

1 John O. Johnson
 2 Tax Counsel
 3 Board of Equalization, Appeals Division
 4 450 N Street, MIC: 85
 5 PO Box 942879
 6 Sacramento CA 95814
 7 Tel: (916) 323-3140
 8 Fax: (916) 324-2618

9 Attorney for the Appeals Division

10 **BOARD OF EQUALIZATION**
 11 **STATE OF CALIFORNIA**

12 In the Matter of the Appeals of:) **HEARING SUMMARY**
 13) **PERSONAL INCOME TAX APPEALS²**
 14 **HAROLD T. RIGGS, JR.¹**) Case Nos. 474423, 449373, 504746³

<u>Years</u>	<u>Proposed Assessments⁴</u>
2003	\$10,951
2004	\$11,260
2005	\$27,528

15 Representing the Parties:

16 For Appellant: Keith A. Shibou, CPA
 17 For Franchise Tax Board: Judy F. Hirano, Tax Counsel III

18 ¹ Appellant resides in Cathedral City, Riverside County, California.

19 ² These appeals were postponed from the September 22-24, 2009, Board calendar to the June 15-18, 2010, Board calendar to allow the parties the opportunity to brief the 2005 tax year. The appeals were further postponed at appellant's request and placed on the October 19-22, 2010, Board calendar.

20 ³ These three appeals have been consolidated. References to Respondent's Reply Brief shall refer to respondent's reply brief on the consolidated appeal dated April 23, 2009. Respondent also submitted a reply brief for Case ID Number 449373 on September 29, 2008. We will refer to this brief as respondent's opening brief, consistent with the parties' treatment. Respondent's supplemental brief was filed on November 9, 2009, to address the 2005 tax year.

21 ⁴ Respondent should be prepared to provide the amount of interest accrued as of the hearing date.

1 QUESTIONS: (1) Whether appellant resided in Indian country during the years at issue so that his
2 reservation-sourced income is not subject to California tax.
3 (2) Whether appellant's reservation-sourced income is exempt from California tax
4 even if he did not live on reservation land.

5 HEARING SUMMARY

6 Background

7 Procedural Background

8 Appellant is a member of the Agua Caliente Band of Cahuilla Indians (the Tribe). From
9 2003 through 2005, appellant lived in a residence on Risueno Drive, in Cathedral City, California, which
10 exists in "Section 9" of the city.⁵ The residence is owned by another individual and is fee simple
11 property assessed property tax by the Riverside County Assessor's Office. (Resp. Supp. Br., exhibit C.)

12 Appellant appears to have filed timely California income tax returns for the years at
13 issue, and subtracted most or all of his income as being reservation-sourced income exempt from
14 California tax.⁶ (Resp. Op. Br., p. 2; Resp. Supp. Br., p. 2.) Respondent indicates that it subsequently
15 examined appellant's returns and issued Notices of Proposed Assessment (NPA's) on
16 September 21, 2007, for tax years 2003 and 2004, and a similar NPA dated September 22, 2008, for
17 2005. (Appeal Letter, Case ID No 474423, attachment; Resp. Op. Br., exhibit F; Resp. Supp. Br.,
18 exhibit F.) The NPA's determined that appellant did not live in Indian country, added the gaming
19 revenue to his taxable income, and assessed additional tax plus applicable interest. Appellant protested
20 the NPA's and respondent affirmed the NPA's with Notices of Action (NOA's) issued on
21 October 16, 2008, March 19, 2008, and December 8, 2008, for tax years 2003, 2003, and 2005
22 respectively. (Appeal Letter, Case ID No 474423, attachment; Resp. Op. Br., exhibit H; Resp. Supp.
23 Br., exhibit H.) These appeals followed.

24 ///

25 _____
26 ⁵ A "Section" is an area of land approximately 1 square mile in size. Neither party disputes that appellant's residence for all
27 years at issue was within Section 19.

28 ⁶ Neither party has provided detailed factual information regarding the filing of the 2003 California income tax return. From
the record available, it appears as though the return was filed timely. Both parties should be prepared to discuss any factual
details concerning the 2003 return at the hearing.

