



STATE BOARD OF EQUALIZATION

450 N STREET, SACRAMENTO, CALIFORNIA
PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0092
1-916-324-1825 • FAX 1-916-322-4530
www.boe.ca.gov

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May 13, 2016

Dear Interested Party:

Enclosed are the Agenda, Issue Paper, and Revenue Estimate for proposed amendments to Regulation 1616, *Federal Areas*, which will be presented at the Board's May 24 – 26, 2016 Business Taxes Committee meeting. The proposed amendments clarify the application of tax to meals, food, and beverages sold or purchased for consumption on a reservation.

Please feel free to publish this information on your website or otherwise distribute it to your associates, members, or other persons that may be interested in this issue.

Thank you for your input on these issues and I look forward to seeing you at the Business Taxes Committee meeting which will be held on **May 24 – 26, 2016** in Room 121 at the address shown above.

Sincerely,

Chief, Tax Policy Division
Business Tax and Fee Department

JP:map

Enclosures

cc: (all with enclosures, via email and/or hardcopy as requested)
Honorable Fiona Ma, CPA, Chairwoman
Honorable Diane L. Harkey, Vice Chair
Honorable George Runner, First District
Honorable Jerome E. Horton, Third District
Honorable Betty T. Yee, State Controller, c/o Ms. Yvette Stowers (MIC 73)
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Mr. Wayne Mashihara (MIC 47)
Mr. Kevin Hanks (MIC 49)
Mr. Mark Durham (MIC 67)
Mr. Robert Tucker (MIC 82)
Mr. Jeff Vest (MIC 85)
Mr. Jeff Angeja (MIC 85)
Mr. David Levine (MIC 85)
Ms. Dana Brown (MIC 85)
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Ms. Laureen Simpson (MIC 70)
Ms. Karina Magana (MIC 47)
Mr. Bradley Miller (MIC 92)
Mr. Bill Benson (MIC 67)
Ms. Tracy McCrite (MIC 50)
Mr. Michael Patno (MIC 50)

Agenda – May 24 – 26, 2016 Business Taxes Committee Meeting
Regulation 1616, Federal Areas

<p>Action 1 – Agreed Upon Items</p> <p>Agenda, pages 2-8.</p>	<p>Approve and authorize publication of proposed amendments to Regulation 1616 as agreed upon by interested parties and staff (except as indicated in Action 2).</p>
<p>Action 2 – Non-Indian Retailers and Meals, Food, and Beverages</p> <p>Agenda, page 9.</p>	<p>Approve and authorize publication of proposed new subdivision (d)(3)(B)3 to clarify that sales of meals, food, and beverages by non-Indian retailers at eating or drinking establishments located in leased space on an Indian reservation, subject to a tribal tax and consumed on the reservation, are exempt from tax.</p> <p style="text-align: center;">OR</p> <p>Approve and authorize the publication of the recommendation from Santa Ynez Band of Chumash Indians to create a “bright line” test. The language clarifies sales of meals, food, and beverages by non-Indian retailers at eating or drinking establishments located in leased space on an Indian reservation, subject to any tribal tax and consumed on the reservation, are exempt from tax. Sales of meals, food, and beverages that are delivered to an off-reservation location are considered the only type of off-reservation consumption.</p>

Agenda – May 24 – 26, 2016 Business Taxes Committee Meeting
Regulation 1616, Federal Areas

Action Item	Staff and Industry's Proposed Regulatory Language
<p>Action 1 – Agreed Upon Items</p>	<p>Regulation 1616, Federal Areas.</p> <p><u>Reference: Sections 6017, 6021, and 6352, Revenue and Taxation Code.</u></p> <p>(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.</p> <p>(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.</p> <p>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</p> <p>(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.</p> <p>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.</p>

Agenda – May 24 – 26, 2016 Business Taxes Committee Meeting
Regulation 1616, Federal Areas

Action Item	Staff and Industry's Proposed Regulatory Language
	<p>(d) Indian Reservations.</p> <p>(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.</p> <p>(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.</p> <p>Indian organizations are entitled to the same exemption as an Indian. “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.</p> <p>(3) Sales by On-Reservation Retailers.</p> <p>(A) Sales by Indians.</p> <p>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.</p> <p>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</p>

Agenda – May 24 – 26, 2016 Business Taxes Committee Meeting
Regulation 1616, Federal Areas

Action Item	Staff and Industry's Proposed Regulatory Language
	<p>below, Indian retailers are required to collect use tax from such purchasers and must register with the Board for that purpose.</p> <p><u>3. Use tax does not apply to sales of meals, food, and beverages by an Indian retailer from an eating and drinking establishment, such as a restaurant or bar, on an Indian reservation when the meals, food, and beverages are purchased for consumption on the Indian reservation.</u> 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.</p> <p>(B) Sales by non-Indians.</p> <p>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.</p> <p>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.</p> <p align="center">[See Action Item 2, Page 9 for proposed amendments to new subdivision (d)(3)(B)3]</p> <p>(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, "<u>Sales for Resale Certificates</u>").</p>

**Agenda – May 24 – 26, 2016 Business Taxes Committee Meeting
Regulation 1616, Federal Areas**

Action Item	Staff and Industry's Proposed Regulatory Language
	<p>(4) Sales by Off-Reservation Retailers.</p> <p>(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.</p> <p>(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, “<i>Exemption Certificates</i>”).</p> <p>(C) Sales Tax - Permanent Improvements - Construction Contractors.</p> <p>1. Indian contractors. Sales tax does not apply to alesales 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, “<i>Construction Contractors</i>.”</p> <p>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</p>

Agenda – May 24 – 26, 2016 Business Taxes Committee Meeting
Regulation 1616, Federal Areas

Action Item	Staff and Industry's Proposed Regulatory Language
	<p>contractors on Indian reservations.</p> <p>(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.</p> <p>(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.</p> <p>(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.</p> <p>(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:</p> <ol style="list-style-type: none"> 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

Agenda – May 24 – 26, 2016 Business Taxes Committee Meeting
Regulation 1616, Federal Areas

Action Item	Staff and Industry's Proposed Regulatory Language
	<p>governance of tribal members, the conduct of intergovernmental relationships, and the acquisition of trust land; and</p> <p>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.</p> <p>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.</p> <p>_____</p> <p>¹ The following is a summary of the pertinent regulations which have been issued:</p> <p>(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.</p> <p>(b) Air Force. Air force regulation 34-57, paragraph 5, permits commissioned officers' and non-commissioned officers' open messes, subject to regulations established by commanders of major air commands to sell alcoholic beverages to authorized purchasers at bars and cocktail lounges, and provides that commanders will issue detailed control instructions. Paragraphs 8 and 9 require commanders of major air commands to issue regulations relative to package liquor sales and to procurement of alcoholic beverages, respectively.</p> <p>(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</p>

Agenda – May 24 – 26, 2016 Business Taxes Committee Meeting
Regulation 1616, *Federal Areas*

Action Item	Staff and Industry's Proposed Regulatory Language
	<p>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.</p> <p>(d) Navy. Navy general order No. 15 provides that commanding officers may permit, subject to detailed alcoholic beverage control instructions, the sale of packaged alcoholic beverages by officers' and noncommissioned officers' clubs and messes and the sale and consumption of alcoholic beverages by the drink in such clubs and messes.</p>

Agenda – May 24 – 26, 2016 Business Taxes Committee Meeting
Regulation 1616, Federal Areas

Action Item	Regulatory Language Proposed by Staff	Regulatory Language Proposed by Santa Ynez Band of Chumash Indians
<p>Action 2</p> <p>Non-Indian Retailers and Meals, Food, and Beverages – (d)(3)(B)3</p>	<p>3. <u>Sales tax does not apply to sales of meals, food, and beverages by a non-Indian operating an eating or drinking establishment, such as a restaurant or bar, in leased space, on an Indian reservation when the sales are subject to the Indian tribe’s sales tax and the meals, food, and beverages are sold for consumption on the Indian reservation. Use tax does not apply to meals, food, and beverages purchased from a non-Indian operating an eating or drinking establishment, such as a restaurant or bar, in leased space, on an Indian reservation when the purchase is subject to an Indian tribe’s sales or use tax and the meals, food, and beverages are purchased for consumption on the Indian reservation. For purposes of this subdivision, it is rebuttably presumed that meals, food, and beverages sold or purchased from an eating or drinking establishment on an Indian reservation in a form suitable for immediate consumption are sold or purchased for consumption on an Indian reservation. Regulation 1603, <i>Taxable Sales of Food Products</i>, prescribes the application of tax to meals, food, and beverages sold or purchased for consumption off an Indian reservation.</u></p>	<p>3. <u>Sales and use tax does not apply to sales of meals, food, and beverages by a non-Indian operating an establishment, such as a restaurant or bar, in leased space, on an Indian reservation when the sales are subject to any sales tax enacted by the Indian tribe and the meals, food, and beverages are furnished for consumption on the Indian reservation. However, tax will apply if the meals, food, and beverages are delivered to a location off the Indian reservation.</u></p>

Issue Paper Number 16-06



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

Regulation 1616, *Federal Areas*

I. Issue

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

II. Alternative 1 - Staff Recommendation

Staff recommends approval and authorization to publish the proposed amendments to Regulation 1616, as set forth in Exhibit 2. Staff's proposed amendments clarify that federal law preempts the imposition of California's sales tax on sales of meals, food, and beverages by and the imposition of California use tax on purchases of meal, food, and beverages from a non-Indian retailer provided that:

- The non-Indian retailer's business is an eating or drinking establishment, such as a restaurant or bar.
- The non-Indian retailer's business is operated under a federally authorized "lease" agreement.
- A tribal sales or use tax is imposed on the sales and purchases of meals, food, and beverages.
- The meals, food, and beverages are consumed on an Indian reservation.

