

Publication 146, *Sales to American Indians and Sales in Indian Country*
June 30, 2010 Written Comments Summary

The information below is a summary of the written comments received from tribal leaders and interested parties regarding suggested revisions to Publication 146, *Sales to American Indians and Sales in Indian Country*. The written comments received have been paraphrased and summarized by publication chapter for ease of review. Following each comment is a description of the action taken, and if no action taken, a reason as to why no action was taken. A copy of the original incoming written correspondence is attached following the summary of written comments.

From	Author	Representing	Date of Letter	Page #
Campo	Monique La Chappa Campo Band of Mission Indians 36190 Church Road, Suite 1 Campo, CA 91906		June 30, 2010	6
Lepera	Ralph Lepera P O Box 1819 Bishop, CA 93515	Bishop Paiute	June 8, 2010	9
Feldman	Glen Feldman Mariscal Weeks McIntyre & Friedlander 2901 N Central Ave, Suite 200 Phoenix, AZ 85012	Santa Ynez, San Pasqual, and Cabazon Bands of Mission Indians	June 22, 2010	11
Saunders	Allyson Saunders Holland & Knight 633 West Fifth Street Los Angeles, CA 90071	Un-named client	June 2, 2010	16
Rincon	Bo Mazzetti Rincon Band of Luiseno Indians P O Box 68 Valley Center, CA 92028		June 30, 2010	21

Preface			
From	Summary of Comments	Action Taken	Reason
Feldman	Update title of document to replace “on Indian Reservations” with “in Indian Country”	Title of publication changed in draft. Official title change	

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		will occur when final document is published later this year.	
Saunders	Revise text in third paragraph	With revision, suggestion incorporated	
Rincon	Include acknowledgement of the tribal sovereignty principle which includes the inherent powers of self government vested in Indian tribes and not extinguished by Congress or divested by the courts	With revisions, suggestion incorporated into third paragraph rather than second paragraph as requested.	Material was more relevant to third paragraph.

1. Key Definitions			
From	Summary of Comments	Action Taken	Reason
Campo	Indian Organization – requirement that Indian organization be wholly owned by Indians is an unlawful assertion of state authority that diminishes tribal sovereignty and infringes on right to tribal self-government.	None	Regulatory change required
Saunders	Insert missing “as” in definition of Indian reservation	Suggestion incorporated	
Saunders	Use Tax – revise language to include “certain <u>untaxed</u> purchases <u>made</u> in Indian country.”	Suggestion incorporated	
Rincon	Definition of “Indian” needs to be broader to include persons of American Indian descent <i>or</i> persons eligible to receive services as an Indian, rather than requiring both criteria be met. Due to conflict with Regulation 1616 on this issues, publication of draft be delayed until regulation is amended	None	Regulatory change required. Significant progress has been made on many other issues and delaying publication will delay sharing of this information with the public.

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2. Sales to Indians: Retailers Located Outside Indian Country			
From	Summary of Comments	Action Taken	Reason
Campo	12-month test should be deleted	None	Regulatory change required
Lepera	Consistency between statements regarding 12 month test period Remove 12-month test requirements	Statements revised to be consistent throughout	
Saunders	Remove residency requirement for Indian purchasers	Clarification added regarding use tax collection when Indian purchaser does not reside in Indian country	
Rincon	Remove residency requirement for Indian purchasers	Clarification added regarding use tax collection when Indian purchaser does not reside in Indian country	

3. Sales by Retailers Located in Indian Country			
From	Summary of Comments	Action Taken	Reason
Campo	In lieu of requiring tribes collection of use tax, BOE should engage tribal governments to formulate tribal-state cooperative tax agreements/compacts to address dual taxation issues	None	BOE lacks authority to enter in compacts
Lepera	Consistency between statements regarding 12 month test period Remove 12-month test requirements	Statements revised to be consistent throughout	
Feldman	Sales for resale – clarify that sales for resale may be made to “Indian retailers or non-Indian” businesses	Suggestion incorporated	
Rincon	Remove 12-month test period requirements	None	Regulatory change required

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4. Purchases by Indians			
From	Summary of Comments	Action Taken	Reason

5. Documenting Exempt Transactions			
From	Summary of Comments	Action Taken	Reason
Lepera	Include sample forms submitted by others documenting receipt of property/materials/fixtures at a construction site	None	No sample forms have been submitted
Feldman	Minor rewording regarding BOE-146-RES requirement and notary requirement	With revision, suggestion incorporated	
Rincon	Clarify risk of loss and transfer of title	With revision, suggestion incorporated	

6. Sales Related to Construction Contracts			
From	Summary of Comments	Action Taken	Reason
Campo	Additional information regarding proper use of resale certificates between prime contractors and subcontractors should be included	Additional information regarding use of resale certificate added	
Lepera	Create table similar to table already provided that is specific to application of tax to construction contracts	Table created and added to chapter 9	
Saunders	Replace paragraph regarding issuance of resale certificate between prime and subcontractor with new paragraph explaining circumstances under which a resale certificate would be allowed	Additional information regarding use of resale certificate added	
Rincon	Exemption certificate should include blanket exemption certificate language	BOE-146-RES and	