1 History of the Tribe

2 The Pacific Railway Act of 1862 was enacted to assist in the construction of a continuous
3 railway across America. The act, and subsequent amendments in 1864, 1866 and 1869, granted
4 alternating sections of land on alternating sides of the railroad track to the railroad companies.⁷ (12 Stat.
5 489.) Congress authorized the President to set aside four tracts of public land in California for Indian
6 reservations in an 1864 act. (10 Stat. 39.) One of the reservation tracts set aside was for the Mission
7 Indians (see *Mattz v. Arnett* (1973) 412 U.S. 481, 493-494), and subsequently its parts were set aside for
8 the individual bands of Mission Indians, of which the Tribe is one (26 Stat. 712; see also *Arenas v.*
9 *United States* (1944) 322 U.S. 419, 420). President Grant, in an executive order in 1876, set aside
10 Section 14 and parts of Section 22 of township 4 south, range 5 east, San Bernardino meridian for the
11 Agua Caliente Reservation. President Hayes, in an executive order in 1877, added all the even-
12 numbered and unsurveyed portions of the general area around Section 9, except Sections 16 and 36, and
13 any tracts for which title had already passed out of the United States Government's control. The
14 executive branch retained the power to add to or diminish the four reservations as deemed necessary.⁸
15 (See *Donnelly v. United States* (1913) 228 U.S. 243, 255-259; *Mattz, supra*, 412 U.S. at 494, fn. 15.)

16 The Agua Caliente reservation was created in a checkerboard fashion, with the odd
17 numbered sections having already been granted to the railroad by the time the reservation was
18 established, and with the reservation consisting of only even numbered sections.⁹ (*Arenas, supra*, 322
19 U.S. at 431; see also *Burke v. Southern Pacific R. Co.* (1914) 234 U.S. 669, 680-682; *United States v.*
20 *Southern Pacific R. Co.* (1892) 146 U.S. 570, 571-573; see also Resp. Reply Br., exhibit G.) Under the
21 General Allotment Act of 1887, tribal land was allotted to individual members of the Tribe, held in trust
22 by the United States for 25 years or longer, and with limited rights of alienability. (24 Stat. 388.)

23 _____
24 ⁷ Respondent indicates that the Southern Pacific Railroad received land in this manner under the 1866 amended statute, and
25 that the patents to the land were granted in 1891. (Resp. Reply Br., p. 5 & exhibit G.)

26 ⁸ Beyond the expansion by President Hayes in 1877, the record does not indicate that the reservation was ever further
27 expanded or diminished, or that it ever included Section 9.

28 ⁹ The Agua Caliente website provides a brief overview of the Tribe's history. Its timeline states that the odd numbered
sections were given to the railroad in the 1860s, and then the reservation was created by President Grant in 1876, when only
the even numbered sections were still available. (*Agua Caliente, History & Culture*
<<http://www.aguacaliente.org/HistoryCulture/tabid/57/Default.aspx>> [as of April 27, 2010].)

1 Through subsequent acts, the allotment policy ended but the lands already allotted were still held in trust
2 by the United States.

3 Applicable Law

4 State Taxation of Indian Income

5 California imposes tax on a resident's entire income from all sources. (Rev. & Tax.
6 Code, § 17041, subd. (a).) A California "resident" includes "every individual who is in this state for
7 other than a temporary or transitory purpose." (Rev. & Tax. Code, § 17014, subd. (a)(1).) The United
8 States Supreme Court has stated that:

9 State sovereignty does not end at a reservation's border. Though tribes are often referred
10 to as sovereign entities, it was long ago that the Court departed from Chief Justice
11 Marshall's view that the laws of [a State] can have no force within reservation
12 boundaries. Ordinarily, it is now clear, an Indian reservation is considered part of the
13 territory of the State.

