July 30, 2009

Mr. Bradley Miller
Tax Policy Division
Board of Equalization
P.O. Box 942879
Sacramento, CA 94279-0044

Dear Mr. Miller:

The Barona Band of Mission Indians wishes to provide the following comments regarding Publication 146.

Indian organization (Page 7)

Indian organization is defined to include Indian tribes and tribal organizations, including corporations that are organized under tribal authority and wholly owned by Indians. This overlooks federally chartered corporations organized by Indian tribes. The publication should be amended to specifically include these entities.

Transfer of Title (ownership) on the reservation (Page 10)
Sale by retailer located on a reservation

This section requires that the sale to an Indian be negotiated on the reservation and that delivery take place on the reservation. This is more stringent than purchases off-reservation, which do not require that negotiations take place on the reservation. The negotiation requirement should be removed to conform with off-reservation purchases, requiring only that ownership of the item being sold to an Indian takes place on the reservation

Purchasers (Page 12)

This section requires corporations to provide documents to the retailer to prove tax exemption. If the organization is a corporation, documents must be provided to show that it is organized under tribal authority and wholly owned by Indians, such as the articles of incorporation. This should be modified to 1) include federally-chartered corporations; and 2) allow for a declaration, or exemption certificate,

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stating the nature of the corporation, rather than requiring the corporation to provide a copy of its articles of incorporation to each and every vendor from whom it makes purchases.

This section also requires organizations to provide documents to show that they are an Indian Tribe or tribal organization. This is onerous and unnecessary. An exemption certificate signed by a duly authorized representative of the Indian organization should suffice.

Married couples or registered domestic partners (Page 15)

This section requires that sales tax be paid on a one-half interest in property when an Indian holds property jointly with a non-Indian spouse. The note also states that the Indian spouse may be required to pay use tax if the property is used off the reservation more than one-half the time during the first twelve months following delivery. The note needs to clarify that the use tax applies only if the Indian spouse uses the property off the reservation, since the non-Indian spouse has already paid sales tax and is entitled to use the property off the reservation.

Permanent improvements to real property (Page 15)

This section states that tax does not apply to sales when the customer is an Indian. This should be modified to include Indian organizations.

Sales by on-reservation Indian retailers to Indians who reside on a reservation (Page 22)

In conformance with the language on page 10, this section also requires that the sale be negotiated on the reservation and that delivery take place on the reservation. As previously stated, this is more stringent than purchases off-reservation, which do not require that negotiations take place on the reservation. The negotiation requirement should therefore be removed, requiring only that ownership of the item being sold takes place on the reservation.

Sales by Indian retailers of meals, food or beverages at eating and drinking establishments (Page 23)

This section provides that Indian retailers do not need to collect sales and use tax for purchases at on-reservation eating and drinking establishments that are sold for consumption on an Indian reservation. The reference to "eating and drinking establishments" should be removed, since it fails to include such items as ice cream, hot dogs and fountain drinks purchased at a convenience store for consumption on the reservation.

Sales by on-reservation, non-Indian retailers (Page 24)

Like the previous sections regarding on-reservation purchases, this section requires that the sale be negotiated on the reservation and that delivery take place on the reservation. As previously stated, this is more stringent than purchases off-reservation, which do not require that negotiations take place on the reservation. The negotiation requirement should therefore be removed, requiring only that ownership of the item being sold takes place on the reservation.

Reporting and paying use tax (Page 26)

Paragraph 2 provides that use tax applies to an Indian's one-half interest in property owned jointly with a non-Indian spouse of the property if the property is used or stored off the reservation more than one-half the time during the first twelve months following delivery. As previously stated, this should apply only to use off the reservation by the Indian spouse, since the non-Indian spouse has already paid sales tax and is entitled to use the property off the reservation.

Electronic Waste Recycling Fee (Page 29)

This section states that the fees are imposed on the consumer of these items so it is not owed if the item is purchased on a reservation by an Indian who resides on a reservation. Since the incidence of the tax falls upon the Indian consumer, this exemption should be extended to sales to Indians from retailers on or off the reservation, provided that the item is delivered to the reservation, transfer of ownership take place on the reservation, and the items will be used on the reservation.

If you have any questions, you may reach me at the address and telephone number on the letterhead.

Sincerely,

Edwin "Thorpe" Romero
Chairman, Barona Band of Mission Indians

TRIBAL ALLIANCE OF SOVEREIGN INDIAN NATIONS
An intergovernmental association of tribal governments throughout Southern California

August 3, 2009

TRIBAL GOVERNMENTS:

AGUA CALIENTE BAND OF CAHUILLA INDIANS

AUGUSTINE BAND OF MISSION INDIANS

CAHUILLA BAND OF INDIANS

CHEMEHUEVI INDIAN TRIBE

MORONGO BAND OF MISSION INDIANS

PECHANGA BAND OF LUISEÑO INDIANS

RAMONA BAND OF CAHUILLA INDIANS

SAN MANUEL BAND OF MISSION INDIANS

SANTA ROSA BAND OF MISSION INDIANS

SANTA YNEZ BAND OF CHUMASH INDIANS

SOBOBA BAND OF LUISEÑO INDIANS

TORRES MARTINEZ DESERT CAHUILLA

Mr. Bradley Miller
Tax Policy Division
Board of Equalization
P.O. Box 942879
Sacramento, CA 94279-0044

Fax: 916 322-0187

Re: Comments on Publication 146

Mr. Miller:

I write on behalf of the Tribal Alliance of Sovereign Indian Nations (TASIN) in response to the BOE's letter dated July 6, 2009, in which the BOE solicits comments in anticipation of its upcoming revision of Publication 146. We appreciate the opportunity to provide input on this matter.

While the BOE's efforts to streamline taxation of Indian tribes and tribal citizens are commendable, we believe that they have been insufficient, especially in connection with on-reservation construction. Ideally, regulations 1521 and 1616 should be revised to enable Tribes to more easily exercise their sovereign right to purchase materials for on-reservation construction without paying State sales tax. We recognize, however, that BOE's current effort focuses not on wholesale revision of its regulations, but rather on clarifying existing regulations through Publication 146.

We agree with the BOE that Publication 146 should be revised. Specifically, the section that discusses sales tax on materials used in on-reservation construction projects should be supplemented to include guidelines as to the manner in which tribes may satisfy BOE requirements. Unlike other states, such as Wisconsin, which provide that materials used in on-reservation construction projects are exempt from state sales tax, California only deems such sales tax-exempt if certain criteria are met. Publication 146 lists the criteria but does not provide any guidance as to how the criteria may be met. Our comments focus on why this is problematic and provide suggestions as to how BOE can revise Publication 146 to address the problems we identify.

Under BOE regulations, non-Indian contractors building on-reservation projects must comply with two sets of requirements in order for their material purchases – and ultimately the Tribe's purchases – to be tax exempt. First, they must qualify as "retailers" and, in order to do so must formulate their construction contracts in certain ways (e.g., explicitly provide for the transfer of title to the

materials prior to the time the materials are installed, and separately state the sales price of materials, exclusive of the charge for installation). Second, they must sell their materials to the tribal owner on the tribe's reservation, with title passing to the tribe on the reservation prior to installation. The tribal owner must issue exemption certificates to its contractors and the contractors must issue resale certificates to their vendors.

While seemingly simple, these requirements are in fact difficult to meet in practice and pose many unnecessary obstacles to tribes seeking to build on their reservations. The difficulty arises because contractors (and subcontractors) building on-reservation projects are required – pursuant to BOE policy – to conduct their work very differently in the context of such projects than they do on typical (i.e., off-reservation) projects in order to enable the owner tribe to take advantage of its exemption from sales tax. Understanding the obstacles imposed by current BOE policy is critical to understanding why and how Publication 146 should be revised.

On a typical construction project materials are supplied to the project through multiple venues. Some materials are provided by the prime contractor, others by subcontractors, and yet others directly by vendors. Materials reach the construction project in myriad ways through hundreds (if not thousands, on a large project) of sales. In order to meet existing requirements and to ensure that sales tax is not paid on such materials, tribes and their contractors, subcontractors, and material vendors are required to change the way they normally operate for each and every one of the hundreds of materials utilized on the project. In essence, they must all ensure that the materials they provide are sold to the tribal owner with title transferring to the tribe on the reservation prior to the materials' installation into the project.

On a typical construction project, i.e., one not conducted on a reservation, the owner contracts with a prime contractor (C) to build a school. C enters into multiple subcontracts with subcontractors (S) who in turn purchase materials from vendors (V). The subcontractor providing electrical work (S-1) has his materials delivered to him on the reservation by his vendor (V-1). Typically, S-1 buys the materials from V-1 and installs them in the project, then bills C for them as part of the cost of the work. C in turn bills the owner. Or S-1 may order the materials on behalf of C, and V-1 may bill C directly. Regardless of the arrangement between the vendor, the subcontractor, and the contractor, in a typical construction project S-1 does not have to sell materials to anyone anywhere along the way nor does title to the materials have to transfer to any one entity at any particular given point in time. In a typical construction project the subcontractor simply orders his materials and installs them, and bills for them at the end.

But current BOE policy requires that all parties involved in supplying and utilizing materials used on a tribally-owned on-reservation construction project act differently. Because existing regulations focus on the moment in time at which title to the materials transfers to the tribal owner, and require that the transfer occur on the reservation and prior to the materials' installation into the project, tribes are required to put into place a system pursuant to which they take title to – using our example from above – the electrical materials *before* S-1 installs them into the project. Thus, S-1 must craft his contract with V-1 such that S-1 takes title to the materials before installing them, and in turn must turn around and sell them to T, with T taking title to them on the reservation, before S-1 installs them. Furthermore, S-1 must take appropriate action, in the middle of his work, to ensure that title passes to the tribe as required.

Now consider S-2, who provides the cement work under subcontract to C. S-2 procures the cement from V-2 and oversees the pour. S-2 must purchase the cement from V-2 with title passing from V-2 to S-2 prior to the pour, then turn around and pass title to the Tribe on the reservation prior to the pour. And S-2 must do all of this while creating a paper trail that evidences that it has all been done as required. But cement must be poured quickly, within as short a time as possible, and yet S-2 must hold up the tens of waiting cement trucks while he fills out paperwork for each load of cement that arrives at the work site, or while he reviews the paperwork for all of his trucks to be sure that the required contract language is contained therein.

In short, in order to meet existing BOE requirements the tribal owner must ensure that hundreds (if not thousands) of individual materials sales be executed in conformity with the BOE's regulations and that each subcontract and sub-subcontract and bill of lading and other such documents be properly worded. These requirements pose significant hurdles and leave much room for error both initially, in drawing up the multitude of contracts and purchase orders and bills of lading and other such documents that are involved in a large-scale construction project, and in the performance stage.

Publication 146 lists the requirements tribes must meet for construction-related material purchases to be free of sales tax (*see* pp. 20, 21) but does not provide any guidance as to how a tribal owner should go about meeting those requirements. Such guidance is critical in connection with large-scale construction projects that include multiple subcontractors, sub-subcontractors and vendors, particularly in light of the fact that there is so much room for error along the way. In order to enable tribes to meet BOE requirements and take advantage of their status as non-tax-paying entities for on-reservation projects, the BOE must provide far greater detail in Publication 146 than is currently provided. The publication should outline specific procedures that tribes and their contractors, subcontractors and vendors may follow, suggest contract language that the BOE deems acceptable, and provide templates for acceptable shipping and other documents. While there are many theoretical ways to achieve compliance with BOE requirements, experience shows that tribes seeking to do so often run afoul of BOE's understanding of how contracts must be written and projects carried out.

Streamlining the way in which California tribes structure their on-reservation construction projects to comply with State sales tax regulations would clearly benefit tribes by providing them with a roadmap for meeting regulatory requirements. It would also benefit the State by creating a template that, once available, would likely be utilized by many tribes. BOE auditors seeking to ascertain compliance with regulatory requirements would thus have an easier time determining whether compliance has been achieved.

Some of the specific issues we believe Publication 146 should address in detail are as follows:

- Page 20 requires that construction contracts include certain language, but does not provide any examples of acceptable language. Some examples should be provided.

- Is it sufficient for the prime contract to include the contract language discussed at page 20, or must all subcontracts and sub-subcontracts and agreements with vendors include that language as well?
- How must the transfer of title to materials to the tribal owner be achieved in situations in which subcontractors order materials from vendors but have no direct contractual relationship with the owner?
- What types of legal arrangements with vendors and subcontractors are required to have title to materials supplied by such vendors and/or subcontractors pass from them to the tribe on the reservation?
- Must tribes pay each vendor/subcontractor that sells materials to the tribe directly, or can payment be channeled through the prime contractor?
- Must shipping documents be worded in any particular manner, and if so, how, in order to ensure that title to materials transfers to the tribe on the reservation and prior to installation?
- May the prime contract provide that all materials purchased for use in the project be sold to the prime contractor and from him to the tribe, upon the materials' reaching the reservation? If so, is such a provision sufficient to satisfy BOE requirements?

These are only some of the issues that Publication 146 should address. In general, the Publication should include detailed guidelines regarding how BOE regulations and policies may be implemented in the context of large-scale construction contracts. We recommend that the BOE consider providing sample contract language, templates for shipping and other documents, and, ideally, a set of procedures that tribes and their contractors, subcontractors, sub-subcontractors and vendors could follow. Without such guidance there is much room for error.

Sincerely,

Lynn "Nay" Valbuena

LYNN VALBUENA
Chairwoman

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July 30, 2009

VIA FACSIMILE (916) 322-0187
& U.S. MAIL

Mr. Bradley Miller
Tax Policy Division
Board of Equalization
P.O. Box 942879
Sacramento, CA 94279-0044

Re: Comments on Publication 146, Sales to American Indians and Sales on Indian Reservations

Dear Mr. Miller:

The Lytton Rancheria of California (Tribe) submits the following comments to the State Board of Equalization's (SBOE) Publication 146, Sales to American Indians and Sales on Indian Reservations.

Requirement that Ownership Transfer on the Reservation

Many vendors prefer to have title transfer upon shipping (i.e., FOB Origin) so that the risk of loss is borne by the tribe. Often times, the only way to get a vendor to agree that title will transfer upon delivery to the reservation (i.e., FOB Destination), is for the tribe to expressly assume liability for any loss that occurs during shipment. While the Tribe does not believe that merely assuming liability during shipment equates to a transfer of ownership, risk of loss is technically linked to ownership. Since Publication 146 does not address this issue, tribes cannot be certain that agreeing to assume risk of loss during shipment will not jeopardize their exemption. Thus, The Tribe requests that the SBOE revise Publication 146 to clarify that a tribe's agreement to assume liability for merchandise during shipment does not equate to a transfer of ownership.

Use Tax

Responsibility for Collection of Use Tax

It is the Tribe's understanding that the responsibility for the payment of use tax lies with the purchaser. There are, however, a number of places in Publication 146 that appear to require u

seller to collect use taxes. For example: Pages 8, 17 and 26 state that "[o]ther businesses that are required to collect use tax from customers and pay it to the SBOE must obtain a Certificate of Registration;" page 23 requires Indian retailers to collect use tax from purchasers; page 24 implies that on-reservation, non-Indian retailers must collect use taxes; and page 26 requires Indian retailers to collect the use tax. The Tribe believes that the responsibility for payment of use tax should never be placed on the seller as doing so presents significant problems.

First, placing the responsibility on the seller may result in a tribe having to forego dealing with a specific vendor or paying unnecessary taxes. On more than one occasion, the Tribe has encountered major issues with vendors relating to the collection of use taxes because vendors are fearful that if they do not collect use taxes, they will get audited. Understanding the use tax exemption is difficult, particularly for individuals who do not have much experience with Indian tribes. As a result, many vendors simply will not agree to exempt a tribe from the payment of use tax.

Second, sellers are not in a position to make a determination regarding use taxes because it is impossible for the seller to know whether or not the merchandise will be used off-reservation more than one-half of the time.

Given the difficult, if not impossible, hurdles created by requiring sellers to collect use taxes, the Tribe requests the SBOE consider revising Publication 146 so that the responsibility for the payment of use taxes is always on the purchaser. If, however, the SBOE decides that the responsibility will remain, in some instances, on the seller, Publication 146 should be revised to clarify:

1. Under what circumstances a seller is responsible for collecting use taxes;

2. How the seller is expected to determine whether or not the merchandise will be used off the reservation more than one-half of the time in the first 12 months after sale.

Applicability of Use Tax if Merchandise is Used Off the Reservation More Than One-Half of the Time

The Tribe believes that the current standard for determining whether or not use tax applies is impracticable as there are many situations in which it is difficult to determine whether the merchandise is used off-reservation more than one-half of the time. Thus, the Tribe would request that (i) an easier standard be employed or (ii) the SBOE provide further guidance and examples regarding the current standard. Specifically:

1. What type of proof is required? Does the owner need to keep a written log of all off-reservation use?;

2. Who has the burden of proving whether or not the merchandise was used off-reservation more than one-half of the time?;

Reporting and Paying Use Tax

Page 26, paragraph 3, addresses the payment of use tax by "Indian retailers." It is the Tribe's understanding that the status of the retailer has no bearing on the reporting or paying of use taxes. Thus, it is unclear as to why this paragraph references only Indian retailers. The Tribe believes this paragraph should be deleted because, as noted previously, it is inappropriate to require retailers to collect use taxes. However, should the SBOE decide to retain this requirement, it should consider revising this paragraph to include non-Indian retailers.