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		BOE-146-CC both revised to include blanket exemption certificate instructions	
Rincon	Clarify use of resale certificate between prime and subcontractors	Additional information regarding use of resale certificate added	

7. Special Taxes and Fees			
From	Summary of Comments	Action Taken	Reason
Rincon	BOE should enter into compacts with tribes for revenue sharing	None	BOE lacks authority to enter in compacts

8. For More Information			
From	Summary of Comments	Action Taken	Reason

9. Table: Proper Application of Tax			
From	Summary of Comments	Action Taken	Reason

10. Statement of Delivery on a Reservation (Exemption Certificate)			
From	Summary of Comments	Action Taken	Reason



Campo Band of Mission Indians

Chairwoman Monique La Chappa
Vice Chairwoman Michelle Cuero
Secretary Kerm Shipp
Treasurer June Jones
Committee Nancy Cuero
Committee Dominique Connolly
Committee Benjamin Dyche

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JUL 9 2010

AUDIT & INFORMATION

June 30, 2010

VIA EMAIL ONLY

Bradley Miller
Board of Equalization
P O Box 942879
Sacramento, CA 94279-0044
Fax 916-322-0187
Brad.Miller@boe.ca.gov

RE: Comments To Pending Draft Publication 146: Sales to American Indians and Sales on Indian Reservations

Dear Mr. Miller:

The Campo Band of Mission Indians submits these comments to the Board of Equalization (BOE) Pending Draft Revision to Publication 146 Sales to American Indians and Sales on Indian Reservations, dated April 29, 2010 (Draft) and the Interested Parties meeting June 3, 2010 (Meeting).

As a general matter, the Band disagrees with the application of state and local taxes on the Campo Indian Reservation. In submitting these comments and participating in this process, nothing set forth in this letter should be construed to bind the Band to any position that concedes state or county authority to tax any Campo Reservation lands, businesses, or goods and services in any context. Nor should these comments be considered a complete inventory of all issues and concerns regarding BOE's position on taxation on Indian lands and shall not in any way, except as stated expressly stated otherwise, be interpreted as acquiescence to or agreement with the revised Draft.

At the Meeting, the BOE agreed to the revise the Draft and continue the consultation process with tribal governments to address proposed regulatory changes to Cal. Reg. 1616(d) that will be necessary to advance competent sales and use tax policy

with respect to Indian people and tribal governments residing in Indian country within the State of California.

1. Key Definitions – Indian Organization

The Band concurs with corrections to the Draft which recognize federally-chartered corporations under Section 17 of the Indian Reorganization Act of 1934, 25 U.S.C. §477. However, the Band disagrees with the Draft statement that Indian organizations qualify for exemption “only if they are ...wholly owned by Indians. If an [Indian] organization does not meet these criteria, it does not qualify, even when owned or operated by Indians.” This is an unlawful assertion of state authority that diminishes tribal sovereignty and infringes our right to tribal self-government.

2. Sales to Indians: Retailers Located Outside Indian Reservations

In our previous comments, we requested deletion of the 12-month test that qualifies Indian purchases of personal property as exempt. This time threshold is arbitrary when compared to the useful life of some items, impracticable from an enforcement perspective, not uniformly stated throughout sections of the Draft and not required by the statute. At the Meeting, the parties discussed the legality of the 12-month test period set forth in Cal. Reg. 1616(d)(3)(A)(1) with respect to the application of use tax for purchases that are exempt from sales tax. We understand and concur that this 12-month test will be discussed in future consultation meetings devoted to consideration of certain regulatory amendments to Cal. Reg. 1616(d) within the discretion of the BOE to approve.

3. Sales by Retailers Located on Indian Reservations

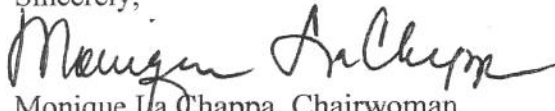
The Band commented previously that application of a use tax to Indian and non-Indian purchases in cases where the buyer does not reside on the reservation and that BOE registration requirements to tax collection and remittance violates the right of tribal governments to assert exclusive control over reservation affairs. This also contributes to the on-going problem of dual taxation on reservations. We suggested that rather than attempting to assert a use tax in lieu of a sales tax on reservation retailers, BOE should seriously consider engaging tribal governments to formulate tribal-state cooperative tax agreements/compacts to constructively address dual taxation under mutually agreeable terms. The BOE response that it lacks statutory authority to enter into cooperative tax agreements with tribal governments may be true. However, we strongly encourage the BOE to reconsider this position in light of the instrumental role the BOE has taken upon itself with respect to the consultation process for the Draft.

4. Sales Related to Construction Contracts

The Band commented previously that this section needs to instruct contractors on the proper use of resale certificates within the chain of contract. There needs to be a cross-reference to resale certificates. Prime contractors do not understand the function of resale certifications vis-à-vis subcontractors. We appreciate the partial clarification set forth in the Draft. As discussed at the meeting, we look forward to reviewing new language concerning use of resale certificates between subcontractors and prime contractors to incorporate the Two Agreements example set forth later in this section. This future revision will clarify the circumstances under which a sale of materials may occur between a prime and subcontractor during a construction project involving Two Agreements so long as the prime contractor resells the materials to the Indian purchaser and other conditions are met.