Staff's proposed amendments also clarify that "use" tax does not apply to Indian retailers' on-reservation sales of meals, food, and beverages for consumption on an Indian reservation.

III. Other Alternative(s) Considered

Staff received comments from Santa Ynez Band of Chumash Indians (SYBCI) in response to staff's second discussion paper. (See Exhibit 3.) Their proposed language is presented as Alternative 2. Other submissions which included comments but no alternative language were received from Temecula Band of Luiseño Mission Indians, Dry Creek Rancheria, Karuk Tribe, 526a Coalition, Cachil Dehe Band of Wintun Indians of the Colusa Indian Community and the Morongo Band of Mission Indians. (See Exhibits 4 – 8.)

Alternative 2 – SYBCI Recommendation

SYBCI submitted proposed language for subdivision (d)(3)(B)3. They recommend a "bright line" test they believe would allow the regulation to be easily and consistently applied by having state taxes only apply to meals, food, and beverages that are delivered off the reservation. They also propose language that they believe clarifies that "any" tribal tax would fulfill the requirement that a tribal sales or use tax be imposed on sales and purchases of meals, food, and beverages.

Issue Paper Number 16-06

IV. Background

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

- Federal law preempts a state’s authority to tax an activity undertaken on a “reservation or by tribal members”² in circumstances where the tax unlawfully infringes on the right of federally-recognized Indian tribes “to make their own laws and be ruled by them”³; and
- “[T]here is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian Reservation or to tribal members,”⁴ and state taxation is preempted when “a particularized inquiry into the nature of the state, federal, and tribal interests at stake” indicate that, in a “specific context, the exercise of state authority would violate federal law”⁵ because it unlawfully infringes on the right of federally-recognized Indian tribes “to make their own laws and be ruled by them.”⁶

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

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

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

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

² 448 U.S. at p. 143.

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

⁴ 448 U.S. at p. 142.

⁵ *Id.* at p. 145.

⁶ *Id.* at p. 142.

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

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

⁹ Codified in 25 U.S.C § 2701 et seq.

¹⁰ Defined in 25 U.S.C. § 2703.

¹¹ 25 U.S.C. § 2710(d).

FORMAL ISSUE PAPER

authorizes Indian tribes to enter into management contracts for the operation and management of gaming activities with the approval of the Chairman of the National Indian Gaming Commission.¹² The act declares that its purpose is to advance three principal goals:

- Tribal economic development;
- Tribal self-sufficiency; and
- Strong tribal governments.¹³

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

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

The Bureau of Indian Affairs (BIA) issued new leasing regulations that interpret and explain the HEARTH Act. These regulations are expressly intended to "promote leasing on Indian land for housing, economic development, and other purposes,"¹⁶ and they state that:

Subject only to applicable Federal law, activities under a lease conducted on the leased premises are not subject to any fee, tax, assessment, levy, or other charge (e.g., business use, privilege, public utility, excise, gross revenue taxes) imposed by any State or political subdivision of a State. Activities may be subject to taxation by the Indian tribe with jurisdiction.¹⁷

However, the BIA's notice that the new leasing regulations were final specifically explains that the new preemption provision is based upon the BIA's findings, after performing a *Bracker* analysis.¹⁸ It explains that, as part of its *Bracker* analysis, the BIA found that:

- "The Federal statutes and regulations governing leasing on Indian lands . . . occupy and preempt the field of Indian leasing" and the "Federal statutory scheme for Indian leasing is comprehensive";
- The purpose of business leases "on Indian land are to . . . allow Indian landowners to use their land profitably for economic development, ultimately contributing to tribal well-being and self-government";
- "Economic development on Indian lands is critical to improving the dire economic conditions faced by American Indians" and "Tribal sovereignty and self-government are substantially promoted by leasing";
- The authority to tax activities on leased Indian land is an "important aspect of tribal sovereignty and self-governance";

¹² 25 U.S.C. § 2711.

¹³ 26 U.S.C. § 2702.

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

¹⁵ 25 U.S.C. § 415.

¹⁶ 25 C.F.R. § 162.001(a).

¹⁷ 25 C.F.R. § 162.017(b).

¹⁸ 77 Fed. Reg. 72440 (Dec. 5, 2012).

FORMAL ISSUE PAPER

- “An additional State or local tax has a chilling effect on potential lessees as well as the tribe that as a result might refrain from exercising its own sovereign right to impose a tribal tax to support its infrastructure needs. Such dual taxation can make some projects less economically attractive, further discouraging development in Indian country”; and
- The “additional burden of State and local taxation on lease activities would significantly affect the marketability of Indian land for economic development” and generally undermines the federal Indian leasing law’s “dual purposes of supporting tribal economic development and promoting tribal self-government.”

As indicated by the Board’s Chief Counsel in an October 7, 2013, memorandum to Board Members, the BIA has previously explained that this preemption provision does not preempt all state taxation on leased Indian land, but expresses the BIA’s view that when determining whether a state tax is preempted on leased Indian land, the federal and tribal interests to be weighed in a *Bracker* analysis are strong. Also, more recently, in *Seminole Tribe of Florida v. Stranburg (Stranburg)*,¹⁹ the court of appeals explained that this preemption provision represents the BIA’s conclusion regarding the ultimate application of *Bracker* and the court of appeals held that it would be inappropriate for the federal courts to defer to this provision without performing its own “particularized inquiry” under *Bracker*.²⁰

Furthermore, in *Wagnon v. Prairie Band Potawatomi Nation (Wagnon)*,²¹ the United States Supreme Court recognized that states and Indian tribes sometimes have concurrent jurisdiction to impose taxes and the Court held that a state tax is not preempted merely because it decreases a tribe’s revenue. Also, in *Wagnon*, Justice Ruth Bader Ginsburg expressed her view, which was joined in by Justice Anthony Kennedy, that “as a practical matter” the two taxes cannot generally coexist because a double-taxed venture operates at a disadvantage and that double-taxation is an appropriate factor to consider in determining whether a state tax is preempted under a *Bracker* analysis.²² In addition, in *Stranburg*, the court indicated that, while double-taxation is “insufficient to support preemption” alone, it may be a factor supporting preemption when there is “extensive and exclusive federal regulation of the activities at issue.”²³

Regulation 1616

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

Based upon the Board’s historic analyses of how federal law preempts California’s sales and use tax, Regulation 1616, subdivision (d)(3), currently provides that tax applies to on-reservation sales by non-Indian retailers to non-Indians and Indians not residing on the reservation, but does not generally apply to on-reservation sales to Indians residing on the reservation. The subdivision further provides that sales tax does not apply to any on-reservation sales made by Indian retailers, whether to Indians who reside on the reservation, non-Indians, or Indians who do not reside on the reservation. However, an on-reservation Indian retailer is generally responsible for collecting the use tax from non-Indians and Indians not residing on the reservation unless the on-reservation retail sale is otherwise not subject to tax. Furthermore, Regulation 1616 provides that on-reservation Indian retailers selling meals, food or beverages at eating and drinking establishments are not required to collect use tax on the sale of meals, food or beverages that are sold for consumption on an Indian reservation because the Board previously “determined that, since [the] adoption of Regulation 1616(d) in 1978,

¹⁹ *Seminole Tribe of Florida v. Stranburg* (11th Cir. 2015) 799 F.3d 1324.

²⁰ *Id.* at p. 1338.

²¹ *Wagnon v. Prairie Band of Potawatomi Nation* (2005) 546 U.S. 95, 114.

²² *Id.* at pp. 116-117.

²³ *Stranburg, supra*, at p. 1340.

FORMAL ISSUE PAPER

federal court decisions [footnote omitted] preclude the imposition of state tax collection obligations upon on-reservation tribal retailers selling meals, food and beverages to non-Indians, when the meals, food and beverages are sold for consumption at eating and drinking establishments on the reservation.”²⁴ Therefore, under the current provisions of Regulation 1616, subdivision (d), California sales tax does not generally apply to and California use tax is not collected on an Indian retailer’s sales of meals, food, or beverages from an eating or drinking establishment on a reservation for consumption on the reservation. However, tax generally applies to such sales by non-Indian retailers, unless the sales are to Indians residing on the same reservation where the sales are made.

Recent Bracker Analysis of Sales by Non-Indian Lessees

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

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

V. Discussion

Staff held interested parties meetings in January and March to discuss staff’s proposed amendments and staff’s discussion papers regarding on-reservation sales of meals, food, and beverages by non-Indian lessees. This paper addresses concerns that interested parties, including Indian tribes, conveyed in the discussions that took place during the meetings and in their subsequent written submissions.

Consumption Must Occur on a Reservation

In staff’s initial discussion paper, staff proposed amendments providing that tax does not apply to sales of meals, food, and beverages by a non-Indian retailer if the sales are made from leased space in an Indian casino and the meals are sold for consumption in the casino, based upon the Legal Department’s *Bracker* analysis discussed above. While interested parties were appreciative of staff’s initial proposal, there was a general consensus that staff’s initial proposal was too narrow. This is because federal preemption on Indian reservations goes beyond the boundaries of Indian casinos and there are other types of tribally operated non-gaming ventures that could potentially have establishments that sell meals, food, and beverages for on-

²⁴ Addendum to the final statement of reasons for the 2003 amendments to Regulation 1616.