Documenting Claimed Exempt Sales

Publication 146 requires retailers to obtain, and purchasers to provide, certain documentation showing that the purchaser is an Indian tribe or tribal organization and provides examples of acceptable documents. These examples (see page 11 under the subheading "Retailers" and page 12, under the subheading "Purchasers") should include the Federal Register listing of Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs.

Questions Relating to Residency

Page 13 provides that where a retailer has "evidence or knowledge that an Indian may not live on a reservation," the retailer "should not accept an exemption certificate unless the Indian buyer gives them **other reliable documents** to verify residence on a reservation." The Tribe cannot think of what type of "other reliable documents" would be acceptable as it is very difficult to verify whether a given address is located on an Indian reservation. Would the purchaser be required to obtain a resolution or letter from the tribe? The SBOE should give consideration to providing additional guidance as to what constitutes a "reliable document."

Construction Contracts

The area of construction contracts is extremely important to Indian tribes. For most tribes, the potential taxes related to materials used in the construction of on reservation facilities represent a significant concern. In addition, construction contracts represent the most complex and misunderstood area relating to tribal tax exemptions. Given the import and complexity of this area, it is vital that the discussion of construction contracts in Publication 146 be as clear and concise as possible.

Construction Contractor as Retailer

Publication 146 requires that in order for a construction contractor to claim a tax exemption on construction materials, the construction contractor must be a retailer of materials. The construction contractor's ability to obtain a tax exemption on materials has a direct effect on tribes as any taxes paid by the contractor will be passed on to the tribe. Thus, the Tribe requests further clarification on the following:

To qualify as a retailer (and thus eligible for a tax exemption), a "contractor must be in the business of selling materials or other tangible personal property." It is unclear what "in the business of selling materials" means. Is the fact that a contractor holds a seller's permit sufficient or is something more required? The Tribe requests additional guidance be provided in Publication 146 on what constitutes "being "in the business of selling materials."

Publication 146 also requires a contractor to possess a seller's permit. The Tribe is concerned that if it is unusual for construction contractors to possess seller's permits, this requirement may significantly limit a tribe's choice of construction contractors. Is it typical for construction contractors to possess a seller's permit? If not, is it difficult for a construction contractor to obtain a seller's permit? If the answer to these questions is yes, the Tribe requests that the SBOE give consideration to the potential impact this requirement may have on tribes.

Tax-Exempt Sales of Materials Under a Construction Contract

In order to for a contractor to resell materials, in a tax-exempt transaction, to an Indian customer on the performance of a construction contract, the materials must be delivered to the Indian Customer on a reservation. While the Tribe understands this requirement, it does have a number of concerns/questions related to this requirement.

First, the concept of "delivery on a reservation" needs further clarification. For example: If a delivery is made within an easements or right-of-way within the boundaries of a reservation does this constitute delivery on a reservation? What about delivery to fee land within the boundaries of a reservation?

Second, guidance should be provided with respect to who can accept delivery of materials (Publication 146 currently provides no guidance on this issue). In providing such guidance, the Tribe urges the SBOE to explicitly permit the construction contractor to accept delivery on behalf of the tribe. It is very important that the construction contractor be permitted to accept delivery since it is the construction contractor who, in the normal course of business, is routinely on-site. The Tribe also requests the following questions be addressed: Does a tribe need to "appoint" somebody as its agent for delivery? If so, how formal does this appointment need to be (i.e., does the tribe need to prepare a formal written designation of agent)? If delivering the materials to the construction contractor is not permissible, who from the tribe can accept delivery (bearing in mind that the authority should be broad as limiting the authority to, for example, the Tribal Chairman, or the Tribal Council, would be burdensome as such individuals are very busy and often travel a great deal)?

Indian vs. Indian Organization

Throughout Publication 146, the term "Indian" and "Indian Organization" are used interchangeably. In some areas, using the terms in this manner may create ambiguity or confusion. Thus, the Tribe recommends the following revisions to avoid any unintended consequences:

1. Page 12 - "For Indian organizations." The words "by an Indian who lives on a reservation" should be deleted from the last bulleted item on the list. This requirement applies only to Indian tribes or Indian organizations and thus the "living on a reservation" requirement is not applicable.

2. Page 14 – "Transfer of ownership on reservation." the words "or is an Indian organization" should be added to the third bulleted item so that it is clear that this section is not limited to only individuals. In addition, the words "who lives on a reservation" should be deleted from the second "Please note" for the same reason.

3. Page 15, "Permanent improvements to real property." The term "or an Indian organization" should be added to the first bulleted item.

4. Page 16, "Reporting and paying use tax." The term "or Indian organization" should be added to the first paragraph.

5. Page 26, "Reporting and paying use tax." The term "or an Indian organization" should be added to paragraph 1., under "Use tax is due."

The Tribe appreciates the opportunity to submit these comments and looks forward to hearing the SBOE's feedback at the upcoming meeting on August 19th.

Sincerely,

Kathryn A. Ogas

Kathryn A. Ogas
Attorney for the Lytton Rancheria of California

SHERWOOD VALLEY RANCHERIA

July 31, 2009

Mr. Bradley Miller
Tax Policy Division
Board of Equalization
PO Box 942879
Sacramento CA 94279-0044

Dear Mr. Miller:

I am writing to make comments on Publication 146, Sales to American Indians and Sales on Indian Reservations. I have two comments to make.

1. Community Property—items purchased and delivered to the reservation are exempt from California taxation. It should not matter if the Indian purchaser has a non-Indian spouse. The taxation should remain 100% because the item will be used 100% of the time on the Reservation.

2. Statement of Delivery on a Reservation—I am a Notary Public and the form BOE-146-RES is not in compliance with California Notary Requirements. The form must be updated to include the following statement before a notary can sign:

   "I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

   WITNESS my hand and official seal."

   Also who pays for the notary to come to the reservation to verify the sale?

It is my hope the Board of Equalization looks at all comments reasonably and equally. Take in account not all reservations have a notary public nearby as some reservations are in very remote areas.

Thank you for this opportunity to voice my concerns.

Sincerely,

Carmen Ochoa, Notary Public &
Tribal Member of Sherwood Valley Rancheria

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(707) 459-9690 • Fax (707) 459-6936

Redwood Valley Little River Band of Pomo Indians

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July 27, 2009

RECEIVED

JUL 31 2009

AUDIT & INFORMATION

Mr. Bradley Miller
Tax Policy Division
Board of Equalization
P.O. Box 942879
Sacramento, CA 94279-0044

RE: Request for Comments to Publication 146

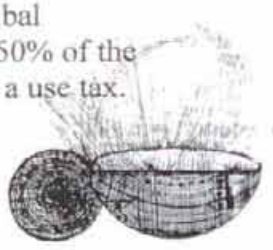
Dear Mr. Miller:

On behalf of the Redwood Valley Rancheria and Redwood Valley Tribal Council, I am writing to highlight some of our concerns regarding Publication 146. Having reviewed Chief Jeffery McGuire's July 6, 2009 letter and Publication 146, the concerns raised by tribal leaders on December 11, 2008 are shared by Redwood Valley Tribe.

Our initial inquiry is whether the Board of Equalization is prepared to provide continuing on-site technical assistance to tribal governments, tribal members, tribal organizations and retailers on the application of Publication 146 both now and once revised. We believe technical assistance is necessary in order to educate the tribal community, ensure compliance and to enhance our relationship with the Board of Equalization.

We have concerns regarding the somewhat global requirement within Publication146 to obtain notarized statements when property is delivered by a seller to an Indian on a reservation. Our tribe does not have a notary public on staff or on our Rancheria. We do not believe any of our neighboring tribes have a notary public available on reservation either. This requirement is difficult to accomplish as none of the common carriers (Federal Express, UPS, USPS) have notary publics accompany them to reservations for deliveries and to our knowledge employees of common carriers are not required to be notary publics. The BOE-146-RES, Statement of Delivery on a Reservation already provides for the seller to state under penalty of perjury that delivery was made on reservation this should be sufficient documentation. Moreover, it does not appear that the California Franchise Tax Board requires any documentation to be notarized. It would be helpful if there was consistency on this issue in order to ease the burden on the taxpayer.

The Redwood Valley Rancheria is a small rancheria and some of our tribal members live on the rancheria but work off the rancheria. If a tribal member purchases a vehicle and has that vehicle delivered to his/her home on the rancheria, that tribal member will not pay the sales tax. However, if the vehicle is used more than 50% of the time off reservation during the first 12 months, the tribal member is subject to a use tax.



As noted by other tribal leaders there is no guidance in Publication 146 as to how this is assessed or what formula, if any, is being used for such a determination. Further, a tribal member may be off reservation on tribal business, or traveling to another reservation for purposes of employment and it is uncertain if that time is counted toward the "more than 50%" time. Many variables can come into play and we believe Publication 146 must be revised to clarify the "more than 50%" rule throughout the Publication.

With respect to purchases made by married couples or domestic partners, we are uncertain how the Board of Equalization defines "buy an item together" and therefore triggers a reduced sales tax and/or use tax. It is unclear whether merely the use of community property funds is enough to trigger the tax or is the tax triggered by the user of the tangible personal property.

Chief McGuire's letter does not highlight the issues raised regarding construction contracts. We would be interested to know what issues were identified at the January 27, 2009 meeting since we were unable to attend. We are interested in these issues but as a small tribe it is often difficult to attend the various meetings throughout the state. If there were minutes taken at the meeting we would appreciate having a copy of them.

We look forward to seeing the revised Publication and trust there will be additional time for comments once the Board of Equalization has shared it with tribal leaders. Thank you for the opportunity to respond to Chief McGuire's letter and we hope to participate at the August 19th meeting. Should you or your staff have any questions regarding this letter, please feel free to contact me.

Thank you!

Sincerely,

Elizabeth Hansen

Elizabeth Hansen, Chairwoman

cc: Tribal Council
Tribal Administrator
Fiscal Department

PECHANGA INDIAN RESERVATION
Temecula Band of Luiseño Mission Indians

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July 31, 2009

Mr. Bradley Miller
Tax Policy Division
Board of Equalization
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Sacramento, CA 94279-0044

HAND DELIVERED

Re: Comments on Publication 146

Dear Mr. Miller:

The Pechanga Band of Luiseño Indians submits the following comments in response to the Board of Equalization's letter dated July 6, 2009, regarding its planned revision of BOE Publication 146. The Pechanga Band appreciates the BOE's efforts to streamline taxation of Indian tribes and tribal citizens; however, we believe that the proposed revision falls short in several areas, both those of great concern to tribal governments, in particular regarding construction contracts, and to tribal members, in particular regarding vehicle use during the first year of ownership.

Construction Contracts

The current Publication 146 should be revised. Specifically, the section that discusses sales tax on materials used in on-reservation construction projects should be supplemented to include specific guidelines as to the manner in which tribes may satisfy BOE requirements. Unlike other states which have a simple, understandable and easy to follow rule that materials used in on-reservation construction projects are exempt from state sales tax, California only deems such sales tax-exempt if certain criteria are met. Publication 146 lists the criteria but does not provide any guidance as to how they can be met. We believe that BOE can revise Publication 146 to address the problems identified below. Regulations 1521 and 1616 should be revised to enable Tribes to more easily exercise their sovereign right to purchase materials for on-reservation construction without paying state sales tax. We recognize, however, that BOE's current effort focuses not on wholesale revision of its regulations, but rather on clarifying existing regulations through Publication 146.

Under BOE regulations, non-Indian contractors building on-reservation projects must comply with two sets of requirements in order for their material purchases – and ultimately the Tribe's purchases – to be tax exempt. First, they must qualify as "retailers" and, in order to do so

must formulate their construction contracts in certain ways (e.g., explicitly provide for the transfer of title to the materials prior to the time the materials are installed and separately state the sales price of materials, exclusive of the charge for installation). Second, they must sell their materials to the tribal owner on the tribe's reservation, with title passing to the tribe on the reservation prior to installation. The tribal owner must issue exemption certificates to its contractors and the contractors must issue resale certificates to their vendors.

While seemingly simple, these requirements are in fact difficult to meet in practice and pose many unnecessary obstacles to tribes seeking to build on their reservations. The difficulty arises because contractors (and subcontractors) building on-reservation projects are required – pursuant to BOE policy – to conduct their work very differently in the context of such projects than they do on typical (i.e., off-reservation) projects in order to enable the owner tribe to take advantage of its exemption from sales tax. Understanding the obstacles imposed by current BOE policy is critical to understanding why and how Publication 146 should be revised.

On a typical construction project materials are supplied to the project through multiple venues. Some materials are provided by the prime contractor, others by subcontractors, and yet others directly by vendors. Materials reach the construction project in myriad ways through hundreds (if not thousands, on a large project) of sales. In order to meet existing requirements and to ensure that sales tax is not paid on such materials, tribes and their contractors, subcontractors, and material vendors are required to change the way they normally operate for each and every one of the hundreds of materials utilized on the project. In essence, they must all ensure that the materials they provide are sold to the tribal owner with title transferring to the tribe on the reservation prior to the materials' installation into the project.

On a typical construction project, i.e., one not conducted on a reservation, the owner contracts with a prime contractor (C) to build a school. C enters into multiple subcontracts with subcontractors (S) who in turn purchase materials from vendors (V). The subcontractor providing electrical work (S-1) has his materials delivered to him on the reservation by his vendor (V-1). Typically, S-1 buys the materials from V-1 and installs them in the project, then bills C for them as part of the cost of the work. C in turn bills the owner. Or S-1 may order the materials on behalf of C, and V-1 may bill C directly. Regardless of the arrangement between the vendor, the subcontractor, and the contractor, in a typical construction project S-1 does not have to sell materials to anyone anywhere along the way nor does title to the materials have to transfer to any one entity at any particular given point in time. In a typical construction project the subcontractor simply orders his materials and installs them, and bills for them at the end.

But current BOE policy requires that all parties involved in supplying and utilizing materials used on a tribally-owned on-reservation construction project act differently. Because existing regulations focus on the moment in time at which title to the materials transfers to the tribal owner, and require that the transfer occur within Indian country and prior to the materials' installation into the project, tribes are required to put into place a system pursuant to which they take title to – using our example from above – the electrical materials *before* S-1 installs them into the project. Thus, S-1 must craft his contract with V-1 such that S-1 takes title to the materials before installing them, and in turn must turn around and sell them to T, with T taking

title to them on the reservation, before S-1 installs them. Furthermore, S-1 must take appropriate action, in the middle of his work, to ensure that title passes to the tribe as required.

Now consider S-2, who provides the cement work under subcontract to C. S-2 procures the cement from V-2 and oversees the pour. S-2 must purchase the cement from V-2 with title passing from V-2 to S-2 prior to the pour, then turn around and pass title to the Tribe on the reservation prior to the pour. And S-2 must do all of this while creating a paper trail that evidences that it has all been done as required. Cement must be poured quickly, within as short a time as possible, and yet S-2 must hold up the tens of waiting cement trucks while he fills out paperwork for each load of cement that arrives at the work site, or while he reviews the paperwork for all of his trucks to be sure that the required contract language is contained therein.

In short, in order to meet existing BOE requirements the tribal owner must ensure that hundreds (if not thousands) of individual materials sales be executed in conformity with the BOE's regulations and that each subcontract and sub-subcontract and bill of lading and other such documents be properly worded. These requirements pose significant hurdles and leave much room for error both initially, in drawing up the multitude of contracts and purchase orders and bills of lading and other such documents that are involved in a large-scale construction project, and in the performance stage.

Publication 146 lists the requirements tribes must meet for construction-related material purchases to be free of sales tax (*see* pp. 20, 21) but does not provide any guidance as to how a tribal owner should go about meeting those requirements. Such guidance is critical in connection with large-scale construction projects that include multiple subcontractors, sub-subcontractors and vendors, particularly in light of the fact that there is so much room for error along the way. In order to enable tribes to meet BOE requirements and take advantage of their status as non-tax-paying entities for on-reservation projects, the BOE must provide far greater detail in Publication 146 than is currently provided. The publication should outline specific procedures that tribes and their contractors, subcontractors and vendors may follow, suggest contract language that the BOE deems acceptable, and provide templates for acceptable shipping and other documents. While there are many theoretical ways to achieve compliance with BOE requirements, experience shows that tribes seeking to do so often run afoul of BOE's understanding of how contracts must be written and projects carried out.

Streamlining the way in which California tribes structure their on-reservation construction projects to comply with State sales tax regulations would clearly benefit tribes by providing them with a roadmap for meeting regulatory requirements. It would also benefit the State by creating a template that, once available, would likely be utilized by many tribes. BOE auditors seeking to ascertain compliance with regulatory requirements would thus have an easier time determining whether compliance has been achieved.

Some of the specific issues we believe Publication 146 should address in detail are as follows:

- Page 20 requires that construction contracts include certain language, but does not provide any examples of acceptable language. Some examples should be provided.

- Is it sufficient for the prime contract to include the contract language discussed at page 20, or must all subcontracts and sub-subcontracts and agreements with vendors include that language as well?
- How must the transfer of title to materials to the tribal owner be achieved in situations in which subcontractors order materials from vendors but have no direct contractual relationship with the owner?
- What types of legal arrangements with vendors and subcontractors are required to have title to materials supplied by such vendors and/or subcontractors pass from them to the tribe on the reservation?
- Must tribes pay each vendor/subcontractor that sells materials to the tribe directly, or can payment be channeled through the prime contractor?
- Must shipping documents be worded in any particular manner, and if so, how, in order to ensure that title to materials transfers to the tribe on the reservation and prior to installation?
- May the prime contract provide that all materials purchased for use in the project be sold to the prime contractor and from him to the tribe, upon the materials' reaching the reservation? If so, is such a provision sufficient to satisfy BOE requirements?