14 (*Nevada v. Hicks* (2001) 533 U.S. 353, 361-362 [internal quotes and cites omitted].) In other words, an
15 individual does not cease to be a California resident merely by living on an Indian reservation that is
16 within California's boundaries. Against this backdrop, California law purports to tax the entire income
17 of any person who resides on an Indian reservation that is within California's borders. It is axiomatic,
18 however, that California cannot confer upon itself the ability to tax income in violation of the U.S.
19 Constitution or federal law.

20 The United States Congress has plenary and exclusive powers over Indian affairs.
21 (*Washington v. Confederated Bands and Tribes of Yakima Indian Nation* (1979) 439 U.S. 463, 470-
22 471.) Throughout the history of our nation, Congress generally has permitted Indians to govern
23 themselves, free from state interference. (*Warren Trading Post Co. v. Arizona Tax Comm'n* (1965) 380
24 U.S. 685, 686-687.) States may exercise jurisdiction within Indian reservations only when expressly
25 allowed to do so by Congress. (*McClanahan v. Arizona State Tax Commission* (1973) 411 U.S. 164,
26 170-171 [*McClanahan*].) Looking to the exclusive authority of Congress and traditional Indian
27 sovereignty, the *McClanahan* Court held that a state may not impose personal income tax on an Indian
28 who lives on his own reservation and whose income derives from reservation sources. (*Id.* at pp. 173-
178.) *McClanahan* has become the seminal case in this area; over 25 years ago the Board asserted that
the taxation question turns on whether appellant is a "reservation Indian" within the meaning of

1 *McClanahan*. (See *Appeal of Edward T. and Pamela A. Arviso*, 82-SBE-108, June 29, 1982.)

2 The Supreme Court later stated that *McClanahan* created a presumption against state
3 taxing authority which extends beyond the formal boundaries of the reservation, to “Indian country.”
4 (*Oklahoma Tax Commission v. Sac & Fox Nation* (1993) 508 U.S. 114.) Congress defined “Indian
5 country” to include reservations, dependent Indian Communities and Indian allotments. (*Ibid*; 18 U.S.C.
6 1151.¹⁰) It is settled law, however, that a state may tax all the income, including reservation-source
7 income, of an Indian residing within the state and outside of Indian country.¹¹ (*Oklahoma Tax
8 Commission v. Chickasaw Nation* (1995) 515 U.S. 450; *Appeal of Edward T. and Pamela A. Arviso*,
9 *supra*.)

10 In the *Appeal of Samuel L. Flores* (2001-SBE-004), decided on June 21, 2001, the Board
11 addressed the nature of per capita gaming distributions. The Board rejected the argument that an Indian
12 tribe is like a partnership and instead concluded that a tribe is like a corporation. The Board held that
13 per capita distributions from a tribe are income from an intangible sourced to the residence of the tribal
14 member. The Board elaborated by stating that if the per capita distributions were received by a tribal
15 member residing in California, but not on the reservation, it is taxable by California.

16 Indian Country

17 Section 1151 appears to contain the most comprehensive and frequently cited federal
18 definition of “Indian country.” Section 1151, which is found in the federal criminal code, states:

19 [t]he term ‘Indian country’ ... means (a) all land within the limits of any Indian
20 reservation under the jurisdiction of the United States Government, notwithstanding the
21 issuance of any patent, and, including rights-of-way running through the reservation, (b)
22 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.

23 Although section 1151 expressly deals with criminal jurisdiction, the Supreme Court has recognized that
24 it also applies to questions of civil jurisdiction. (*De Coteau v. District County Court for Tenth Judicial*

25 _____
26 ¹⁰ Hereafter, 18 U.S.C. section 1151 will be referred to simply as “section 1151.”

27 ¹¹ The California appellate court in its recent opinion in *Angelina Mike* held that a state may impose income taxes on income
28 received by an enrolled member of a tribe from his or her tribe's reservation activities when that member resides on the
reservation of a different tribe. (*Angelina Mike v. Franchise Tax Board* (2010) 182 Cal.App.4th 817.) The court did not
reach the issue of the meaning of “Indian Country”.