FORMAL ISSUE PAPER

reservation consumption, which the regulation should treat the same as establishments in Indian casinos. Interested parties stated that museums, outlet malls, and zip-lines are examples of on-reservation, non-gaming ventures that could potentially have establishments that sell meals, food, and beverages for on-reservation consumption.

Staff evaluated the comments and agreed that, under a *Bracker* analysis, the facts that sales of meals, food, and beverages are made on a reservation and for consumption on the reservation where the sales take place are both factors supporting a finding of federal preemption of state tax on such sales. Staff also found that the facts that such sales are made from and for consumption in a casino operated under IGRA provides further support for federal preemption, but that the application of IGRA is not critical to federal preemption when both the sale and consumption of the meals, food, or beverages occurs on an Indian reservation. Therefore, staff agreed to and has expanded its initial proposed amendments to include on-reservation sales of meals, food, and beverages for consumption on an Indian reservation.

Sales and Purchases for Off-Reservation Consumption

Board staff is not aware of any federal statute or regulation or court case preempting the imposition of California's use taxes on sales of tangible personal property by non-Indian retailers to non-Indian consumers for consumption off an Indian reservation. Therefore, in the second discussion paper, staff added a sentence to its proposed amendments providing that tax will apply to a non-Indian retailer's sales of meals, food, and beverages, when "the meals, food and beverages are sold for consumption off the Indian reservation."

During the second interested parties meeting, an issue was raised about how to determine whether meals, food, and beverages are being sold or purchased for consumption on or off a reservation. Subsequent submissions received from interested parties also indicated that there are numerous factual situations in which a consumer may purchase meals, food, and beverages from an on-reservation establishment "to go" or for "take out" and still consume the meals, food, and beverages purchased on-reservation, such as meals consumed in a hotel room, parked automobile, casino or a scenic location on a reservation. Also, questions were raised about whether retailers, in order to comply with proposed amendments, would have to ask customers intrusive questions such as where they plan to consume their meals and drinks or what portion of their order would be consumed on the reservation and so forth. In addition, after the second interested parties meeting, SYBCI provided alternative language providing that "tax will [only] apply if the meals, food, and beverages are delivered to a location off the Indian reservation."

Staff considered the compliance issue, compliance questions, the scope of federal preemption, and alternative language. Staff determined that there are currently and there will continue to be many eating and drinking establishments on Indian reservations that either do not make any sales of meals, food, or beverages "to go" or for "take out" or "delivery" or do make some sales of meals, food, or beverages "to go" or for "take out" or "delivery," but are so situated within an Indian reservation or within another venture on an Indian reservation, such as a hotel or casino, that it would be unlikely, based upon the facts and circumstances, that their sales of meals, food, and beverages in a form suitable for immediate consumption will be for off-reservation consumption. Therefore, staff concluded that it should generally be presumed that these establishments' sales of meals, food, and beverages in a form suitable for immediate consumption are for consumption on-reservation, and it is not necessary to impose specific compliance requirements on retailers operating these types of establishments to prove that their sales are for consumption on-reservation.

Staff also determined that there are currently, and there will continue to be, a small percentage of eating and drinking establishments that make sales "to go" or for "take out" or "delivery" and are situated in locations on Indian reservations that would permit them to make on-reservation sales of meals, food, and beverages for consumption off-reservation. However, the extent of these establishments' sales for consumption off-reservation will vary based upon their locations and business models, meaning some will make very few sales for consumption off-reservation, while others may make regular and substantial sales for consumption off-reservation. Therefore, staff concluded that it should generally be presumed that at least some of these

FORMAL ISSUE PAPER

establishments' on-reservation sales of meals, food, and beverages in a form suitable for immediate consumption are for consumption on-reservation, it would be impractical to prescribe specific compliance requirements that would fit all of these establishments' specific facts and circumstances, and it would be of limited utility and overly burdensome to specifically require that all of the non-Indian retailers operating these establishments, some of which may rarely make sales for consumption off-reservation, adhere to specific compliance requirements, such as asking all of their customers intrusive questions.

Instead, staff proposes that the regulation establish a rebuttable presumption, applicable to all on-reservation eating and drinking establishments operated by non-Indian retailers "*that meals, food, and beverages sold or purchased from an eating or drinking establishment on an Indian reservation in a form suitable for immediate consumption are sold or purchased for consumption on an Indian reservation.*" Under this presumption, all retailers operating eating and drinking establishments will be able to presume that their on-reservation sales of meals, food, or beverages are for consumption on a reservation, unless the Board can rebut the presumption by establishing that the sales were in fact made for consumption off an Indian reservation, and only those on-reservation retailers that actually make sales for off-reservation consumption will need to report tax on any of their on-reservation sales of meals, food, or beverages. Staff believes that the rebuttable presumption is administratively efficient and will allow for the correct administration of tax in all factual situations. Also, to assist such retailers, staff plans to provide outreach to non-Indian retailers explaining how tax applies when meals, food, and beverages are consumed on or off the reservation. The outreach would be directed to tribes and those non-Indian establishments with sales as described above. The outreach would include an updating of the Board's American Indian Tribal Issues webpage and the updating of Publication 146, *Sales to American Indians and Sales in Indian Country*. The outreach would also provide assistance to affected retailers as to the proper accounting of their on-reservation and off-reservation sales, under their specific facts and circumstances.

Clarification of Prior Language

In the first and second discussion papers, staff's proposed amendments stated that "sales and use tax does not apply to sales" of meals, food, and beverages made under the specified circumstances. However, to be more accurate and precise, staff's revised recommended amendments clarify that sales tax does not apply to "sales" and use tax does not apply to "purchases" of meals, food, and beverages under the specified circumstances. As a result, proposed subdivision (d)(3)(B)3 now first addresses sales tax then use tax.

In addition, the last sentence in staff's proposed subdivision (d)(3)(B)3 in place at the time of the second discussion paper's distribution indicated that tax will apply when "the meals, food and beverages are sold for consumption off the Indian reservation." Board staff determined that the sentence was not entirely consistent with all of the provisions in Regulation 1603, *Taxable Sales of Food Products*. Therefore, staff has replaced the sentence with new language to inform readers that Regulation 1603 prescribes the application of tax to meals, food, and beverages sold or purchased for consumption off an Indian reservation, to ensure consistency between Regulations 1603 and 1616.

The term "eating and drinking establishment" is already used in the current provisions of Regulation 1616, subdivision (d)(3)(A), and it is based upon the provisions of Regulation 1603 referring to "restaurants, concessionaires, hotels, boarding houses, soda fountains, and similar establishments." In the first and second discussion papers, staff's proposed amendments referred to sales of meals, food, and beverages by a retailer operating an "establishment, such as a restaurant or bar," based upon the current provisions of Regulations 1603 and 1616, but the prior versions of staff's proposed amendments inadvertently omitted the language regarding "eating and drinking" establishments that is currently in Regulation 1616 and makes the current text of Regulation 1616 consistent with the reference to "restaurants, concessionaires, hotels, boarding houses, soda fountains, and similar establishments" in Regulation 1603. Therefore, staff's revised recommended amendments have been clarified to refer to "eating or drinking establishments, such as restaurants or bars."

Amendments Pertain to Meals, Food, and Beverages

During the interested parties process, multiple Indian tribes contended that limiting the amendments to sales of meals, food, and beverages would not comply with federal law, and some tribes recommended that “meals, food, and beverages” be replaced with “items” in staff’s proposed amendments. They asserted that a *Bracker* analysis supports federal preemption from the imposition of a California sales and use tax on all transactions by non-Indian lessees of trust land on a reservation. They believe that California sales and use tax does not apply regardless of the nature of the items sold.

As previously discussed, staff is not aware of any federal law or precedent that preempts the application of state tax to a non-Indian’s sale of an item to a non-Indian for consumption outside of an Indian reservation and staff does not agree that current federal law preempts the imposition of state tax on all on-reservation sales by non-Indian leases. Staff believes replacing the term “meals, food, and beverages” with “items” would create confusion rather than provide clarity to a majority of non-Indian retailers.

Board staff also considers its proposed amendments to be consistent with federal law as well as the regulation’s current language clarifying the application of tax to sales of meals, food, and beverages by Indian retailers. Regulation 1616, subdivision (d)(3)(A) was last amended in 2002. The 2002 amendments specifically addressed the federal preemption of the duty to collect use tax and how it applied to use tax that might otherwise be required to be collected on on-reservation sales of meals, food, and beverages by Indian retailers. The 2002 amendments received a great deal of support from a number of Indian tribes and their representatives, with some tribes indicating that the reference to meals, food, and beverages was consistent with federal law.

Indian Tribal Tax

Some Indian tribes contended that staff’s proposed requirement that a tribal tax be imposed on sales by and purchases from non-Indian retailers for California tax to be preempted was unwarranted and that state tax is preempted in all cases, even when the tribal government elects not to impose a tax or impose a “0%” tax. Citing *Bracker*, they assert that federal preemption from state tax should apply regardless of whether a tribal government imposes its own tax on a sale. They also recommended that the reference to a tribal tax be deleted from the proposed amendments.

