

August 15, 2006

The Hon. Gary Matthews, Speaker  
Montana House of Representatives  
State Capitol  
Helena, MT 59620

Dear Speaker Matthews:

You have requested my opinion as to the following questions:

1. Can the adjudication fee provided in Mont. Code Ann. § 85-2-276 (2005) be legally imposed on an enrolled tribal member who holds a state-law based water right put to beneficial use on fee land within the exterior boundary of the reservation?
2. If the fee is imposed and the tribal member declines to pay the fee, is the fee collectible under federal law?
3. Does the fact that the described tribal member has intentionally chosen to participate in the state water adjudication process affect the analysis?
4. Does the fact that the intentional participation enhances the value of the privately owned property affect the analysis?

Your questions arise from the enactment by the 2005 Montana Legislature of HB 22, which, among other things, imposes certain fees on parties who have submitted claims in the statewide water rights adjudication. Mont. Code Ann. § 85-2-276 (2005). The Department of Natural Resources and Conservation, which has been delegated the responsibility under HB 22 to collect the fees, has adopted a policy under which it does not charge or collect the fees with regard to water rights arising under state law that are owned by an enrolled tribal member who resides on the tribal member's reservation and puts the water to beneficial use within the reservation's boundaries.

After thorough review I have determined that your specific questions cannot be answered definitively because of the flexible fact-bound analysis required by principles of federal

Indian law. I have determined that an informal letter of advice rather than an official opinion is appropriate in these circumstances.

I.

Water rights on Indian reservations fall into several categories. A non-exhaustive list of such categories could include tribal federal reserved rights, see State ex rel. Greely v. Confederated Salish and Kootenai Tribes, 219 Mont. 76, 712 P.2d 754 (1985) (statewide adjudication includes tribal federal reserved rights), rights held by non-tribal members for use on fee land within the reservation under state law, water rights arising under state law held by the Tribe for use on acquired land, and water rights arising under state law held by members of the tribe for use on fee land within the reservation boundaries. Your letter requests an opinion as to whether the HB 22 adjudication fee can lawfully be imposed with regard to this last category of rights.

Rules of federal Indian law with respect to the application of state law within reservation boundaries are extraordinarily fact-specific. For example, while as a general rule state law applies to the activities of non-tribal members within the boundaries of Indian reservations, Cotton Petroleum v. New Mexico, 490 U.S. 163 185 (1989), there are instances in which, based on a factual inquiry into the various state, federal, and tribal interests involved, federal Indian law will preempt the application of state law even with respect to the on reservation activities of non-Indians. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980). For this reason, it is hazardous to generalize about the effect of federal Indian law on the ability of a state to regulate the on-reservation activities of tribal members.

Initially, it is important to determine whether the fee is a tax, since the United States Supreme Court has made clear that a state may tax the on-reservation property or activities of a tribal member only if Congress has specifically authorized the tax, see, e.g., Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976) (state tobacco tax cannot be applied to on-reservation sales to tribal members), and no contention has been made that Congress has specifically authorized the collection of the fee if it is in effect a tax.

In 48 Op. Att’y Gen. No. 24 (2000), Attorney General Mazurek held that the State could not impose its “light vehicle registration fee” against a tribal member residing on the member’s reservation because the “fee” actually operated as a tax. He reasoned that the “fee” was a replacement for the prior new vehicle sales tax and served to raise general government revenues. It was not assessed against a specific property in an amount roughly proportional to the government services provided to the property. He therefore concluded that the “fee” should be treated as a tax and could not be collected from tribal

members residing on their reservations. See Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 127-28 (1993).

The fee at issue here, in contrast, operates as a true fee. It is assessed with respect to a particular property interest, a state-law created water right, and is designed not to raise general government revenue but rather to defray the cost of government activities relating specifically to the property, viz. the conduct of the statewide adjudication. The bright-line rule requiring express congressional authorization for a tax therefore does not apply.

The remaining federal law issue is whether, after engaging in a “particularized inquiry into the state federal and tribal interests at stake, . . . the exercise of state authority would violate federal law.” Bracker, 448 U.S. at 144-45. The overriding federal policy--the need to protect the right of the Indians to make their own laws and be ruled by them, Williams v. Lee, 358 U.S. 217, 220-23 (1959)--coincides with the tribal interest in this case. The State interest is in completing the constitutionally mandated creation of a central repository for state water right records, Mont. Const. art. IX, § 3(4), an interest the state has chosen to implement through a state-wide water adjudication.

The present question involves only a relatively small sliver of the adjudication--that portion that involves adjudication of water rights based in state law held by tribal members for use on fee land that they own within their reservations. As a general matter, applying the Bracker test, the balance of interests would seem to tip in the State's favor. The property interest at issue arises solely under the law of the State. It involves the right to apply water to beneficial use on land owned by an individual Indian in fee, not by the Tribe or by the United States in trust for the Tribe or in trust for an individual tribal member. No adverse impact on the tribe or tribal self-government is apparent from the imposition of the fee.