On behalf of the Campo Band, we appreciate the leadership and initiative the BOE has and continues to demonstrate in seeking government-to-government resolution of these matters. In the fall, we intend to formally engage the new Governor in government-to-government discussions to explore and establish a framework for an agreement governing the full range of taxation matters involving Indian lands and extend an invitation to BOE to participate in the development of mutually agreeable solutions to these issues.

Sincerely,



Monique Ija Chappa, Chairwoman
Campo Band of Mission Indians

RALPH R. LEPERA
ATTORNEY AND COUNSELOR AT LAW

MEMBER OF
CALIFORNIA AND
NORTH DAKOTA BARS

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June 8, 2010

Mr. Bradley Miller
Tax Policy Division
Board of Equalization
PO Box 942879
Sacramento, CA 94279-0050

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

Dear Mr. Miller:

The purpose of this letter is to respond to your request to provide you with written comments concerning the proposed revisions to Publication 146 as a result of the June 3, 2010 hearing at Culver City.

My comments are very brief and to the point. I had made a comment that there appeared to be different terms used in section 2 dealing with sales to Indians: Retailers Located outside Indian country and section 3 Sales by Retailers located in Indian country. As an example, on page 10 of the redline version under the notes section, it indicates that an Indian couple may be liable for use tax on the purchase price of the property if the property is "used outside of Indian country more than one half of the time during the first twelve months following delivery".

I then compared that language with the language on page 13 on the penultimate paragraph. That paragraph states "in such an instance, the Indian purchaser may be required to pay use tax, but only if, within the first twelve months following delivery, the property is used outside of Indian country more than it is used in Indian country."

In one instance the criteria is "more than one half of the time during the first twelve months following delivery" and in the second instance the criteria is that it is

“used outside Indian country more than it is used in Indian country”.

However, the real issue as pointed out by many of the tribal representatives is where does the authority come from for either criteria. If a purchase by an Indian takes place in Indian country, but the Indian purchaser is a member of a tribal government that is landless, how would that Indian qualify? It would appear that the criteria in total should be eliminated. If the purchase takes place in Indian country by a qualifying Indian, that should be the only criteria required.

My next comment is that the table shown on 37 is extremely helpful. I would suggest that a similar table be composed dealing with the construction issues. That is, contracts dealing with materials, fixtures and other incidents of ownership that we have reviewed at length. Such a table I suggest would be very useful for reference purposes.

Finally, the number of the participants at the June 3, 2010 hearing indicated that they had provided sample forms in the construction area. These forms could be very helpful once the final Publication 146 is revised. I would strongly recommend the enclosure within Publication 146 of all forms submitted that would in fact comply with Publication 146 requirements. As an example, reference was made by several attorneys to documentation used on site documenting receipt of materials/fixtures at a construction site. These receipts would document receipt of the product on the reservation and I assume document what was in fact received.

Your continued participation and cooperation in this endeavor to revise Publication 146 is appreciated. If you have any further questions or comments concerning the content of this letter please feel free to contact me at your convenience.

Sincerely,



Ralph R. LePera

Cc: Bishop Paiute Tribal Council

Miller, Brad

From: GLENN FELDMAN [Glenn.Feldman@mwmf.com]
Sent: Tuesday, June 22, 2010 3:52 PM
To: Miller, Brad
Subject: RE: BOE Publication 146 Metting Information
Attachments: Document.pdf

mr. miller-- attached are my final comments to the most recent draft of publication 146. if you have any questions about them, please let me know. thank you for your continued effort on this project. glenn

Glenn M. Feldman
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From: Miller, Brad [mailto:Brad.Miller@boe.ca.gov]
Sent: Wednesday, May 12, 2010 2:28 PM
Subject: FW: BOE Publication 146 Metting Information

Sorry, the link to the letter containing the meeting details was not added to my original message. You may use the following link to obtain the meeting details:

<http://www.boe.ca.gov/sutax/pdf/bem%20june%20meeting.pdf>

From: Miller, Brad
Sent: Wednesday, May 12, 2010 1:32 PM
To: Miller, Brad
Cc: McGuire, Jeff; Hellmuth, Leila; Kuhl, James
Subject: BOE Publication 146 Metting Information

A meeting to discuss the most recent revisions to Publication 146, *Sales to American Indians and Sales on Indian Reservations*, is scheduled for **Thursday, June 3, 2010, at 10 a.m.** in Room 207 at the Board of Equalization **Culver City District Office**, 5901 Green Valley Circle, Culver City, California. Additional details regarding the meeting may be found at the following link:

<http://www.boe.ca.gov/sutax/pdf/bem%20june%20meeting.pdf>

A revised draft of Publication 146 is available, along with other information that may be of interest, on our website at the following link:

<http://www.boe.ca.gov/sutax/indianLandSales.htm>

If you would like to submit written comments regarding the revisions to Publication 146, you may submit your written comments to me via email at Brad.Miller@boe.ca.gov or by letter at the following address:

9/14/2010

Mr. Bradley Miller
Tax Policy Division
Board of Equalization
P O Box 942879
Sacramento, CA 94279-0050

If you have any questions, comments, or concerns, please let me know.