These are only some of the issues that Publication 146 should address. In general, the Publication should include detailed guidelines regarding how BOE regulations and policies may be implemented in the context of large-scale construction contracts. We recommend that the BOE consider providing sample contract language, templates for shipping and other documents, and, ideally, a set of procedures that tribes and their contractors, subcontractors, sub-subcontractors and vendors could follow. Without such guidance there is much room for error.

Purchases by Individual Tribal Members

The Pechanga Band respectfully requests that the BOE reconsider the requirement (not found in statutory or case law) that personal property be used more than half of the time within Indian country during the first 12 months of ownership to qualify for exemption from sales and use tax. This requirement appears to be a unique invention of the State of California. Other states, including Washington, only require that the item be partially used in Indian Country after purchase by an Indian or tribe within Indian Country. Additionally, in the State of Washington, the purchase of a vehicle or other property by an Indian or tribe creates a presumption that the property will be used at least partially in Indian country. Such an approach appears more reasonable due to the difficulty of documenting location of use. We realize that revisiting Regulation 1616 is beyond the scope of the proposed revision of Regulation 146 and the invitation to comment on it, but we strongly encourage the BOE to consider amending that provision of the regulation.

In the absence of a revision of Reg. 1616, we would request that Publication 146 provide sufficient and realistic examples of what constitutes "acceptable documentation" to prove use within Indian country. Pechanga members have been audited with regard to vehicles they no longer own and asked for unrealistic proof of where the vehicle was driven. While the regulation is not new, it appears that such audits are indeed new and are imposing a hardship on Indian

vehicle purchasers who were accustomed to the state's former approach that location of use was unmeasurable and therefore there would be no such audit. We believe that the BOE has set up a standard which tribal members are unlikely to be able to meet even if they in fact did use the vehicle on their reservation more than off during the first year of ownership. At a minimum, Publication 146 should address what realistic steps a tribal member should take at and following the time of purchase so as to fairly warn them that such an audit may come up to eight years later, and to prepare them for such an eventuality.

We appreciate the opportunity to comment on the proposed revision to Publication 146 and thank you in advance for your anticipated attention to these comments.

Sincerely,

Mark Macarro
Chairman

Pauma Band of Mission Indians

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Established 1893

July 31, 2009

Bradley Miller
Tax Policy Division
Board of Equalization
P.O. Box 942879
Sacramento, CA 94279-0044

Re: Publication 146, Tax Tips for Sales to American Indians and Sales on Indian Reservations.

Dear Mr. Miller:

On behalf of the Pauma Band of Mission Indians, I am submitting initial comments regarding the California State Board of Equalization ("BOE") Publication 146, Tax Tips for Sales to American Indians and Sales on Indian Reservations (the "Guidelines"). For ease of reference, I have set forth our comments section by section.

1. Introduction.

First and foremost, the Pauma Band takes this opportunity to vehemently oppose any attempt by the State of California to tax on-reservation activities of tribes or tribal members, absent express authorization by Congress. This is consistent with the holding in the case of Bryan v. Itasca County, which found that Public Law 83-280 ("P.L. 280") did not confer authority of the state to tax the personal property of reservation Indians. Bryan v. Itasca County, 426 U.S. 373 (1976). As set forth below, we also oppose any attempt by BOE to dictate to our tribe and our tribal members any rules or regulations

that would apply within the exterior boundaries of our reservation. As such, the Pauma Band requests BOE to include further information regarding relevant federal Indian Law, including P.L. 280 in its Guidelines.

2. Key Definitions.

The Guidelines provide a definition of the difference between sales tax and use tax and when such taxes should be assessed. A better explanation should be provided in the Guidelines regarding the difference between such taxes since there is no clear indication as to when such taxes should be assessed and paid by certain parties. Furthermore, BOE should take a closer look as to what terminology is used throughout the Guidelines to ensure further definitions are not needed.

3. Documenting Claimed Exempt Sales.

The Guidelines sets forth required documentation for claimed exempt sales to Indians. Such Guidelines indicate that an Indian purchaser carry a tribal ID card, a letter from a Tribal Council, or a letter from the U.S. Department of the Interior to prove he/she is an Indian. Furthermore, the Guidelines suggest that an exemption certificate from the Indian purchaser stating that the Indian purchaser resides on the reservation could also suffice as documentary evidence. However, when the exemption certificate is addressed later in the Guidelines with respect to what the retailer should obtain from the Indian purchaser, it appears that an Indian purchaser would have to give the retailer documentary evidence proving that such purchaser is an Indian **and** an exemption certificate. The Guidelines are contradictory in that it indicates that the Indian purchaser may provide one of the required documents, but also indicates the retailer should obtain additional documentary evidence.

The Pauma Band opposes BOE's request for an Indian purchaser to provide any type of documentary evidence as it is overly burdensome on the Indian purchaser since the burden should fall on the retailer to show that transfership of ownership and delivery of the merchandise took place on the reservation. Moreover, the Pauma Band is opposed to BOE's attempt to dictate what type of documentary evidence is required of an Indian to prove his/her ancestry.

In addition, BOE provided a model exemption certificate in the Guidelines, which is found on page 37. In the Guidelines, BOE indicates that a Notary Public must sign the document when delivery is made on the Reservation. Such a requirement, if the retailers were to use such a model, infringes on tribal sovereignty. There may be some tribes that do not have a notary public and for BOE to dictate that one must be had in order to complete delivery to the reservation is outrageous. An easier option would be for the retailer to submit its own record to BOE stating that he/she delivered merchandise to an Indian on the reservation, and if BOE would like further investigate the transaction, it is certainly free to seek further information from the tribe or its tribal members.

Furthermore, the Guidelines set forth essential elements regarding what should be contained in the exemption certificate that would be considered the minimum amount of information to help support claimed exempt sales. BOE provided a model certificate for retailers to utilize; however, before providing such a model exemption certificate in the Guidelines, BOE should ensure that the required elements set forth in the Guidelines are accurately reflected in the model certificate that it provides. Lastly, if such a certificate is to be signed on the reservation by the tribe or its members, then it is up to the tribe to decide the contents of such a certificate.

4. Sales to Indians: Retailers Located Outside Indian Reservations.

Publication 146 provides guidelines regarding sales and use tax as it applies to sales to Indians by an off-reservation retailer. The guidelines state that "[u]se tax is owed by the Indian purchaser on the transaction…if the Indian purchaser who lives on a reservation…[u]ses the item off the reservation more than one-half of the time in the first 12 months after the sale." This would require an Indian purchaser to keep a daily record of off-reservation use, which is an onerous burden on such Indian purchaser. Not only that, the Indian purchaser would have to keep such records for up to eight (8) years. Again, the Pauma Band is opposed to BOE's attempt to dictate what type of documentary evidence is required of an Indian to prove that his/her use of an item took place on or off the reservation.

In addition, the guidelines indicate that when an off-reservation retailer makes a sale to both members of a married couple or registered domestic partners, and only one of the couple is an Indian who resides on a reservation, than sales tax would apply to one-half interest in the property attributable to the non-Indian spouse or partner. This indicates that the couples or partners would have to keep separate accounts so that they could prove whose funds were used to purchase the property. Further, the requirement again requires the Indian spouse or partner to keep records of off-reservation use of such property during the first twelve (12) months following delivery in order to prove that they are not subject to use tax. Keeping such records an onerous burden on the purchasers, and frankly, if such activities are occurring within the exterior boundaries of the Tribe, it should be left to the tribe to determine what activities should be required of its members.

5. Construction Contracts

The Pauma Band agrees that the guidelines do not provide sufficient guidance regarding the proper application of tax to construction contracts performed on Indian land. Further guidance is needed as to why sales tax is not applicable to non-Indian contracts, yet use tax is not.

6. Sales by Retailers Located on Indian Reservations.

The Pauma Band takes issue with the Guidelines' notation that a tribal sales license is not a legal substitute for a seller's permit or a certificate of registration to collect use tax. As a sovereign nation, the Tribe has the inherent right to enact their own tribal laws to regulate activities regarding sales within the exterior boundaries of their reservation. Furthermore, the power to tax is a fundamental attribute of sovereignty that has been retained by Indian Tribes; therefore, Indian tribes have the inherent right to tax its tribal members.

Again, as set forth above in Section 4, the Pauma Band is opposed to any requirement that an Indian purchaser must show that property is used on the reservation more than on the reservation within the first twelve (12) months following delivery. Since the Indian purchaser resides on the reservation and such property was delivered to the reservation, the Pauma Band is opposed to any requirement that such purchaser provide any documentation regarding the use of such property. It is overly burdensome and since the State of California has no jurisdiction to tax on-reservation activities of tribes or tribal members, absent express authorization by Congress, such a requirement infringes upon tribal self government.

7. Recommendations.

In conclusion, the Pauma Band requests that BOE amends the proposed Guidelines, taking into consideration the basic concepts of federal Indian law. In order to alleviate some of the issues that surround the issuance and implementation of the Guidelines, the Pauma Band requests that BOE consider entering into tax agreements with tribes. Pursuant to various state and federal laws, a state government may negotiate an agreement with individual tribes concerning taxation. Many states and tribes have opted to pursue this avenue and such efforts have proven to be successful because the terms set forth in such agreements have been negotiated and agreed to by both sovereign governments. As such, tax agreements are a practical way to resolve tax issues and to prevent future litigation between the parties. Lastly, as sovereign nations, further meetings should be held between the state and the tribes to discuss the content of the Guidelines. In fact, when making any further changes to the Guidelines, the Tribes should be allowed to have their selected representative assist in such an endeavor.

Thank you in advance for taking our comments into consideration.

Sincerely,

Chris Devers

Christobal Devers, Chairman
Pauma Band of Mission Indians

/s/
Juanita Majel, Tribal Legislative Council
Pauma Band of Mission Indians

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July 31, 2009

Mr. Bradley Miller
Tax Policy Division
Board of Equalization
P.O. Box 942879
Sacramento, CA 94279-0044

Re: Comments Regarding Revisions to Publication 146, Sales *to American Indians and Sales on Indian Reservations*

Dear Mr. Miller,

The Karuk Tribe Housing Authority (KTHA) is an Indian housing authority formed under the law of the Karuk Tribe. In accordance with the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), the Karuk Tribe designated the KTHA to serve as the Tribally Designated Housing Entity (TDHE) for the Tribe. As the TDHE, the KTHA constructs affordable housing projects and maintains existing housing for low income Indian families living within the Tribe's service area. The KTHA activities are funded primarily through the Tribe's NAHSDA block grant funding received from the Department of Housing and Urban Development (HUD). As required by HUD, the KTHA's housing activities are set forth in its Tribal Housing Plan approved by HUD and conducted in accordance with NAHSDA and applicable HUD regulations.

BOE Publication 146, *Sales to American Indians and Sales on Indian Reservations*, provides guidance regarding the application of state taxes and certain fees to sales occurring on Indian reservations. In a letter to California tribal leaders and interested parties, dated July 6, 2006, the BOE indicated that it is in the process of revising Publication 146 and extended an invitation to tribes to participate in this revision process. Based on a December 2008 meeting between the State Controller's office and tribal leaders, the BOE identified the six "main questions" to address in the revision of Publication 146.

We appreciate the attention the BOE is giving to Publication 146 and the effort the BOE is making to work with Indian tribes located within the state. The invitation to tribes and interested parties to submit comments represents a constructive start to the consultation process, and we look forward to continuing a dialogue with the BOE as this process continues. Below are the KTHA's comments regarding the issues having the

greatest affect on our affordable housing activities and our low income Indian family tenants.

- **The BOE should provide a summary of its evaluation of the submitted comments prior to the August 19 meeting, invite additional comments following the meeting, and conduct additional meetings as warranted.**

The BOE has set a firm deadline of July 31, 2009 for tribes and other interested parties to submit written comments, in order to allow the BOE to evaluate all written comments prior to a meeting scheduled for August 19, 2009. We appreciate the invitation to provide comments on the issues raised in the BOE's July 6 letter; however, we request that the BOE provide a more meaningful consultation process and engage tribes, tribal organizations, and other interested parties in more thorough dialogue about these complex issues. To facilitate a productive meeting, we encourage that prior to the meeting BOE provide tribes and commenting parties with a written summary of its evaluation of the issues raised in the comments. Based on the January 27 workshop, we expect that the August meeting will be well attended and provide the opportunity for a constructive exchange of information and ideas. However, there are a number of issues to work through, some of which were not addressed in the July 6 letter, and it would be unrealistic to believe that one round of comments and one meeting will be sufficient to adequately work through the full range of issues. We therefore urge the BOE to entertain additional written comments and schedule additional meetings as warranted.

- **We agree that Publication 146 does not provide sufficient information regarding federal law, and we urge the BOE to include a summary of the federal law that sets the parameters of the State's authority to tax sales within Indian country.**

In the July 6 letter, the BOE recognizes that Publication 146 does not provide sufficient information regarding federal law, and cites Public Law 280. We agree with the need for additional explanation of federal law, but it is not clear why BOE's notice focuses on Public Law 280, which does not grant the State taxing authority over on-reservation activities.[1] Rather than focusing on Public Law 280, we suggest that the publication include a summary of the well established federal case law setting out the parameters of the State's authority.

The Supreme Court has found a "deeply rooted" policy in our Nation's history of "leaving Indians free from state jurisdiction and control." *See, Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114, 123 (1985) citing *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 168 (1973). The Supreme Court has addressed the limitations on state power to tax in Indian country in a number of cases. Under the Supreme Court's analysis of Indians' immunity from state taxation, "the 'who' and the 'where' of the challenged tax have significant consequences." *Wagnon v. Prairie*

[1] *Bryan v. Itasca County* makes clear that P.L. 280 jurisdiction does not provide states with authority to tax tribal members in Indian Country. 426 U.S. 373 (1976).

Band Potawatomi Nation, 546 U.S. 95, 101 (2005). When determining whether a state tax is applied to a sales transaction within Indian country the courts seek first to determine upon whom the tax falls (the "incidence of the tax"), which is distinct from who bears the economic burden of the tax. To determine the legal incidence of the tax courts look at the language of the tax statutes at issue and prior construction of the statutes. *See, Coeur D'Alene Tribe v. Hammond*, 384 F. 3d 674, 681-682 (9th 2004) (the question is one of federal law, the stated intent of state legislature is not dispositive as to where the legal incidence falls.) Additionally, lower courts seeking to determine the legal incidence of the taxation should look to the "fair interpretation of the taxing status as written and applied." *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1189 (2008) quoting *Board of Equalization v. Chemehuevi Tribe*, 474 U.S. 9, 11 (1985). Next the courts look to the location of the activity, to determine if it occurred within Indian Country.

State attempts to tax Indians or tribes for activities occurring within Indian country are per se invalid. *Yee*, 528 F. 3d at 1188-1189. "[W]hen a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, we have employed, instead of a balancing inquiry, 'a more categorical approach: '[A]bsent cession of jurisdiction or other federal statutes permitting it,' . . . a State is without power to tax reservation lands and reservation Indians.'" *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 458 (1995) (quoting County of *Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 258 (1992).

If the courts find that the incidence of the tax falls on a non-Indian, the court will apply a balancing test established by the Supreme Court to determine if the tax is preempted by federal law. *See, White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980). The Supreme Court cautions that this test calls for careful attention to the factual setting, requiring "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." *Bracker* at 448 US 145. The Supreme Court has identified a number of factors to be considered when determining whether a state tax borne by non-Indians is preempted, including: "the degree of federal regulation involved, the respective governmental interests of the tribes and states (both regulatory and revenue raising), and the provision of tribal or state services to the party the state seeks to tax." See *Salt River Pima-Maricopa Indian Community v. Arizona*, 50 F. 3d 734, 736 (9th Cir. 1995)

A basic explanation of these federal limitations on the State's taxing authority regarding sales in Indian country will help inform the general public as well as BOE staff of the need for Publication 146 and the grounds for these special rules. It will also assist retailers, contractors, and Indian purchasers apply the guidance and comply with state regulations.

► **Rather than require Indian purchasers to use a time and material contract to demonstrate that a contractor is a retailer, Publication 146 should be tailored to the two requirements set forth in the State Regulation 1521(b)(2)(A)(2) and clearly state the contract provisions that will satisfy these two requirements.**

The BOE recognizes that Publication 146 does not provide sufficient guidance regarding the proper application of the sales tax to construction contracts performed on Indian land, and the July 6 letter indicates that additional information provided in the January 27 meeting will be added to the publication. While Publication 146 and the January 27, 2009 guidance help explain the interrelationship of several state tax regulations, they are not entirely consistent with each other or the state regulations. Significantly, in the January 27 meeting, the BOE provided guidance that establishes new contractual requirements that exceed those set forth in the regulations. The guidance also conflicts with federal regulations governing many construction projects within Indian Country.

Regulation 1521 sets out two contractual requirements necessary to treat to treat a construction contractor as the retailer of construction materials. (1) the contract must explicitly provide for the transfer of title to the materials prior to the time the materials are installed; and (2) the contract must separately state the sale price of the materials, exclusive of the charge for installation. The January 27, 2009 guidance states that in addition to these two contractual requirements, the construction contract must be a time and material contract. This additional requirement should be removed because it deviates from and exceeds the requirements set forth in Regulation 1521 and is overly burdensome. Furthermore, this requirement conflicts with federal regulations governing construction contracts for programs implemented by tribes and tribal entities, including but not limited to the regulations governing the use of NAHASDA funds to construct housing projects for low income Indians.