1 *Dist.* (1975) 420 U.S. 425.) As relevant here, the Court has expressly referenced section 1151 in the
2 context of state income taxation. (*Oklahoma Tax Commission v. Sac & Fox Nation, supra*, 508 U.S. at
3 p. 123.) Under section 1151, “Indian country” includes places such as Indian reservations, dependent
4 Indian communities, and Indian allotments, which in turn have their own definitions and usages.

5 Section 1151(a) includes in Indian country “all land within the limits of any Indian
6 reservation . . . notwithstanding the issuance of any patent.”¹² The term “Indian reservation” in section
7 1151(a) refers to land that the federal government has expressly set aside for the residence or use of
8 tribal Indians. (*Donnelly v. United States* (1913) 228 U.S. 243, 269; *Cohen’s Handbook of Federal*
9 *Indian Law* (2005) § 3.04(2)(c)(ii).) When called upon to interpret that language, the Supreme Court
10 stated that section 1151 was intended to prevent “an impractical pattern of checkerboard jurisdiction.”
11 (See *Seymour v. Superintendent of Washington State Penitentiary* (1962) 368 U.S. 351, 358.) The court
12 decided that criminal jurisdiction was not based on ownership of the land, but whether the land had been
13 set aside by congress as Indian reservation land, notwithstanding any subsequent transfer of ownership
14 as long as congress had not subsequently separated the land from the reservation. (*Id.*)

15 Once the boundaries of a reservation are established, all tracts therein “remain a part of
16 the reservation until separated therefrom by Congress.” (*Seymour v. Superintendent, supra*, at p. 359;
17 See also *Solem v. Bartlett* (1984) 465 U.S. 463, 470.) Even granting title of reservation lands to non-
18 Indians “does not, by itself, affect the exterior boundaries of the reservation” and all such lands within
19 the exterior boundaries remain part of Indian country. (*United States ex rel. Condon v. Erickson* (8th
20 Cir. 1973) 478 F.2d 684, 688-689.)

21 In *Alaska v. Native Village of Venetie Tribal Gov’t.* (1998) 522 U.S. 520 (“*Venetie*”), the
22 Supreme Court held that “dependent Indian community,” as used in section 1151(b), refers to:

23 [a] limited category of Indian lands that are neither reservations nor allotments, and that
24 satisfy two requirements--first, they must have been set aside by the Federal Government
25 for the use of the Indians as Indian land; second, they must be under federal
superintendence. (*Venetie*, at p. 527.)

26 The Court explained its holding by stating:
27 _____
28

¹² “Patent” is an outdated term for parcels of land held in fee by Indians and non-Indians within the reservation’s limits. (See *Seymour v. Superintendent of Washington State Penitentiary, supra*, at pp. 357-358.)

1 [t]he federal set-aside requirement ensures that the land in question is occupied by an
2 'Indian community'; the federal superintendence requirement guarantees that the Indian
3 community is sufficiently 'dependent' on the Federal Government that the Federal
Government and the Indians involved, rather than the States, are to exercise primary
jurisdiction over the land in question. (*Id.* at p. 531.)

4 While the *Venetie* Court disapproved of a Ninth Circuit six-factor test for determining a "dependent
5 Indian community," the Court expressly stated that some of the Ninth Circuit's factors were still relevant
6 in determining whether the federal set-aside and the federal superintendence requirements are met,
7 including: "the degree of federal ownership of and control over the area, and the extent to which the area
8 was set aside for the use, occupancy, and protection of dependent Indian peoples." (*Id.* at p. 531, fn 7.)