Bradley Miller
Regulations and Legislative Coordinator
Business Taxes Committee
(916) 319-9924

SALES TO AMERICAN INDIANS AND SALES ~~ON INDIAN RESERVATIONS~~ IN INDIAN COUNTRY

Publication 146

Pending draft revision

Preface

This Board of Equalization (BOE) publication is intended primarily as a guide to the proper application of California's Sales and Use Tax Law to transactions occurring in Indian country in California that involve at least one non-Indian party. It is also intended to help Indian purchasers understand how the Sales and Use Tax Law generally applies to their purchases, as well as to provide some general information on other tax and fee programs administered by the BOE. We use the term "Indian" in this publication since that is the term used in state and federal law for "American Indian."

There are numerous federal and state laws, in addition to opinions issued by the courts, that impact the application of BOE-administered taxes and fees to transactions involving Indians. In administering the Sales and Use Tax Law in a fair and uniform manner, the BOE is subject to, and limited by, all pertinent laws and regulations, including Public Law 83-280, the provisions of the California Revenue and Taxation Code, and opinions issued by the federal courts in *Bryan v. Itasca County* (1976) 426 U.S. 373, 48 L.Ed.2d 710, *Moe v. The Confederated Salish and Kootenai Tribes of the Flathead Reservation* (1976) 425 U.S. 463, 48 L.Ed.2d 96, *Washington v. Confederated Tribes of the Colville Indian Reservation* (1980) 447 U.S. 134, 65 L.Ed.2d 10, *Oklahoma Tax Commission v. Chickasaw Nation* (1995) 515 U.S. 450, 132 L.Ed.2d 400, *Cabazon Band of Mission Indians v. Wilson* (9th Cir. 1994) 37 F.3d 430, and *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma* (1991) 498 U.S. 505, 112 L.Ed.2d 1112. The BOE is committed to working cooperatively with tribal leaders to respect tribal sovereignty and promote tax compliance in California.

The applicable laws, regulations, and court decisions do not grant the state of California general authority to impose sales and use taxes on Indian tribes or tribal members in Indian country. Therefore, certain on-reservation sales to Indians and certain other transactions in Indian country may not be subject to California sales or use tax. While there is no general sales tax exemption for sales to Indians, this publication explains how sales or use tax generally applies to sales or purchases in Indian country. This publication also describes the types of documentation that retailers and Indian purchasers need to maintain in order to qualify for an exemption from paying sales or use taxes with respect to certain transactions. It also provides information on certain other applicable California taxes and fees.

Before you read other parts of this publication, be sure to read chapter 1, "Key Definitions." It contains important information that will help you as you review the rest of the publication (see page 7).

This publication supplements our basic sales tax publication 73, *Your California Seller's Permit*. Publication 73 includes general information about obtaining a permit, using a resale certificate, reporting and paying sales and use taxes, discontinuing a business, and keeping records.

All BOE publications, forms, regulations, and much more information regarding all of our programs, are available on our website at www.boe.ca.gov.

If you have a general tax question, please call our Taxpayer Information Section and speak with a customer service representative. Representatives are available weekdays from 8:00 a.m. to 5:00 p.m. (Pacific time),

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 in Indian country or Indian organizations, please see chapter 5, page 18.

Tribal taxes

Some tribes require "on-reservation" retailers to collect and pay a tribal tax on their sales. The amount of tribal tax you charge your customers for sales you make in Indian country is not subject to California sales or use tax when the following apply:

- The tax is based on a percentage of the selling price of the merchandise.
- You are substantially complying with the requirements of the California Sales and Use Tax Law. In other words, you have a seller's permit or a certificate of registration to collect use tax and you are filing your sales and use tax returns on time, reporting all taxable and nontaxable sales, and paying all California taxes due.

The imposition of a tribal tax does not affect the liability for California sales or use taxes.

Sales for resale

As a registered seller, you may make nontaxable sales for resale to businesses who will sell the merchandise they buy from you or physically include that merchandise in items they make and sell. If you accept a timely, fully-completed resale certificate from your customer in good faith, you generally do not owe tax on your sale.

A certificate will be considered timely if you accept it any time before you bill the purchaser for the property, or any time within your normal billing and payment cycle, or any time at or prior to delivery of the property to the purchaser. A resale certificate remains valid until it is revoked in writing.

Indian retailers may purchase items for resale regardless of whether they are required to hold a seller's permit. Indian buyers who are not required to hold a seller's permit should make note of that fact on their resale certificates. For example, the buyer might state, "I do not hold a California seller's permit because all of my sales are made in Indian country. None of my sales are subject to California sales or use tax."

The seller may accept this certificate as a valid resale certificate if it is timely taken and is in the proper form as provided in Regulation 1668, *Sales for Resale*, and taken in good faith from a person who is engaged in the business of selling the kind of merchandise being purchased. Other evidence to show the purchaser is engaged in the business of selling the kind of merchandise being purchased may include documents such as a business license, business card, or a copy of an advertisement from a newspaper or telephone book.

For more information, see Regulation 1668, *Sales for Resale*, and our publication 103, *Sales for Resale*.

Therefore, risk of loss and transfer of title will both occur in Indian country. However, where the sale occurs depends solely on where title passes.