- January 27, 2009 Guidance Exceeds the Regulatory Requirements

State regulations apply state sales taxes to the sale of construction materials related to a construction contract even when the materials are delivered on a reservation and permanently attached to real estate on a reservation. (Publication 146, p. 20). This is because contractors are generally treated as the consumer of construction materials which they furnish and install. Regulation 1521(b)(2)(A)(1).[2] However, the regulations provide an exemption to this general rule. A contractor will be deemed a retailer, "[i]f the contract explicitly provides for the transfer of title to the materials prior to the time the materials are installed, and separately states the sale price of the materials, exclusive of the charge for installation. . ." Regulation 1521(b)(2)(A)(2).

[2] On the other hand, state regulation generally treats contractors as the retailers of fixtures, machinery, and equipment that they furnish and install. Regulation 1521(b) (2) (B) (1) and 1521(b)(2)(C)(1).

Publication 146 explains that when a construction contractor qualifies as a retailer of materials, the contractor may purchase materials from its vendor for resale to an Indian customer in the performance of a construction contract on an Indian reservation. Publication 146, p. 20. If the contractor is the retailer, the legal incidence of the tax shifts from the contractor to the Indian purchaser, and the sales tax is rendered per se invalid. *See, Yee*, 528 F. 3d at 1189-1190. In accordance with this categorical rule, Publication 146 recognizes that if the contractor is a retailer, the resale of construction materials will be treated as a tax-exempt transaction and the publication describes the requirements that must be met to shift the incidence of the tax and to show that the transaction occurs within Indian County.

The January 27, 2009 guidance strays from the regulations by stating that contracts that meet the two regulatory requirements in Regulation 1521(b)(2)(A)(2) are commonly known as time and material contracts. *See*, January 27, 2009 guidance, p. 2. Rather than focusing on the substance of the regulations and the duties of the parties under the contract, this guidance turns BOE's attention to superficial distinctions between the definitions of contract forms. The distinction between a time and material contract and a lump sum contract is only applicable to the establishment of a rebuttable presumption which is described in a separate paragraph from the provision containing the contract requirements. The fact that this presumption paragraph clarifies that it only applies in the case of a time and material contract indicates that other types of construction contracts may meet the basic requirements to establish the contractor as a retailer – although without that presumption.

- Issues Raising Potential Preemption Challenges

If the BOE does in fact require that a time and material contract must be used to demonstrate that a contractor is a retailer, the state tax would still likely be preempted under the Supreme Court's balancing test if the contract is to construct a project using federal funds such as a NAHASDA block grant. We understand that the BOE is likely unfamiliar with the federal regulations governing the use of NAHSDA funds;[3] however, as discussed below, these federal regulations would significantly affect the application of the balancing test and likely alter the outcome.

In situations where a state asserts authority over the conduct of non-Indians engaging in activity on the reservation, the courts turn the "Bracker" balancing test. *Yee*, 528 F. 3d at 1190. The court in *Yee* applied the balancing test to the construction of a casino project and found that the state's sales tax was not preempted. *Id.* at 1193. However, as the Court has emphasized, this is fact specific inquiry that makes "a particularized inquiry into the nature of the state, federal, and tribal interests at stake. . ." *Id.* at 1190 citing *Bracker*, 448 US at 145. The application of this balancing test to a tax imposed on a contractor building a housing project for an Indian tribe or TDHE on Indian land, and using NAHASDA funding, will give rise to a very different factual scenario

[3] Similar federal law applies to funds received through other federal programs.

from that considered in the *Yee* case. The use of NAHASDA funds is highly regulated by the federal government. Indian tribes and TDHEs using block grant funds provided under NAHASDA must comply with the Department of Housing and Urban Development's procurement regulations. 24 C.F.R. § 1000.26. These regulations provide that time and material type contracts may only be used "(i) after a determination that no other contract is suitable, and (ii) if the contract includes a ceiling price that the contractor exceeds at its own risk." 24 C.F.R. § 85.36(b)(10). In addition to regulating procurement activities, HUD regulates program eligibility, rents, management and maintenance of housing assisted with NAHASDA funds. Sections 102 and 103 of NAHASDA also require that a tribe prepare detailed one and five year housing plans, which must be approved by HUD.

Moreover, whereas the court in *Yee* focused on the impression that a commercial enterprise was seeking to manipulate tax policy to gain a competitive advantage over other businesses, in the case of a tribal housing authority, a sales tax is taken from federal funds intended to provide affordable housing for low income Indians. Not only does the economic burden of the sales tax fall on the tribal entity, it affects a federal program and conflicts with federal regulations. Under such circumstances, the imposition of unwarranted administrative requirements, may give the appearance that the state has manipulated application of its tax regulations to acquire a percentage of federal program funding provided for the benefit of low income Indian families.

- Impracticality of the Time and Material Requirement

During the January 27 workshop, it quickly became apparent that there is no clear distinction between a "time and material" and a "lump sum" contract. The definitions are vague and they do not address the wide range of construction contracts that are regularly used in marketplace. In particular, the guidance does state whether common contract provisions intended to protect the interests of the parties will preclude the contractor from being treated as a retailer of materials. As discussed above, federal regulations prohibit the use of time and material contracts except when no other contract will work, and even if such contracts are utilized, the regulations require that the contract cap the total cost. As a matter of prudent business, many owners seek to protect their interests by negotiating a fixed fee or a Guaranteed Maximum Price (GMP), and by negotiating terms allocating the risk that prices of materials, equipment, and fixtures may rise or fall by the time of the actual purchase. To the extent such provisions do not conflict with the two contract provisions required in Regulation 1521(b)(2)(A)(2), Indian purchasers should not be denied the benefit of regulations available to parties with projects located off reservation.

At the January 27 workshop, BOE staff were not able to advise as to whether such basic provisions would disqualify a contract and cause the contractor to be treated as a purchaser. Acknowledging that the distinction between a time and material contract and a lump sum contract is blurry, tribes were advised to seek written advice from BOE regarding each contract in accordance BOE regulations. As the BOE is well aware, it

may take quite some time to secure such written advice, especially if all tribal construction contracts are submitted to the BOE for prior review. This is clearly not a workable solution for the BOE, Indian purchasers, or contractors.

We request that Publication 146 be revised to clearly explain the provisions that must be included in a construction contract in order to satisfy Regulation 1521(b)(2)(A)(2) and that no mandate requiring use of a time and material contract be added to the publication. Rather than focusing on the form of contract, we suggest that the guidance state that the contract must set forth the cost of the construction materials, exclusive of the cost of installation, and require that title to materials must pass on Indian lands prior to installation of the materials. The publication should further clarify that provisions, such as cap on the total cost of the contract or a previously established material price, will not affect the status of the contractor as a retailer, as long as the cost of the materials is not lumped together with any installation costs and that materials are in fact purchased separately from the purchase of services. If the responsibilities of the parties are clear and the construction contract includes the two statements required under Regulation 1521(b)(2)(A)(2), the BOE should not deny the retail status of the contractor.

- **If the contractor is the retailer of the materials, Publication 146 should clarify that the transaction between the contractor and the Indian purchaser will establish the place of sale, which is presumed to be the jobsite.**

If the contractor is deemed to be acting as a retailer of construction materials, the place of sale of the transaction between the vendor and the contractor should have no bearing on the place of sale of the transaction between the contractor and the Indian purchaser. For the purpose of determining whether the sale of materials by the contractor is exempt from state sales taxes, Publication 146 should focus solely on the location of the transaction between the contractor and the Indian purchaser. State regulations provide that the jobsite is regarded the place of sale of fixtures and the place of use of materials furnished and installed by a contractor. Regulation 1826. Accordingly the application of local taxes is determined by the taxes in the district in which the jobsite is located. Similarly, if the contractor is the retailer of the materials, the location of the sale should be the on-reservation jobsite, in which case the state tax is not applicable to an Indian purchaser. We request that Publication 146 be revised to reflect that the contractor's place of business is presumed to be the jobsite and, therefore, that the place of sale for the contractor's sale of materials is presumed to be the jobsite.

- **Section 2 of Publication 146 establishes excessively burdensome requirements to document the delivery of merchandise to an Indian purchaser on a reservation, and should be revised to conform to regulations applicable to documenting out-of-state sales.**

Currently Publication 146 states that delivery to a reservation must be made either by the retailer's vehicle or by common carrier when the contract of sale meets certain requirements and the goods are in fact delivered to the Indian reservation.

Publication 146, pp. 10-11. The publication further suggests that a retailer must meet excessively burdensome documentation requirements to establish that the place of sale was in fact made on Indian lands.[4] The Statement of Delivery on a Reservation form (BOE-146-RES (5-08)), which is attached to Publication 146, requires that for each delivery the delivery vehicle must be described, the seller must be identified, and the form must be signed by the delivery person, the purchaser, and a Notary Public who must also witness the delivery.[5] Although the January 27, 2009 guidance states that the form is not required, its inclusion gives the misimpression that it is required, and BOE staff may in fact treat it as such. The State regulation setting out the rules applicable to out-of-state sales does not require delivery within a vendor's vehicle and it does not require any particular documentation of delivery. This regulation only requires that the property sold be delivered by the retailer or his or her agent to an out-of-state destination, or that it be delivered to a common carrier for delivery to an out-of-state destination. *See* Transaction (Sales) and Use Tax Regulation 1822(a). It is improper to suggest that greater documentation is required to show delivery to an Indian reservation than to an out-of-state location. Publication 146 should state that delivery to an Indian reservation may be supported by invoices, bills of lading, delivery receipt, or freight invoices, and that in the absence of such documentation, such delivery may be supported by the BOE form, which should be revised to just require the name and signature of the retailer and the Indian purchaser.

- **Section 4 of Publication 146 should be revised to state that documentation of Certificate of Exemption can be stated in the text of a construction contract.**

Section 4 of Publication 146 states that a contractor must obtain an exemption certificate from its Indian purchaser in order to demonstrate that a sale of materials is tax exempt. Publication 146, p. 21. Section 2 of the publication strongly suggests that such documentation should be maintained by a retailer. Publication 146, p. 11. The publication provides a very clear and helpful description of what documentation will qualify as an exemption certificate. At the January 27 meeting, BOE staff stated that such documentation would avoid complications for the contractors if they are audited, but that a separate document is not required. The BOE staff agreed that a provision in the construction contract containing the exemption certificate language would serve the same purpose. We suggest that this clarification be included in Publication 146.

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[4] Similar requirements are applied to the sale of construction materials by a contractor acting as a retailer. As discussed above, we do not believe the transaction between the vendor and the contractor can establish the place of sale between the contractor and the Indian purchaser.

[5] During the January 27, 2009 meeting BOE staff indicated that, for the sale of materials, BOE would want to see either the form or a detailed manifest and logs to show delivery on the reservation.

- **Even when there is no sales tax, Publication 146 states that an Indian purchaser must pay a use tax if a vehicle or merchandise, purchased on the reservation, is used more than half of the time off reservation. This requirement conflicts with federal law and should be removed from Publication 146.**

"The Supreme Court has held that states may not impose a motor vehicle excise tax on vehicles owned by tribal members residing in Indian country, regardless of whether the taxes were designated personal property taxes,[6] taxes levied for the privilege of using the vehicle in the state,[7] excise taxes only when the vehicle is sold,[8] or registration fees required for state resident using state roads.[9]" Felix Cohen Handbook of Federal Indian Law, §8.03[1][b] (2005 ed.). Although the Court has suggested that a tax narrowly tailored to the amount of off-reservation use might be valid, if the state tax is not tailored to the actual amount of off-reservation activity, the tax is invalid. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 163 -164 (1980). A tax that operates as a tax on the ownership of a motor vehicle will be struck down because ownership of a motor vehicle is the sort of on-reservation activity that a state is not permitted to tax without express Congressional authorization. *United States ex rel. Cheyenne River Sioux Tribe v. South Dakota*, 105 F. 3d 1552, 1558 (8th Cir. 1997), citing *Oklahoma Tax Commission v. Sac & Fox Nation*, 508 U.S. 127. Like the motor vehicle taxes struck down in South Dakota and Washington, the California use tax on vehicles and other merchandise is based on the value of the item not the amount of off-reservation use and the tax operates as a tax upon on-reservation ownership. Thus application of these taxes to vehicles and other items owned by Indians, tribes, or tribal entities residing or located on reservation is impermissible and such provisions should be removed from Publication 146.

We appreciate your invitation to comment on the revisions to Publication 146, and we look forward to continuing to work with the BOE through the completion of the revision process.

Sincerely,

Sami Jo Difuntorum
Executive Director

cc: Tim Seward, Hobbs, Straus, Dean & Walker, LLP.

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[6] *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 480-481 (1976).
[7] *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 162-163 (1980).
[8] *Oklahoma Tax Commission v. Sac & Fox Nation*, 508 U.S. 114, 126-127 (1993).
[9] *Id.* at 128.

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July 30, 2009

Jeffrey L. McGuire, Chief
Tax Policy Division
Sales and Use Tax Department

Dear Sir:

I don't believe it is appropriate for the State of California to presume that they have the authority to determine how sales or use taxes apply to on reservation sales or purchases. The Tribe is a Sovereign and has the ability to make this determination.

The State of California does not have the authority under the United States Constitution to require a federally recognized Indian Tribe to act without an MOU, MOA, Tribal Resolution, or a Treaty. The State requiring the Tribe to Collect Taxes "for the State" would seem additionally to require some sort of compensation from the State. This would certainly be a start at "taxation without representation" The State of California may represent "constituents" within the Tribe, but they certainly do not represent the Tribe itself.

The document is vague and ambiguous in places and appears to give the impression that the Tribe should be "frightened" into creating more Tribal policies that in essence are the State requiring the Tribe to fulfill duties of the State, again without compensation to the Tribe. We do not have a Treaty with the State of California that I am aware of. Where does the Legal Authority the State of California presumes to have come from that gives them the authority to come on to Indian Lands and Audit the Tribe for these purposes? Certainly the United States Constitution supersedes any laws the State of California would presume to enforce upon a federally recognized Tribe. The State of California already possesses the mechanism to collect these taxes from individuals and businesses that are required to pay them. It is not the duty of the Tribe to work for the State of California.

I don't believe that this is a fair burden and would not submit to what is in essence an unreasonable search and seizure when a State Agency would presume to have the authority to come on to Indian Land, audit the tribe and require them to maintain records of each sale that prove a purchaser to be an "Indian". The Tribe does not have the capacity or the requirement that we maintain records to fulfill the desires of the State of California, again without compensation, agreement or Treaty. The Karuk Tribe is a Sovereign entity. If the State would like to entertain the concept of entering into an agreement with the Tribe contact my office at your nearest convenience.

Sincerely,

Arch Super, Chairman

Karuk Tribe

cc: Robert A. Goodwin, Self-Governance Coordinator, Karuk Tribe

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July 30, 2009

Bradley Miller
Tax Policy Division
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Re: Comments on BOE Publication 146

Dear Mr. Miller:

The following comments are submitted on behalf of the Morongo Band of Mission Indians, a sovereign California Indian tribe (hereinafter "Morongo"), in response to the July 6, 2009 letter from Jeffrey L. McGuire, Chief of the Tax Policy Division, Sales and Use Tax Department of the California Board of Equalization ("BOE"), requesting tribal comments on BOE Publication 146 entitled "Tax Tips for Sales to American Indians and Sales on Indian Reservations." Our law firm serves as General Counsel to Morongo.

Morongo appreciates the initiative taken by the Board of Equalization ("BOE") to provide information regarding how state taxes apply to the various kinds of sales that occur on Indian reservations in the State of California and to sales made to Indians outside reservations. Providing accurate and useful information regarding issues that arise in this often litigated area of the law should assist the readers in the proper application of the state tax laws. In addition, such information should ensure that those transactions involving Indian tribes, tribal entities, and individual tribal members that are exempt from the application of state law under federal statutory and decisional law are properly identified and documented. In this regard, we note that Publication 146 is a guide to the application of state tax laws and, as such, is not itself binding law. In short, it reflects the BOE's interpretation and application of state tax law, including Regulation 1616. Federal Areas.

We make this latter point for two reasons. First, Morongo wishes to make it clear that in commenting on limited elements of Publication 146, Morongo is not implying that it agrees with all other elements of the document or with its interpretation of the underlying state regulations, such as Regulation 1616. For example, Morongo takes specific issue with the limited attention that both Publication 146 (and Regulation 1616) give to sales of tangible personal property to non-Indians and Indians who do not reside on a reservation where there is "reservation value added" to the transaction that should not be subject to state sales or use tax. In Publication 146, there is no mention of this other than the cryptic paragraph on page 23 stating that "retailers selling meals, food or beverages at on-

reservation eating and drinking establishments are *not* required to collect sales tax or use tax" where the meals, food or beverages are for consumption on the reservation. There is no statement of the underlying rationale for this exemption, which is rooted in the "reservation value added" aspect. Nor is there any discussion of other situations where reservation value is added to a transaction or tangible personal property and therefore should not be subject to state taxation under a fair interpretation of the governing federal decisions.

Second, Morongo may disagree with the BOE's interpretation or application of federal law as reflected in Regulation 1616. However, this is not the appropriate process for commenting on Regulation 1616, although its basic elements are incorporated into Publication 146's explanations of how it and other state laws and regulations are implemented and enforced.

