

Memorandum

To: Honorable Jerome E. Horton, Chairman
Honorable Michelle Steel, Vice Chair
Honorable Betty T. Yee, First District
Senator George Runner, Second District
Honorable John Chiang, State Controller

Date: October 7, 2013

From: Randy Ferris
Chief Counsel



**Subject: Report on Regulation Promulgated by the Bureau of Indian Affairs Regarding State Property Taxation on Indian Land – 25 C.F.R. § 162.017
October 29-31, 2013 Board Meeting – Chief Counsel Matters – Item P**

The Department of the Interior, Bureau of Indian Affairs (BIA) recently promulgated new federal regulations, 25 C.F.R. part 162,¹ regarding “Residential, Business, and Wind and Solar Resource Leases on Indian Land,” under authority of the federal statutes governing Indian land leasing.² These regulations were published as final in the Federal Register dated December 5, 2012, and became effective on January 4, 2013. Section 162.017 of those regulations governs the applicability of state taxes to leased Indian land.³ Upon its promulgation, questions arose regarding the regulation’s intent and scope. Recently, however, in a court filing, the BIA explained that Section 162.017 does not preempt all state taxation on leased Indian land, but rather, expresses its view that the federal and tribal interests to be weighed in determining whether a state tax is preempted are strong.

Section 162.017 was promulgated within the framework of well-settled judicial precedent that sets forth the test for determining whether a state or local tax is preempted by federal law. Under that framework, states may not impose the legal incidence of state taxes on tribes or tribal members with respect to property or transactions on Indian land absent clear congressional intent. The Supreme Court has stated:

. . . we have traditionally followed “a *per se* rule” “in the special area of state taxation of Indian tribes and tribal members.” Though the rule has been most often applied to produce categorical prohibition of state taxation when there has been no “cession of jurisdiction or other federal [legislative permission],” *Mescalero Apache Tribe*, 411 U.S. at 148, we think it also applies to produce

¹ All “Section” references are to title 25 of the Code of Federal Regulations part 162 unless otherwise indicated.

² The specific statutory authorities are listed at 77 Fed.Reg. 72467.

³ 25 C.F.R. § 162.003 defines “Indian land” to mean “any tract in which any interest in the surface estate is owned by a tribe or individual Indian in trust or restricted status and includes both individually owned Indian land and tribal land.”

categorical allowance of state taxation when it has in fact been authorized by Congress.⁴

However, when the legal incidence of a state tax is imposed on non-tribal members on Indian land, they are not categorically barred.⁵ Instead, courts apply a preemption analysis that makes “a particularized inquiry into the nature of the state, federal and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.”⁶

Section 162.017, entitled “*What taxes apply to leases approved under this part?*,” addresses state and local taxation of permanent improvements on leased Indian land, activities on Indian land, and possessory interests of leased Indian lands. It states:

(a) *Subject only to applicable Federal law*, permanent improvements on the leased land, without regard to ownership of those improvements, are not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Improvements may be subject to taxation by the Indian tribe with jurisdiction.

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

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

In the preamble to the regulation (Preamble), BIA provided the following rationale for promulgating it:

The Federal statutes and regulations governing leasing on Indian lands (as well as related statutes and regulations concerning business activities, including leases, by Indian traders) occupy and preempt the field of Indian leasing. The Federal statutory scheme for Indian leasing is comprehensive, and accordingly precludes State taxation. In addition, the Federal regulatory scheme is pervasive and leaves no room for State law. [¶. . . ¶] Assessment of State and local taxes would obstruct Federal policies supporting tribal economic development, self-determination, and strong tribal governments.⁷

⁴ *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation* (1992) 502 U.S. 251, 267.

⁵ *Washington v. Confederated Tribes of the Colville Indian Reservation* (1980) 447 U.S. 134, 160-161.

⁶ *White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, 145; see *Cotton Petroleum Corp. v. New Mexico* (1989) 490 U.S. 163, 176. This “particularized inquiry” has come to be known as the “*Bracker* balancing test” or “*Bracker* analysis.”

⁷ 77 Fed.Reg. 72447-72448 (Dec. 5, 2012).

Based on the understanding that this language evidenced BIA's intent for Section 162.017 to preempt all state property taxation on Indian land, whether or not the legal incidence of the tax is imposed on tribal members, the Desert Water Agency, a political subdivision of the State of California providing water and services in Riverside County, filed a complaint seeking declaratory and injunctive relief from Section 162.017, setting forth the arguments that the regulation does not preempt its water and service charges, but that if it does, it exceeds the promulgating agency's authority under federal law and is unlawful. (*Desert Water Agency v. United States* (C.D.Cal. 2013) Case No. 5:13-cv-00606-DMG-OP.)

However, in its Reply Memorandum in Support of its Motion to Dismiss (Memorandum), the BIA clarified that Section 162.017 *does not* automatically preempt all state and local taxation. Rather, the Memorandum states:

. . . section 162.017 is a statement of the strong federal interest prong articulated in the test under *White Mountain Apache Tribe v. Bracker* [citation] and its progeny. In other words, it does not change current law; it only clarifies current law within the surface leasing regulations.

In explaining section 162.017, the Preamble states:

The *Bracker* balancing test requires a particularized examination of the relevant State, Federal, and tribal interests. In the cases of leasing on Indian lands, the Federal and tribal interests are very strong.

77 Fed.Reg. 72440, 72447. The Preamble then articulates why, in the Department of Interior's view, the Federal interests are so compelling in the Indian surface leasing area as to weigh heavily in favor of taxation preemption under the *Bracker* analysis. [citation]⁸ [Underline added.]

The Memorandum further explains that the current law clarified by Section 162.017 incorporates the "*Bracker* balancing test":

Section 162.017 expressly provides that state taxation of permanent improvements, activities, and possessory interests on Indian land leases are "subject only to applicable Federal law." The section incorporates the federal common test articulated in *Bracker* and its progeny. See *Confederated Tribes of Chehalis Reservation v. Thurston County Bd. Of Equalization*, -- F.3d --, 2013 WL 3888429 *6 n.6 (9th Cir. 2013) (the recently promulgated regulation, 25 C.F.R. § 162.017, "merely clarifies and confirms" what federal law already states).⁹ [Underline added.]

⁸ United States' Reply Memorandum in Support of its Motion to Dismiss in *Desert Water Agency v. United States* (C.D.Cal. 2013) Case No. 5:13-cv-00606-DMG-OP, filed September 20, 2013 (Memorandum), p. 3.

⁹ Memorandum, *supra*, at p. 3.

Therefore, the BIA's view of its own regulation is consistent with the Legal Department's long-standing view of the applicability of state taxation on Indian land, specifically that a *Bracker* analysis is to be performed to determine whether the tax has been preempted.¹⁰

If you need more information or have any questions, please contact Robert Tucker, Assistant Chief Counsel, at (916) 322-0437 or Richard Moon, Tax Counsel IV, at (949) 440-3486.

Approved:



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¹⁰ See back-up letter to Property Tax Annotation 525.0025 and Property Tax Annotation 525.0020.