Confederated Tribes *of the*
Umatilla Indian Reservation

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Honorable Chairman Barnhart
House Revenue Committee
900 Court St. NE, H-279
Salem, Oregon 97301

SUBJECT: House Bill 2148 – Legal Analysis
ENCLOSURE: WA Department of Revenue Property Tax Advisory 1.1.2014, Taxation of Permanent Improvements on Tribal Trust Land, March 31, 2014

Dear Chairman Barnhart:

Thank you for this opportunity to provide legal analysis of House Bill 2148 and urge you to advance the passage of this Bill.

House Bill (HB) 2148 is consistent with long standing federal statutes and policy supporting tribal governments to be free from state property taxation on tribal trust lands. This analysis includes a summary of relevant federal statutes, regulations, the federal court interpretations of those implementing statutes, a state model and recommendations for Oregon's approval of HB 2148.

Federal Statutes and Policy

In 1934, Congress passed the Indian Reorganization (Wheeler-Howard) Act. The primary policies of the Reorganization Act ended the future allotment of tribal lands, extended period of federal trust protection of tribal allotments among other matters. Sponsoring Senator Wheeler noted: *This bill…seeks to further to give the Indians the control of their own affairs and of their own property; to put it in hands of either an Indian council…*" 78 Cong. Rec. 11125. The Indian Reorganization Act halted the prior allotment and assimilation policies of the 1887 General Allotment (Dawes) Act and the 1906 Burke Act and shifted Congressional policy to recognize tribal governance and promote economic development on Indian reservations.

The General Allotment Act broke up Indian reservations into individual parcels as allotments and surplus lands, and facilitated tribal lands leaving tribal ownership. Those allotments assigned to individual Indians were by law inalienable and restricted from sale for twenty-five years until the Indian owner could be eligible to sell the land upon approval by a federal agent. Further those allotments were held in the name of the United States in trust for a tribe of individual Indian owner, and not subject to state taxation while remaining in trust status.

The Allotment policies between 1887 and 1934 resulted in the dispossession of nearly two-thirds of all Indian lands into private ownership. However, the Congressional policy of keeping tribal trust land exempt from state taxation continued in the Indian Reorganization Act.

Under the Indian Reorganization Act, tribal trust lands remain exempt from state and local taxation. 25 USC §465. The United States Supreme Court adhered to the Congressional policy of exempting of tribal trust lands from state property taxation. This includes permanent improvements attached to tribal trust lands.

Federal Court Interpretations

In 1903, the Roberts County Assessor in South Dakota attempted to collect personal property and real property improvements on members of the Sisseton band of Sioux Indians in South Dakota. The Supreme Court ruled that permanent improvement attached to tribal trust allotments were exempt from state taxation:

> *It is true that the statutes of South Dakota, for the purposes of taxation, classify 'all improvements made by persons upon lands held by them under the laws of the United States' as personal property. But that classification cannot apply to permanent improvements upon lands allotted to and occupied by Indians, the title to which remains with the United States… their use by the Indians is necessary to effectuate the policy of the United States. United States v. Rickert, 188 U.S. 432.*

In 1973, the Supreme Court heard *Mescalero Apache Tribe v. Jones*, 411 U.S. 145. In *Mescalero*, the tribe entered into an off-reservation long term lease and constructed permanent improvements on real property owned by the United States. The court applied the Indian Reorganization Act that provided for land owned or taken into trust by the United States for an Indian Tribe or individual Indian *"…shall be exempt from State and local taxation.*" 25 USC § 465. The Court ruled that the construction materials the tribe purchased out of state for the construction of real property improvements, and the improvements being permanently attached to the real property, shall be exempt from state and local taxation:

> *"…personal property has been 'permanently attached to the realty." In view of Section 465, these permanent improvements on the Tribe's tax exempt land would certainly be immune from the State's ad valorem property tax…" Every reason that can be urged to show that the land was not subject to local taxation applies to the assessment and taxation of permanent improvements*." citing *Rickert.*