The Legal Department has concluded that it is necessary for a tribe to impose a sales or use tax on transactions between non-Indian retailers and non-Indian consumers which occur on an Indian reservation, in order for the transactions to be preempted from state tax under a *Bracker* analysis. This is because when there is no tribal sales or use tax imposed, the imposition of a state tax does not result in double taxation and does not put non-Indian retailers at a competitive disadvantage versus off-reservation retailers.²⁵ In addition, staff’s proposed amendments recognize a tribe’s sovereign authority to impose taxes on their on-reservation sales and appropriately avoids creating a chilling effect on the exercise of that authority by eliminating the potential for double taxation when an Indian tribe does impose taxes on non-Indian retailers’ on-reservation sales of meals, food, and beverages to non-Indians for consumption on the reservation. The submission from SYBCI includes the phrase “any sales tax” and staff believes it does not clarify the tax application any better than staff’s proposal. In staff’s opinion, it could be inferred by non-Indian retailers that a tribe imposing a 0% tax rate, as some Indian tribes stated should be an option for them, would meet the federal preemption. Therefore, staff maintains that a sales or use tax must be assessed by the tribe on sales between non-Indians for the proposed amendments to be applicable.

Federally Authorized Leases

Submissions were received after the initial discussion paper asking whether the “lease” requirement in the proposed amendment requires that non-Indian retailer’s leases have to be approved under the HEARTH Act; asserting that the proposed amendments should apply equally to non-Indian retailers operating under any types

²⁵ Some submissions indicated that, in the current context, double taxation is an appropriate factor to consider in determining whether a state tax is preempted under a *Bracker* analysis.

FORMAL ISSUE PAPER

of leases approved under a federal regulatory process, including the process under the HEARTH Act; and recommending that that the term “lease” in the proposed amendments include all tribal commercial contracts with non-Indians, including, but not limited to leases approved by a tribe pursuant to tribal leasing regulations adopted under the HEARTH Act, leases approved by the BIA pursuant to 25 Code of Federal Regulations part 162, and contracts and agreements authorized under 25 United States Code section 81 et seq. (contracts generally) and section 2701 et seq. (gaming contracts).

Staff previously explained that staff did not include a direct reference to the HEARTH Act in the proposed amendments because the HEARTH Act is relatively new, staff was aware that Indian tribes were authorized to enter into non-HEARTH Act leases, and the Legal Department is not aware of any difference between HEARTH Act leases and other types of federally authorized Indian leases that would have a significant effect on a *Bracker* analysis. Therefore, staff concurred that the phrase “leased space” in the proposed amendments should be interpreted broadly so that it applies to any space leased under a written agreement authorized under federal law under which an Indian tribe grants a non-Indian the right to operate an establishment on the tribe’s reservation, and the phrase “leased space” should not be interpreted narrowly so that it only applies to space leased under a HEARTH Act lease.

Sales by Indian Retailers

During the first interested parties meeting, an interested party suggested that the unnumbered paragraph at the end of subdivision (d)(3)(A) was inconsistent with staff’s proposed amendments provided with the first discussion paper. This was because, at that time, staff’s proposed subdivision (d)(3)(B)3 stated that “California sales and use tax does not apply to sales of meals, food, and beverages by a non-Indian” for consumption in an Indian casino on an Indian reservation, and, when the unnumbered paragraph in subdivision (d)(3)(A) is read together with subdivision (d)(3)(A)2, the unnumbered paragraph indicates that use tax applies to Indian retailers on-reservation sales of meals, food, and beverages for consumption on the reservation, but that the use tax is not required to be collected by Indian retailers.

Staff reviewed the unnumbered paragraph at the end of subdivision (d)(3)(A) and agreed that the existing language is inconsistent with staff’s proposed amendments regarding non-Indian retailers. In addition, the Legal Department performed a *Bracker* analysis of sales by Indian retailers, and staff concluded that federal law preempts the imposition of use tax on an Indian retailer’s on-reservation sales of meals, food, and beverages to non-Indians solely for consumption on the reservation where the sales are made. Therefore, in the second discussion paper, staff proposed replacing the unnumbered paragraph at the end of subdivision (d)(3)(A) with a new subdivision (d)(3)(A)3, which provided that “*Sales and use tax* does not apply to sales of meals, food, and beverages by an Indian retailer . . . for consumption on the Indian reservation” (italics added) based upon staff’s amendments from the first discussion paper adding new subdivision (d)(3)(B)3 to maintain consistency.

However, staff received comments from Mr. Russel Attebury of the Karuk Tribe, who stated that the reference to “sales tax” in the proposed amendments adding new subdivision (d)(3)(A)3 gave the impression that sales tax could apply, even though subdivision (d)(3)(A)2 currently provides that sales tax does not apply to on-reservation sales made by Indian retailers (as discussed above). Therefore, staff made revisions to the amendments adding new subdivision (d)(3)(A)3 to remove the reference to sales tax. Additionally, staff included the phrase “eating and drinking” used in the original unnumbered paragraph at the end of subdivision (d)(3)(A) in the amendments adding new subdivision (d)(3)(A)3, which was inadvertently omitted (as previously discussed).

VI. Alternative 1 - Staff Recommendation

A. Description of Alternative 1

Staff recommends approval and authorization to publish the proposed amendments to Regulation 1616, as set forth in Exhibit 2. Staff’s proposed amendments clarify that federal law preempts the

imposition of California’s sales tax on sales of meals, food, and beverages by and the imposition of California use tax on purchases of meal, food, and beverages from a non-Indian retailer provided that:

- The non-Indian retailer’s business is an eating or drinking establishment, such as a restaurant or bar.
- The non-Indian retailer’s business is operated under a federally authorized “lease” agreement.
- A tribal sales or use tax is imposed on the sales and purchases of meals, food, and beverages.
- The meals, food, and beverages are consumed on an Indian reservation.

Staff’s proposed amendments also clarify that “use” tax does not apply to Indian retailers’ on-reservation sales of meals, food, and beverages for consumption on an Indian reservation.

B. Pros of Alternative 1

Staff’s proposed amendments make Regulation 1616 consistent with the Legal Department’s *Bracker* analyses of how federal law preempts the application of California sales and use tax to Indian and non-Indian retailers on-reservation sales of meals, food, and beverages for on-reservation consumption. Also, staff’s proposed amendments will only require on-reservation retailers that actually make sales of meals, food, and beverages for consumption off-reservation to account for their taxable sales of meals, food, and beverages, and allow those retailers to work with staff who will provide guidance on the documentation necessary to support their sales as taxable or exempt based on a retailer’s specific facts and circumstances.

C. Cons of Alternative 1

Interested parties disagree with some of the particular requirements for preemption. Some stated that meals, food, and beverages sold for delivery off-reservation are the only transactions in which meals, food, and beverages are considered sold for off-reservation consumption. Certain interested parties were of the belief that federal law preempts the state from assessing tax on all sales of items on Indian reservation, not just sales of meals, food, and beverages. Other interested parties asserted that federal law preempts the imposition of California tax on non-Indian retailers’ on-reservation sales of meals, food, and beverages regardless of whether any tribal tax was imposed on the sales.

D. Statutory or Regulatory Change for Alternative 1

No statutory change is required. However, staff’s recommendation will require a regulatory change.

E. Operational Impact of Alternative 1

Staff will publish the proposed amendments to Regulation 1616 and thereby begin the formal rulemaking process. Once proposed amendments are approved by the Office of Administrative Law (OAL), staff will provide outreach to appropriate retailers and update the Board website information and Publication 146, *Sales to American Indians and Sales in Indian Country*.

F. Administrative Impact of Alternative 1

1. Cost Impact

The workload associated with publishing the regulation is considered routine. Any corresponding cost 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

Staff believes its proposed amendments clarify how federal law preempts the application of California sales and use tax to Indian and non-Indian retailers' on-reservation sales of meals, food, and beverages for on-reservation consumption. Staff will provide outreach and guidance to affected retailers regarding the documentation necessary to support reported and claimed sales that fit their specific facts and circumstances. Staff will also update the Board's website and publications that provide information regarding Regulation 1616 to taxpayers.

H. Critical Time Frames of Alternative 1

None.

VII. Other Alternatives

A. Alternative 2 – SYBCI Recommendation

SYBCI submitted proposed language for subdivision (d)(3)(B)3. They recommend a “bright line” test they believe would allow the regulation to be easily and consistently applied by having state taxes only apply to meals, food, and beverages that are delivered off the reservation. They also proposed language they believe clarifies that “any” tribal tax would fulfill the requirement that a tribal sales or use tax be imposed on sales and purchases of meals, food, and beverages.

B. Pros of Alternative 2

The proposal would make accounting for sales of meals, food, and beverages that are subject to state tax easy for non-Indian retailers, as only sales and purchases for delivery off-reservation would be considered subject to California tax.

C. Cons of Alternative 2

The proposal that state tax only apply to meals, food, and beverages delivered off-reservation is not fully consistent with current federal law, which, in the Legal Department's opinion, does not preempt the imposition of otherwise applicable California sales and use taxes on meals, food, and beverages that are sold or purchased for consumption off an Indian reservation, but not delivered off of an Indian reservation (as previously discussed). Staff is also uncertain as to how replacing “an Indian tribe's sales tax” with “any sales tax enacted by the Indian tribe” improves staff's proposed amendments. Staff has concerns that the phrase may be wrongly construed by some readers to mean a “0%” tax.

