

January 16, 2003

Mr. Edward A. Amestoy
Phillips County Attorney
171 South Central Ave.
Malta, Montana 59538

Re: Taxation of Personal Property in Indian Country

Dear Mr. Amestoy:

Your letter has been referred to me for response. As we discussed on the telephone, Montana Attorney General Opinions are issued only in specific circumstances apparently not be present here. I understand there are factual and legal disputes surrounding your conclusions that one or more mobile homes are not sufficiently affixed to the real property on which they sit to be real property under Montana law, and whether certain individuals' property is in fact held in trust. Your questions are not, therefore, susceptible at this time to a formal Attorney General's Opinion.

You indicated your office would nonetheless appreciate a letter of advice from this office setting out what we believe to be the current rules regarding taxation of personal property

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located within an Indian reservation. I had drafted this about two years ago, but as we discussed on the telephone, waited until the Montana Supreme Court decided the Flat Center Farms case. That case has been decided against the state, but the Department of Revenue filed a petition for certiorari. The Court finally denied certiorari.

Questions of state/tribal jurisdiction are highly fact dependent. To avoid appearing to provide you with legal advice for a specific fact situation for which I may not have all the relevant facts, I will restate your questions and discuss the generally applicable rules. Whether or not that particular analysis applies to a specific fact situation is beyond the purview of this letter. If after reviewing this letter you determine that your office or the County Commissioners still wish to seek an Attorney General's Opinion regarding a more specified fact situation, please refer to the enclosed policy.

General Principles of Taxation in Indian Country

1. What type of personal property, if any, is exempt from taxation by the State of Montana and local governing body when that personal property is owned by an individual of Native American descent who is not eligible for tribal enrollment and the personal property is located on trust land?

Montana has no personal property taxes denominated by code as such. Montana does tax various specific items of personal property such as unaffixed mobile homes (with wheels still attached), vehicles, cattle, and business equipment. Whether a particular mobile home is so affixed to real property that it loses its status as personal property and becomes an improvement on real property is addressed by Mont. Code Ann. §§ 15-1-101, (i), (m), (n).

State authority to tax the personal property of enrolled tribal members living in Indian Country set aside for their tribe is preempted by federal law unless the taxation is

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expressly authorized by Congress. Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463(1976); United States of America on behalf of the Cheyenne River Sioux Tribe, et. al. v. South Dakota, 105 F.3d 1552(1997). Persons, who are descendants but not enrolled, have not been within that bright line rule. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980); Assiniboine and Sioux Tribes et. al. v. State of Montana, 568 F. Supp. 269 (1983). There is no express Congressional authorization for state taxation of the on reservation personal property of enrolled members, so all personal property of enrolled members is exempt from state and local taxation. Assiniboine Sioux, Id.

State authority to tax on-reservation personal property of persons of Indian descent, but who are not enrolled, may also be preempted by federal law under the interest balancing tests of White Mountain Apache Tribe v. Bracker, 448 U.S. 136(1980), and Flat Center Farms Inc. v. Montana (enclosed)). The rather fluid, “particularized inquiry” test of Bracker requires balancing the competing interests of the state versus the federal government and the tribe, whether the United States has legislated or regulated extensively in an area, and whether the exercise of state jurisdiction would interfere with the Tribe’s right to make their own laws and be governed by them. Williams v. Lee, 348 U.S. 483 (1954).

The Montana Supreme Court has ruled that member status is not determinative, and that its test of taxability is multifactored, depending on a coalescence of factors, the most important of which is situs. In Flat Center Farms v. State Department of Revenue, 2002 MT 140 (2002), (enclosed) the Montana Supreme Court held that the state could not tax the income of a state incorporated corporation doing business on the Fort Peck Reservation even though the income was of the corporation, not the taxpayers, and the corporation was incorporated only under Montana law for the tax years in issue. The Court was unimpressed with the federal authority indicating that nonmember Indians are

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treated as non-Indians for taxation analysis. The reasoning was broad, but may have been significantly influenced by the fact that much of the property farmed by the corporation was trust land. The Court also reaffirmed its holding in LaRoque v. State (1978), 178 Mont. 315, 583 P.2d 1059, that that tribal membership was not determinative of tax status. Thus, after Flat Center, it is unclear whether any personal property located on trust land within a reservation would be taxable. Such a determination would depend on the totality of circumstances, and Flat Center certainly can be read to suggest that taxation would not be allowed.

2. Does a mobile home which is owned by an individual of Native American descent who is not eligible for tribal enrollment which is placed on a permanent foundation become a part of the real property and no longer subject to personal property taxes?

Mont. Code Ann. § 15-1-101 (2001) provides that such a home on a foundation is an improvement, not personal property. When attached to trust property it is not taxable. Given the Montana Supreme Court ruling in Flat Center, it's doubtful that even unaffixed mobile homes owned by Indians within the reservation could be taxed. The Court in Flat Center squarely rejected the argument that enrollment status is determinative.

3. If the personal property of an individual of Native American descent who is not eligible for tribal enrollment and is located on trust property is taxable, what remedies are available for enforcement and collection of the taxes by the local governing body?

Because the rules regarding taxation of on reservation activities of Indians are not subject to a bright line analysis based on tribal enrollment, it's not clear that any property would

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ever fall into this category. In general, state enforcement remedies for taxation of on-reservation activities are limited to off-reservation activities and property of the taxpayer. See, Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991); Anderson v. Engelke, 1998 MT 24, 287 Mont. 283, 954 P.2d 1106.

Again, I apologize for the length of time it took to discuss your issues. Please feel free to call if you have any further questions.

Very truly yours,

CIVIL SERVICES BUREAU

SARAH A. BOND
Assistant Attorney General

sab/sjb
Enc.