Please note: This is a general description of transfer of ownership in Indian country. 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 purchaser as explained previously in this publication, you should keep copies of documents that BOE auditors can use to verify your sale is exempt. This generally requires documentation that you transferred title to the property in Indian country and that the sale of the property was to an Indian purchaser. For example, you may obtain documentation such as the following:

- 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 in Indian country and delivery occurred there, such as contracts of sale, invoices, bills of lading, delivery receipts, and freight invoices.

To help you document exempt sales you may obtain an exemption certificate from the Indian purchaser. As discussed in more detail below, the exemption certificate should state that the Indian purchaser lives in Indian country. The exemption certificate will serve as support that the property was sold to an Indian. Therefore, if you obtain an exemption certificate, you will not need to obtain any additional documentation showing the purchaser is an Indian such as a tribal ID card. You will still need to retain documentation showing transfer of title and delivery of the property to the Indian in Indian country.

The BOE-146-RES, *Statement of Delivery in Indian Country*, is available on page 37. The BOE-146-RES contains all of the required elements of an exemption certificate. Additionally, it contains a section that may be completed by a notary public to document delivery of the property in Indian country. *Generally, A* notarized BOE-146-RES *may be* used to document delivery of the property when delivery is made by facilities of the retailer. The retailer is not required to obtain a notarized statement of delivery, but the retailer is required to obtain documentation demonstrating the property was delivered to the Indian purchaser in Indian country. If you obtain a properly completed and notarized BOE-146-RES, you do not need to obtain any additional documentation showing the property was delivered directly to the purchaser in Indian country. If the property is delivered by a common carrier or contract carrier, freight invoices or bills of lading will generally qualify as sufficient documentation of delivery to the Indian purchaser in Indian country.

If a state-licensed notary public is not readily available to document delivery of the property by facilities of the retailer in Indian country, ~~please note that many tribes have tribal council officers who may act in the capacity of notary public for the purpose of documenting delivery in Indian country.~~ Certification of delivery in Indian country by tribal council officers or ~~their designees~~ *other duly authorized tribal representatives* is acceptable.

Purchasers

If you are an Indian who lives in Indian country, you will need to provide documentation to the retailer that you qualify for the tax exemptions explained in this publication. Generally, you will need to provide the retailer with a signed exemption certificate stating that you live in Indian country. In lieu of providing the retailer with an exemption certificate, you may provide the retailer with documentation showing you are an

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June 2, 2010

VIA ELECTRONIC MAIL

Mr. Bradley Miller
Tax Policy Division
Board of Equalization
P O Box 94279-0050
Sacramento, CA 94279

Re: Comments on Draft Publication 146 Dated April 29, 2010

Dear Mr. Miller:

We write on behalf of several California Indian tribes in response to the BOE's request for comments on draft Publication 146 dated April 29, 2010. We would like, first, to express our appreciation for the opportunity to work with the BOE in developing tax guidelines that are in keeping with federal Indian law. BOE's willingness to solicit and implement comments provided by tribal representatives is noteworthy.

Although our comments are aimed solely at improving publication 146 and implementing existing regulations, we believe that the regulations themselves, and particularly regulation 1616, require revision. We reserve the right to oppose these regulations in the future. Nonetheless, in order to assist in the process of making Publication 146 a better and more streamlined guidance document, we provide the following comments.

Note that our office has submitted comments on the draft publication in the past. Most of our earlier comments focused on the section dealing with construction contracts, which required significant clarification. BOE has subsequently made changes to that section, so that aside from one issue discussed below, we have no further comments on it at this time. Instead, our current comments focus on other aspects of the draft publication that we have not previously addressed.

We have one major comment, impacting several sections in the draft publication, and several smaller comments affecting scattered sections. We begin with the smaller comments, which we present in the order of their appearance in the draft.

- On page three of the draft, in the third full paragraph, the following sentence should be revised as indicated: While there is no general sales tax exemption for sales to Indians, this publication explains when and how sales or use tax is due on ~~generally applies to~~ sales or purchases in Indian country.

We recommend this change because the original sentence implies that sales and use tax generally applies to sales or purchases in Indian country, which is not the case. The tax does not generally apply. Rather, in certain cases the tax is due on particular types of transactions. We have revised the sentence to reflect this difference.

- On page eight of the draft, the word "as" has been omitted from the sentence: Under the Sales and Use Tax Law "reservation" generally has the same meaning as "Indian country" ...
- On page nine of the draft, untaxed purchases made in Indian country should be treated the same as untaxed purchases made from out-of-state sellers, and the text describing both types of sales should conform. Accordingly, under the heading of "Use tax," the following sentence should be revised as indicated: Use tax generally applies to untaxed purchases made from out-of-state sellers. It may also apply to certain untaxed purchases made in Indian country.
- On page 25, the current draft includes a new paragraph providing that subcontractors may not take a resale certificate from a prime contractor who subsequently re-sells the materials to an Indian tribe in Indian country. We believe that this instruction is incorrect.

Under regulation 1521, any contractor who furnishes and installs materials under a contract that 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, will be deemed a retailer of those materials. The definition of "contractor" in regulation 1521 explicitly includes subcontractors, which means that subcontractors (who by definition subcontract with a prime contractor who contracts with the owner) may also be retailers of materials as long as the conditions for being a retailer are met.

