

48 Op. Att'y Gen. No. 24

INDIANS - Application of light vehicle registration fee to tribally owned vehicles;
INDIANS - Application of light vehicle registration fee to vehicle owned by enrolled tribal members residing on their reservations;
INDIANS - Application of light vehicle registration fee to vehicle owned by Indian not residing on the reservation at which he or she is enrolled;
MOTOR VEHICLES - Application of light vehicle registration fee to tribally owned vehicles;
MOTOR VEHICLES - Application of light vehicle registration fee to vehicle owned by enrolled tribal members residing on their reservations;
MOTOR VEHICLES - Application of light vehicle registration fee to vehicle owned by Indian not residing on the reservation at which he or she is enrolled;
MOTOR VEHICLES - Application of light vehicle registration fee to motor vehicle owned by non-resident active duty military personnel stationed in Montana;
TAXATION - Determination of whether light vehicle registration fee operates as a tax for purposes of tax exemptions for Indians and Indian tribes;
TAXATION - Determination of whether light vehicle registration fee operates as a tax for purposes of tax exemption for non-resident active duty military personnel;
MONTANA CODE ANNOTATED - Sections 61-3-321, -456, -502, -508 to -511, 61-10-201;
MONTANA LAWS OF 1999 - Chapter 515;
MONTANA LAWS OF 1999 (MAY 2000 SPECIAL SESSION) - Chapter 11;
OPINIONS OF THE ATTORNEY GENERAL - 46 Op. Att'y Gen. No. 7 (1995), 43 Op. Att'y Gen. No. 46 (1989), 42 Op. Att'y Gen. No. 21 (1987), 39 Op. Att'y Gen. No. 46 (1981), 39 Op. Att'y Gen. No. 45 (1981), 37 Op. Att'y Gen. No. 28 (1977);
UNITED STATES CODE - Title 50, app. § 574;
UNITED STATES CONSTITUTION - Article VI, clause 2.

HELD:

1. The light vehicle registration fee established in 1999 Mont. Laws, ch. 515, §§ 1-3, ratified by the voters as L.R. 115, may not be assessed against tribally owned vehicles or vehicles owned by enrolled tribal members residing on their reservations.
2. The light vehicle registration fee established in 1999 Mont. Laws, ch. 515, §§ 1-3, ratified by the voters as L.R. 115, may not be assessed against non-resident active duty military personnel stationed in Montana.

December 27, 2000

Mr. Larry D. Epstein
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Dear Mr. Epstein:

You have requested my opinion on the following questions:

1. May the motor vehicle registration fees imposed pursuant to legislative referendum measure 115 ("L.R. 115") be assessed against Indian tribes with respect to tribally owned vehicles or enrolled tribal members residing on their reservations with respect to their personal vehicles?
2. May the same fees be imposed against non-resident active duty military personnel stationed in Montana with respect to their personal vehicles?

You have asked for an analysis of the applicability of the new light vehicle registration fee, imposed by L.R. 115, referred to the voters in 1999 Mont. Laws, ch. 515, to Indians, tribal members, tribal governmental fleets, and to non-resident active duty military personnel. Legislative Referendum 115 created a "light vehicle registration fee" ("LVRF"), which "replace[es] the current system of taxation for automobiles, vans, sport utility vehicles, and light trucks." 1999 Mont. Laws, ch. 515, Title. The LVRF is an annually assessed, three-tiered fee based on vehicle age. The fee is \$195 for vehicles four or fewer years old, \$65 for vehicles five to ten years old, and \$6 for vehicles eleven years old or older. The LVRF is "in addition to other annual registration fees." 1999 Mont. Laws, ch. 515, § 1(1). The "other annual registration fees" to which the statute refers are: (1) the \$10.25 to \$15.25 registration fee required under Mont. Code Ann. §§ 61-3-321 and -456; (2) the \$1.50 to \$2 junk-vehicle disposal fee of Mont. Code Ann. § 61-3-508; (3) the \$1.50 weed control fee of Mont. Code Ann. § 61-3-510; (4) the \$1 county motor vehicle computer fee, Mont. Code Ann. § 61-3-511; and, where applicable, (4) the gross vehicle weight fee of Mont. Code Ann. § 61-10-201. Under the statute, light vehicles may also be subject to a local option vehicle tax or flat fee. 1999 Mont. Laws, §§ 37, 38.