In 2013, the Ninth Circuit cited Mescalero as controlling in *Chehalis v. Thurston County Board of Equalization*, 724 F.3d 1153. The Confederated Tribes of the Chehalis Reservation successfully defended against Thurston County's taxation of real property improvements of a water park and hotel resort facility located on tribal trust land owned by the Chehalis Tribe, known as the Great Wolf Lodge between 2005-2007. The Ninth Circuit's *Chehalis* opinion cited *Mescalero* and stated:

> "*Mescalero sets forth the simple rule that § 465 preempts state and local taxes on permanent improvements built on non-reservation land owned by the United States and held in trust for an Indian tribe. This is true without regard to the ownership of the improvements. Because the Supreme Court has not revisited this holding, we are required to apply it*." *Confederated Tribes of Chehalis*, 724 F.3d at 1159.

In *Chehalis*, the Ninth Circuit took judicial notice that the US Department of Interior finalized the 2012 federal regulation for BIA (Bureau of Indian Affairs) leasing approvals and protection of tribal trust lands under 77 Federal Register 72440, December 5, 2012.

Federal Regulations

The 2012 BIA regulations include statements that the federal regulations streamline and expedite the leasing process, advance economic development, and spur renewable energy development for tribal governments. The federal regulations further support and recognize tribal sovereignty and tribes' achievements in terms of their ability to manage their own affairs on critical leasing issues. Section § 162.017 provides:

> "***What taxes apply to leases approved under this part?*** *(a) Subject only to applicable Federal law, permanent improvements on the leased land, without regard to ownership of those improvements, are not subject to any fee, tax, assessment, levy or other charge imposed by any State or political subdivision of a State. Improvements may be subject to taxation by the Indian tribe with jurisdiction*." 77 Federal Register 72440, December 5, 2012

State Models

Subsequently, in 2014, the Washington State Department of Revenue issued a Property Tax Advisory: Taxation of Permanent Improvements on Tribal Trust Land (copy enclosed). The Advisory is consistent with 25 USC § 465 and the ruling from *Chehalis*. The Department's process to develop and issue the guidance included significant review and consultation with tribal governments to address the following:

> ***Question:*** *May state and local governments assess property tax on permanent improvements built on land owned by the United States and held in trust for an Indian tribe or tribal member?*
>
> ***Answer:*** *No. The United States Court of Appeals for the Ninth Circuit determined in Confederated Tribes of the Chehalis Reservation v. Thurston County Board of Equalization, 724 F.3d 1153 (9th Cir. 2013) that where the United States owns land covered by 25 U.S.C. § 465 and holds it in trust for the use of a tribe or tribal member, permanent improvements on that land are exempt from state and local property taxation. This is true without regard to the ownership of the improvements. Washington Department of Revenue, Property Tax Advisory* 1.1.2014, March 31, 2014

As a result of the *Chehalis* decision, a number of Washington state counties, including Thurston County are now refunding millions of dollars in taxes back to the tribes and non-Indian taxpayers that paid those respective taxes and were barred by the *Chehalis* decision.

By passing House Bill 2148, Oregon can avoid this circumstance and costly litigation. This Bill was developed to minimize the chances of the same problem occurring in Oregon. Oregon counties have not been imposing property taxes against permanent improvements on tribal trust lands. This legislation would continue and affirm that practice as tax policy and law in Oregon.

Oregon Law and Tax Policy

In this current age of government-to-government relations, there remains a need to remove significant obstacles for tribal governance as envisioned by federal policy:

> *The importance of preserving the government-to-government relationship which is the cornerstone of … federal Indian policy; the need to recognized and build upon the ever growing competence of Indian people and their leaders; the importance of encouraging individual Indians to enter the business world; the need for tribes to act to promote business development on reservations by Indian and non-Indian entrepreneurs; and the importance of extending to tribal governments the regulatory and financial incentives available to other governments. Presidential Commission on Indian Reservation Economies, Report and Recommendations to the President of the United States,* pt. 1, p. 25; pt. 2, pp. 29, 43, 57, 69 (GPO 1984)

The United States is still addressing obstacles to those goals including the type of economic development addressed in House Bill 2148. This Bill is an important step in moving toward better government-to-government relationships between Oregon and the federally recognized tribes within the State.