9 *Venetie's* federal set-aside requirement calls for more than just tribal ownership or close
10 proximity or importance to a tribe. (*Blunk v. Arizona Dept. of Transportation* (9th Cir. 1999) 177 F.3d
11 879, 884; 83 Ops.Cal.Att'y.Gen. 190 (1999).) In addition, *Venetie's* superintendence requirement
12 implies some active federal control over the subject land. (*Venetie, supra*, 522 U.S. at p. 533; 83
13 Ops.Cal.Att'y.Gen. 190 (1999).) Some federal courts examine "the entire Indian community," not just a
14 particular tract of land, to determine whether the *Venetie* set-aside and superintendence requirements are
15 satisfied. (*United States v. Arrieta* (10th Cir. 2006) 436 F.3d 1246, 1250-1251; *HRI, Inc. v.*
16 *Environmental Protection Agency* (10th Cir. 2000) 198 F.3d 1224, 1248-1249.)

17 Finally, section 1151(c) includes in Indian country:

18 [a]ll Indian allotments, the Indian titles to which have not been extinguished, including
19 rights-of-way running through the same.

20 "Allotments" are land that is either owned by individual Indians with restrictions on alienation, or held
21 in trust by the United States for the benefit of individual Indians. (*Yankton Sioux Tribe v. Gaffey* (8th
22 Cir. 1999) 188 F.3d 1010, 1022; *Cohen's Handbook of Federal Indian Law* (2005) § 3.04(2)(c)(iv).)

23 Federal Preemption

24 Section 3.5 of article III of the California Constitution states:

25 An administrative agency, including an administrative agency created by the Constitution
26 or an initiative statute, has no power (a) [t]o declare a statute unenforceable, or refuse to
27 enforce a statute, on the basis of it being unconstitutional unless an appellate court has
28 made a determination that such statute is unconstitutional; (b) [t]o declare a statute
unconstitutional; (c) [t]o declare a statute unenforceable, or to refuse to enforce a statute
on the basis that federal law or federal regulations prohibit the enforcement of such
statute unless an appellate court has made a determination that the enforcement of such
statute is prohibited by federal law or federal regulations.

1 (See also Cal. Code Regs., tit. 18, § 5412, subd. (b).)

2 In addition, the Board has a long-established policy of declining to consider constitutional issues. In the
3 *Appeal of Aimor Corporation* (83-SBE-221), decided on October 26, 1983, the Board stated:

4 This policy is based upon the absence of any specific statutory authority which would
5 allow the Franchise Tax Board to obtain judicial review of a decision in such cases and
6 upon our belief that judicial review should be available for questions of constitutional
importance. Since we cannot decide the remaining issues raised by appellant,
respondent's action in this matter must be sustained.

7 This policy was in place long before the enactment of article III, section 3.5. As far back as 1930, the
8 Board stated:

9 It is true that we have occasionally asserted that right [to question the constitutionality of
10 a statute]. But this has been only under circumstances wherein such action on our part
was necessary in order to protect the revenues of the state and get the problem before the
11 Courts In the instant case, and in all others like it before us, the taxpayers will have
the opportunity of taking the question to the Courts for decision. . . . It might be argued
12 that, if the law is plainly unconstitutional, why should taxpayers be put to that trouble and
expense? However, there is diversity of opinion as to the constitutionality of the Act, and
13 it seems to us desirable that this controversy should be settled by the Courts, whose
authority to hold acts of the Legislature invalid cannot be questioned.

14 (*Appeal of Vortex Manufacturing Co.*, 30-SBE-017, Aug. 8, 1930 [internal citations omitted].)

15 Contentions

16 Several facts are not in contention in this appeal. Both parties agree that appellant was a
17 member of the Tribe for all years at issue. It is uncontested that appellant's address is located in
18 Township 4 South, Range 5 East, Section 9 in Palm Springs. (App. Reply Br., exhibit C.) The parties
19 agree that the dollar amount of appellant's income during the years at issue was per capita distributions
20 derived from the Tribe's gaming activities and is reservation-sourced income.

