive services under the vast majority of federal programs for Indians and should not be included as eligible tribal governments under the proposed Amendment.

Therefore, CTBA requests the following revisions to the proposed Amendment:

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

1. The 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 services from the United States Postal Service;
2. The property is purchased by the tribal government for use in tribal self-governance, including the governance of tribal members, the conduct of inter-governmental relationships, and the acquisition of trust land; and,
3. The property is delivered to the tribal government and ownership of the property transfers to the tribal government at the principal place where the tribal government meets to conduct tribal business.

The purchase of tangible 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-governmental purposes within the first 12 months following delivery.

Respectfully,



ROBERT H. SMITH
Chairman

Rincon Band of Luiseño Indians

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



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

March 31, 2011

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

Dear Mr. McGuire,

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

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

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

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

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

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

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

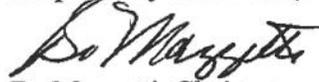
Second, the Band also believes the proposed Amendment should include an Indian Organization, as that term is defined in Regulation 1616(d)(2), of officially recognized tribes provided that the same delivery and title transfer requirements are satisfied in accordance with the proposed Amendment.

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

Our suggested revisions to the proposed Amendment are:

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

Respectfully Submitted,



Bo Mazzetti, Chairman
Rincon Band of Luiseno Indians



March 9, 2011

Elizabeth D. Kipp
Chairperson

Ms. Susanne Buehler
Division Chief
State Board of Equalization
P.O. Box 942879
Sacramento, CA 94279-00092

Arrow Sample
Vice Chair

Lisa Garcia
Secretary

Dear Division Chief Buehler,

Johnny Baty
Treasurer

The Big Sandy Rancheria appreciates your request for input from tribal governments in California regarding proposed amendments to California Tax Regulation 1616. Federal Areas set forth in your February 23, 2011 letter. Big Sandy Rancheria supports the amendment allowing landless tribes to enjoy the benefits of the unique state tax status of federally recognized Indian tribes and Indian lands. This status is important in fulfilling the sovereign rights enjoyed by Indian tribes.

Amy A. Hutchins
Member-At-Large

In this regard, California has, at least in part, already recognized that where a tribe provides goods and services to non-members on their reservation and those goods and services are created by the tribe on their reservation, the State is without the power to tax those goods and services. California Tax Reg. 1616(d)(3)(A)(2). The value added by the tribes on their reservation displaces whatever taxing jurisdiction the State might have enjoyed over those non members. However, as currently written, this exemption from State taxation only applies to meals, foods and beverages. Federal law recognizes no such limitation on this exemption. The State lacks jurisdiction to tax any goods and services that arise out of value added by the Tribe on the Tribe's reservation. So while these regulations are most definitely a step in the right direction, they still do not fully take into account the limits of State jurisdiction to tax reservation transactions involving non-Indians. Big Sandy Rancheria will provide a more detailed analysis of this issue to the Board of Equalization before the comment period closes on March 31, 2011. Thank you.

Sincerely,

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

Elizabeth Kipp
Chairperson, Big Sandy Rancheria



BIG SANDY RANCHERIA

March 29, 2011

Elizabeth D. Kipp
Chairperson

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

Arrow Sample
Vice Chair

Lisa D. Garcia
Secretary

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

Johnny Baty
Treasurer

Dear Ms. Buehler:

Amy Hutchins
Member-At-Large

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

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

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

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

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

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

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

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

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

Sincerely,





U. S. Department of Justice

Office of Tribal Justice

Washington, D.C. 20530

OCT 8 1997

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

Dear Mr. Orlow:

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

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

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

Montana v. Blackfeet Indian Tribe, 471 U.S. 759, 764 (1985). Thus, states may not tax cigarette sales to tribal members within tribal territory. Moe v. Salish & Kootenai, 425 U.S. 463 (1974).

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

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

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

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Barry Orlow, Esq.
Bureau of Alcohol, Tobacco & Firearms
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In contrast, based on the federal policies promoting tribal self-determination and economic self-sufficiency, where Indian tribes generate value on their reservations, the goods or services provided to non-Indians are generally exempt from state regulation or taxation. For example, in New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983), the Supreme Court held that the State could not regulate non-Indian hunters patronizing a tribal hunting and fishing enterprise within tribal territory. The Court explained:

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

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

Similarly, in California v. Cabazon Band of Indians, 460 U.S. 202 (1987), the Supreme Court held that California had no authority to regulate Indian gaming because state regulation would interfere with tribal self-government. The Court explained:

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

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

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

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

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

The Act has been held to apply to cigarette transactions by Indian transporters and retailers, where cigarettes are otherwise subject to state taxation. United States v. Baker, 63 F.3d 1478 (9th Cir. 1995). In passing the Act, however, the Conference Committee was clear that it did not intend to change the existing case law to extend state taxation authority in tribal territory. H.R. Conf. Rep. 95-1778, 95th Cong., 2nd Sess (1978); 1978 WL 8548 (Leg. Hist.). The Conference Committee Report explains:

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

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

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

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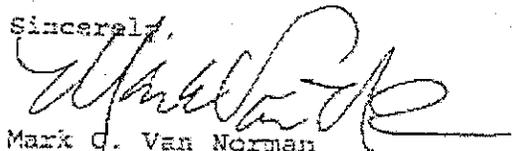
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Barry Orlow, Esq.
Bureau of Alcohol, Tobacco & Firearms
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As you know, we have consulted with the Associate Solicitor for Indian Affairs in the Department of the Interior, and he is in agreement with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

Sincerely,



Mark C. Van Norman
Deputy Director

CALIFORNIA VALLEY MIWOK TRIBE

10601 N. Escondido Pl, Stockton, California 95212 Bus: (209) 931-4567 Fax: (209) 931-4333
<http://www.californiavalleymiwoktribe-nsn.gov>



Transmitted via Facsimile to (916) 322-4530

March 29, 2011

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

Re: Comments Regarding the Recommended Amendments to Regulation 1616

Dear Ms. Buehler:

On behalf of the California Valley Miwok Tribe ("Tribe"), I would first like to extend my thanks to the Board of Equalization ("Board") for shining light on the current disparity present in sales and use taxes applicable to federally and state recognized Indian tribes. The Tribe supports amending the existing regulation to expressly include landless tribes as eligible for sales and use tax exemptions. All recognized tribes should be treated equally by the Board.

As a landless tribe, we do not currently share in the same advantages afforded to tribes with a reservation or other land base. The irony of the Board's current regulatory structure is that it burdens tribal governments that are already disadvantaged by their landless status while awarding more established and likely prosperous tribes with sales and use tax exemptions. We applaud the Board's efforts to level the playing field.

All recognized tribes in the State of California should have the same rights and privileges whether they have land or not. No tribe is better than another tribe simply because they are fortunate enough to have an established land base. Amending Regulation 1616 to include rights to sales and use tax exemptions for landless tribes serves a very important function of recognizing equality amongst the State's native population.

Thank you again for allowing the greater tribal community to participate and comment on the proposed amendments to Regulation 1616. I look forward to exploring this very important issue upon the Board's issuance of the Second Discussion Paper.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Silvia Burley".

Silvia Burley, Chairperson
s.burley@californiavalleymiwoktribe-nsn.gov



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Anthony Cohen
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March 30, 2011

VIA FACSIMILE and U.S. MAIL: (916) 322-4530

Susanne Buehler
Chief, Tax Policy Division, Sales and Use Tax Department
State Board of Equalization
450 N Street
P.O. Box 942879
Sacramento, CA 94279-0092

Re: Comment of Manchester-Point Arena Band of Pomo Indians
On Proposed Regulation 1616 Amendments Re: Landless Tribes

Dear Ms. Buehler:

I write on behalf of the Manchester-Point Arena Band of Pomo Indians, a federally recognized Tribe ("Tribe") with tribal trust land in Northern California. Although the Tribe does have trust land, it is committed to the principle that any action by the State of California that affects the sovereignty of any tribe potentially impacts the State's government-to-government relationship with all tribes. With that principle in mind, by this letter, the Tribe comments upon the "landless tribe" Regulation 1616 amendments being considered by BOE staff, and ultimately by the Board itself.

First, the Tribe commends BOE and its staff for their continuing efforts to address the impacts of California's sales tax policies upon the separate sovereigns within California's borders and to ensure that the effects of those policies are consistent with the tribes' rights under federal law. We note that BOE staff's efforts led to the tentative conclusion that two aspects of the exercise of sovereignty by landless tribes could be adversely affected by imposition of sales taxes upon such tribes' purchases. BOE staff proposed amendments to subdivision (d) of Regulation 1616, "to clarify that a limited exemption from sales and use taxes exists for sales to and purchases by officially recognized landless Indian tribes of tangible personal property *for use by their tribal governments in the governance of tribal members or for the acquisition of trust land.*" [Emphasis added.] (02/16/2011 Initial Discussion Paper.)

"Governance of tribal members" and "the acquisition of trust land" certainly are critical aspects of the exercise of sovereignty by landless sovereigns. The Tribe believes that government-to-government interaction of any tribal government (with or without land) with California or any other

Letter to Susanne Buehler, BOE
March 30, 2011
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sovereign government, for example the submission of this comment by Manchester-Point Arena to the State Board of Equalization, is also an exercise of tribal sovereignty that may not be subject to State sales tax. The Tribe therefore suggests the following amendment to the language proposed by BOE staff:

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

Thank you very much for considering adding these provisions to the language that will be recommended by staff to the Board. Please feel free to contact me if you need any more information.

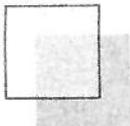
Sincerely,



Anthony Cohen

AC/cl

cc: Chairman Nelson Pinola,
Manchester-Point Arena Band of Pomo Indians



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Kathryn A. Ogas
Brenda L. Tomaras

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March 30, 2011

VIA E-MAIL

State Board of Equalization
P.O. Box 942879
Sacramento, CA 94279-0044

Re: Comments on Proposed Revisions to Regulation 1616 - Landless Indian Tribes

To Whom It May Concern:

The Lytton Rancheria of California, a federally-recognized Indian tribe (Tribe) submits the following comments to the State Board of Equalization's (SBOE) proposal to extend the sales and use tax exemption under Regulation 1616 to landless Indian tribes.