Currently, tribal members, tribal governments, and non-resident active duty military personnel stationed in Montana pay the "other annual registration fees" referred to in the referendum. However, tribal members residing on their reservations and tribal governments have not been obligated to pay the sales tax on new motor vehicles, the 1.4 percent annual motor vehicle value tax, or any county option tax, and military personnel have been exempt from the 1.4 percent annual motor vehicle value tax and any county option tax. The "other annual registration fees" currently being paid by tribal members, tribal governments, and non-resident active duty military personnel are not in issue in your opinion request.

II.

Although clearly denominated as a fee, the LVRF shares many salient characteristics of the prior tax, which it replaced. The prior tax was preempted by federal law, and was not assessed against tribal members residing on their reservations or tribal governments. 39 Op. Att'y Gen. No. 45 (1981); Assiniboine & Sioux Tribes v. Montana, 568 F. Supp. 269 (D. Mont. 1983); accord Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463 (1976).

The question posed is whether the structure of the LVRF is sufficiently different from the prior taxes and license fees to warrant its assessment against tribal members and tribal governments. This question is a complicated one, requiring application of federal Indian law principles as well as state law governing whether fees are substantively taxes or actually fees for purposes of determining application of exemptions from certain taxes.

A.

The federal government has plenary authority over Indians. Under the Supremacy Clause of the United States Constitution, art. VI, cl. 2, federal law preempts conflicting state laws. Absent express Congressional authorization, states may not tax or apply their laws to tribal members or their property, or to tribal governments. Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995); Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 126 (1993); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 475 (1976); Lummi Indian Tribe v. Whatcom County, 5 F.3d 1355, 1357 (9th Cir. 1993); Standing Rock Sioux Tribe v. Janklow, 103 F. Supp. 2d 1146, 1153-54 (D.S.D. 2000). Although the United States Supreme Court recently has held that Congressional authorization exists for states to tax tribally owned real property no longer held in trust, Cass County v. Leach Lake Band of Chippewa Indians, 524 U.S. 103 (1998), there remains no Congressional authorization for states to tax personal property of tribes or of tribal members residing on their reservations. Bryan v. Itasca County, 426 U.S. 373, 391 (1976); Standing Rock Sioux Tribe, 103 F. Supp. 2d at 1153-54.

Federal law does not operate to divest a state of authority over persons of Indian heritage who are not tribal members residing on their own reservation. Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 160-61 (1980). Thus, nontribal members and other non-Indians residing on reservations are subject to all state laws. That is because federal Indian law is derived from the treaty relationship between the United States and its federally recognized tribes. It is a political classification, not a racial one. Morton v. Mancari, 417 U.S. 535, 553-55 (1974). Thus, federal law does not preempt any

state laws applying to individuals of Indian descent who are not enrolled members of the tribe on whose reservation they reside. Colville, 447 U.S. at 160-61; Assiniboine and Sioux Tribes, 568 F. Supp. at 275.

B.

Application of state law to the on-reservation conduct of tribal governments is generally considered an undue infringement on tribal sovereignty, sometimes expressed as the right of the Indians to make their own laws and be governed by them. Williams v. Lee, 358 U.S. 217, 220 (1959); In re Marriage of Skillen, 1998 MT 43, ¶ 17, 287 Mont. 399, 956 P.2d 1; State ex rel. Iron Bear v. District Court, 162 Mont. 335, 340, 512 P.2d 1292, 1295 (1973). A tribe and its members are, however, subject to nondiscriminatory taxes and fees for off-reservation conduct. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 157-58 (1973). With respect to mobile personal property, the task of a state wishing to tax tribal members' or tribes' interests is, therefore, to craft a tax which applies only to off-reservation use. See 39 Op. Att'y Gen. No. 45 (1981). For vehicles, obviously, the problematic issue for a state wishing to apply a personal property tax, sales tax, or vehicle registration fee to tribal members' vehicles is how to allocate a tax only to off-reservation miles driven. See Standing Rock Sioux, 103 F. Supp. 2d at 1159-60.