D. Statutory or Regulatory Change for Alternative 2

The Legal Department has determined that a change in federal law is necessary to preempt the imposition of otherwise applicable California sales and use taxes on meals, food, and beverages that are sold or purchased for consumption off an Indian reservation, but not delivered off of an Indian reservation. Alternative 2 – SYBCI Recommendation will also require a regulatory change.

E. Operational Impact of Alternative 2

Same as Alternative 1, except less outreach will be required to explain how tax applies when meals, food, and beverages are consumed off the reservation because of the bright-line test.

F. Administrative Impact of Alternative 2

1. Cost Impact

Same as Alternative 1.

FORMAL ISSUE PAPER

2. Revenue Impact

None. See Revenue Estimate (Exhibit 1).

G. Taxpayer/Customer Impact of Alternative 2

If the SYBCI proposal is adopted by the Board and approved by OAL, then staff will provide outreach to affected retailers and help them develop accounting and reporting methods for their taxable sales for delivery off of an Indian reservation. Staff will also update the Board's website and publications that provide information regarding Regulation 1616 to taxpayers.

H. Critical Time Frames of Alternative 2

None.

Preparer/Reviewer Information

Prepared by: Tax Policy Division, Business Tax and Fee Department.

Current as of: May 9, 2016

REVENUE ESTIMATE

STATE OF CALIFORNIA
BOARD OF EQUALIZATIONBOARD OF EQUALIZATION
REVENUE ESTIMATE

Proposed Regulation 1616, *Federal Areas***I. Issue**

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

II. Alternative 1 - Staff Recommendation

Staff recommends approval and authorization to publish the proposed amendments to Regulation 1616, as set forth in Exhibit 2. Proposed revisions clarify that non-Indian retailers of businesses selling meals, food, and beverages are exempt from tax provided the following conditions are met:

- The business is located on an Indian reservation.
- The non-Indian retailer leases space under federally authorized agreements.
- Businesses are eating or drinking establishments, such as restaurants or bars.
- A tribal tax is in effect on the sales and purchases of meals, food, and beverages.
- Consumption of the meals, food, and beverages must be on an Indian reservation.

III. Other Alternative(s) Considered

Staff received comments from Santa Ynez Band of Chumash Indians (SYBCI) in response to staff's second discussion paper. Their proposed language is presented as Alternative 2. Specifically, under Alternative 2 two more conditions are added to those of Alternative 1:

- Sales tax will apply only if the meals, food and beverages are delivered to a location off the reservation.
- Any tribal tax is sufficient to fulfill the tribal tax requirement.

Background, Methodology, and Assumptions

Alternative 1 – Staff Recommendation

Indians may make sales of food and beverages themselves on reservations or lease space for such operations to others. Under the current provisions of Regulation 1616, two distinctions are made regarding taxability of food and beverage sales made on Indian reservations: (1) whether such sales are made by Indians or non-Indians, and (2) whether sales are consumed on the reservation or off the reservation. The proposed regulation removes both of these distinctions.

Taxable sales made under each of these circumstances are unknown. Therefore revenues made under each of these circumstances are unknown.

The only data available to staff are from the U.S. Census Bureau, *2012 Economic Census*. According to the Census Bureau, revenues from California casino hotels in 2012 were about \$4.374 billion. National data from the Census Bureau indicate that 13.3 percent of 2012 revenues of casino hotels were derived from sales of food and beverages for immediate consumption. If staff applies this percentage to California, sales of food and beverages for immediate consumption are estimated to have been \$582 million. At an average statewide state and local tax rate of 8.21 percent, this implies revenues of \$47.8 million.

This estimate does not consider whether sales are made by non-Indians or whether such sales are consumed off the reservation. Since the sales are made for immediate consumption, it seems likely that such sales were consumed on the reservation. If so, no sales tax is owed if sales were made by Indians. Staff does not know whether the sales were made by Indians or non-Indians, which would also affect taxability. Furthermore, these sales are only for casino hotels; they do not include sales made by other types of business activities Indian tribes may engage in.

Given the unknown information under the current regulation, and that this regulation revision clarifies the application of existing law, staff cannot quantify the extent to which revenues are impacted. Therefore, staff concludes that there is no revenue impact.

Alternative 2 – SYBCI Recommendation

Alternative 2 is similar to the staff recommendation, and differs only in terms of additional clarifying language. All the circumstances of the staff recommendation also apply to Alternative 2. Consequently, as with the staff recommendation, we conclude that there is no revenue impact.

Revenue Summary

Alternative 1 – Staff recommendation does not have a 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. This estimate has been reviewed by Mr. Mark Durham, Manager, Research and Statistics Section, Legislative and Research Division. For additional information, please contact Mr. Fitz at (916) 323-3802.

Current as of April 21, 2016.

Regulation 1616, Federal Areas.

[Reference: Sections 6017, 6021, and 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.

(d) Indian Reservations.

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

(2) Definitions. For purposes of this regulation "Indian" means any person of Indian descent who is entitled to receive services as an Indian from the United States Department of the Interior.

Indian organizations are entitled to the same exemption as ~~aan~~ aan Indians. "Indian organization" includes Indian tribes and tribal organizations and also includes partnerships all of whose members are Indians. The term includes corporations organized under tribal authority and wholly owned by Indians. The term excludes other corporations, including other corporations wholly

owned by Indians. "Reservation" includes reservations, rancherias, and any land held by the United States in trust for any Indian tribe or individual Indian.

(3) Sales by On-Reservation Retailers.

(A) Sales by Indians.

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

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

3. Use tax does not apply to sales of meals, food, and beverages by an Indian retailer from an eating or drinking establishment, such as a restaurant or bar, on an Indian reservation when the meals, food, and beverages are purchased for consumption on the Indian reservation. ~~Indian retailers selling meals, food or beverages at eating and drinking establishments are not required to collect use tax on the sale of meals, food or beverages that are sold for consumption on an Indian reservation.~~

(B) Sales by non-Indians.

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

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

3. Sales tax does not apply to sales of meals, food, and beverages by a non-Indian operating an eating or drinking establishment, such as a restaurant or bar, in leased space, on an Indian

reservation when the sales are subject to the Indian tribe's sales tax and the meals, food, and beverages are sold for consumption on the Indian reservation. Use tax does not apply to meals, food, and beverages purchased from a non-Indian operating an eating or drinking establishment, such as a restaurant or bar, in leased space, on an Indian reservation when the purchase is subject to an Indian tribe's sales or use tax and the meals, food, and beverages are purchased for consumption on the Indian reservation. For purposes of this subdivision, it is rebuttably presumed that meals, food, and beverages sold or purchased from an eating or drinking establishment on an Indian reservation in a form suitable for immediate consumption are sold or purchased for consumption on an Indian reservation. Regulation 1603, *Taxable Sales of Food Products*, prescribes the application of tax to meals, food, and beverages sold or purchased for consumption off an Indian reservation.

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

(4) Sales by Off-Reservation Retailers.

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

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

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

1. Indian contractors. Sales tax does not apply to ~~ales~~sales of materials to Indian contractors if the property is delivered to the contractor on a reservation. Sales tax does not apply to sales of

fixtures furnished and installed by Indian contractors on Indian reservations. The term “materials” and “fixtures” as used in this paragraph and the following paragraph are as defined in Regulation 1521, “*Construction Contractors.*”

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

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

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

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

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

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

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

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

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

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

(a) General. Air force regulation 34-57, issued under date of February 9, 1968, army regulation 210-65, issued under date of May 4, 1966, and navy general order No. 15, issued under date of May 5, 1965, authorize the sale and possession of alcoholic beverages at bases and installations subject to certain enumerated restrictions.

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

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

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

BUSINESS COMMITTEE

KENNETH KAHN, INTERIM CHAIRMAN
GARY PACE, SECRETARY-TREASURER
MAXINE LITTLEJOHN, COMMITTEE MEMBER
MIKE LOPEZ, COMMITTEE MEMBER



March 23, 2016

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

Re: Regulation 1616, *Federal Areas*

Dear Ms. Buehler,

On February 26, 2016, the State Board of Equalization (Board) sent a letter to interested parties inviting them to present comments and suggestions regarding its Second Discussion Paper on Regulation 1616, *Federal Areas*. The issue is whether the Board should amend Regulation 1616 to clarify that state sales and use tax does not apply to sales of meals, food, and beverages by a non-Indian operating an establishment, in leased space on an Indian reservation, when the sales are subject to the Indian tribe's sales tax and the meals, food, and beverages are furnished for consumption on the reservation. The amended language further provides that sales tax will apply if the meals, food, and beverages are sold for consumption off the Indian reservation.

We would like to express our support for the Board's efforts to clarify the application of Regulation 1616 and we agree with the newly amended language extending state tax preemption to sales of meals, food, and beverages to Indian reservations rather than limiting it strictly to sales in a tribe's casino. However, we are concerned with the feasibility of accurately applying the last section of the proposed amendment, which clarifies that sales tax will apply if the meals, food, and beverages are sold for consumption off the Indian reservation.

Additionally, we agree with other Tribes that have provided comments that any tribal tax, even if it is at a rate lower than the comparable state tax rate, is sufficient to fulfill the requirement that sales must be subject to an Indian tribe's sales tax. We discuss each issue in further detail below.