21 Appellant's Contentions

22 Appellant contends that his residence is within the exterior boundaries of the Tribe's
23 reservation, and is therefore within Indian country for purposes of section 1151(a). (App. Reply Br., pp.
24 3-6.) Appellant supports his contention by providing a letter from the Bureau of Indian Affairs (BIA)
25 that includes a diagram showing the outermost boundaries of the Tribe's reservation to be a boundary
26 encompassing all of the federally designated tracts as well as any sections, including Section 9, not

27 ///

28 ///

1 federally designated as reservation land but being surrounded by reservation land.¹³ (App. Reply Br.,
2 exhibit C, p. 3.) Appellant also cites case law stating the discouragement of “an impractical pattern of
3 checkerboard jurisdiction,” and noting that even if reservation lands are granted to non-Indians, all such
4 lands within the exterior boundaries remain part of Indian country. (App. Reply Br., pp. 4-5; e.g.
5 *Seymour v. Superintendent of Washington State Penitentiary* (1962) 368 U.S. 351; *United States ex rel*
6 *Condon v. Erickson* (8th Cir. 1973) 478 F.2d 684, 688-689.)

7 Appellant contends since he is a member of the Tribe, the revenue in question is
8 reservation-sourced, and he resides in Indian country, that the per capita distributions are tax exempt.
9 Appellant also contends that California taxation is preempted by the Indian Gaming Regulatory Act
10 (IGRA), when the IGRA is read and interpreted together with the Tribe’s state gaming compact. (App.
11 Reply Br., pp. 11-14.) Appellant also asserts that when the laws are ambiguous, the issues should be
12 determined in favor of the Indian community.¹⁴ (App. Reply Br., p. 9.)

13 Appellant contends that the per capita payments were derived from Class III Gaming
14 Revenues, and therefore are not taxable based on their source, regardless of his status. (App. Reply Br.,
15 p. 12.) Appellant presents arguments that equate the Tribe to a partnership. He claims that the pass-
16 through taxation nature of the Tribe means that the revenue is earned by the Tribe, not him, and that he
17 is not required to pay taxes on income that the Tribe would not have to pay taxes on. (App. Reply Br.,
18 pp. 8-11.)

19 Respondent's Contentions

20 Respondent contends that appellant’s reservation-sourced income is taxable in California
21 because he was a California resident and did not live in Indian country. (Resp. Supp. Br., pp. 3-9.)
22 Respondent states appellant’s interpretation of Indian country under section 1151(a) would convert non-
23 reservation lands into reservation land, but notes that only Congress and the President have the power to
24

25 ¹³ In his presentation of supporting case law, appellant quotes the dissenting opinion in *De Coteau* to argue against the
26 checkerboard jurisdiction. This dissenting opinion is not precedent. (*De Coteau, supra*, 420 U.S. at pp. 467-468.)

27 ¹⁴ The Supreme Court has stated when faced with two reasonable interpretations, the choice between them follows a “deeply
28 rooted” principle that “statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to
their benefit.” (*County of Yakima v. Confederated Tribes & Bands of Yakima Indians* (1992) 502 U.S. 251, 269, citing
Montana v. Blackfeet Tribe of Indians, supra, 471 U.S. at p. 766, *McClanahan, supra*, 411 U.S. at p. 174.)

1 create or enlarge reservation land. (Resp. Supp. Br., pp. 7-9; See *Donnelly v. United States, supra*, 228
2 U.S. at 255-259.) Respondent notes that Section 9 was never set aside as Indian reservation land and
3 contends that the U.S. Supreme Court has stated an Indian reservation may not be contiguous, and,
4 ultimately, it is for Congress to alter or undo the checkerboard territory. (Resp. Supp. Br., pp. 10-11;
5 see *Mescalero Apache Tribe v. Jones* (1973) 411 U.S. 145.) Respondent contends case law cited by
6 appellant that discourages a checkerboard jurisdiction is inapplicable in this instance, since the
7 checkerboard pattern was created by Executive Orders. (Resp. Supp. Br., p. 9.)

8 Respondent asserts that appellant has not provided sufficient evidence to show that his
9 residence qualifies as being in Indian country under section 1151. Respondent indicates that appellant's
10 residence is subject to county property tax, showing that the state has jurisdiction over the land. (Resp.
11 Supp. Br., p. 13 & exhibit C.) Respondent also contends that the Tribe is not like a partnership, and that
12 appellant owes taxes on tribal income. (Resp. Reply Br., pp. 8-9). Respondent states that even though
13 "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to
14 their benefit," this rule does not apply in this situation to deem appellant's residence to be within Indian
15 country. (Resp. Supp. Br., p. 9; *Montana v. Blackfeet Tribe* (1985) 471 U.S. 759, 766.)