All the tribal governments in Montana own some vehicles, which they register to the Tribe and use for governmental purposes. Although state laws, including nondiscriminatory state fees, would apply to off-reservation tribal governmental conduct, Mescalero Apache Tribe, 411 U.S. at 257-58, as a practical matter it may be impossible to identify that portion of the use which occurs off-reservation. Thus, I believe that regardless of whether this is concluded to be a fee or a tax, the LVRF cannot be applied to tribally owned vehicles, as such application would be preempted by federal law because it interferes with tribal government and it is not expressly authorized by Congress. See 37 Op. Att'y Gen. No. 28 (1977) (holding workers' compensation laws not applicable to tribal businesses operating on reservations); In re Skillen, 1998 MT 43, ¶ 17.

C.

As explained above, L.R. 115 replaced the prior new motor vehicle sales tax and 1.4 percent annual vehicle value tax with a three-tiered, age-based flat fee. Legislative Referendum 115 intended to replace the taxes with a fee. Its title includes the following language: "An act revising the taxation of certain vehicles; replacing the current system of taxation of automobiles . . . with a registration fee on light vehicles"

Both prior Attorney General's Opinions and federal Indian case law provide, however, that the characterization as a fee or a tax is not determinative. On very similar facts, in 39 Op. Att'y Gen. No. 45 (1981), the Attorney General held a license fee which had replaced a property tax based on vehicle value was functionally a tax, and therefore, could not be applied to tribal members residing on their reservations. See also 46 Op. Att'y Gen. No. 7 at 4-5 (1995) (fire service fees not fees but taxes); 43 Op. Att'y Gen. No. 46 at 159-60 (1989) (water and sewer levies designed to satisfy expenses in connection with federal loan repayment obligations were property taxes because the expenses associated with loan repayments could not be segregated based on benefit conferred to each property). "Under the teaching of Supreme Court precedent it is the nature and characteristics of the particular tax that determines whether the tax is permissible, not the nature of the label applied to it." Sac & Fox, 508 U.S. at 127-28; Colville, 447 U.S. at 163. This requires examination of all the attributes of the particular tax." United States ex rel. Cheyenne River Sioux v. Johnson, 105 F.3d 1552, 1557 (8th Cir. 1997).

With respect to tribal members residing on the reservation of the Tribe in which they are enrolled, in general, if a "fee" operates more as a sales tax or a property tax, it cannot be applied, for the reasons noted above. In Assiniboine & Sioux Tribes, the United States District Court for the District of Montana held that tribal members residing on their reservations are exempt from both the Montana new vehicle sales tax, regardless of situs of purchase, and from state personal property tax. 568 F. Supp. at 275. If, however, the light vehicle registration fee is truly a fee for registering a vehicle in the state of Montana, rather than operationally a property tax or a sales tax, then it can be applied to anyone who seeks to register his or her car in Montana. Cheyenne River Sioux, 105 F.3d at 1559.

The legislature clearly intended to impose a fee. The language "in lieu of a tax," which will generally trigger a finding that the fee operates as a tax rather than a fee, was deleted as applied to light vehicles, and does not appear in any section that creates, or refers to, the light vehicle registration fee as such. See, e.g., 1999 Mont. Laws, §§ 1-3 and 7 (amending Mont. Code Ann. § 15-8-202(1)), and 33 (amending Mont. Code Ann. § 61-3-506). However, the language of the bill and the attached analysis (HB 540 Impact on Local Government and School Districts, prepared for the Legislative Finance Committee by Jim Standaert, Senior Fiscal Analyst, dated June 6, 2000, at 7), indicate that the proceeds are essentially distributed in the same manner as the preexisting personal property taxes on vehicles.

The LVRF is specifically deductible from state income taxes, see 1999 Mont. Laws, ch. 515, § 10 (amending Mont. Code Ann. § 15-30-121 to include light vehicle registration fees paid during the tax year as a deduction in computing net income for tax purposes. as were the taxes it replaced). Also, credits that were available to some for the prior taxes remain available for the LVRF. See, e.g., id., §11 (amending Mont. Code Ann. § 15-50-207(2) to allow payment of the LVRF as a credit against a contractor's corporation license tax or income tax). Additionally, the bill maintains essentially every express exemption for the LVRF that was available under the value-based tax system it replaced. Id., § 1(2)(a) and (b) (exempting from the LVRF "light vehicles that meet the description of property exempt from taxation under 15-6-201(1)(a), (1)(c) through (1)(e), (1)(g), (1)(m), (1)(o), (1)(q) or (1)(w), 15-6-203, or 15-6-215, except as provided in 61-3-520" and "a motor vehicle owned by a disabled veteran qualifying for special license plates under 61-3-332(10) or a motor vehicle registered under 61-3-456").