Assuming that both the prime contract and the subcontract contain the language required under regulation 1521 (separate sales price, contractor as seller of materials), that the subcontractor's materials will ultimately be sold to the Indian owner and installed in Indian country, and that the subcontractor is bound by the prime contract so that all of the materials and services he's providing are covered by the prime contract, the subcontractor should qualify as a retailer of materials under regulation 1521(b)(2)(A)(2). As a retailer,

the subcontractor is permitted to sell his materials to the prime contractor and to take a resale certificate as long as the prime contractor sells the materials to the Indian owner in Indian country.

Accordingly, we suggest that the new paragraph on page 25 be replaced by a paragraph explaining the conditions under which a subcontractor may take a resale certificate from a prime contractor.

Our final comments pertain to the requirement, present throughout the draft publication, that only Indians who *reside in* Indian country may make tax-free purchases within Indian country. We call this requirement the "residence requirement." We see no basis for the residence requirement and believe that it should be removed from publication 146 because the State is precluded from imposing its tax on any member of a federally-recognized Indian tribe transacting a sale within Indian country and utilizing the purchased property within Indian country regardless of the individual Indian purchaser's place of residence.

We note at the outset that we are aware that regulation 1616 includes the residence requirement in subsection (d)(3), dealing with on-reservation retailers.¹ Under this subsection, only Indians who reside in Indian country may make tax-free purchases from on-reservation retailers. We believe that this requirement is not supported by federal Indian law and should be removed from the regulation. We understand, however, that the BOE is not currently engaged in revising its regulations and instead is interested in elucidating their implementation. Accordingly, we direct our comments only at those portions of publication 146 that address subsections (d)(4)(A)-(E) of regulation 1616, which do not include the residence requirement.

Regulation 1616(d)(4)(A), applying to sales by off-reservation retailers, explains the conditions under which Indians may make tax-free purchases. Under this regulation, an Indian's purchase is free of sales tax if "the property is delivered to the purchaser and ownership to the property transfers to the purchaser on the reservation." Subsection (d)(4)(B) applies the same criteria to the purchase by an Indian of tangible personal property (including a trailer coach) that is intended to be permanently attached by the purchaser on the reservation. Subsection (d)(4)(C) applies similar criteria to contractors who are also sellers of materials. And under subsection (d)(4)(E), use tax only applies to the use of tangible personal property purchased under subsections (d)(4)(A)-(C) if the personal property is used off of the reservation more than it is used on the reservation in the first 12 months following delivery.

Regulation 1616(d)(4)(A)-(E) does not require that an Indian purchaser reside within Indian country in order to partake in Indians' right to make tax-free purchases within Indian country. Nor does it require residence in Indian country as a precondition for the non-payment

¹ Subsection (d)(4), dealing with off-reservation retailers, does not include the residence requirement. Thus, under the regulation's plain language, individual members of federally-recognized Indian tribes may make tax-free purchases in Indian country from non-Indian retailers provided that the property purchased is delivered to the Indian in Indian country, title transfers in Indian country, and the property is used (or located) in Indian country for more than half of the first year after its purchase.

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of use tax. In fact, residence within Indian country is not required at all in connection with sales by off-reservation retailers.

Subsection (d)(4)(F), on the other hand, does include the residence requirement, as does regulation 1616(d)(3). Thus, when the regulation's drafters wanted to include a residence requirement they did so explicitly. No such requirement exists for subsections (d)(4)(A)-(E), and thus residence in Indian country is not a prerequisite to enjoyment of an exemption from sales and/or use tax.

Nonetheless, the draft publication includes this requirement in almost all of the sections dealing with subject matter covered by regulation 1616(d)(4)(A)-(E). For example, on page 10 under the heading "Transfer of ownership" the third bullet point is a requirement that the Indian purchaser live within Indian country. The same unfounded requirement exists at the top of page 11 under the headings "Dealer sales of vehicles, vessels, and aircraft" and "Permanent improvements to real property" and in the middle of page 11 under the heading "Mobilehomes." In each of these examples, the publication includes a requirement that the Indian purchaser reside within Indian country in order to take advantage of the tax exemption. And in each example, the residence requirement is not present in the regulation itself. We ask that the residence requirement be removed from those portions of the draft Publication dealing with section 1616(d)(4)(A)-(E).

The draft publication contains numerous references to the residence requirement that will have to be revised once the requirement is dropped with regard to off-reservation retailers. Such references are found on pages 17 (under the heading "Reporting and paying use tax"), 18 (under the heading "Mobilehomes"), 19 (in the very last paragraph on the page), 20 (under the heading "Retailers," in the second full paragraph), 21 (under the heading "Purchasers"), 30 (under the heading "California Tire Fee"), 37 (in the chart), 40 (throughout the sample exemption certificate), and 43 (construction contract exemption certificate). Similar references may also be present in other parts of the draft publication.

Note that while the section dealing with construction contracts correctly omits any reference to the residence requirement, the sample exemption certificate on page 43 includes such a requirement. References to the residence requirement in the sample certificate should be revised to apply only in those cases in which the seller of the materials (i.e., the contractor-retailer) is an on-reservation seller.