1. State Taxation for Meals, Food, and Beverages Sold for Consumption Off the Indian Reservation

As currently proposed, Regulation 1616 would presumably require non-Indian retailers to keep separate records for purposes of taxation for meals, food, and beverages sold for consumption off the Indian reservation as opposed to consumption on the reservation. While we understand the Board's desire to tax items consumed off the reservation, the current language would make this provision confusing and impractical to apply.

There are countless scenarios one can envision in which a retailer would have difficulty applying the regulation as currently drafted. For instance, is a cashier supposed to ask each consumer what their intentions are for each meal they order? What if a consumer orders three meals, two of which they intend to consume on the reservation and one they are taking "to

go”? Would there be two separate checks or will two thirds of the check be considered consumed on the reservation and one third considered consumed off of it? What if a consumer places an order “to go” but then changes his mind and eats it on the reservation? Does the cashier have to change the ticket to reflect this? Perhaps the most likely scenario would be a patron who orders food “to go” but intends to consume the meal, food, or beverage at another location on the reservation such as at a casino hotel or shopping area. It is not reasonable to expect the consumer to know what is considered on the reservation as opposed to off the reservation for purposes of informing the cashier. In the case of a drive thru window, it is presumed that an order will be “to go”. However, what if the consumer is taking the order back to the casino hotel? Does the cashier have to ask the consumer exactly where he or she intends to consume their order? It is easy to come up with instances in which accurately enforcing this provision would be impractical, if not impossible.

In order to alleviate the confusion in applying the regulation, we propose that the language be amended to state that sales tax will apply if the meals, food, and beverages are *delivered to a location* off the Indian reservation. This would provide a bright line test that would leave no room for varying interpretation and produce consistent results in its application. It would make it less burdensome on both the retailer as well as the consumer and, most importantly, would be easy and practical to apply.

2. Any Tribal Sales Tax Is Sufficient to Fulfill the Requirement Under Regulation 1616

Regulation 1616 requires that tribes impose a tax on sales of meals, food, and beverages in order for it to be exempt from state taxation. While we believe there is a question as to whether state taxation is preempted even if a tribe does not impose its own sales tax, at a minimum, the regulation should be revised to clarify that any tribal tax, even at a rate lower than the applicable state tax, is sufficient to fulfill the tribal tax requirement.

The Supreme Court has held that “[t]he power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management.” *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982). Additionally, the preamble to the BIA’s leasing regulations states that an “important aspect of tribal sovereignty and self-governance is taxation.” 77 Fed. Reg. 72447. By requiring a tribe to impose a sales tax at a rate dictated by the state, the state would be infringing on tribal sovereignty and self-government. The Board itself seems to agree with this position. In its Second Discussion Paper, in addressing the issue of whether an Indian tribal tax must be assessed for the proposed exemption to apply, the Board does not specify what rate the tribal tax must be. It merely states, “it is necessary for a tribe to impose a tax on on-reservation transactions to be preempted from state tax under a *Bracker* analysis.” *State Board of Equalization, Second Discussion Paper Regulation 1616, Federal Areas*, 7-8 (February 26, 2016). This seems to support the position that tribes are free to impose tax rates that they deem appropriate. We agree, as any other position would be an infringement on tribal sovereignty and self-government.

3. Proposed Language for Regulation 1616

We believe that Regulation 1616, as currently drafted, is at best impractical and at worst impossible to apply. This is due to the countless scenarios in which making a determination as to whether a particular meal, food, or beverage is consumed on a reservation would be difficult to ascertain. Therefore, we recommend a bright line test that will allow the regulation to be easily and consistently applied by having state taxes apply to meals, food, and beverages

that are delivered off the reservation. Additionally, in order to keep in line with federal law, we propose language that clarifies that any tribal tax would fulfill the requirement that tribes must enact their own tax. Accordingly, we propose the following language for Regulation 1616(d)(3)(B)(3):

Sales and use tax does not apply to sales of meals, food, and beverages by a non-Indian operating an establishment, such as a restaurant or bar, in leased space, on an Indian reservation when the sales are subject to any sales tax enacted by the Indian tribe and the meals, food, and beverages are furnished for consumption on the Indian reservation. However, tax will apply if the meals, food, and beverages are delivered to a location off the Indian reservation.

Chumash representatives were present at the second interested parties meeting held on March 9, 2016, and we would like to express our appreciation for the Board's openness to hearing the suggestions and comments from the various parties who attended.

Sincerely,

A handwritten signature in blue ink, appearing to read 'K. Kahn', is written over a light blue horizontal line.

Kenneth Kahn,
Interim Tribal Chairman



PECHANGA INDIAN RESERVATION

Temecula Band of Luiseño Mission Indians

OFFICE OF THE GENERAL COUNSEL

Post Office Box 1477 • Temecula, CA 92593
Telephone (951) 770-6000 Fax (951) 695-7445

March 24, 2016

General Counsel
Steve Bodmer

Deputy General Counsel
Michele Hannah

Associate General Counsel
Breann Nuruhiwa
Lindsey Fletcher

Of Counsel
Frank Lawrence

VIA EMAIL Susanne.Buehler@boe.ca.gov

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

Re: Pechanga Band of Luiseño Indians' Comments on the Second Discussion Paper on Regulation 1616

Dear Ms. Buehler,

The Pechanga Band of Luiseño Indians hereby submits its comments on the BOE's Second Discussion Paper on Regulation 1616, February 26, 2016. We thank the BOE and its staff for continuing to engage in meaningful government-to-government discussions in advance of changing California State regulations in ways that affect Indian Tribes. We believe that such discourse facilitates the adoption of policies that accurately reflect and uphold applicable law.

Pechanga appreciates that the BOE has modified its proposed language for Regulation 1616(d)(3)(B)(3), however, the BOE's draft provision remains unduly narrow. We acknowledge the BOE's rationale for limiting the exemption to the sale of meals, food, and beverages. However, by BOE's own statement, taxation could be preempted for items sold for consumption on a reservation. Language to this effect should be included in Regulation 1616 to ensure there is an avenue for tax exemption for qualifying items. Otherwise, the proposed provision's silence on this issue could be interpreted as foreclosing the possibility of preemption for items that are justifiably exempt. Pechanga stands by and reasserts the legal analysis on this topic that was provided in its January 29, 2016 comments on the Initial Discussion Paper (which are incorporated by reference herein).

Similarly, while we understand BOE's rationale for requiring a tribal tax to be imposed, Pechanga respectfully disagrees with BOE's analysis. Again, by BOE's own statements made during the March 9, 2016 interested parties meeting, preemption can occur under circumstances where a tribal tax is not imposed. Language to this effect should be included in Regulation 1616 so that it is not interpreted to foreclose such a possibility. Pechanga again stands by and reasserts the legal analysis on this topic that was provided in its January 29, 2016 comments on the Initial Discussion Paper (which are incorporated by reference herein).

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

Sincerely,

Steve Bodmer
General Counsel

Submission from LaPena Law Corporation

Pena

Law Corporation

A Professional Law Corporation

March 25, 2016

VIA FACSIMILE: (916) 322-4530

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

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

Dear Ms. Buehler,

I am writing you to on behalf of the Dry Creek Rancheria, Band of Pomo Indians regarding your letter dated February 26, 2016 and the accompanying Second Discussion Paper, Regulation 1616, *Federal Areas*. We would first like to express our appreciation for the opportunity to work with the BOE in developing tax guidelines that are in keeping with federal Indian law. BOE's willingness to solicit and implement comments provided by tribal representatives is noteworthy.

We have reviewed the Second Discussion Paper (the "Proposal") and we believe that the Proposal is well-drafted and is consistent with our previous comment letter.

Discussion Regarding Federal Pre-Emption

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

6352. There are exempted from the taxes imposed by this part the gross receipts from the sale of and the storage, use, or other consumption in this State of tangible personal property the gross receipts from the sale of which, or the storage, use, or other consumption of which,

Submission from LaPena Law Corporation

this State is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State.

We support the inclusion of Section 6352 into Regulation 1616 and believe that the reference provides legal authority for the Proposal.

Application of *White Mountain Apache Tribe v. Bracker*

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

Moreover, we also agree that the Proposal accurately applies the *Bracker* analysis to support an exemption where a Tribe enters into a business site lease for a bar or restaurant on its reservation pursuant to a Secretarial approved Leasing Code under the "Helping Expedite and Advance Responsible Tribal Homeownership Act of 2012" or the "HEARTH Act of 2012". Pub. L. No. 112-151, 126 Stat. 1150. (2012). It is our position that the taxing of sales under a tribal lease other than the HEARTH Act, would also fall under the BOE's analysis and agree with the broad language included in the Proposal that would extend the exemption to all tribal leases.

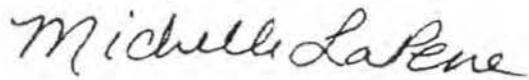
It is our position that it is within the Tribe's discretion whether it will assess a tribal tax, as that decision is one that requires careful balancing. The *Seminole* court noted, "If Florida's Rental Tax does not apply, an entity leasing tribal land will have additional money in its pocket – money that would then be available to the Tribe, either through negotiated higher rent or through a tribal tax."¹ We assert that the HEARTH Act was passed and the 25 C.F.R Part 162 supports the Tribe's right to determine how best to leverage the financial terms so that the Tribe can achieve the highest benefit from a business site lease. Accordingly, we do not believe that the Regulation should require a specific tribal tax, which should be left to the discretion of each Tribe. However, the Dry Creek Rancheria intends to assess and collect tribal taxes for sales of food and beverage at a leased facility on its Rancheria.