16 Respondent contends that taxation is not preempted by the IGRA because the issue at
17 hand involves the state taxation of per capita distributions to individuals and not gaming in Indian
18 country, and, in any event, the Board is precluded from reaching the federal preemption question.
19 (Resp. Op. Br., pp. 12-14; Resp. Supp. Br., pp. 5-8.) Respondent asserts that the Board has repeatedly
20 recognized a well-established policy of abstention in issues like the one present in this appeal. (Resp.
21 Supp. Br., p. 15.) Respondent notes that the Board's practice of abstention allows the matter to be
22 handled by Courts, where respondent has the ability to seek judicial review of a decision and the
23 authority to hold acts of the Legislature invalid rests. (*Id.* at pp. 14-16; *Appeal of Vortex Manufacturing*
24 *Co., supra.*)

25 STAFF COMMENTS

26 It appears to staff that the question of whether Section 9 is "Indian country" for purposes
27 of determining whether the state is preempted from taxing appellant's income pursuant to R&TC section
28 17041 may be a federal preemption question. The issue of whether a state statute is preempted by

1 federal law is a constitutional issue. (U.S. Const., art. VI, cl. 2.) The California Constitution prohibits
2 this Board from refusing to enforce a statute on the basis that it is preempted by federal law, unless an
3 appellate court has already made such a determination, and this Board has a long-established policy of
4 declining to consider such issues. (Cal. Const., art. III, § 3.5; *Appeal of Aimor Corporation, supra.*)
5 The parties cite Title 18, United States Code section 1151, and federal case law interpreting the federal
6 statute, in support of their arguments with respect to whether Section 9 is Indian country. The parties
7 should be prepared to discuss whether an appellate court decision prohibits the enforcement of R&TC
8 section 17041 under the circumstances present in this appeal such that the Board could refuse to enforce
9 that statute by granting this appeal. The parties should also discuss whether there is any decision or
10 other authority that has permitted a state agency to refuse to enforce a state statute on the basis of an
11 appellate court decision that did not expressly address the state statute in question. Should the Board
12 determine that no appellate court decision prohibits the enforcement of R&TC section 17041, the Board
13 must sustain the FTB's action on the basis of abstention from deciding constitutional issues. Appellant
14 could then pay the tax and file a refund suit so that the courts could decide the issue.

15 However, should the Board determine that there is an appellate court decision prohibiting
16 the enforcement of R&TC section 17041 under the circumstances present in this appeal, then the Board
17 may determine whether appellant lived in Indian country. In that event, staff notes that it does not
18 appear as though Section 9 is currently, or ever was, part of the tracts of land specifically set aside for
19 the Agua Caliente Reservation.¹⁵ Appellant should be prepared to provide any evidence showing that
20 Section 9 was ever part of the tracts of land designated as the Tribe's reservation or the larger Mission
21 Reservation. The parties should be prepared to discuss the correct interpretation of section 1151(a), and
22 whether appellant's residence, which apparently was never specifically designated by the federal
23 government as Indian country, can be labeled as being in Indian country for purposes of California
24 income tax. In particular, the parties should be prepared to discuss the meaning of "all land within the
25 limits of any Indian reservation," and whether this should be interpreted broadly to include tracts of land
26 never set aside by the federal government as Indian reservation land strictly due to their being
27

28

¹⁵ The Tribe's website contains a map that shows Section 9 as being "Off Reservation," or non-reservation land. (Agua Caliente, *Land Status* <http://www.aguacaliente.org/Portals/0/Land_Status_Jan-09.pdf> [as of April 27, 2010].)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

surrounded by Indian reservation land, as appellant suggests.

///

///

///

Riggs_jj