We would be happy to work with you to revise all of the above references to the residence requirement to ensure that they require residence only in the limited situations in which residence is required under the regulations.

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Thank you for your consideration of our comments.

Sincerely yours,

HOLLAND & KNIGHT LLP

A handwritten signature in black ink, appearing to read "Allyson G. Saunders", with a long horizontal flourish extending to the right.

Allyson G. Saunders

Rincon Band of Luiseño Indians

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June 30, 2010

Comments of Rincon Band of Luiseno Indians Regarding Board of Equalization Pending Draft Revision of Publication 146: Sales to American Indians and Sales on Indian Reservations¹

Dear Mr. Miller,

The Rincon Band of Luiseno Indians submits these comments in response to the Board of Equalization (the "BOE") letter, dated April 29, 2010, circulating the Pending Draft Revision to Publication 146 Sales to American Indians and Sales on Indian Reservations ("Draft") and the Interested Parties meeting on June 3, 2010, in Culver City (the "Meeting"). The Draft is intended to provide guidance on how the State of California (the "State") handles sales and use tax in Indian country. At the Meeting,

¹ The Rincon Band continues to have a number of disagreements with the State regarding taxation policy and interpretation of cases regarding the incidence and applicability of state taxes. In submitting these comments and participating in this process, the comments of the Rincon Band of Luiseno Indians should neither be construed to bind the Band to any position that concedes state authority to any tax in any context nor should they be considered a complete inventory of all issues and concerns regarding BOE's position on taxation on Indian lands. Further, the comments shall not in any way be interpreted as acquiescence to or agreement with the revised Draft, nor in any way be interpreted as a waiver of the Tribe to contest any position the State may take regarding applicability of state or local taxes to Indian lands, Indian enterprises, or goods and services provided on Indian lands.

Bo Mazzetti
Chairman

Stephanie Spencer
Vice-Chairwoman

Charlie Kolb
Council Member

Steve Stallings
Council Member

Kenneth Kolb
Council Member

California (the “State”) handles sales and use tax in Indian country. At the Meeting, BOE agreed to revise the Draft and continue the consultation process with tribal governments to address proposed regulatory changes to Cal. Reg. 1616(d) for competent and fair tax policy with respect to Indian people and tribal governments residing in Indian country within the State.

1. Preface

We appreciate the proposed revisions to the Preface that describe the limitations on State authority to tax Indians or Indian commerce on reservations. We propose adding language that recognizes the inherent authority of Indian tribes as sovereign governments over reservations. Specifically, acknowledgement of the “tribal sovereignty” principle which includes the inherent powers of self-government vested in Indian tribes and not extinguished by Congress or divested by the courts.² This basic principle guides the scope of tribal and state authority in Indian country and is the driving force behind BOE’s need for the Draft. We suggest the second paragraph of the Preface include an acknowledgement of tribal sovereignty by adding the following sentence:

“The inherent sovereignty of Indian tribes to exercise powers of self-government over their territory restricts the application of state laws to regulate or tax activities in Indian country. There are numerous federal and state laws, in addition to court opinions that impact the application of BOE taxes and fees to transactions involving Indians. In administering the Sales and Use Tax Law in a fair and uniform manner, the BOE is subject to, and limited by, all pertinent laws and regulations, including Public Law 83-280, the provisions of the California Revenue and Taxation Code, and opinions issued by the federal courts in *Bryan v. Itasca County*, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976), *Moe v. The Confederated Salish and Kootenai Tribes of the Flathead Reservation* (1976) 425 U.S. 463, 48 L.Ed.2d 96, *Washington v. Confederated Tribes of the Colville Indian Reservation* (1980) 447 U.S. 134, 65 L.Ed.2d 10, *Oklahoma Tax Commission v. Chickasaw Nation* (1995) 515 U.S. 450, 132 L.Ed.2d 400, *Cabazon Band of Mission Indians v. Wilson* (9th Cir. 1994) 37 F.3d 430, and *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma* (1991) 498 U.S. 505, 112 L.Ed.2d 1112.”

2. Key Definitions

“Indian”

In our January comments, we also suggested that the definition of “Indian” person needs to be broader and more inclusive such that either persons of American Indian descent or persons eligible to receive services as an Indian from the United States Department of the Interior fall within the definition. The Draft requires that an “Indian” person be both a descendant and eligible to receive services excludes Indian persons who are lineal descendants residing on Indian reservations but not eligible to receive services

² *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978).

from the United States due to a broad range of enrollment issues. The Band suggested the following revisions to this definition:

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

- An individual of American Indian descent, ~~and or~~
- Eligible to receive services as an Indian from the United States Department of the Interior.

This issue was discussed at the Meeting. Tribes and the BOE had previously discussed that determination of who is and is not an Indian for purposes of retail tax exemptions in Indian country lies with tribal governments. However, the Draft does not reflect the right of tribes to determine this issue. The BOE staff explained that the Draft definition of Indian cannot contravene the regulatory definition set forth in Cal. Reg. 1616(d)(2) and that future consultation meetings will be necessary to amend this and other regulatory provisions subject to the discretion of the BOE. Because a regulatory change may be necessary and future tribal consultation meetings on this and other issues (discussed below) is likely, we recommend that publication of the Draft be delayed to coincide with the amendments to the regulation, if any.