The proceeds of the light vehicle registration fee for new vehicles are distributed to the state highway restricted state special revenue account. Id., § 34; 1999 Mont. Laws (May 2000 Spec. Sess.), ch. 11, § 11. Thus, the LVRF paid on a new vehicle funds the same account to which the repealed new car sales tax use was dedicated. Cf. Mont. Code Ann. § 61-3-502(6) (1999) (allocation of new car sales tax proceeds). For previously registered light vehicles, the funds from the LVRF are distributed for local government and school purposes pursuant to Mont. Code Ann. § 61-3-509, as amended by May 2000 Spec. Sess. Laws, ch. 11, § 16. Thus, the LVRF is distributed similarly to the proceeds from the former new car sales tax which it replaced, and which predominantly went to "the highway nonrestricted account of the state special revenue fund," Mont. Code Ann. § 61-3-502(6) (1999), and the 1.4 percent vehicle value tax, which was distributed, after deduction of the district court fee, for local and school purposes.

A Montana Attorney General's Opinion addressed a very similar issue with respect to another motor vehicle license fee in 1981. In 39 Op. Att'y Gen. No. 45, it was held that the license fee based on a vehicle's age and weight, and which was expressly in lieu of a tax, operated as a tax and therefore could not be applied to tribal members residing on their reservations. That Opinion noted that the license fee replaced a value-based tax, was based on vehicle age and weight, and was in addition to other annual registration fees. The funds generated by the license fee were distributed in the same manner as the funds generated from the tax it replaced. It noted the fee was not based on off-reservation miles driven, and was substantively and functionally a tax. Under Moe and Colville, it therefore could not be levied on tribal members residing on their reservations.

Various Attorney General's Opinions provide further guidance as to when a fee is a true fee for services and when it is a tax. In 46 Op. Att'y Gen. No. 7, it was held that fire protection fees assessed by a city could not be assessed against property exempted from property taxation because they were more in the nature of a tax than a fee. Although denominated a fee, they were not apportioned or assessed against specific properties based on the cost of providing those benefits to those properties. This type of analysis is soundly based in longstanding Montana law. "The central inquiry will thus normally be whether the purpose of the levy or assessment is to compensate . . . for benefits directly conferred upon a particular piece of property within its jurisdiction in direct proportion to the cost of those benefits; i.e., whether the levy is in the nature of a user fee." 42 Op. Att'y Gen. No. 21 at 83 (1987). "An assessment is imposed against specific property to defray the costs of a specific benefit to that property, the benefit to be commensurate with the assessment." Vail v. Custer County, 132 Mont. 205, 217, 315 P.2d 993, 1000 (1957).

The LVRF is indistinguishable from the license fee held equivalent to a property tax in the 39 Op. Att'y Gen. No. 45 (1981). It is not related to the cost of administering the vehicle registration system or off-reservation miles driven. The funds raised are distributed in essentially the same manner as the sales and

value taxes they replaced. Although the "in lieu of tax" language was removed from the characterization, the title of the bill and the substance and structure of the fee clearly indicate that the LVRF functions as a three-tiered, value-based annual motor vehicle tax.

Like the license fee held impermissibly applied to tribal members, this fee is assessed annually, and based on age. The 1981 fee ranged from \$15 to \$90, the LVRF ranges from \$6 to \$195. The fee addressed earlier was based on age and weight, but the question remains whether age is a surrogate for value, as was age and weight. A fee based on value, even if assessed annually, is more like a property tax than a fee, and cannot be assessed against tribal members. Cheyenne River Sioux, 105 F.3d at 1558. Certainly, based on standard valuations, the age of a car is one of the most salient characteristics determining value, as all Blue Book valuations are based on age. Weight, the additional characteristic in the earlier case, does relate to value, but not as directly; e.g., an old, small Mercedes will still be more valuable than a newer but heavier passenger car. Thus, the removal of weight as a determiner of the fee is not significant. Indeed, use of weight in calculating the fee indicates an assessment more in the nature of a fee, because the vehicle's weight, unlike its age, directly relates to its impact on the condition of the highways and therefore the cost of administering transportation-related state services to that vehicle. In this sense, then, the LVRF is even less like a fee than the 1981 fee determined to be a tax.