Application of Sales and Use Taxes to Non-Indian Spouses of Reservation Indians

Morongo has concerns regarding the bifurcated application of the state sales and use taxes to the respective interests of Indian and non-Indian spouses when sales of tangible personal property are made to them as a couple. In most situations, an Indian family, including families where one spouse is non-Indian, will make purchases of automobiles, recreational vehicles, mobile homes, appliances, and other major items of personal property as joint purchases for the Indian family unit's use. Even as to smaller items, as with any family, either spouse may frequently make purchases for the Indian family unit for use by the family. However, under the BOE's approach, although all of these transactions may ultimately benefit the Indian family unit on the reservation, they will be treated differently for tax purposes. As pointed out in preliminary comments made by other parties regarding Publication 146, the BOE's application of the state sales and use tax essentially splits the Indian family into two purchasing units (Indian spouse and non-Indian spouse), one taxable and the other non-taxable, and thereby forces the family to make artificial and onerous distinctions in the way they acquire personal property for the simple purpose of tax-avoidance. In addition, the BOE's bifurcated tax treatment of couples consisting of one spouse who is non-Indian interferes with the internal family and community relationships of Indian tribes, especially those families who reside on the reservation and who interact with and are recognized unitarily by the tribal community as an "Indian" family.

A better approach, and one that Morongo recommends to the BOE, would be to allow the tribal governing body of the reservation to certify the identity of an Indian family unit, including the Indian and non-Indian spouse and, once certified by the tribal governing body, that family unit would be treated unitarily as "Indian" for purposes of Regulation 1616. This approach would address concerns the BOE may have regarding documentation of exempt transactions and would avoid unnecessarily artificial and time-consuming structuring of personal property acquisitions to ensure that the Indian spouse is the sole purchaser. Morongo also questions whether the BOE has done any assessment of the increased tax revenue it expects to generate through this bifurcated tax treatment of these couples versus the administrative costs of administering and auditing such an approach.

Construction Contracts

In his letter of July 6, Mr. McGuire indicated that, in response to the January 27, 2009 meeting of BOE representatives with Tribal Leaders and other interested parties, additional information will be added to Publication 146 on the topic of construction contracts. Morongo will await receipt of the "additional information" before submitting its final comments on the BOE's direction regarding the application of the state tax to these contracts. Thus, the following comments reflect only the discussion at the January 27th meeting and Morongo's understanding of the tentative understandings reached at that meeting regarding the tax treatment of reservation construction contracts.

At the meeting, a number of tribal attorneys asked questions about "time and materials contracts" because of the high cost of such contracts and the preference of many tribes to use a guaranteed maximum price ("GMP") contract. One attorney also mentioned that, when federal funds are being used in a construction project, the federal government generally discourages straight time and materials contracts. After discussion, the BOE representatives conceded that a GMP contract could pass muster under the Indian tax exemption as long as there is specificity with respect to the materials purchases; i.e., that the contract clearly states that a retail sale of materials is involved. Similarly, a "cost plus fee" contract could also qualify under the regulations, as long as the cost of materials is separately broken out and documented by delivery invoices showing that title to the materials passed prior to installation and that the title transferred on the reservation. One tribal attorney observed that a tribe should be able to enter into a "sale on approval" contract with a series of amendments for each acquisition of materials. The BOE representatives seemed to concur as long as the contract amendments were entered into before the sale of materials and the delivery of materials was "FOB [free on board] Reservation." In short, the discussion focused on the underlying premise that the contract documents must establish that the tribe (not the general contractor) is the consumer of the construction materials and gets the benefit of the price reduction of the materials (as a result of the Indian tax exemption). Morongo agrees with this flexible approach because it allows the contract documents to take different forms as long as the underlying basis of the Indian tax exemption is properly documented.

Questions were also posed about the use of the general contractor as the tribe's agent solely for receipt of the materials on the reservation. The SBOE representatives explained that this was acceptable as long as the *actual practice* documents receipt of materials on the reservation and specifies the materials received. Materials should be logged in and the log should be available for subsequent audit, if requested. Any ambiguity in the logging of materials receipts could be eliminated by notarized statements documenting delivery of materials. However, because of the difficulty of having a notary present at the time of materials deliveries, an alternative would be to have an established process in which each delivery is logged, the delivery receipt or invoice is signed by the tribe's representative, and a copy of the receipt is retained in the tribe's files. In the event there were questions about the process, the tribe's representative could submit a declaration under penalty of perjury attesting to the elements of the process and attaching the relevant documentation. Again, Morongo believes this is a reasonable approach that would not impose undue documentation burdens.

The BOE representatives also urged those tribes that are considering variations of the time and materials contract to request written confirmation from the BOE that the construction contract they intend to use will meet the requirements for the Indian tax exemption. Use of such "advice letters" is authorized by Revenue and Taxation Code § 6596. Although the advice letter is useful, Morongo recommends that the actual guidelines for construction contracts be specific enough to cover all except the most unusual situations.

Morongo appreciates the opportunity to submit written comments on Publication 146 and intends to participate and provide further oral comments through its representatives, including the undersigned attorney, at the meeting scheduled for August 19, 2009.

Sincerely,
KARSHMER & ASSOCIATES

Stephen V. Quesenberry

cc. Morongo Tribal Council

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July 30, 2009

Mr. Bradley Miller
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Re: Comments on Publication 146

Mr. Miller:

We write on behalf of several tribal clients in response to the BOE's letter dated July 6, 2009, in which the BOE solicits comments in anticipation of its upcoming revision of Publication 146. We appreciate the opportunity to provide input on this matter.

While the BOE's efforts to streamline taxation of Indian tribes and tribal citizens are commendable, we believe that they have been insufficient especially in connection with on-reservation construction. Ideally, regulations 1521 and 1616 should be revised to enable Tribes to more easily exercise their sovereign right to purchase materials for on-reservation construction without paying State sales tax. We recognize, however, that BOE's current effort focuses not on wholesale revision of its regulations, but rather on clarifying existing regulations through Publication 146. We agree with the BOE that Publication 146 should be revised. Specifically, the section that discusses sales tax on materials used in on-reservation construction projects should be supplemented to include guidelines as to the manner in which tribes may satisfy BOE requirements. Unlike other states, such as Wisconsin, which provide that materials used in on-reservation construction projects are exempt from state sales tax, California only deems such sales tax-exempt if certain criteria are met. Publication 146 lists the criteria but does not provide any guidance as to how the criteria may be met. Our comments focus on why this is problematic and provide suggestions as to how BOE can revise Publication 146 to address the problems we identify.

Under BOE regulations, non-Indian contractors building on-reservation projects must comply with two sets of requirements in order for their material purchases – and ultimately the Tribe's purchases – to be tax exempt. First, they must qualify as "retailers" and, in order to do

so, must formulate their construction contracts in certain ways (e.g., explicitly provide for the transfer of title to the materials prior to the time the materials are installed, and separately state the sales price of materials, exclusive of the charge for installation). Second, they must sell their materials to the tribal owner on the tribe's reservation, with title passing to the tribe on the reservation prior to installation. The tribal owner must issue exemption certificates to its contractors and the contractors must issue resale certificates to their vendors.

While seemingly simple, these requirements are in fact difficult to meet in practice and pose many unnecessary obstacles to tribes seeking to build on their reservations. The difficulty arises because contractors (and subcontractors) building on-reservation projects are required – pursuant to BOE policy – to conduct their work very differently in the context of such projects than they do on typical (i.e., off-reservation) projects in order to enable the owner tribe to take advantage of its exemption from sales tax. Understanding the obstacles imposed by current BOE policy is critical to understanding why and how Publication 146 should be revised.

On a typical construction project materials are supplied to the project through multiple venues. Some materials are provided by the prime contractor, others by subcontractors, and yet others directly by vendors. Materials reach the construction project in myriad ways through hundreds (if not thousands, on a large project) of sales. In order to meet existing requirements and to ensure that sales tax is not paid on such materials, tribes and their contractors, subcontractors, and material vendors are required to change the way they normally operate for each and every one of the hundreds of materials utilized on the project. In essence, they must all ensure that the materials they provide are sold to the tribal owner with title transferring to the tribe on the reservation prior to the materials' installation into the project.

On a typical construction project, i.e., one not conducted on a reservation, the owner contracts with a prime contractor (C) to build a school. C enters into multiple subcontracts with subcontractors (S) who in turn purchase materials from vendors (V). The subcontractor providing electrical work (S-1) has his materials delivered to him on the reservation by his vendor (V-1). Typically, S-1 buys the materials from V-1 and installs them in the project, then bills C for them as part of the cost of the work. C in turn bills the owner. Or S-1 may order the materials on behalf of C, and V-1 may bill C directly. Regardless of the arrangement between the vendor, the subcontractor, and the contractor, in a typical construction project S-1 does not have to sell materials to anyone anywhere along the way nor does title to the materials have to transfer to any one entity at any particular given point in time. In a typical construction project the subcontractor simply orders his materials and installs them, and bills for them at the end.

But current BOE policy requires that all parties involved in supplying and utilizing materials used on a tribally-owned on-reservation construction project act differently. Because existing regulations focus on the moment in time at which title to the materials transfers to the tribal owner, and require that the transfer occur on the reservation and prior to the materials' installation into the project, tribes are required to put into place a system pursuant to which they take title to – using our example from above – the electrical materials *before* S-1 installs them into the project. Thus, S-1 must craft his contract with V-1 such that S-1 takes title to the materials before installing them, and in turn must turn around and sell them to T, with T taking

title to them on the reservation, before S-1 installs them. Furthermore, S-1 must take appropriate action, in the middle of his work, to ensure that title passes to the tribe as required.

Now consider S-2, who provides the cement work under subcontract to C. S-2 procures the cement from V-2 and oversees the pour. S-2 must purchase the cement from V-2 with title passing from V-2 to S-2 prior to the pour, then turn around and pass title to the Tribe on the reservation prior to the pour. And S-2 must do all of this while creating a paper trial that evidences that it has all been done as required. But cement must be poured quickly, within as short a time as possible, and yet S-2 must hold up the tens of waiting cement trucks while he fills out paperwork for each load of cement that arrives at the work site, or while he reviews the paperwork for all of his trucks to be sure that the required contract language is contained therein.

In short, in order to meet existing BOE requirements the tribal owner must ensure that hundreds (if not thousands) of individual materials sales be executed in conformity with the BOE's regulations and that each subcontract and sub-subcontract and bill of lading and other such documents be properly worded. These requirements pose significant hurdles and leave much room for error both initially, in drawing up the multitude of contracts and purchase orders and bills of lading and other such documents that are involved in a large-scale construction project, and in the performance stage.

Publication 146 lists the requirements tribes must meet for construction-related material purchases to be free of sales tax (*see* pp. 20, 21) but does not provide any guidance as to how a tribal owner should go about meeting those requirements. Such guidance is critical in connection with large-scale construction projects that include multiple subcontractors, sub-subcontractors and vendors, particularly in light of the fact that there is so much room for error along the way. In order to enable tribes to meet BOE requirements and take advantage of their status as non-tax-paying entities for on-reservation projects, the BOE must provide far greater detail in Publication 146 than is currently provided. The publication should outline specific procedures that tribes and their contractors, subcontractors and vendors may follow, suggest contract language that the BOE deems acceptable, and provide templates for acceptable shipping and other documents. While there are many theoretical ways to achieve compliance with BOE requirements, experience shows that tribes seeking to do so often run afoul of BOE's understanding of how contracts must be written and projects carried out.

Streamlining the way in which California tribes structure their on-reservation construction projects to comply with State sales tax regulations would clearly benefit tribes by providing them with a roadmap for meeting regulatory requirements. It would also benefit the State by creating a template that, once available, would likely be utilized by many tribes. BOE auditors seeking to ascertain compliance with regulatory requirements would thus have an easier time determining whether compliance has been achieved.

Some of the specific issues we believe Publication 146 should address in detail are as follows:

- Page 20 requires that construction contracts include certain language, but does not provide any examples of acceptable language. Some examples should be provided.

- Is it sufficient for the prime contract to include the contract language discussed at page 20, or must all subcontracts and sub-subcontracts and agreements with vendors include that language as well?
- How must the transfer of title to materials to the tribal owner be achieved in situations in which subcontractors order materials from vendors but have no direct contractual relationship with the owner?
- What types of legal arrangements with vendors and subcontractors are required to have title to materials supplied by such vendors and/or subcontractors pass from them to the tribe on the reservation?
- Must tribes pay each vendor/subcontractor that sells materials to the tribe directly, or can payment be channeled through the prime contractor?
- Must shipping documents be worded in any particular manner, and if so, how, in order to ensure that title to materials transfers to the tribe on the reservation and prior to installation?
- May the prime contract provide that all materials purchased for use in the project be sold to the prime contractor and from him to the tribe, upon the materials' reaching the reservation? If so, is such a provision sufficient to satisfy BOE requirements?

These are only some of the issues that Publication 146 should address. In general, the Publication should include detailed guidelines regarding how BOE regulations and policies may be implemented in the context of large-scale construction contracts. We recommend that the BOE consider providing sample contract language, templates for shipping and other documents, and, ideally, a set of procedures that tribes and their contractors, subcontractors, sub-subcontractors and vendors could follow. Without such guidance there is much room for error.

We have longstanding experience in working with tribes and contractors to devise procedures that are both feasible from a practical perspective and meet BOE requirements. We would be happy to work with you to devise detailed procedures for compliance with sales tax requirements that could be used by all Tribes.

Sincerely,

Allyson G. Saunders

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July 31, 2009

VIA FACSIMILE (916-322-0187) & U.S. MAIL

Mr. Bradley Miller
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Re: Comments on Publication 146

Dear Mr. Miller:

Forman & Associates serves as general or special counsel to several Indian tribes within the State of California. In response to your letter dated July 2, 2009, please find the attached marked-up draft of Publication 146 (*Tax Tips for Sales to American Indians and Sales on Indian Reservations*). Our comments address matters ranging from imprecise or ambiguous word choice to the documentation that should suffice for demonstrating a tax exempt transaction. We hope you will consider these suggestions for improvement to make Publication 146 an accurate and helpful resource for those who purchase, sell and tax transactions on Indian reservations within the State.

Sincerely,

FORMAN & ASSOCIATES

Jay B. Shapiro

Enclosure

1. Key Definitions

This chapter provides definitions of specific terms used throughout the publication. It also explains essential conditions for tax-exempt sales to Indians and requirements for documenting those sales. Be sure to read it before proceeding to the following chapters.

Terms used throughout the publication

Please review these terms carefully. How tax applies to different sales can depend on whether a person, organization, or location fits the specific definitions below.

Indian

For California sales and use tax purposes, an "Indian" is a person who is both of the following:

~~An individual of American Indian descent, and~~

- Eligible to receive services as an Indian from the United States Department of the Interior.

To show that they are eligible for the exemptions described in this publication, Indians ~~must~~ provide identification documents to prove their status, such as an ID card, a letter from the tribal council, or a letter from the U.S. Department of Interior.

Indian organization

"Indian organization" includes Indian tribes and tribal organizations. Partnerships qualify as "Indian organizations" for California sales and use tax purposes only when all of the members or partners are Indians. Corporations qualify as Indian organizations only if they are ~~organized under tribal authority and~~ wholly owned by Indians. ~~If an organization does not meet these criteria, it does not qualify, even when owned or operated by Indians.~~

For California sales and use tax purposes, a sale to an Indian organization is treated the same as a sale to an individual Indian. Please keep that in mind as you read this publication.

Reservation

For California sales and use tax purposes, a "reservation" can be any of the following:

- A reservation.
- A rancheria.
- Any land held by the United States in trust for any Indian tribe or Indian individual (also known as "trust land").

Summary of Comments on Tax Tips for Sales to American Indians and Sales on Indian Reservations

Page: 6

Number: 1 Author: JeffKeohane Subject: Cross-Out Date: 7/30/2009 4:28:15 PM
[Unnecessary, and makes it sound like a racial, rather than a political classification.]

Number: 2 Author: JeffKeohane Subject: Inserted Text Date: 7/30/2009 12:20:22 PM
because of their status as Indians, because they are members of a federally recognized tribe, or both

Number: 3 Author: JeffKeohane Subject: Replacement Text Date: 7/30/2009 4:29:40 PM
may have to

Number: 4 Author: JeffKeohane Subject: Inserted Text Date: 7/30/2009 1:50:07 PM
be able to

Number: 5 Author: JeffKeohane Subject: Inserted Text Date: 7/30/2009 1:51:43 PM
if demanded by BOE

Number: 6 Author: JeffKeohane Subject: Replacement Text Date: 7/30/2009 4:29:17 PM
federal or tribal government-issued

Number: 7 Author: JeffKeohane Subject: Inserted Text Date: 7/30/2009 4:29:59 PM
, or a certificate of exemption [see p. 13]

Number: 8 Author: JeffKeohane Subject: Cross-Out Date: 7/30/2009 12:16:37 PM

Number: 9 Author: JeffKeohane Subject: Cross-Out Date: 7/30/2009 12:15:09 PM

Number: 10 Author: JeffKeohane Subject: Inserted Text Date: 7/30/2009 2:13:34 PM
[Corporations organized pursuant to the Indian Reorganization Act are exempt from taxation, and as such should be recognized by BOE as "Indian organizations." Further, tribal corporations organized under state law should not be penalized because they organize under the laws of the state--which the state would presumably prefer on public policy grounds. Under federal law, it is the de facto status as a tribal organization, not the de jure status that makes a corporation immune from state taxation.]

