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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

March 18, 2015

Representative Phil Barnhart
900 Court Street NE H279
Salem OR 97301

Re: Property taxation of permanent improvements on tribal trust land

Dear Representative Barnhart:

You asked whether the exemption from state and local property taxes for permanent improvements located on tribal trust land provided by A-engrossed House Bill 2148 is required under federal law. The answer is yes with respect to locally assessable property. The exception to the exemption for centrally assessed property is not expressly required under federal law but may be justified given the lack of guidance on that point.

1. The controversy

A-engrossed House Bill 2148 provides that, regardless of ownership, permanent improvements located on land owned by the United States and held in trust for an Indian tribe or a member of an Indian tribe are exempt from state and local property taxes and fees, charges and assessments related to property taxation. The exemption does not apply to centrally assessed property.

The proponents of the bill have stated that, with respect to locally assessed property, the prohibition is required under 25 U.S.C. 465, as interpreted by the United States Supreme Court in Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), and the Ninth Circuit Court of Appeals in Confederated Tribes of the Chehalis Reservation v. Thurston County Board of Equalization, 724 F.3d 1153 (9th Cir. 2013), and under regulations promulgated by the United States Department of the Interior, Bureau of Indian Affairs, and codified at 25 C.F.R. 162.017(a). The proponents note that these authorities do not deal specifically with centrally assessed property. Thus, the proponents state that, by allowing taxation of centrally assessed property while exempting locally assessed property, A-engrossed House Bill 2148 restricts its effect to what is legally certain in this area of law at this time.

Based on telephone conversations with an attorney for the Tax and Finance Section of the Oregon Department of Justice, we understand the department's position to be that the exemption for locally assessed property in the bill is too broad. Because the permanent improvements involved in the Chehalis decision were operated under a lease agreement by an entity that was 51 percent owned by the tribe, the department argues that the decision is limited to permanent improvements that are majority owned by a tribe. The department further believes that treating centrally assessed property differently from locally assessed property cannot be

justified under the proponents' understanding of the federal law and cases. Thus, the department's position is that the bill is both too broad and too narrow. The department also believes that the Bureau of Indian Affairs regulations were adopted in violation of certain procedural requirements relating to executive orders.

We are of the opinion that the proponents have the better argument.

2. Federal law

25 U.S.C. 465, originally enacted in 1934, provides that title to lands or rights acquired pursuant to the statute, as amended, shall be taken in the name of the United States in trust for the Indian tribe or tribal member for which the land is acquired, "and such lands or rights shall be exempt from State and local taxation."

In Mescalero, in relevant part, the New Mexico Bureau of Revenue had imposed a use tax on tangible personal property purchased by the Mescalero Apache Tribe and used to construct ski lifts installed on federal land. Analyzing the imposition of the tax under 25 U.S.C. 465, the Supreme Court stated that the permanent improvements, i.e., the ski lifts, "on the Tribe's tax-exempt land would certainly be immune from the State's ad valorem property tax."[1] 411 U.S. at 158. Because the personal property on which the use tax had been assessed was "permanently attached to the realty," the Supreme Court treated the personal property as it would the permanent improvements to which it was attached and held that the "use of permanent improvements upon land is so intimately connected with use of the land itself that an explicit provision relieving the latter of state tax burdens [i.e., 25 U.S.C. 465] must be construed to encompass an exemption for the former." Id.

In Chehalis, Thurston County, Washington, had assessed property taxes on the Great Wolf Lodge, located on land acquired by the United States and held in trust for the Confederated Tribes of the Chehalis Reservation pursuant to 25 U.S.C. 465. The lodge property was operated under a 25-year lease agreement with the tribe by an LLC in which the tribe held a 51 percent interest. The Ninth Circuit stated that the question posed by the tribe's challenge to the assessment was whether the exemption of trust lands from state and local taxation under 25 U.S.C. 465 extends to permanent improvements located on the trust lands. The court held that the Supreme Court's ruling in Mescalero was "dispositive": "[W]here the United States owns land covered by § 465, and holds it in trust for the use of a tribe (regardless of 'the particular form in which the [t]ribe chooses to conduct its business'), § 465 exempts permanent improvements on that land from state and local taxation." 724 F.3d at 1157. The decision has not been appealed to the Supreme Court.

The Bureau of Indian Affairs recently revised and expanded its regulations addressing nonagricultural surface leasing of Indian land. 25 C.F.R. 162.017(a), a new provision that became effective January 4, 2013, provides:

> 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

[1] The Supreme Court treated the federal land leased by the tribe as if it were land held in trust for the tribe because "it would have been meaningless for the United States, which already had title to the [land], to convey title to itself for the use of the Tribe." 411 U.S. at 156 n.11.

> State. Improvements may be subject to taxation by the Indian tribe with jurisdiction.

In the summary of the substantive revisions of the regulations, published at 77 F.R. 72440, the bureau stated that "Federal courts apply a balancing test [announced in White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980)] to determine whether State taxation of non-Indians engaging in activity or owning property on the reservation is preempted. . . . The Bracker balancing test requires a particularized examination of the relevant State, Federal, and tribal interests. In the case of leasing on Indian lands, the Federal and tribal interests are very strong." 77 F.R. at 72447. Moreover, "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." Id. With respect to leasing on tribal land, the bureau stated, "Assessment of State and local taxes would obstruct Federal policies supporting tribal economic development, self-determination, and strong tribal governments. State and local taxation also threatens substantial tribal interests in effective tribal government, economic self-sufficiency, and territorial autonomy." Id.