However, since the application of federal Indian law principles is fact-specific, one must be mindful that specific factual situations may tip the balance in the other direction. Potentially significant factual nuances include situations in which the parcel of property to which a water right is appurtenant may include intermingled fee and tribal trust land. Or, the water right may be owned by a corporation dually chartered under state and tribal law or a corporation owned by both tribal members and nonmembers. Or, treaty language may also affect the ability of a state to engage in what would otherwise be permissible regulation. See, e.g., State v. McClure, 127 Mont. 534, 539-40, 268 P.2d 629 (1954)

The Montana Supreme Court's decision in Flat Center Farms, Inc. v. Montana Department of Revenue, 2002 MT 140, 310 Mont. 206, 49 P.3d 578, cert. denied, 537 U.S. 1046 (2002), illustrates how such seemingly small variations in facts can affect

the resolution of issues in this area. In that case, a tribal member and his non-tribal member spouse chartered a farm corporation under Montana law. The closely held corporation operated its farm within the boundaries of the Fort Peck Reservation on a combination of fee land leased from individual Indians and tribal trust land leased from the Tribes. The corporation refused to pay its annual Montana corporate license tax, arguing that the tax was preempted by federal law. After the tax dispute erupted, the corporation received an ad hoc charter from the Tribal Council. On these facts, the Montana Supreme Court held that the seemingly significant facts that (1) the tax was assessed against a state-chartered corporation, and not against an individual Indian, and (2) some of the corporation's activities occurred on fee land, and (3) half of the corporation was owned by a non-tribal member, still were insufficient to permit the State to levy the tax.

Thus, the answer to the question of whether the imposition of the adjudication fee would be upheld with respect to a water right created under state law and used by a tribal member on fee land within the reservation is neither "Yes, always" nor "No, never." A factual examination into the situation of each affected claim would be required to determine whether the "particularized inquiry" mandated by Bracker would favor the imposition of the fee.

## II.

Similar analysis disposes of your second question. Thirty years ago the Montana Supreme Court held the principles of federal Indian law would not preclude an off-reservation bank from garnishing the wages of tribal members earned on the reservation to enforce a judgment entered in a state court to collect on a loan negotiated off the reservation between the bank and the tribal members. Little Horn State Bank v. Stops, 170 Mont. 510, 555 P.2d 211 (1976). Since then, for such civil regulatory jurisdictional issues, the United States Supreme Court has eschewed bright line rules such as the ones applied in Stops, favoring instead the flexible weighing process outlined in Bracker.

HB 22 provides that several things happen upon non-payment of the fee. Penalties apply and interest begins to accrue upon non-payment of the fee. Mont. Code Ann. § 85-2-276 (2). After failure to pay following the initial billing and a followup reminder, Mont. Code Ann. § 85-2-279 directs the Department of Natural Resources and Conservation to turn the matter over to the Department of Revenue for debt collection efforts, and if those efforts are unsuccessful a lien may be recorded against the water rights.

In general, it would appear that if the imposition of the fee is allowable, these efforts to collect it should be allowable as well. However, individual cases may present thorny procedural and substantive issues that may make enforcement difficult. Cases have been

brought in which tribal members have sought damages against state officers or counties for their actions in extending state-court process to lands within a reservation, see, e.g., Inyo County v. Paiute-Shoshone Indians, 123 U.S. 1887 (2003) (tribal claim for violation of rights under 42 U.S.C. § 1983 for execution of search warrant), indicating that a cautious approach would be well-advised in this area. Treaty language specific to particular reservations may come into play, making generalization on this issue even more difficult. The Bracker particularized inquiry test would apply in each circumstance in determining whether a specific enforcement activity would infringe tribal sovereignty.

### III.

Your third question is whether the analysis is affected by the fact that the tribal member has voluntarily chosen to participate in the adjudication. In my opinion the tribal member's decision to participate in the adjudication can hardly be characterized as "voluntary," any more than any defendant who chooses to answer a lawsuit served against him can be said to be "voluntarily" before the court. The State has established a comprehensive state-wide lawsuit to adjudicate all water rights in Montana. The action commenced with the filing of a petition by the Attorney General in the Montana Supreme Court, and the filing of a claim is in effect the water user's responsive pleading. The penalty for failure to participate is the attachment of a conclusive presumption of abandonment of the water right. Mont. Code Ann. § 85-2-226; see In re Adjudication of Existing Rights to Water in the Yellowstone River, 253 Mont. 167, 175, 832 P.2d 1210 (1992) (conclusive presumption of abandonment from non-filing constitutional).

The tribal member is thus faced with the choice of agreeing to participate in the adjudication or forfeiting a property right that may well be the key to economic survival for the tribal member and the member's family. In such a case the decision to defend the property right can hardly be deemed "voluntary." Under these circumstances, the decision of the tribal member to appear and defend a water right in the Water Court is likely entitled to little or no weight in the Bracker balancing analysis.

### IV.

Your fourth question contains the issue as the third, and adds another: that the tribal member's "voluntary" participation in the adjudication "enhances the value of the privately owned property."

The tribal member's water right exists and has value independent of the adjudication. Mont. Const. art. IX, § 3(1) ("All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed."). Had the legislature chosen not to conduct the adjudication at all, the member's right would remain intact and retain its value, both intrinsically and as an enhancement to the value of the lands to which the

right appertains. It may be true in a sense that pursuing the water right claim to the point of inclusion in a final decree “enhances” the value of the right, in much the same way that successfully defending a claim of encroachment on a neighbor’s land “enhances” the value of the portion of the landowner’s property that was the subject of the dispute. But the fact that the tribal member is participating in the adjudication to prevent the injury to the member’s property rights that would result from the abandonment of the water right that follows a failure to file a claim would not, in my opinion, weigh heavily in favor of the State in the Bracker analysis. Bracker requires a sensitive evaluation of the federal, state, and tribal interests involved. The participation of the tribal member in the process in order to protect the member’s property interest from extinguishment does not make the State’s interests any stronger.

I hope you find this of assistance. This letter of advice may not be cited as a formal opinion of the Attorney General.

Very truly yours,

MIKE McGRATH  
Attorney General

mm/jym