Number: 11 Author: JeffKeohane Subject: Inserted Text Date: 7/30/2009 12:50:56 PM
is "Indian country" as defined by 18 USC 1151. It

Number: 12 Author: JeffKeohane Subject: Inserted Text Date: 7/30/2009 12:52:04 PM
or restricted fee status

Please note: Not all portions of a facility housing an Indian gaming establishment may be located on "land held by the United States in trust for any Indian tribe or Indian individual." Some portions of a facility containing a gaming establishment (for example, a parking lot) may be located on ~~privately-owned~~ land and transactions that occur there may not meet the exemption requirements.

Sales tax and use tax: what's the difference?

Sales tax

California sales tax generally applies to the retail sale of physical items in California: goods, merchandise, vehicles, vessels, aircraft, and other physical products. Sales are taxable unless they are specifically exempt or excluded by law. As noted in the "Preface," there is no general exemption from the sales tax for sales to Indians.

If you make sales that are subject to tax at the retail level, you are required to hold a California seller's permit. This is true even when most or all of your sales are not taxable, or qualify as exempt. (Exception: You are not required to hold a seller's permit if all of your sales are made exclusively in interstate or foreign commerce.)

For more information, see our publication 107, *Do You Need a California Seller's Permit?*, which is available on our website at *www.boe.ca.gov* or from our Taxpayer Information Section at 800-400-7115 (see page 32).

Use tax

Some on-reservation Indian retailers need a certificate of registration to collect use tax, rather than a seller's permit which is used for the collection of sales tax. California use tax is a companion to the sales tax. Persons or businesses generally owe use tax when they use, store, give away, or consume physical products in California if they did not pay California sales tax on their purchase. Use tax generally applies to untaxed purchases made from out-of-state sellers. It may also apply to certain purchases on Indian reservations. The use tax rate for a California location is the same as the sales tax rate.

Retailers who are required to collect use tax, but not pay sales tax, are required to hold a Certificate of Registration—Use Tax. You may obtain an application (BOE-400-CSC) from our website at *www.boe.ca.gov* or by calling our Taxpayer Information Section (see page 32).

Construction contracts - definition

Construction contractors—Persons who for themselves, in conjunction with, or by or through others, agree to perform and do perform construction contracts. A construction contract means and includes a contract, whether on a lump-sum, time and material, cost-plus, or other basis, to:

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facilities associated with [under IGRA all tribal gaming establishments must be located on "Indian lands."]

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Number: 3 Author: JeffKeohane Subject: Inserted Text Date: 7/30/2009 12:53:00 PM

non-reservation

Number: 4 Author: JeffKeohane Subject: Inserted Text Date: 7/30/2009 1:04:47 PM

[If all sales are exempt because they all take place on a reservation, to Indians, why should a retailer not be exempt from obtaining a seller's permit? And Cert. of Registration--Use Tax?]

2. Documenting Claimed Exempt Sales

This chapter provides information to sellers and purchasers regarding the correct type of documentation to support claimed exempt sales. This documentation should be provided by the purchaser and maintained in the seller's records as proof of the exempt sale. For more information on records that are suitable for sales and use tax purposes, please see Regulation 1628, Transportation Charges, *Regulation 1667,* Exemption Certificates, *and Regulation 1698,* Records.

Transfer of title (ownership) on the reservation

How tax applies to a particular sale or purchase by an Indian depends on whether ownership of the item being sold or purchased transfers to the Indian purchaser on the reservation.

Sale by retailer located on a reservation

Ownership of an item being sold transfers on a reservation when an on-reservation retailer does both of the following:

- Negotiates the sale on the reservation, and
- ~~Hands over or de~~delivers the item being sold on the reservation to an Indian.

Sale by retailer not located on a reservation

Retailers located outside a reservation may sell to Indian buyers who request delivery on a reservation. For a sale to qualify as a transfer of title (ownership) on the reservation, the following conditions must apply:

- The contract of sale or other sales agreement cannot transfer ownership of the item to the buyer before the item is delivered on the reservation, and
- The buyer cannot take possession of the item before delivery on the reservation.

In addition, the retailer generally must deliver the product:

1. Using the retailer's vehicle, or
2. By mail, common carrier (UPS, FedEx), or contract carrier (a shipping, trucking, or transport company), when both of the following requirements are met:
    - The contract of sale or sales invoice must include a statement specifically requiring delivery at the reservation (for example, F.O.B. name of Indian reservation) and that title passes upon delivery on the reservation, and

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, including an agent of the Indian

[The publication should not give the impression that sales are only exempt if they are handed/delivered to an Indian, since it is legally the same thing if they are handed/delivered to the agent of the Indian (including an Indian Organization). This could also be addressed by changing the definition of Indian at the beginning of the document.]

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(title)

- The goods are in fact delivered to the Indian reservation.

When delivery does not take place as described here, ownership of the item being sold or purchased generally transfers to the buyer off the reservation.

Please note: This is a general description of transfer of ownership on the reservation. Other sections of this publication describe the specific rules that apply to certain types of sales and leases.

Claimed exempt sales to Indians ~~require~~ documentation

Retailers

When you make an exempt sale to an Indian as explained later in this publication, you should keep copies of documents that BOE auditors can use to verify that your sale is exempt. To help you document exempt sales you should ~~retain~~ items such as:

- One or more documents that show the purchaser is an Indian, such as a copy of the purchaser's tribal ID card, a letter from a tribal council, or a letter from the U.S. Department of the Interior.
- Documents to show that ownership of the merchandise transferred to the buyer on the reservation and delivery occurred there, such as contracts of sale, invoices, bills of lading, delivery receipts, and freight invoices.
- An exemption certificate from the Indian purchaser stating that the Indian purchaser lives on a reservation (an exemption certificate such as the one provided on page 37 may be used). The BOE-146-RES, *Statement of Delivery on a Reservation*, is also available from our website at *www.boe.ca.gov* or by calling our Taxpayer Information Section at 800-400-7115 (see page 32).

Purchasers

If you are an Indian who lives on a reservation, you will need to prove to the retailer that you qualify for the tax exemptions explained in this publication. You may need to give the retailer both of the following:

1. A copy of a document showing that you are an Indian, such as a tribal ID card, a letter from your tribal council, or a letter from the U.S. Department of the Interior, and
2. An "exemption certificate" stating that you live on a reservation in addition to other required information as explained below.

If you are an Indian organization, you must also provide documents to prove that you qualify for the tax exemptions explained in this publication. You may need to give the retailer:

Page: 10

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should have

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for audit purposes

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make copies of

Number: 4 Author: JeffKeohane Subject: Inserted Text Date: 7/31/2009 1:23:22 PM
[see comment re docs on pp. 7 & 13]

[The certificate in the 3d bullet is enough if accompanied by a official federal, state, or tribal government-issued ID, which is what BOE wrote on p. 13.]

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[Make this the first bullet]

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[Since it is presumably a crime to falsely provide a certificate of exemption, it should be sufficient to supply government-issued ID along with the certificate of exemption. A state driver license, passport, or tribal government ID should be sufficient. The BOE may be under a false impression that all tribal members have either a tribal ID or CDIB.]

Number: 7 Author: JeffKeohane Subject: Inserted Text Date: 7/30/2009 1:57:02 PM
be able to

Number: 8 Author: JeffKeohane Subject: Inserted Text Date: 7/30/2009 2:04:23 PM
[See comment attached to third bullet, above.]

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[Make this no. 1]

- If your organization is a partnership, documents to show that all of your partners are Indians, such as partnership agreements.
- Documents showing that your organization is an Indian tribe or tribal organization.
- If your organization is a corporation, documents to show it is organized under ~~tribal~~ authority and wholly owned by Indians, such as the organization's articles of incorporation.
- An "exemption certificate" containing certain other required content (see next section).

Exemption certificates

An exemption certificate based on an Indian's residency on a reservation must be in writing. It can be a simple document in the form of a letter. The certificate or letter must include all of the following essential elements:

For individuals:

- The date,
- The purchaser's name,
- Home address,
- Signature,
- A description of the products or merchandise purchased under the certificate, and
- A statement that the property is being purchased for use on a reservation by an Indian who lives on a reservation.

For Indian organizations:

- The date,
- The organization's name,
- The organization's address,
- The title and signature of the person completing the certificate,
- A description of the products or merchandise purchased under the certificate, and
- A statement that the property is being purchased for use on a reservation by an Indian who lives on a reservation.

A document containing the essential elements described above is considered the minimum amount of information to help support claimed exempt sales.

A sample exemption certificate BOE-146-RES, *Statement of Delivery on a Reservation*, can be used to document exempt sales of general merchandise, vehicles, vessels, and aircraft is provided on page 37 of this publication. The form is also available from our website at: *www.boe.ca.gov.*

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governmental

Number: 2 Author: JeffKeohane Subject: Inserted Text Date: 7/30/2009 2:18:48 PM
[why not the form at p. 37 and from the website, as described in the last line of this page?]

Number: 3 Author: JeffKeohane Subject: Highlight Date: 7/31/2009 1:24:18 PM
[BOE should not imply above that the seller must ask for, and the purchaser must supply, tribal ID, and seller must retain a copy of the sales contract showing FOB the reservation?]

More information on exemption certificates may be found in Regulation 1667, *Exemption Certificates*. You can view or download a copy from our website at *www.boe.ca.gov* or order a copy from our Taxpayer Information Section (see page 32).

Records

A retailer's records should include documents to support the basis for a claim that a particular sale was exempt from tax. If you accept a complete exemption certificate from an Indian purchaser in good faith, our audit staff should not question your acceptance of the certificate. However, if you have evidence or knowledge that the Indian may not live on a reservation (for example, if the Indian asked you to send the bill to a nonreservation address), you should not accept an exemption certificate *unless* the Indian buyer gives you other reliable documents to verify residency on a reservation.

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[This makes it clear that there is no need for tribal, or other government, ID.]

3. Sales to Indians: Retailers Located Outside Indian Reservations

This chapter describes how sales and use tax generally apply to sales to Indians when the retailer is not located *on an Indian reservation (off-reservation retailer). Please be sure to read chapter 1, "Key Definitions," before you read this chapter.*

Sales to Indian customers, in general

If you are a California retailer who is not located on a reservation, your sales to Indian customers are generally subject to tax, unless specific requirements for exemption are met.

This chapter discusses the general rules that apply to your sales to Indian customers. The chapter also discusses specific rules that apply to dealer sales of vehicles, vessels, and aircraft, and to leases.

Transfer of ownership on reservation

Sales tax generally applies to sales by off-reservation retailers to Indian purchasers unless *all* of the following conditions are met:

- You transfer ownership of the merchandise to an Indian purchaser on a reservation.
- You deliver the merchandise on a reservation.
- The Indian purchaser lives on a reservation.

Please note: The purchaser is not required to live on the same reservation where ownership transfers. In other words, a resident of Reservation A could qualify for the exemption even when taking ownership of merchandise on Reservation B.

(For a more complete definition of "Transfer of title (ownership) on the reservation," please see page 10).

Please note: Use tax is owed by the Indian purchaser on the transaction above if the Indian purchaser who lives on a reservation does both of the following:

- Takes ownership and delivery of an item on a reservation, *and*
- Uses the item *off* ~~the~~ reservation more than one-half of the time in the first 12 months after the sale. (An item is used off ~~the~~ reservation when the item is stored or used off ~~the~~ reservation.)

Use tax, if due, is payable by the Indian purchaser directly to the BOE.

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(title)

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[Use either "title (ownership)" or "ownership (title)" throughout or once, at the beginning with an explanation.]

Number: 3 Author: JeffKeohane Subject: Replacement Text Date: 7/30/2009 2:35:11 PM
of a [This should not be limited to a single reservation; it should be all of Indian country.]

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of a

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of a

Married couples or registered domestic partners

When an off-reservation retailer makes a sale to both members of a married couple or registered domestic partners, and only one of the couple is an Indian who resides on a reservation, the following rules apply.

Sales tax liability

Sales tax does not apply to the one-half interest in the property attributable to the Indian spouse or partner who lives on a reservation if the ownership (title) of the merchandise is transferred to the couple or partners on the reservation, and the merchandise is delivered on the reservation. Sales tax applies to the one-half interest in the property attributable to the nonIndian spouse or partner. *Please note:* The Indian spouse or partner may be liable for use tax on their one-half interest if the property is used off ~~the~~ reservation more than one half of the time during the first 12 months following delivery.

Permanent improvements to real property

In general, tax does not apply to your sale of an item that will be permanently attached as an improvement to real property on a reservation, provided all of the following conditions apply:

- Your customer is an Indian who resides on a reservation (see Purchasers on page 11).
- The merchandise is delivered to the Indian purchaser on a reservation.
- Ownership of the item transfers to the purchaser on the reservation (see page 10).

Improvements to real property include:

- Buildings, structures, fixtures, and fences erected on or attached to land. For purposes of this sales tax exemption, improvements include trailer coaches that are not registered with the Department of Motor Vehicles (DMV), mobilehomes, and factory-built housing.
- Ornamental trees and vines. Please note that fruit and nut trees can also be improvements, but their sale may be exempt under another section of the sales and use tax law.

For information on construction contractors, please see chapter 4, on page 19.

Mobilehomes

"Mobilehomes," sometimes referred to as modular homes, are structures designed:

- To be movable in one or more sections, and
- Equipped to contain one or two dwelling units.

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of a

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(title)

They can be designed for use with or without foundation systems. "Modular home" is a relatively new term and meets the definition of a mobilehome. However, the Revenue and Taxation Code uses the term mobilehome, and therefore for consistency we continue its use.

Use off the reservation

A sale of a mobilehome to an Indian purchaser who lives on a reservation and takes ownership and delivery on a reservation will not be exempt from tax if the mobilehome is used ~~off the reservation~~ more than one-half of the time in the first 12 months after the sale.

In this case, the buyer owes the use tax and is responsible for paying it by using:

- Publication 79-B, *California Use Tax*,
- California income tax return, or
- Sales and use tax return, if the purchaser has a California seller's permit.

For more information on mobilehomes and factory-built housing, see publication 47, *Mobilehomes and Factory-Built Housing*, and publication 9, *Tax Tips for Construction and Building Contractors*. You can obtain a copy from our website or by calling our Taxpayer Information Section (see page 32).

Reporting and paying use tax

An Indian purchaser may owe use tax when the transaction is exempt from sales tax (see use tax description on page 8). Use tax is due when the Indian buyer who lives on a reservation does both of the following:

- Takes ownership and delivery of an item on a reservation, and
- Uses the item outside a reservation more than one-half of the time in the first 12 months after the sale. (An item is used off a reservation when the item is stored or used off a reservation.)

  Example: An Indian purchaser who resides on a reservation operates an event business, and negotiates the purchase of a sound system for $3,500 from a dealer in Los Angeles. The dealer, using its own trucks, delivers the system on a reservation and ownership transfers to the purchaser there. The sale is exempt from sales tax. The purchaser will use the sound system at concerts and events all over California. Some of the events are on reservations while others are not. The purchaser owes use tax based on the system's $3,500 purchase price if in the first 12 months after purchase the purchaser uses or stores the sound system outside reservations more than half the time.

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Number: 1 Author: JeffKeohane Subject: Replacement Text Date: 7/30/2009 2:50:51 PM

outside of reservations

[For sentences like this, use "outside reservations," the use at the bottom of p. 16, or "off of a reservation," or "off-reservation" to indicate that it does not need to remain on a single reservation.]

Paying use tax

Individuals who owe use tax can pay it when filing their California income tax return or by using the simple form found in our publication 79-B, *California Use Tax*. If the tax liability involves an aircraft, publication 79-A, *Aircraft and California Tax*, should be used to report the applicable use tax. Both publications are available on our website at *www.boe.ca.gov* or from our Taxpayer Information Section (see page 32).

Businesses that hold seller's permits should pay any use tax they owe when filing their Sales and Use Tax Return. Other businesses that are required to collect use tax from customers and pay it to the BOE must obtain a Certificate of Registration—Use Tax. You can obtain an application from our website at *www.boe.ca.gov* or from our Taxpayer Information Section (see page 32).

Use tax liability

If a married couple or registered domestic partners, living on a reservation, buy tangible personal property from an out-of-state retailer, and only one member of the couple is an Indian, the *use tax is based on one-half of the purchase price.*

For information on how to apply district use tax to this and other specific situations, please refer to publication 44, *Tax Tips for District Taxes* (see page 32 for ordering information).

Dealer sales of vehicles, vessels, and aircraft

Sales

Tax generally applies to a dealer's sales of vehicles, vessels, and aircraft in the same way it does to sales of other merchandise. However, sales tax generally does not apply to sales to Indians who live on a reservation when the vehicle, vessel, or aircraft is delivered on a reservation and ownership also transfers to the Indian on a reservation. The sale does *not* qualify for the exemption if the Indian takes ~~possession~~ [1] before delivery on the reservation. The same principles apply to sales to Indian organizations.