The bureau offered this backdrop for the provision prohibiting state and local taxation of permanent improvements on tribal trust land, regardless of who owns the improvements, and stated in summation, "State and local taxation of improvements undermine Federal and tribal regulation of improvements." Id. at 72448.

In Chehalis, the Ninth Circuit based its decision entirely on the Supreme Court's interpretation of 25 U.S.C. 465 in Mescalero. Asked to consider 25 C.F.R. 162.017(a), the court stated, "Because this regulation 'merely clarifies and confirms' what 465 'already conveys,' we need not reach the applicability of this regulation or the level of deference owed to the Bureau of Indian Affairs in this context." 724 F.3d at 1157 n.6.

3. Analysis

In light of 25 U.S.C. 465 and 25 C.F.R. 162.017(a) and the Mescalero and Chehalis decisions, we believe that the exemption for locally assessable permanent improvements granted by A-engrossed House Bill 2148, regardless of the ownership of the permanent improvements, is required under federal law.

The points raised by the Oregon Department of Justice are highly speculative. The fact that the permanent improvements involved in the Chehalis decision were operated by an entity that was 51 percent owned by the tribe is not reflected in the Ninth Circuit's decision, which is unequivocal on this point: "[T]he County attempts to distinguish Mescalero on the ground that the improvements at issue in this case are owned by CTGW, not the Tribe itself. Mescalero instructs us, however, that this distinction is irrelevant." 724 F.3d at 1157. The department's point might well mean that if a case arose in which the permanent improvements were minority-owned by the tribe or entirely owned by a nontribal entity, that case would be heard. It is far from certain, however, that such a case would cause either the Ninth Circuit or the Supreme Court to distinguish or overturn Chehalis.

Moreover, 25 C.F.R. 162.017(a) makes the holding in Chehalis a matter of blackletter law: "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" (emphasis added).

The department's argument that the regulations are tainted by a procedural defect would be far more compelling in the context of litigation than of legislation. Tax disputes deal with specific property tax years. If the procedure by which an applicable regulation has been promulgated was improper, the regulation may be invalidated for the years in dispute, without requiring the court to address the substance of the regulation.

By contrast, the analysis of 25 C.F.R. 162.017(a) with respect to A-engrossed House Bill 2148 is not limited to any specific year. The bill is an attempt to set statewide policy in this area and so the analysis of the regulation must be substantive and not merely procedural. The department may be correct about the procedure in this case but the point is nonetheless irrelevant to this opinion. For these purposes, we may presume that the Bureau of Indian Affairs could cure the procedural defect and readopt the identical provisions.

The department also argues that the qualifying phrase, "Subject only to applicable Federal law," means that the regulations do not supersede the interpretation of 25 U.S.C. 465 under Mescalero and Chehalis. This is a circular argument, however, because it poses a problem only if we accept the department's reading of those cases in the first place, which we do not.

Altogether we do not believe at this time that it is useful to question the validity of the regulations, procedurally or substantively. They may be vulnerable procedurally, or even substantively under the judicial analysis of administrative regulations under Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984), but it does not strike us as prudent for the Legislative Assembly to craft legislation in anticipation of the outcome of a hypothetical challenge to federal regulations.

Finally, the department believes that, to be consistent, anyone arguing that federal law requires exemption of all permanent improvements on tribal trust land, regardless of ownership, also has to argue that centrally assessed property must be exempt. Theoretically that may be true, but whether a court would find that the exemption must extend to permanent improvements used or held for future use by a company whose property is subject to central assessment is another matter. To our knowledge, such a case has not been heard.

Locally and centrally assessed property are distinguished by the understanding that the value of the latter is inextricably linked to the value of the other property of the company with which it functions in a network and to the value of the company as a whole. This understanding is the basis of the unitary method of valuing centrally assessed property including intangible personal property. Other considerations include the magnitude of taxable value involved with centrally assessed property and the incentive to relocate permanent improvements to tribal trust lands that an exemption for centrally assessed property would create. It is thus possible that a court would find that Mescalero did not control in the case of centrally assessed permanent improvements on tribal trust land and that the balancing test of federal, state and tribal interests under Bracker dictated a different outcome.

No one can say for certain, but, again, we believe that the proponents of A-engrossed House Bill 2148 have the better argument. Exempting locally assessed permanent improvements, regardless of ownership, states the extent to which the federal law has been tested in court at this time. By contrast, excluding centrally assessed property from the exemption does represent a policy choice on the part of the legislature. The best argument for that choice is probably that the taxation of centrally assessed property on tribal trust land has

not been tested in court and so it is prudent for the legislature to continue to assert the taxing authority of the state to that extent until the federal government expressly directs otherwise. As the Supreme Court stated in Mescalero: "This Court has repeatedly said that tax exemptions are not granted by implication. . . . It has applied that rule to taxing acts affecting Indians as to all others. . . . If Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences." 411 U.S. at 156 (citing Oklahoma Tax Commission v. United States, 319 U.S. 598, 606-607 (1943)).

4. Conclusion

We believe that 25 U.S.C. 465, 25 C.F.R. 162.017(a) and the Mescalero and Chehalis decisions mandate the exemption from state and local property taxes for locally assessed permanent improvements located on tribal trust land provided by A-engrossed House Bill 2148. The exclusion from the exemption for centrally assessed property provided by the bill is not expressly required under these authorities. If the Legislative Assembly makes such a policy choice, however, we believe that federal doctrine supports the choice given the lack of federal guidance on that specific point.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

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