The Tribe appreciates and supports the SBOE's proposal to extend the current sales and use tax exemption to landless Indian tribes. The Tribe believes that the tax exempt status of Indian tribes should be based on their status as sovereign governments rather than the existence or non-existence of reservation land. The Tribe is pleased that the SBOE has acknowledged, through its proposed amendments to Regulation 1616, that the exemption from state sales and use taxes applies equally to all federally recognized Indian tribes. While the Tribe believes that the SBOE's proposed additions to Regulation 1616 are a great start, the Tribe does have a few comments on the proposed language.

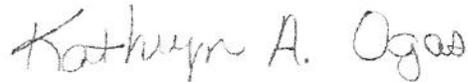
First, the Tribe urges the SBOE to consider revising the proposed language to expand the exemption to include Tribes whose governmental facilities are located off-reservation because the Tribe's reservation is: (i) too small to accommodate such facilities or (ii) not located, for reasons beyond the Tribe's control, in the Tribe's historical territory (making it impossible or infeasible for the Tribe to conduct its governmental operations from such reservation).

Second, the Tribe believes the exempt "uses" should be extended to encompass **all** purchases made by a Tribe relating to the conduct of its governmental activities. As we have stated above, landless Tribes should be treated the same as Tribes with reservation land. Thus, since all purchases made by Tribes whose tribal offices or business enterprises are located on reservation land are exempt from state sales and use tax, the same should be true for landless Tribes. It may be that the SBOE intended to cover all such purchases through its use of the phrase "in the governance of tribal members." However, it is not clear that this is indeed what the SBOE intended (for example, it is unclear whether office supplies purchased for use at tribal

governmental offices would be exempt from state sales and use taxes). Thus, the Tribe urges the SBOE to revise the proposed language to clarify the scope of the exemption. It would also be useful to both Tribes and vendors to further amend Publication 146 to provide detailed guidance on the scope of this exemption.

The Tribe appreciates the opportunity to submit these comments and thanks the SBOE for its continued efforts to improve Regulation 1616 and engage in government-to-government consultations with Tribes on these important regulatory issues.

Sincerely,



Kathryn A. Ogas
Attorney for the Lytton Rancheria of
California



CALIFORNIA INDIAN LEGAL SERVICES

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Alex Cleghorn, Directing Attorney

March 31, 2011

Bradley Miller
Tax Policy Division
Board of Equalization
P.O. Box 942879
Sacramento, CA 94279-0044

Sent via email at Brad.Miller@boe.ca.gov and U.S. Mail

Re: Comments to Board of Equalization Initial Discussion Paper and Proposal to Amend Regulation 1616, *Federal Areas*, Regarding Sales to Landless Tribes

Dear Mr. Miller:

California Indian Legal Services (“CILS”) is the oldest non-profit Indian law firm in the state of California. CILS represents individual Native Americans and California Tribes in a wide variety of legal matters, including state taxation. The proposal to amend Regulation 1616 is a welcome change, however we suggest that the Board recognize California’s unique history and include landless **and** small land base tribes.

Some historical background may be useful to the Board in considering this issue. In 1850 and 1851 the federal government entered into nearly twenty treaties with California Indians. However these treaties were never ratified by the Senate and were kept secret until the early 1900’s. In 1958 Congress passed the Rancheria Act, which sought to terminate forty-one California rancherias. This termination sought to end these tribes’ special status as sovereign governments having a trust relationship with the United States. Thirty-eight California tribes had this special status terminated. Through litigation, legislation and administrative efforts many of these terminated tribes have restored this status. However, in many instances restoration of federal recognition did not restore a land base, or may have restored an inadequate land base.

In addition, many California tribes have a land base that is particularly small or unsuited for operation of a tribal government for several reasons. For example, as we previously pointed out in our comments to Publication 146, many reservations and rancherias do not have reliable United States Postal Service and therefore are required to obtain a Post Office box which is usually located outside “Indian Country.” Further, many reservations and rancherias may not have access to reliable utilities, including phone or internet service, which makes operating a



March 31, 2011

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tribal office difficult. Finally, many reservations and rancherias may not have access to adequate buildings to house tribal government offices. These examples are not exhaustive but merely an attempt to illustrate the reasons why small land base tribes should not be penalized because they are forced to locate tribal offices outside of "Indian Country."

In conclusion, we believe that recognition of these realities for numerous California tribes requires that the board extend the proposal to include not just landless tribes but also small land base tribes. CILS would like to thank the Board for the opportunity to provide comments on the Initial Discussion Paper and Proposal to Amend Regulation 1616, *Federal Areas, Regarding Sales to Landless Tribes*. As an Indian law firm representing both individual Native Americans and Tribes in the area of sales and use tax law, we have a direct interest in these issues. I am available to answer any questions regarding our comments at (916) 978-0960 ext. 305. Please feel free to contact me.

Sincerely,

CALIFORNIA INDIAN LEGAL SERVICES



Alex Cleghorn
Directing Attorney