While sales tax would not apply in this case, the buyer owes use tax if the vehicle, vessel, or aircraft is used ~~off the reservation~~ [2] more than one-half of the time in the first 12 months after purchase (see previous section). A vehicle, vessel, or aircraft is used off a reservation when it is used or stored ~~off a reservation~~. [4]

Documenting exempt sales of vehicles, vessels, and aircraft

Your records must include ~~documents~~ [5] support each claimed exempt sale. For information on documenting sales to Indians who live on reservations or Indian organizations (see page 10). Please contact our Taxpayer Information Section at 800-400-7115 for further assistance in providing the necessary documentation to

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ownership (title)

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outside of reservations

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outside reservations

Number: 5 Author: JeffKeohane Subject: Replacement Text Date: 7/30/2009 3:04:07 PM
documentation [On p. 13 BOE writes that the cert. of exemption should be enough.]

establish that the sale of the vehicle, vessel, or aircraft took place on the reservation. You may also call our Consumer Use Tax Section directly at 916-445-9524.

Note: An exemption certificate that may be used to document exempt sales, BOE-146-RES, *Statement of Delivery on a Reservation,* is included on page 37 of this publication. The form is also available from our website at *www.boe.ca.gov* or from our Taxpayer Information Section (see page 32).

Leases

Neither sales nor use tax generally applies to leases of tangible personal property, for any time period when the leased property is located and used on an Indian reservation and the Indian lessee resides on the reservation. Unless there is contrary evidence, it is assumed the use of the property by the Indian lessee is on the reservation if the lessor delivers the property to the Indian lessee on the reservation. However, use tax applies to leased vehicles registered with the DMV to the extent that the vehicles are used off the reservation.

Leases of vehicles and mobile transportation equipment

If you lease vehicles or mobile transportation equipment to Indian customers, please contact our Taxpayer Information Section (see page 32) for help regarding how tax applies and what documentation you need to claim an exemption from tax for your lease.

Number: 1 Author: JeffKeohane Subject: Inserted Text Date: 7/30/2009 3:07:21 PM
["to the extent that" should be quantified, and there should be an exemption for de minimis off-reservation use.]

4. Sales Related to Construction Contracts

This chapter describes how tax applies to sales to and by construction contractors, in situations involving Indian customers and construction contracts for work on Indian reservations. For detailed information on applying tax to sales of construction materials, fixtures and supplies, please see publication 9, Tax Tips for Construction and Building Contractors. *You may also want to refer to Regulation 1616,* Federal Areas, *and Regulation 1521,* Construction Contractors. *You may obtain copies from our website at* www.boe.ca.gov *or Taxpayer Information Section at 800-400-7115.*

Construction activity outside reservations

There are no special sales or use tax exemptions for construction work done for an Indian customer ~~off~~ [1]n Indian reservation. Tax applies to your sales in the same manner as other construction contracts.

Materials vs. fixtures

Materials are construction materials, components, and other tangible personal property incorporated into, attached to, or affixed to real property by contractors in the performance of a construction contract, and which, when combined with other tangible personal property, lose their identity to become an integral and inseparable part of the real property. Examples of items typically regarded as materials include cement, doors, electric wiring, lumber, flooring, roofing, windows, and paint.

Fixtures are items that are accessories to a building or other structure. Fixtures do not lose their separate identity as accessories after installation. Examples include signs, heating and air conditioning units, furnaces, plumbing fixtures, lighting fixtures, shutters, and blinds.

For more information on typical items regarded as materials or fixtures, see Appendix A and Appendix B of Regulation 1521, *Construction Contractors* (see page 32).

Sales to construction contractors (by off-reservation retailers)

Sales to Indian contractors

Materials

Sales tax does not apply to your sales of materials to Indian construction contractors (construction contractors that are Indians) when you deliver the materials on a reservation, and ownership t[2]nsfers to the Indian contractor on

Page: 18

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outside of

Number: 2 Author: JeffKeohane Subject: Inserted Text Date: 7/30/2009 3:19:18 PM
(title)

Sales by on-reservation, nonIndian retailers: basic application of tax

If you are a nonIndian retailer located on a reservation, some of your sales may be exempt from California sales tax, but others may be taxable. In some cases, use tax will apply (see use tax description on page 8).

Sales by on-reservation, nonIndian retailers to Indians who reside on a reservation

Sales tax does not apply to sales of tangible personal property made to Indians by nonIndian retailers when:

- The sales are negotiated at places of business located on Indian reservations,
- The Indian purchaser resides on a reservation, and
- The property is delivered to the Indian purchaser on a reservation.

In such an instance, the Indian *purchaser* may be required to pay use tax but only if, within the first 12 months following delivery, the property is used off a reservation more than it is used on a reservation.

Please note: The Indian purchaser is not required to live on the specific reservation where ownership transfers. In other words, a resident of Reservation A could qualify for the exemption when taking ownership of merchandise on Reservation B.

Please also note: The sale is exempt from sales tax whether the retailer is a federally licensed Indian trader or is not so licensed.

Sales by on-reservation, nonIndian retailers to nonIndians and Indians who do not reside on a reservation

Either sales tax or use tax applies to sales of merchandise by on-reservation non-Indian retailers to nonIndians and Indians who do not reside on a reservation, or if you make any off-reservation sales. You may download a seller's permit application (BOE-400-SPA), *California Seller's Permit Application for Individuals/Partnerships/Corporations/Organizations (Regular or Temporary)*, from our website at *www.boe.ca.gov* or call our Taxpayer Information Section for a copy (see page 32). A tribal sales license is not a substitute for a seller's permit or a certificate of registration to collect use tax.

Documenting claimed exempt sales

Be sure your records include documents to show the basis for your claim that a particular sale was exempt from tax. For information on documenting sales to Indians who live on reservations or Indian organizations, please see chapter 2, on page 10.

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Number: 1 Author: JeffKeohane Subject: Inserted Text Date: 7/30/2009 4:10:27 PM
(title)

Reporting and paying use tax

Use tax may be due when the transaction is exempt from sales tax (please see basic information on sales and use tax in chapter 3, on page 14).

Use tax is due:

1. When an Indian purchaser who lives on a reservation takes ownership on a reservation but uses the merchandise off the reservation more than one-half of the time in the first 12 months after the sale. In this case, the purchaser owes the use tax and must pay it to the state.

   Example: An Indian purchaser who lives on a reservation purchases a display unit for $750 from an Indian retailer on a reservation and takes it from the shop to his home on the reservation. The sale is exempt from sales tax. The purchaser will use the display unit at trade shows throughout California. If in the first 12 months after buying the display, the purchaser uses or stores the display unit ~~off the reservation more~~ more than half the time, the purchaser owes use tax based on the unit's $750 purchase price.

2. If a married couple or members of a registered domestic partnership buy an item together, and only one member of the couple is an Indian residing on a reservation, sales tax is due on one-half of the purchase price of the merchandise. If in the first 12 months after buying the merchandise, the merchandise is used or stored ~~off the reservation more~~ more than half the time the Indian purchaser owes use tax on the other one-half of the purchase price.
3. When an Indian retailer sells an item to a nonIndian or to an Indian who does not live on a reservation and the purchaser takes ownership on the reservation the seller must collect the use tax from the purchaser and pay it to the BOE.

Paying use tax

Individuals who owe use tax can pay it when filing their California income tax return or by using the simple form found in our publication 79-B, *California Use Tax*. Publication 79-B is available from our website at *www.boe.ca.gov* or by calling our Taxpayer Information Section (see page 32).

Businesses that hold seller's permits should pay any use tax they owe when filing their Sales and Use Tax Return. Other businesses that are required to collect use tax from customers and pay it to the BOE must obtain a Certificate of Registration—Use Tax. You can obtain an application from our website at *www.boe.ca.gov* or by calling our Taxpayer Information Section (see page 32).

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Number: 1 Author: JeffKeohane Subject: Replacement Text Date: 7/30/2009 4:12:55 PM
outside of reservations

Number: 2 Author: JeffKeohane Subject: Replacement Text Date: 7/30/2009 4:13:38 PM
outside of reservations

6. Special Taxes and Fees

In addition to sales and use taxes, special taxes and fees may be applicable to sales to Indians and sales on Indian reservations. Following is information pertaining to some of the more common special taxes and fees that may apply to transactions or activities involving Indians or conducted on Indian reservations.

Fuel taxes

The following tax and fee programs are administered by the Fuel Taxes Division:

- Motor Vehicle Fuel Tax
- Diesel Fuel Tax
- Aircraft Jet Fuel Tax
- Underground Storage Tank Maintenance Fee
- Oil Spill Response Prevention and Administration Fees
- Use Fuel Tax
- International Fuel Tax Agreement (IFTA)
- California/Mexico Interstate User Diesel Fuel Tax and NAFTA
- Childhood Lead Poisoning Prevention Fee

~~There are no special exemptions from the state's motor vehicle or diesel fuel taxes related to fuel sales on Indian reservations.~~ California's excise tax on motor vehicle fuel and diesel fuel applies when the fuel is removed from an in-state fuel terminal rack or imported into the state. As a result, fuel delivered to an Indian reservation will generally include California excise tax in its cost. Fuel retailers usually pass the tax on to their customers.

Any person who uses fuel on reservation lands that are not part of a state or local road system may claim a refund for taxes paid on fuel consumed off-highway on reservation lands.

If you have used gasoline on reservation lands, you may file a claim for refund with the State Controller's Office. To download a claim form (SCGR-1) and schedules, go to the State Controller's website at *www.sco.ca.gov.* Follow the directions to file your claim for refund. If you need help or have any questions, see the contact information on the State Controller's website at *www.sco.ca.gov* or call staff in the Gas Tax Refund Section of the State Controller's Office at 916-445-4868. You can fax the State Controller's Office at 916-327-7116.

If you have used tax-paid clear diesel fuel off-highway on reservation lands, you may file a claim for refund (BOE-770-DU, *Diesel Fuel Claim for Refund on Nontaxable Uses)* with the BOE, Fuel Taxes Division.

Number: 1 Author: JeffKeohane Subject: Replacement Text Date: 7/31/2009 3:29:25 PM

This language strikes us as overly general and ambiguous. Fuel that is refined on the reservation and then sold to an Indian residing on the reservation would be presumptively exempt from state tax. Moreover, the on-reservation sale of fuel to an owner of an off-road vehicle also would be exempt from state tax. It may be that in most situations the state tax will have been imposed off-reservation and then passed along in the form of higher prices, but that point could be made without suggesting (as we believe the text currently does) that all motor vehicle or diesel fuel sales on Indian reservations are subject to state tax.

2. **Disposal Fee**

   The Disposal Fee generally applies to every person who disposes of hazardous waste in this state based on the type of waste placed in a disposal site.

3. **Generator Fee**

   In addition to the Disposal Fee, the Generator Fee applies to every person who generates five or more tons of hazardous waste per site in California within a calendar year for a specific site. This includes recycled waste and waste sent outside California for disposal. The fee is determined by the total tonnage of waste generated. If the Facility Fee has been paid for a site, the Generator Fee does not apply.

For more information regarding any of the Environmental Fee programs listed above, please visit our website at *www.boe.ca.gov* or contact:

By Phone, Fax, or website
800-400-7115 toll-free
916-323-9555 phone
916-327-0859 fax
Online
www.boe.ca.gov

By Mail
Environmental Fees Division, MIC:57
State Board of Equalization
P.O. Box 942879
Sacramento, CA 994279-0057

Excise taxes

The Excises Taxes Division oversees the following tax and fee programs:

- Alcoholic Beverage Tax
- Cigarette and Tobacco Products Tax
- Cigarette and Tobacco Products Licensing
- Insurance Tax
- Emergency Telephone Users Surcharge
- Natural Gas Surcharge
- Energy Resources Surcharge

Cigarette and tobacco products taxes

Distributors

There are no special exemptions from the state's cigarette and tobacco products taxes for sales of cigarettes and tobacco products to Indians.[1] A nonIndian cigarette distributor who sells cigarettes to an Indian must pay cigarette and tobacco products taxes and apply California cigarette tax stamps to the cigarette packages.

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Number: 1 Author: JeffKeohane Subject: Inserted Text Date: 7/30/2009 3:35:40 PM
off-reservation

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July 31, 2009

VIA FACSIMILE (916-322-0187) & U.S. MAIL

Mr. Bradley Miller
Tax Policy Division
Board of Equalization
P.O. Box 942879
Sacramento, CA 94279-0044

Re: Comments on Publication 146

Dear Mr. Miller:

Forman & Associates serves as general counsel to the Soboba Band of Luiseño Indians ("Soboba"), which has requested that we submit on its behalf the following comments on BOE Publication 146 (*Tax Tips for Sales to American Indians and Sales on Indian Reservations*). While Soboba agrees with the comments of others that Publication 146 does not provide adequate guidance on the various issues identified in its letter dated July 2, 2009, this letter will focus on only three particular shortcomings of the Publication.

1. The Sufficiency of Exemption Certificates to Document Exempt Sales

On page 11, Publication 146 seems to advocate that sellers, in order to later establish that an exempt sale took place, should maintain copies of (1) identification showing that the purchaser is Indian, (2) documents (*e.g.*, contracts, delivery receipts) showing that delivery occurred and title transferred on the purchaser's reservation, and (3) an exemption certificate from the Indian purchaser. Elsewhere, however, Publication 146 states that an exemption certificate alone is sufficient to establish that a particular sale was exempt. *See, e.g.*, page 12 ("If you accept a complete exemption certificate from an Indian purchaser in good faith, our audit staff should not question your acceptance of the certificate."). It makes sense to treat an exemption certificate as sufficient because the certificate it contains detailed information concerning the transaction (*see* page 12) and doing so would reduce the burden on the retailer to collect myriad documents. Accordingly, we request that the BOE make clear that a properly

validated exemption certificate, alone, is all that a purchaser need provide and the seller need request for later use as proof that an exempt sale took place

2. Non-Indian Spouses or Partners Should not be Taxed for the Off-Reservation Purchase of Goods for Delivery on the Reservation

Publication 146 provides that on sales by an off-reservation retailer, "sales tax does not apply to the one-half interest in the property attributable to the Indian spouse or partner who lives on a reservation if the ownership (title) of the merchandise is transferred to the couple or partners on the reservation, and the merchandise is delivered on the reservation. Sales tax applies to the one-half interest in the property attributable to the non-Indian spouse or partner." (Page 15.)

The stated policy is problematic in two respects. First, the policy appears to rest on the unfounded premise that the use or benefit of purchases by a particular spouse can be neatly attributed in a 50-50 fashion. Common experience and commonsense, however, show that real-life does not work this way. In the case of a married couple without kids, one spouse often purchases items for the sole or predominant use by the other. And where a Indian and non-Indian couple have several children who are tribal members, purchases will often be for the benefit of the entire family unit, which may have only a single non-Indian member. Thus, if the non-Indian mother purchases a car or major appliance, Publication 146 effectively attributes 50% of that transaction to her when, in fact, her use or enjoyment of the item would be far less (assuming it can be quantified at all). Second, the distinction between Indian and non-Indian spouses creates an arbitrary hurdle in everyday family decisions by creating a strong disincentive for the non-Indian spouse to shop on behalf of his/her partner.

A better approach would simply exempt from state tax all such off-reservation purchases by a non-Indian spouse or partner so long as s/he provides valid documentation of on-reservation residence and marriage (or partnership) with a tribal member.

3. Purchases at Tribal Casinos or Associated Reservation-Based Businesses Should not be Subject to State Tax Regardless of the Residence of the Purchaser

Publication 146 states that "use tax generally applies to sales by on-reservation Indians made to non-Indians and Indians who do not live on a reservation. (*See* page 23.) The Publication fails to address, however, that the State is preempted from taxing sales of tangible personal property to non-Indians and Indians residing off-reservation where tribal investment has created reservation value in the purchased goods. Given the importance of tribal gaming in California, the omission of any discussion of this exception would likely sow confusion. We recommend that the BOE add language addressing exemption from tax of these transactions.

The United States Supreme Court has held that the on-reservation sale of goods that have been manufactured on the reservation or that derive their value from tribal investments in on-reservation ventures, are not properly subject to state tax. *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219-20 (1987) (holding that California was preempted from exercising jurisdiction over Tribes' on-reservation activities the value which was generated by the Tribes themselves; "the Tribes are not merely importing a product onto the reservations for immediate resale to non-Indians."); *cf. White Mtn. Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980) (holding that the preemptive power of tribal interests is "strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services"); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155 (1980) (holding that state tax of on-reservation sales of cigarettes to non-Indians was not preempted because the Tribes had no right "to market an exemption from state taxation to persons who would normally do their business elsewhere").

Pursuant to IGRA, dozens of California tribes have made substantial investments in on-reservation gaming operations and ancillary businesses that attract Indians and non-Indians, alike, thereby vindicating the Indian Gaming Regulatory Act's goals of "promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. §2702(1). Taxing sales connected to the tribal gaming operations would subvert federal policy reflected in IGRA. Thus, regardless of the general rule concerning the taxation of on-reservation sales to non-Indians or Indians residing off-reservation, the purchases at tribal casinos and reservation-based businesses associated with those gaming operations should be treated as exempt from State taxation.

Soboba appreciates the opportunity to raise these issues with the Board, and looks forward to providing further feedback through its representatives at the meeting scheduled for August 19, 2009.

Very truly yours,

FORMAN & ASSOCIATES

Jay B. Shapiro

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July 31, 2009

VIA FACSIMILE (916-322-0187) & U.S. MAIL

Mr. Bradley Miller
Tax Policy Division
Board of Equalization
P.O. Box 942879
Sacramento, CA 94279-0044

Re: Comments on Publication 146

Dear Mr. Miller:

Forman & Associates serves as general counsel to the Cahuilla Band of Indians ("Cahuilla"), which has requested that we submit on its behalf the following comments on BOE Publication 146 (*Tax Tips for Sales to American Indians and Sales on Indian Reservations*). While Cahuilla agrees with the comments of others that Publication 146 does not provide adequate guidance on the various issues identified in its letter dated July 2, 2009, this letter will focus on only three particular shortcomings of the Publication.