House Bill 2148 is the product of 2 years of work by the tribes in Oregon working through a government-to-government process. These concepts were vetted to adhere to Oregon Executive Order 96-30, which guides tribal and state government-to-government relationships on common governance issues.

That extensive process resulted in vetting by tribal governments through an ad-hoc tribal tax working group, the Oregon Department of Revenue, County Assessors, government-to-government agency clusters (in coordination with the Commission on Indian Services), and most recently the Oregon League of Cities.

The concepts of HB 2148 reflect the identified impacts, informed analysis and recommendations affecting the interests of the respective governing bodies gained through the government-to-government process.

We would welcome the opportunity to further discuss these issues by either contacting Rebecca Ball (503-382-7824) or me (541-429-7400).

Cordially,

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Confederated Tribes of the Umatilla Indian Reservation

Department of Revenue Washington State

Property Tax Advisory

Property Tax Advisories are interpretive statements authorized by RCW 34.05.230.

NUMBER: PTA 1.1.2014 ISSUE DATE: 3/31/14

Taxation of Permanent Improvements on Tribal Trust Land

Question: May state and local governments assess property tax on permanent improvements built on land owned by the United States and held in trust for an Indian tribe or tribal member?

Answer: No. The United States Court of Appeals for the Ninth Circuit determined in *Confederated Tribes of the Chehalis Reservation v. Thurston County Board of Equalization*, 724 F.3d 1153 (9th Cir. 2013) that where the United States owns land covered by 25 U.S.C. § 465 and holds it in trust for the use of a tribe or tribal member, permanent improvements on that land are exempt from state and local property taxation. This is true without regard to the ownership of the improvements.

Facts: The Great Wolf Lodge is located in Thurston County on land owned by the United States and held in trust for the Chehalis Tribe. The Lodge itself (i.e., the permanent improvements and buildings on the property) is owned by CTGW, LLC, an entity in which the Chehalis Tribe has a 51 percent ownership interest.

In 2007, Thurston County began assessing property taxes on the Great Wolf Lodge. The County recognized that § 465 exempted the land from state and local taxation. It concluded, however, that the structures on the land were not tax exempt because they were owned by CTGW and not the Tribe. The Tribe and CTGW believed that federal law barred the County from imposing these property taxes and brought suit against the County and related defendants in September 2008, seeking declaratory and injunctive relief. The district court granted summary judgment to the County, holding that state and local governments are not necessarily prohibited from taxing permanent improvements, like the Great Wolf Lodge, that are owned by non-Indians. The Tribe and CTGW appealed to the Ninth Circuit Court of Appeals.

The Court of Appeals reversed the district court. Relying on *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), the Court explained that "the question of tax immunity cannot be made to turn on the particular form in which the Tribe chooses to conduct its business." The Court held that under *Mescalero* and 25 U.S.C. § 465, state and local governments cannot tax permanent improvements built on land owned by the United States and held in trust, stating that:

> Under *Mescalero*, § 465's exemption from state and local taxation applies to permanent improvements on that land. Thus, neither Thurston County nor any other state or local entity can

tax the Great Wolf Lodge or other permanent improvements on that land. Thurston County's property taxes on the Grand Mound Property are therefore invalid under § 465 and *Mescalero. Confederated Tribes*, 724 F.3d at 1157.

Conclusion: State and local property taxes on permanent improvements built on land owned by the United States and held in trust for an Indian tribe or tribal member are preempted by § 465. This is true without regard to the ownership of the improvements. Thus, state and local governments cannot assess property tax on permanent improvements built on trust land.

The scope of this Property Tax Advisory is limited to the issue of whether land owned by the United States and held in trust for an Indian tribe or tribal member, and the permanent improvements built thereon, are subject to state and local property taxation. This Advisory does not address the applicability of any state or local property taxation to personal property (other than permanent improvements) located on trust land. Nor does it address the applicability of any state and local excise taxes to activities or transactions occurring on trust land, including but not limited to the leasehold excise tax or other taxes on possessory interests. These remaining taxation issues will be addressed in future Tax Advisories after additional consultations with interested stakeholders.

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