The earlier opinion also relied on the language stating that the fee was "in lieu of a tax." Although this term of art does not appear in the pertinent sections, the title of the bill indicates it is "replacing the current system of taxation of automobiles . . . with a registration fee on light vehicles." 1999 Mont. Laws, ch. 515, Title. There is no meaningful distinction between the terms "in lieu of" and "replacing with." Thus, the lack of the specific terms of art and their replacement with synonyms cannot be meaningful. The earlier fee was also distributed in essentially the same manner as personal property taxes; thus, on this element, the fees addressed in 1981 and now are substantively indistinguishable.

Comparing the LVRF with the fees upheld in Cheyenne River Sioux, both are assessed annually as a condition precedent to issuance of state plates. However, the South Dakota fee ranged between \$20 and \$40 for average noncommercial vehicles, whereas the LVRF ranges from \$6 to \$195. Thus, I find Cheyenne River Sioux distinguishable from the matter presented here.

In conclusion, the light vehicle registration fee imposed by 1999 Mont. Laws, ch. 515, §§ 1-3, is substantively indistinguishable from its predecessor tax and the 1981 tax held to be more akin to a personal property tax in 39 Op. Att'y Gen. No. 45. Therefore, it cannot be levied against tribal members residing on their reservations. With respect to tribal members and tribal governments, the LVRF should be administered in the same manner as the taxes it replaced.

III.

The conclusion that the new light vehicle registration fee is functionally a tax, rather than a fee, also affects active military personnel serving in Montana.

Under the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. § 574, a non-resident serviceperson stationed in a state under military orders has immunity from personal property and income taxation of that state. This exemption covers motor vehicles and taxation, including "license, fees, or excises imposed in respect to motor vehicles or the use thereof," provided the "license, fee or excise required by the State . . . of which the person is a resident or in which he is domiciled has been paid."

The purpose of § 574, as elucidated by the United States Supreme Court, is to relieve a serviceperson of the burden of supporting the government of a state in which the person was residing solely in compliance with military orders. California v. Buzzard, 382 U.S. 386, 393 (1966). This relief extends, independent of the label attached by the state, to a vehicle "license fee" that serves primarily a revenue interest, narrower in purpose but not different in kind from taxes raised to defray the general expenses of government. Id. at 395; see also United States v. Highwood, 712 F. Supp. 138, 142 (N.D. Ill. 1989) (\$15-75 annual license fee based on vehicle weight was revenue-raising measure that could not be enforced against non-resident service personnel from adjacent army installation).

Thus, non-resident active duty service personnel may only be subject to those taxes or fees that are essential to the functioning of the host state's licensing and registration laws. Buzzard at 395. In Montana, prior to 1999 Mont. Laws, ch. 515, those fees have been determined to be the fees set forth in Mont. Code Ann. § 61-3-321-- the \$ 10.25 to \$ 15.25 registration or license fee and the \$ 2 license plate fee. 39 Op. Att'y Gen. No. 45 (1981). An earlier flat vehicle licensing fee, based on vehicle age and weight, the proceeds of which were used in the same manner as the prior ad valorem property tax on vehicles and served primarily a revenue purpose, was determined to be "more akin to a property tax than a registration fee" and thus was a fee from which non-resident active duty military personnel were determined to be exempt. Id.

Under the analysis set forth in Part II.C, supra, the LVRF is indistinguishable from the fee discussed in the 1981 opinion. Accordingly, it cannot be assessed for the registration of a light vehicle owned by a non-resident active duty serviceperson stationed in Montana.

THEREFORE, IT IS MY OPINION:

1. The light vehicle registration fee established in 1999 Mont. Laws, Ch. 515, §§ 1-3, ratified by the voters as L.R. 115, may not be assessed against tribally owned vehicles or vehicles owned by enrolled tribal members residing on their reservations.
2. The light vehicle registration fee established in 1999 Mont. Laws, ch. 515, §§ 1-3, ratified by the voters as L.R. 115, may not be assessed against non-resident active duty military personnel stationed in Montana.

Sincerely,

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Attorney General

jpm/sab/bn/dm