1. The Sufficiency of Exemption Certificates to Document Exempt Sales

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The stated policy is problematic in two respects. First, the policy appears to rest on the unfounded premise that the use or benefit of purchases by a particular spouse can be neatly attributed in a 50-50 fashion. Common experience and commonsense, however, show that real-life does not work this way. In the case of a married couple without kids, one spouse often purchases items for the sole or predominant use by the other. And where a Indian and non-Indian couple have several children who are tribal members, purchases will often be for the benefit of the entire family unit, which may have only a single non-Indian member. Thus, if the non-Indian mother purchases a car or major appliance, Publication 146 effectively attributes 50% of that transaction to her when, in fact, her use or enjoyment of the item would be far less (assuming it can be quantified at all). Second, the distinction between Indian and non-Indian spouses creates an arbitrary hurdle in everyday family decisions by creating a strong disincentive for the non-Indian spouse to shop on behalf of his/her partner.

A better approach would simply exempt from state tax all such off-reservation purchases by a non-Indian spouse or partner so long as s/he provides valid documentation of on-reservation residence and marriage (or partnership) with a tribal member.

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The United States Supreme Court has held that the on-reservation sale of goods that have been manufactured on the reservation or that derive their value from tribal investments in on-reservation ventures, are not properly subject to state tax. *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219-20 (1987) (holding that California was preempted from exercising jurisdiction over Tribes' on-reservation activities the value which was generated by the Tribes themselves; "the Tribes are not merely importing a product onto the reservations for immediate resale to non-Indians."); *cf. White Mtn. Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980) (holding that the preemptive power of tribal interests is "strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services"); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155 (1980) (holding that state tax of on-reservation sales of cigarettes to non-Indians was not preempted because the Tribes had no right "to market an exemption from state taxation to persons who would normally do their business elsewhere").

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Cahuilla appreciates the opportunity to raise these issues with the Board, and looks forward to providing further feedback through its representatives at the meeting scheduled for August 19, 2009.

Very truly yours,

FORMAN & ASSOCIATES

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July 31, 2009

Mr. Bradley Miller
Tax Policy Division
Board of Equalization
P.O. Box 942879
Sacramento, CA 94279-0044
Fax 916-322-0187

Dear Mr. Miller:

Please accept the following comments regarding the content of Publication 146, "Sales to American Indians and Sales on Indian Reservations," pursuant to the request dated July 2, 2009.

1. We suggest that the publication take some type of measure to improve clarity of its description of the tax effects of common transactions. In many situations, it is not clear without studying the rules closely exactly how one scenario differs from another, or that two different sets of facts will yield the same tax effect. A table such as the one below, for example, would help readers recognize the similarities and differences are, and understand the tax consequences more readily.

Location of Sale	Seller	Buyer	Transfer of Possession and Title	Tax Result
Anywhere	Any	Indian residing on reservation	On reservation	No sales tax. Buyer must pay use tax if merchandise is used off-reservation for more than half of the first year of ownership.
Anywhere	Any	Any	Off reservation	Sales tax payable by seller
Off reservation	Any	Non-Indian or Indian residing off reservation	Anywhere	Sales tax payable by seller
On reservation	Any	Non-Indian or Indian residing off reservation	On reservation	No sales tax, but seller must collect and remit use tax
On reservation	Indian restaurant	Any	On reservation	No sales tax, no use tax
On reservation	Non-Indian restaurant	Non-Indian or Indian residing off reservation	Anywhere	Sales tax payable by seller

It might also be helpful for the Publication to describe, at least in general terms, the reason for the different treatment of Indian transactions, i.e., that Indians on Indian reservations are subject to federal jurisdiction, except where Congress provides otherwise, and because Congress has not given California the right to tax Indians for on-reservation transactions, the State does not collect sales and use taxes on such transactions.

2. On-Reservation Sales by Non-Indians to Non-Indians (see Pub. 146, p. 24): the tax effect is not clear. The Publication reads, "Either sales tax or use tax applies," without giving details about when each type of tax would apply. We interpret this to mean that tax applies in the same manner as for an Indian retailer. (This interpretation is reflected in the table above.) But more clarity would improve understanding.

3. On-Reservation Sales by Indians to Non-Indians (see Pub. 146, p. 23): We question the authority of the State to require Indian retailers on a reservation to collect use tax owed by non-Indian buyers, and to require Indian retailers to hold a California Certificate of Registration—Use Tax. We believe these requirements exceed the State's regulatory authority and impermissibly infringe upon Indian sovereignty.

4. Cigarette and Tobacco Products Taxes (see Pub. 146, p. 30-31): Publication 146 does not address two common types of transactions in this context, where Cigarette and Tobacco Products Taxes need not be paid: An Indian distributor selling to an Indian, and an Indian retailer selling untaxed cigarettes to an Indian. The Publication should specify that in both of these transactions, the cigarette tax is not paid or collected.

5. Tax applies to transactions involving non-Indian spouse (see Pub. 146, pp. 15, 17, 26): We question the authority of the State to impose sales or use tax on the portion of a purchase made by a non-Indian spouse. Such a tax impacts tribal sovereignty in that it affects the household income of an on-reservation Indian.

The requirement also raises issues of compliance and documentation. In theory, any tax-free purchase by an Indian raises the possibility that the tax-free benefit will be shared by its co-owner, the Indian's spouse, who might be non-Indian and therefore not entitled to a share of the benefit. Therefore absolute compliance would require that every Indian provide proof that he or she is not married, or is married to an Indian, or that the funds used for the purchase are traceable to a separate property source? Such requirements, we hope you would agree, are absurd. Rather than maintain a policy that can only be sporadically enforced and is legally questionable in the first place, we submit that the better practice would be to include the spouse of an Indian residing on a reservation within the definition of "Indian," thus affording spouses the same tax treatment.

6. Documentary evidence (see Pub. 146, pp. 10-13): Although we do not interpret the Publication or its attached form, "Statement of Delivery on a Reservation," to *require* notarization, we suggest that the form's instructions state explicitly that notarization is optional.

Thank you for the opportunity to provide these comments. We look forward to reviewing your draft revisions to the Publication.

Sincerely,

Morris Reid

Morris Reid
Chairman

CALIFORNIA INDIAN LEGAL SERVICES

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July 29, 2009

RECEIVED

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AUDIT & INFORMATION

Bradley Miller
Tax Policy Division
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P.O. Box 942879
Sacramento, CA 94279-0044

Sent via facsimile at (916) 322-0187 and U.S. Mail

Re: Comments to Board of Equalization 2008 Publication 146, "*Sales to American Indians and Sale on Indian Reservations.*"

Dear Mr. Miller:

California Indian Legal Services ("CILS") is the oldest non-profit Indian law firm in the state of California. CILS represents individual Native Americans and California Tribes on a wide variety of legal matters, state taxation being one of the most notable areas. A predominate state taxing issue we are asked for legal advice on is the state's sale and use tax exemption for the purchase of personal property on and off the reservation. These requests are not limited to individual tribal members making personal property purchases, but also include requests from tribal clients engaged in development and construction projects on their reservation. In reviewing the proposed 2008 Publication 146, "*Sales to American Indians and Sale on Indian Reservations*", our focus has not only been of the legal accuracy of the Publication but whether the information is "user friendly" for both Tribes and individual Native Americans. Our comments are grouped by "General Comments" and "Specific Comments." For purposes of commenting we will refer to "Chapter" to identify the title areas we are referencing.

General Comments

1. We find the Publication repetitive and its organizational structure confusing. Chapter 1, "Key Definitions", is followed by Chapter 2 "Documenting Claimed Exempt Sales," which seems illogical without first discussing what sales are exemption from sales and use tax. The sales exemption discussion is found in Chapters 3 and 5, and as a consequence tends to repeat much of the discussion in Chapter 2.

It is our recommendation to reorder the Chapters as follows:

Chapter 1. Key Definitions
Chapter 2. Sales to Indians: Retailers Located Outside Indian Reservations

Chapter 3. Sales by Retailers Located on Indian Reservations
Chapter 4. Documenting Claimed Exempt Sales
Chapter 5. Sales Related to Construction Contracts
Chapter 6. Special Taxes and Fees
Chapter 7. For More Information
Chapter 8. Statement of Delivery on Reservation (Exemption Certificate)

This reorganization will allow the reader to first learn about what sales are exempt from sale and use tax and then how to document the exemption claim. With this reorganization it may also be possible to eliminate Chapter 2 "Documenting Claimed Exempt Sales" and incorporate the information into Chapters 3 and 5 when discussing the rules for tax exemption, thus avoiding the repetitiveness of the information.

2. CILS would recommend the Board reconsider the requirement that personal property be used "**more than one-half of the time**" on the reservation during the first 12 months of use to avoid use tax. Other states, such as Washington, only require that the item be "**partial used**" in Indian Country after purchased by an Indian or the tribe in Indian Country. Additionally, in the State of Washington, the purchase of a motor vehicle, trailer, snowmobile, off-road vehicle, or other such property by an Indian *"it is assumed that the acquisition of those items in Indian County creates the assumption that the property will be used, at least partially, in Indian Country."* Washington's approach appears more reasonable due to the difficulty of an individual and tribe to document use "on" versus "off" reservation. The requirement of use on the reservation more than one-half of the time is stated in Regulation 1616(d)(4)(E); however, in our research we could not find this use requirement in the California Revenue and Taxation Code §§ 6017, 6021, or 6352 mentioned in Regulation 1616, or in any other section. The Board should revisit Regulation 1616 and consider amending the regulation. Moreover, the Board has not provided sufficient examples of what constitutes "acceptable documentation" to prove use on the reservation.

3. The Board should assure that the regulatory citations in the Publication are accurate. In Chapter 2, the Board states "[f]or more information on records that are suitable for sales and use tax purposes, please see Regulations 1628, Transportation Charges, Regulation 1667, Exemption Certificates, and Regulation 1698, Records." After reviewing these cited regulations, these regulations do not provide specific examples of proper documentation and appear to address only Sellers or Retailers; there are no examples of documentation that should be retained by the purchaser to prove use tax exemptions.

Specific Comments

Chapter 1 "Key Definitions" Page 7-9

1. We recommend that under the definition of "Reservation" bullet 3, delete "(also known as trust lands)" and insert ("Indian allotment.") Individual trust lands should be identified as an "allotment" for clarity.

2. The subsection "Sales tax and use tax: what is the difference?" does not adequately address the distinction between sales and use taxes, and more importantly when use tax applies to a sale. The

subsection focuses more on the retailer and less on the purchaser. Many of our individual clients are confused regarding use tax. Clients often misunderstand that while they may have satisfied the Board requirements in obtaining an exemption from sales tax, they are nonetheless subject to use tax on the same purchase. As written the use tax seems to be applied to "out-of-state sellers" and "may apply to certain purchases on Indian reservations." While this may be true, an Indian purchaser, for example, of a vehicle off reservation that is delivered on reservation while exempt from sales tax is still subject to use tax and must demonstrate the vehicle will be used on reservation at least 50% of the time for the first 12 months from purchase.

This subsection should make clear that personal property purchases by Indians and tribes on or off reservation, if found to be exempt from sales tax, are potentially subject to use tax. It should be reiterated that use tax exemption requires documentation and attestation that the personal property will be used or stored on the reservation for at least 50% of the time during the first 12 months of purchase. This point is made several times through the later Chapters but is not mentioned in this subsection.

Chapter 2 "Documenting Claimed Exempt Sales" Page 10-13

1. It states under subsections "Retailers" and "Purchasers" that acceptable documentation that an individual is an Indian would be a copy of the tribal ID card, a letter from a tribal council, or a letter from the Department of the Interior. Additionally, you refer to an "exemption certificate" from the Indian purchaser stating that they live on the reservation and the purchased item is for use on the reservation. However, under the "Records" subsection it states that if a retailer has evidence or knowledge that the Indian may not live on a reservation then the retailer should not accept an "exemption certificate" unless other reliable documents to verify residency on a reservation is provided by the Indian. You give the example of the Indian purchaser asking for the bill to be sent to a "nonreservation address." Unfortunately, many reservations do not have reliable United States Postal Service and therefore Indians from the reservations are required to obtain a Post Office box which is usually located off reservation. However, you do not provide examples of what would constitute "other reliable documentation," under these circumstances. It would be beneficial for both retailers and Indian purchasers to know what documentation is acceptable to the Board of Equalization for these purposes.

2. This Chapter does not address documentation needed to claim exemption from use tax or that such documentation should be retained for up to 8 years. Claiming exemption from sales tax is well defined, but many of our clients are unaware that they will also need to demonstrate that they used the personal property on the reservation 50% of the time within the first 12 months of purchase. The only reference we have found with regard to proper use tax documentation is on the BOE-146-RES form "Statement of Delivery on a Reservation" which contains very small print in the "Notice to Purchaser" section. As this form is not required by the Board, but is offered only as a sample of what should be on the exemption certificate, it would be prudent to provide examples of acceptable documentation of use in the text of the Publication.

The importance of knowing what documentation is needed is best illustrated by CILS clients that have been issued a "Redetermination of Use Tax" on a vehicle purchased by our client many years previously (in one case 4 years previously.) Our client will have satisfied all the sale tax exemption requirements (delivered on the reservation, etc.) but is now met with the burden of

demonstrating that the vehicle was used on the reservation 50% of the time during the 12 months from its purchase. In some cases our client no longer owned the vehicle and because of the delay in the Board's issuance of the "Redetermination" it is almost impossible to meet the burden of proof. As noted, there is little to no guidance from the Board on what documentation it requires from the Indian purchaser. This needs to be clearly stated under this Chapter and again that the documentation should be retained for up to 8 years, which is the statute of limitation for the Board to issue a "Redetermination."

Chapter 3 "Sales to Indians: Retailers Located Outside Indian Reservations" Page 14-18

1. "Transfer of ownership on reservation" the second "Please note" should be rewritten as follows:

> "Use tax is **not** owed by the Indian purchaser on the transaction above if the Indian purchaser who lives on the reservation does both of the following: takes ownership and delivery of an item on a reservations, and uses the item on a reservation more than one-half of the time in the first 12 months after the sale."

2. Under "Married couples or registered domestic partners" the first sentence "both members of" should be stricken as it is repetitive. Additionally, CILS recommends that in a mixed marriage, (an Indian and non Indian) the entire purchase be exempt for "sales" tax. It appears from the Board's Proposed Annotations for changes to Volume 2 of the Business Taxes Law Guide, "Current Legal Digest 1077" that you may be in the process of changing this requirement with annotation 305.0019.100 to exempt from tax the entire purchase. By way of example, Washington treats the spouse of a tribal member as a tribal member so long as it does not conflict with tribal law. Additionally, they treat a mixed family (Indians and non Indians) as satisfying the "comprised solely" criteria if at least half of the owners are Indian.

3. Under "Permanent improvements to real property" in the "Mobilehomes" subsection, we refer you to our General Comment 2 regarding changing the "one half" use on the reservation to "partial use" on the reservation. Also, the Board should clarify if the use requirement is limited to the Indian's own reservation or if the use applies to any reservation. An example, a tribal member of Tribe A purchases a mobilehome and has it delivered to Tribe B's Reservation, where Tribal member A lives. Does the use on Tribe B's Reservation count towards the requirement of use on a reservation?

4. Under "Reporting and paying use tax" in the "Use tax liability" subsection, you refer to "an out-of-state retailer," does it have to specifically be an out-of-state retailer?

5. Under "Dealer sales of vehicles, vessels, and aircraft" in the "Sales" subsection, CILS again would like clarification on what records are acceptable to document use on the reservation. See comment under Chapter 2, 2.

Chapter 4 "Sales Related to Construction Contracts" Page 19-21

We understand that this Section will be reorganized in light of the comments from the January 27, 2009 meeting with Tribal Leaders and interested parties. This Section should clearly outline

the difference between a "time and materials" contract and a "lump sum" contract and its effect on the sales and use taxability of materials.

Chapter 5 "Sales by Retailers Located on Indian Reservations" Page 22-26

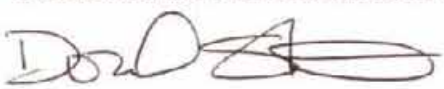
1. Under "Sales by on-reservation Indian retailers to Indians who reside on a reservation," you state that Indian purchaser may be required to pay use tax if the property is used off the reservation more than half the time in the first 12 months. Again, there is no discussion on what documentation is acceptable to prove this requirement. See comment under Chapter 2, 2.

2. Under "Sales by on-reservation Indian retailers to non Indians and Indians who do not reside on a reservation" subsection, you refer to "a reservation" does it have to be the retailer's reservation or does it refer to any reservation?

3. Under "Reporting and paying use tax" in the "Use tax is due:" subsection, it would be helpful to have an example using a vehicle, vessel or aircraft in discussing the of proper documentation to prove use on the reservation. See comment under Chapter 2, 2.

In conclusion, CILS would like to thank the Board for the opportunity to provide comments on Publication 146 "*Sales to American Indians and Sale on Indian Reservations.*" As an Indian law firm representing both individual Native Americans and Tribes in the area of sales and use tax law, we have a direct interest in the Publication. I am available to answer any questions regarding our comments at (916) 978-0960 ext. 303. Please feel free to contact me.

Regards,
CALIFORNIA INDIAN LEGAL SERVICES



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