¹ *Seminole Tribe of Florida v. Stranburg* (11th Cir. 2015) 799 F.3d 1324.

Conclusion

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

Respectfully,



LAPENA LAW CORPORATION
Michelle LaPena

Karuk Community Health Clinic

64236 Second Avenue
Post Office Box 316
Happy Camp, CA 96039
Phone: (530) 493-5257
Fax: (530) 493-5270

Karuk Tribe



Administrative Office

Phone: (530) 493-1600 • Fax: (530) 493-5322
64236 Second Avenue • Post Office Box 1016 • Happy Camp, CA 96039

Karuk Dental Clinic

64236 Second Avenue
Post Office Box 1016
Happy Camp, CA 96039
Phone: (530) 493-2201
Fax: (530) 493-5364

March 24, 2016

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

Re: Amendment to clarify Regulation 1616, Federal Areas, regarding taxation of meals, food, and beverages sold on an Indian reservation.

Dear Ms. Buehler,

As part of the revision process to clarify Regulation 1616 the Board of Equalization's staff expanded the scope of their proposed regulatory revisions from just Indian casinos to Indian reservations generally. While we agree with the expanded scope we have concerns with the resulting implications and discussion regarding off reservation consumption for both non-Indian retailers and Indian retailers.

First, tribal enterprises are as diverse as Tribes themselves and it would be extremely difficult to determine what is considered off reservation consumption for meals, food, and beverages without an individualized analysis. An individualized analysis would be burdensome for Tribes, retailers, and the State. Defining what constitutes off reservation consumption for meals, food, and beverages will be equally problematic due to the expendable nature of these consumable goods. However, without a bright line rule on what constitutes off reservation consumption Tribes will still be subjected to great uncertainty.

In the Second Discussion Paper there is a brief argument that "to go" or "drive thru" features of an establishment may be potential factors triggering the off reservation consumption analysis, and thus necessitate state sales and use tax collection for the sale of meals, food, and beverages. While there is no proposition to include "to go" and "drive thru" language in the amended regulation these two instances were factors considered by Staff and that line of reasoning is extremely problematic.

For example, it is entirely possible, and likely quite frequent, that individuals will purchase meals, food, and beverages "to go" and still consume those goods on the Indian reservation. A patron may purchase a meal "to go" in a casino and return to their hotel room, which is in the same complex on the Indian reservation, to consume that meal. Even though that order was a "to go" order the end consumption still occurred on the reservation. This would create many instances where meals, food, and beverages are being subjected to state tax, instead of a tribal tax, even though the entire transaction occurred on the reservation.

Without a clear rule on when consumption will be considered off reservation, retailers will have no guidance on what type of records need to be maintained to ensure compliance with this regulation. Thus, the Karuk Tribe urges you to scrutinize the ambiguity that is caused by an “off reservation consumption” standard for taxation of meals, food, and beverages, while understanding that a broad interpretation and lack of definition would be problematic.

Due to the nature of these consumable goods, we ask you to conclude that the location of the transaction be determinative of whether tribal or state tax applies, and not where perceived consumption will occur. Finally, a tribal tax alone should suffice for the sale of meals, food, and beverages in establishments such as restaurants in leased spaces on Indian reservations and we ask that you conclude that state sales and use tax does not apply in these situations.

Secondly, while we recognize that the intent to clarify this rule was specific to non-Indian retailers, we feel that the proposed changes will actually impact Indian retailers as well. Not only because of the off reservation consumption issue, but because sales tax was presumably not applicable before, and should not be now, regardless of where the consumption occurs.

In the original language of (d)(3)(A)(3), which applies to Indian retailers, there was no mention of sales tax. The regulation implied that only a use tax *may* apply to the sale of meals, food or beverages if sold for off reservation consumption. However, to maintain consistency, it was proposed that this section be changed to mirror the new language in (d)(3)(B)(3). The proposed section now reads:

“Sales and use tax does not apply to sales of meals, food, and beverages by an Indian retailer...when the meals, food, and beverages are furnished for consumption on the Indian reservation.”

Because sales tax was not originally included in the regulation, the requirement to collect sales tax was arguably never implied before. Therefore, this addition creates a presumption that an Indian retailer would now have to collect sales and use tax if the meals, food or beverages were sold for off reservation consumption.

Additionally, in section (d)(3)(A)(2) it is clear that sales tax does not apply to the sales of tangible personal property by an Indian retailer so long as the property is delivered to the purchaser on the reservation. So, it should follow that an Indian retailer should not have to collect a sales tax on food, meals, or beverages if the food, meals, or beverages were provided to the consumer on the reservation as well. This should be the case regardless of where consumption takes place.

The discussion on *Sales by Indian Retailers* on page 8 and 9 that prompted this change only mentions the applicability of a use tax - not a sales tax. Thus, it seems that including sales tax in the proposed regulation was merely an oversight by the Staff and not an intended consequence. Furthermore, on page 4 of the Second Discussion Paper, as part of an explanation of Regulation 1616, Staff states that “sales tax does not apply to any on-reservation sales made by Indian retailers” regardless of who the consumer is. The emphasis is placed on the location of the sale, not the end consumption.

The purpose of this clarification process was to address the issue for non-Indian retailers, and not place an additional burden on Indian retailers. Thus, we also ask that you strike the word “sales” from section (d)(3)(A)(3).

We appreciate and support your efforts to bring clarity to this complex regulatory regime. The Karuk Tribe also appreciates your responsiveness to comments received and encourages more consultation on future endeavors. We look forward to a continued working relationship.

Sincerely,

A handwritten signature in blue ink, appearing to read "Russel Attebery".

Russel Attebery
Karuk Tribe, Chairman

From: James [mailto:james@barrettparalegal.org]
Sent: Monday, March 07, 2016 10:04 PM
To: Buehler, Susanne
Cc: james@526acoalition.org <james@526acoalition.org>
Subject: Interested Party Comment on Proposed Amendments to Regulation 1616

March 7, 2016

Re: Interested Party Comment on Proposed Amendments to Regulation 1616 – Federal Areas

Good Day Ladies and Gentlemen of the Board and all Interested Parties:

On behalf of all of the taxpayers in the State of California, and as interested parties, the 526a Coalition would like to briefly comment on the proposed amendments to Regulation 1616. To begin however, a response to a comment made by an interested party in the first round of interested party comments is in order.

In an issue that is merely dicta to the discussion topic that is the subject of these interested party hearings, in their June 1, 2015, comment letter to this Board, the Sycuan Band of the Kumeyaay Nation goes to great lengths to illustrate their point of view that it is inequitable not to return to tribal governments a portion of the sales and use tax revenue that they collect on behalf of the state in a fashion similar to how local state entities capture a portion of the sales and use tax proceeds collected from within their respective jurisdictions. And though the Board of Equalization does not have the legal authority to change this taxation formula which has been established by the State Legislature, I do however applaud this tribe's effort to bring up the subject that unlike counties and municipalities who receive the return of a certain portion of sales and use tax revenue that is collected from within their respective spheres of influence, tribal governments do not likewise benefit from this legislative mandated taxing structure; a clear social inequity.

Plainly, this state revenue scheme that allows counties and cities to recoup some of the monies they have expended on making the retail experience within their boundaries possible, should also include to some degree, tribal governments who spend a considerable amount of tribal assets making their lands conducive to a safe and secure retail marketplace. Accordingly, it is the position of the 526a Coalition that outside of these instant proceedings the Board should inquire of their experts, and also their contacts at the state capital, about the possibility of having the State Legislature consider this matter at a later date. This does not mean though, that our position is that tribal governments should receive the same percentage of sales and use tax revenue that is currently returned to local state entities, for the mere logic that a consumer visiting a tribal retailer does not miraculously appear at the border of the reservation without having first used the infrastructure of the surrounding municipalities to reach that destination.

In closing on this point, we believe that a beneficial side effect of the aforementioned revenue sharing arrangement might be that certain tribal corporations that are currently not in compliance with the sales and use

tax collection requirements of the Revenue and Taxation Code, would then have an incentive to do the right thing and collect and remit to the Board of Equalization those sums that the law requires of them.

This being said the matter of the proposed Regulation 1616 amendments will now be briefly addressed.

First and foremost it is the position of the 526a Coalition (www.526acoalition.org) that any amendments to Regulation 1616 should be enacted by the Board with the intent that the requirements delineated in said regulation are strictly enforced by Board of Equalization staff, as the reality is that currently said staff have refused to uniformly apply them against the Selnek-Is Tem-Al Corporation (Torres-Martinez Tribe of Cahuilla Indians); to the point that Board of Equalization defense counsel (Office of the Attorney General) have even argued that Revenue and Taxation Code Section 6511 does not create a mandatory duty on the Board of Equalization to “compute and determine the amount of tax or other amount required to be paid to the state”, when a taxpayer does not file a return, in spite of the fact that the statute uses the word “shall” four times, and the applicable definition of “shall” found in Section 16, is “ ‘Shall’ is mandatory and ‘may’ is permissive.”

This position of the Board of Equalization is a slippery slope that both damages the integrity of the agency as well as placing them in a very vulnerable position to future litigation by parties such as other tribal corporations that are faithfully, and with much integrity, complying with their responsibilities under the Revenue and Taxation Code.