From the Band's perspective, there are advantages to delay. First, the Draft will be immediately outdated upon adopting any amendments to the regulation. Second, additional tribal consultation meetings will likely be necessary after amending the regulation to re-publish the Draft. Third, the new Governor is likely to engage tribal governments on tax issues which would also require re-publication of the Draft. For these reasons, we urge the BOE to consider completing the regulatory amendments prior to publication of the Draft.

"Reservation"

The Band's comments, dated July 31, 2009 and January 29, 2010, concerning the Band's regulatory jurisdiction over non-trust lands within the exterior boundaries of the reservation are unchanged and incorporated herein by this reference.

3. Sales to Indians: Retailers Located Outside Indian Country Reservation

Transfer of Ownership in Indian Country ~~on the reservation~~

The Band disagrees with new language that imposes residency requirements on Indian organizations in the absence of any such requirements in the regulation. The regulatory provision dealing with off-reservation retailers, Cal. Reg. 1616(d)(4), is concerned with delivery requirements and ownership transfer on the reservation. Because the new language adds an extra layer of restriction to retail transactions between

off-reservation retailers and Indian organizations without sufficient regulatory basis, we suggest the following revisions:

~~[w]hen the Indian purchaser is an Indian organization, the requirement that the Indian purchaser reside in Indian country must still be met. An Indian organization will be deemed to reside in Indian country if the Indian organization satisfies the definition of an Indian organization set forth in Chapter J, Key Definitions is located in Indian country or otherwise conducts the business of the Indian organization in Indian country.~~

4. Purchases by Indians

At the Meeting, the parties discussed the legality of the 12 month test period set forth in Cal. Reg. 1616(d)(3)(A)(1) with respect to the application of use tax for purchases that are exempt from sales tax. We understand and concur that this 12 month test period will be added to the list of issues considered for regulatory amendments to Cal. Reg. 1616(d).

5. Documenting Exempt Transactions

Transfer of title (ownership) in Indian Country ~~on the reservation~~

The new language below regarding shipping instructions in cases of common carrier delivery of the product to an Indian purchaser is not particularly helpful to clarify whether risk of loss and title transfer must both occur on the reservation. To clarify this statement, we suggest the following revisions:

“[w]hen delivery does not take place as described here, ownership of the product being sold or purchased generally transfers to the buyer ~~outside Indian Country~~ ~~off the reservation~~ because risk of loss typically follows possession of the purchased product and shifts upon delivery of the product unless otherwise provided in the contract of sale.

Generally, when products are ~~property~~ is delivered by common carrier, the transfer of title and the shift of risk of loss may occur at different locations unless. However, it is important to note that for the sale of property to an Indian residing in Indian country with delivery by common carrier or contract carrier to qualify as exempt from tax, the contract of sale must contain both a title clause indicating title transfers to the Indian purchaser in Indian country and the contract of sale must also require delivery a destination clause that in Indian country (F.O.B. destination). ~~Inclusion of an F.O.B. destination statement will dictate that the risk of loss shifts at the destination. Therefore, risk of loss and transfer of title will both occur in Indian country. However, where the sale occurs depends solely on where title passes.~~

The new language regarding construction contract exemption certificates provide for a “blanket exemption certificate covering numerous transactions” during the course of

a construction project. However, the form of exemption certificate the BOE provided does not contain this language but should. This should be on face of the form to avoid having to review the Draft to determine whether a global exemption certificate in the context of a construction contract will suffice for documentation purposes.

6. Sales Related to Construction Contracts

Tax exempt sales of materials under a construction contract

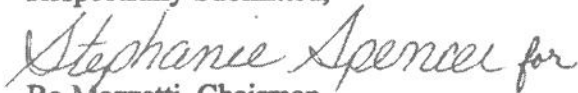
There was discussion at the Meeting that the new language added to the Draft concerning use of resale certificates between subcontractors and prime contractors will be clarified to incorporate the Two Agreements example set forth later in this section. This modification will clarify the circumstances under which a sale of materials may occur between a prime and subcontractor during a construction project involving Two Agreements so long as the prime contractor resells the materials to the Indian purchaser and other conditions are met.

7. Special Taxes and Fees

The Band appreciates the clarification the Draft provides confirming that BIA roads are not considered part of the state or local road system. The Band also desires and intends to move forward with the State to seek resolution to a broad range of taxation issues. The Draft indicates that the BOE lacks statutory authority to enter into tax compacts with tribal governments to address these issues. We encourage BOE to reconsider this position.

The BOE has shown leadership on these issues and can play a – crucial role in ongoing government-to-government negotiations to establish a compact framework between the State and tribal governments. The imposition, enforcement and collection of State sales and use taxes often rest with the independent action of the BOE even though the Governor has supervisory powers and executive order authority over taxation. The Band intends to formally engage the Governor in government-to-government discussions on these issues and extends an invitation to BOE to more fully explore mutually agreeable solutions to taxation matters.

Respectfully Submitted,



Bo Mazzetti, Chairman
Rincon Band of Luiseno Indians