Being so, the 526a Coalition compliments the tribal parties that have already commented on the proposed changes to Regulation 1616, and applaud their efforts to assist the Board of Equalization in formulating a practical regulation that can be easily interpreted by, (and hopefully evenly applied to), all entities affected by it.

Thank you for your time,

James G. Barrett
The 526a Coalition
www.526acoalition.org

FORMAN & ASSOCIATES
ATTORNEYS AT LAW
4340 REDWOOD HIGHWAY, SUITE E352
SAN RAFAEL, CALIFORNIA 94903

TELEPHONE: (415) 491-2310 FAX: (415) 491-2313

GEORGE FORMAN
JAY B. SHAPIRO
JEFFREY R. KEOHANE
MARGARET CROW ROSENFELD

GEORGE@GFORMANLAW.COM
JAY@GFORMANLAW.COM
JEFF@GFORMANLAW.COM
MARGARET@GFORMANLAW.COM

March 25, 2016

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

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

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

Dear Ms. Buehler:

Forman & Associates serves as legal counsel to the Cachil Dehe Band of Wintun Indians of the Colusa Indian Community ("Colusa" or "Tribe"), which has requested that we submit on its behalf the following comments on the new proposed revisions to Board of Equalization ("BOE") Regulation 1616 which were the subject of interested parties meetings on January 13 and March 9, 2016. The Tribe is encouraged by the responsiveness of the BOE to comments received after the January 13th meeting and supports the new proposed changes to the regulation. The new proposed changes bring the rule into conformance with the current state of the law regarding state jurisdiction over activities in Indian country.

One issue identified at the March 9th meeting remains unresolved by the new proposed changes: the state's intention to impose state sales tax on meals, food, and beverages sold by non-Indian retailers on leased land when such products are assumed to be intended for consumption off-reservation. The question of how to determine which goods would fall within this category was raised by Commissioner Diane Harkey and others present at the meeting. The Tribe contends that the state does not possess the authority to impose state sales tax on these products for two reasons. First, there is no efficient and accurate way to determine which meals, food, or beverages would be subject to the state sales tax. Second, even if there were an efficient and accurate way to determine which products are destined for off-reservation consumption, the imposition of state sales tax would infringe on the ability of the Tribe to govern itself by

Susanne Buehler
March 25, 2016
Page 2

undermining a tribal tax system. Both of these issues implicate the analysis set out in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

As noted in our January 29, 2016 comment letter, the Tribe contends that the state's sales tax jurisdiction is preempted as to all sales by retailers operating under leases from the Tribe, without distinction as to where the meals, food, or beverage might be consumed.

The State's Analysis of its Taxing Jurisdiction Fails to Consider the Impact on the Tribal Taxation System and Tribal Economic Development.

The Second Discussion Paper on Proposed Revision to Board of Equalization Regulation 1616: Federal Areas concluded, after a renewed analysis pursuant to *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), that California is preempted from imposing sales or use tax on these particular retailers for food and beverage sales for consumption on-reservation when such sales are subject to tribal tax. As to sales for consumption off-reservation, the state concluded that it is not preempted from imposing its tax on those transactions. The Tribe respectfully disagrees.

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

First, given that the state's analysis is premised on the transactions at issue being subject to a tribal sales tax, the analysis does not consider the specifics of any given tribal taxation scheme. A tribal sales tax ordinance may apply to all food and beverage sales by the non-Indian retailer to non-members on the reservation, which is a permissible exercise of tribal authority. If the state imposes its sales tax on the same transaction, then the sale is taxed twice.

The staff discussion paper notes "In addition, staff's proposed revisions recognize Indian tribes' sovereign authority to impose taxes on on-reservation sales and appropriately avoids creating a chilling effect on the exercise of that authority by eliminating the potential for double taxation when Indian tribes do impose taxes on non-Indian retailers' on-reservation sales of meals, food, and beverages to non-Indians for consumption on the reservation." The first clause of this sentence acknowledges that a tribe has the authority to impose taxes on on-reservation sales, but the second clause assumes a limitation not otherwise obvious: that the authority applies only to sales for consumption on-reservation. The tribal taxing authority is for sales on the

Susanne Buehler
March 25, 2016
Page 3

reservation, but the state proposes to tax those sales intended for off-reservation consumption. The state has not presented a rationale for this limitation which would result in double taxation

This double taxation would become a strong factor in a *Bracker* analysis preempting state taxing jurisdiction as an impermissible infringement of the self-governance capacity of the tribe.

Second, assuming for purposes of this discussion that there is a relevant distinction to be made in the taxing authority applicable to off-reservation consumption and on-reservation consumption, determining the answer to that question is in itself an impermissible burden on the tribe's ability to govern itself. Any effort to determine where food and/or beverages sold by a non-Indian retailer to a non-member is intended to be consumed would burden that retailer in a manner which would impede the economic development activity of the Tribe. A tribe's ability to negotiate with potential non-Indian lessees would be negatively impacted by explaining that the retailer would need to determine conclusively where the food and beverage being sold is to be consumed so that it could meet a state sales tax requirement. This would place the tribe at a disadvantage in its economic development activities as well as in the efficient operation of its own taxation system. Those burdens would become strong factors in a *Bracker* analysis, preempting state taxing jurisdiction as an impermissible infringement of the self-governance capacity of the tribe.

The state has not proposed any mechanism whereby it could be conclusively determined where the food or beverage would be consumed, which supports the premise that such a determination would burden the non-Indian retailer. While the state proposed that all "to go" sales be tracked separately by retailers, it is not possible to conclude that all "to go" sales are intended for off-reservation consumption, as consumers may be taking the "to go" meals to the parking lot, to their hotel, to another location on the reservation or may not know their intention at the time of purchase. Indeed, some of the meal might be consumed on-reservation and some might be consumed later off-reservation. To require the retailer to make such conclusive determinations is unreasonable and results in a burden on the tribe's ability to engage in economic development activity.

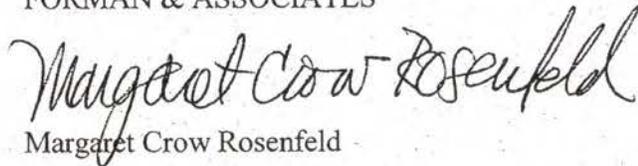
The Tribe contends that the state does not have the authority to tax the food and beverage transactions already taxed by the Tribe, but even if a persuasive rationale were available for consideration, the Tribe contends that the burden of determining whether food and beverages would be consumed on or off-reservation would impermissibly infringe on the Tribe's ability to impose its own taxation scheme and to engage in economic development activity through leases approved pursuant to federal and tribal laws.

Susanne Buehler
March 25, 2016
Page 4

Colusa appreciates the opportunity to raise these issues with the Board, and looks forward to the meeting with the Business Tax Committee in May.

Very truly yours,

FORMAN & ASSOCIATES



Margaret Crow Rosenfeld

Margaret Crow Rosenfeld

FORMAN & ASSOCIATES
ATTORNEYS AT LAW
4340 REDWOOD HIGHWAY, SUITE E352
SAN RAFAEL, CALIFORNIA 94903

TELEPHONE: (415) 491-2310 FAX: (415) 491-2313

GEORGE FORMAN
JAY B. SHAPIRO
JEFFREY R. KEOHANE
MARGARET CROW ROSENFELD

GEORGE@GFORMANLAW.COM
JAY@GFORMANLAW.COM
JEFF@GFORMANLAW.COM
MARGARET@GFORMANLAW.COM

March 25, 2016

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

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

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

Dear Ms. Buehler:

Forman & Associates serves as legal counsel to the Morongo Band of Mission Indians ("Morongo" or "Tribe"), which has requested that we submit on its behalf the following comments on the new proposed revisions to Board of Equalization ("BOE") Regulation 1616 which were the subject of interested parties meetings on January 13 and March 9, 2016. The Tribe is encouraged by the responsiveness of the BOE to comments received after the January 13th meeting and supports the new proposed changes to the regulation. The new proposed changes bring the rule into conformance with the current state of the law regarding state jurisdiction over activities in Indian country.

One issue identified at the March 9th meeting remains unresolved by the new proposed changes: the state's intention to impose state sales tax on meals, food, and beverages sold by non-Indian retailers on leased land when such products are assumed to be intended for consumption off-reservation. The question of how to determine which goods would fall within this category was raised by Commissioner Diane Harkey and others present at the meeting. The Tribe contends that the state does not possess the authority to impose state sales tax on these products for two reasons. First, there is no efficient and accurate way to determine which meals, food, or beverages would be subject to the state sales tax. Second, even if there were an efficient and accurate way to determine which products are destined for off-reservation consumption, the imposition of state sales tax would infringe on the ability of the Tribe to govern itself by

Susanne Buehler
March 25, 2016
Page 2

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Susanne Buehler
March 25, 2016
Page 3

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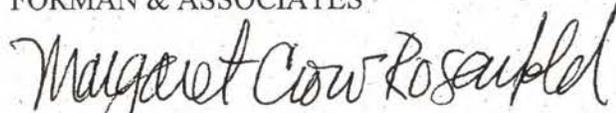
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Susanne Buehler
March 25, 2016
Page 4

Morongo appreciates the opportunity to raise these issues with the Board, and looks forward to the meeting with the Business Tax Committee in May.

Very truly yours,

FORMAN & ASSOCIATES

A handwritten signature in black ink that reads "Margaret Crow Rosenfeld". The signature is written in a cursive, flowing style.

Margaret Crow Rosenfeld