TAX DEVELOPMENTS PROVIDE OPPORTUNITIES FOR ECONOMIC GROWTH IN INDIAN COUNTRY

Date: 4 January 2019

Environmental, Land and Natural Resources Alert

By: Bart J. Freedman, Benjamin A. Mayer, Christina A. Elles, Francesca M. Eick

Opportunities for economic growth in Indian country — including the development of retail space, hotels and resorts, energy projects, data farms, and more traditional farming activities, to name a few — are tied to several recent tax-related developments. These developments include federal regulations regarding the taxation of on-reservation real property and improvements leased and/or owned by non-Indians, whether tribes can collect sales taxes for on-reservation transactions with non-Indians, and how treaties can impact taxation of certain off-reservation activities. The developments are important for both tribes and nontribal parties interested in investing in on-reservation economic growth and development.

In 2013, the Bureau of Indian Affairs ("BIA") enacted regulations that put limits on the ability of state and local governments to tax activities occurring on Indian lands. More recently, in October 2018, the U.S. Supreme Court heard oral argument in *Washington Department of Licensing v. Cougar Den, Inc.*, a case that will decide whether Yakama Nation-based fuel company Cougar Den, Inc. ("Cougar Den"), is subject to Washington's fuel tax or exempt from that tax under the Yakama Treaty of 1855. The 2013 regulations and the Supreme Court's decision in *Cougar Den* are bound to have significant impacts for taxing in and related to Indian country in the state of Washington and throughout the United States.

THE BIA REGULATIONS: TRIBES MAY ASSESS TAXES ON LESSEES OF INDIAN TRUST LAND, BUT STATE AND LOCAL GOVERNMENTS CANNOT

In 2013, the BIA enacted regulations confirming the authority of Indian tribes to assess taxes on lessees of Indian trust lands while prohibiting certain state and local taxes on those lessees. [1] The rules expressly prohibit state and local taxes on permanent improvements on trust land, the activities of lessees of trust land, and leasehold or possessory interests. [2] The regulations apply to leases that must be reviewed and approved by the BIA. [3]

The Ninth Circuit briefly addressed these new regulations in *Confederated Tribes of Chehalis Reservation v. Thurston County Board of Equalization*, also known as the *Great Wolf Lodge* decision. [4] That case involved a challenge by the Chehalis Tribe to Thurston County's assessment of property taxes on the Great Wolf Lodge, a recreational complex consisting of a hotel, indoor water park, and convention center jointly run by the tribe and a non-Indian company. [5] The Ninth Circuit held that Thurston County and the state of Washington could not tax permanent improvements on lands held in trust by the federal government for the Confederated Tribes of the Chehalis Reservation. [6] In a footnote, the Ninth Circuit described the 2013 regulations as clarifying and confirming existing law under 25 U.S.C. § 465 and *Mescalero Apache Tribe v. Jones*, i.e., that state and local governments cannot tax permanent improvements on Indian trust lands. [8]

©2005-2021 K&L Gates LLP. All Rights Reserved.

These regulations create opportunities for tribes and businesses to work together to develop strategic plans for taxation and economic development that address the needs of and maximize the benefits to both parties.

WASHINGTON STATE AND SNOHOMISH COUNTY CAN COLLECT SALES TAX FROM TULALIP TRIBES' SHOPPING AREA

The 2013 regulations do not apply to all tribes. In the Pacific Northwest, for example, the Tulalip Tribes do not need BIA approval to lease Indian land. [9] Pursuant to this independent authority to lease land, the Tulalip Tribes have developed a 2,100 acre shopping and entertainment complex called Quil Ceda Village, about 35 miles north of Seattle. It includes retail stores such as Wal-Mart, Home Depot, Cabela's, and other stores located in the Seattle Premium Outlet Mall. [10]

In *Tulalip Tribes v. Washington*, the Tulalip Tribes challenged the state of Washington and Snohomish County's ability to collect certain sales and business taxes at the Quil Ceda Village, arguing that the collection of those taxes infringed upon the Tulalip Tribes' sovereignty and was preempted by federal law, including the BIA's 2013 regulations. [11] The United States, however, admitted the 2013 regulations do not apply to the Tulalip Tribes given their independent leasing authority under 25 U.S.C. § 415(b). [12] The District Court for the Western District of Washington held the state and county were not preempted from collecting certain sales and business taxes at the Quil Ceda Village shopping area. [13] The court's ruling is a boon for the state's and the county's coffers: In 2015, Washington collected more than $31 million in sales tax from the Quil Ceda Village shopping area, and Snohomish County collected more than $10.2 million. [14]

THE COUGAR DEN CASE: U.S. SUPREME COURT SET TO DETERMINE WHETHER A TRIBAL CORPORATION HAS TO PAY TAXES ON FUEL IT TRANSPORTS ON PUBLIC HIGHWAYS IN WASHINGTON STATE

Cougar Den is a fuel company owned by a member of the Yakama Nation and incorporated under tribal law. The company buys fuel in Oregon, transports it to the Yakama Reservation via a public highway in the state of Washington, and then sells it to tribal businesses on the reservation. [15]

From March to October 2013, Cougar Den transported more than five million gallons of fuel through Washington to the Yakama Reservation. Cougar Den did not pay taxes on any of that fuel.

In December 2013, the Washington State Department of Licensing assessed Cougar Den with $3.6 million in unpaid taxes, penalties, and licensing fees for transporting the fuel from Oregon into Washington. [16] Washington's fuel tax is imposed when fuel is removed from the terminal rack or imported into the state. [17] The fuel tax generates over $1.5 billion each year for the state. [18]

Cougar Den contends that a clause in the 1855 treaty between the United States and the Yakama Indian Nation preempts Washington's fuel tax. Specifically, the "right to travel" provision, which grants tribal members "the right, in common with citizens of the United States, to travel upon all public highways." [19]

The Yakima County Superior Court ruled that the fuel tax violated the tribe's right to travel guaranteed by the 1855 treaty. Washington sought direct review with the Washington Supreme Court, which also ruled in favor of Cougar

©2005-2021 K&L Gates LLP. All Rights Reserved.

Den. [20] Washington then appealed to the U.S. Supreme Court, which granted review. The Supreme Court is expected to issue its decision in 2019.

CONCLUSION

The BIA's 2013 regulations, the *Tulalip Tribes v. Washington* decision and other cases interpreting those regulations, and the upcoming *Cougar Den* decision are important for economic development by Indian tribes and nontribal parties in Indian country. The *Cougar Den* decision, once issued, is likely to have lasting impacts on taxing in and related to Indian country in the Pacific Northwest. It will join the 2013 regulations to form the basis of modern law on tribal taxing issues. Parties who are conducting and/or considering conducting business within Indian country and with Indian tribes, in the Northwest and around the United States, should stay tuned for the result. We will continue to monitor tax-related developments, and we anticipate issuing a new alert when the Supreme Court issues its *Cougar Den* decision.

NOTES:

[1] 24 C.F.R. § 162.017.
[2] *Id.*
[3] *See* 25 C.F.R. § 162.006(a) ("This part applies to leases of Indian land entered into under 25 U.S.C. 380, 25 U.S.C. 415(a), and 25 U.S.C. 4211, and other tribe-specific statutes authorizing surface leases of Indian land with our approval.").
[4] 724 F.3d 1153 (9th Cir. 2013).
[5] *Id.* at 1154.
[6] *Id.* at 1153 (9th Cir. 2013). In another case involving the 2013 regulations, the Eleventh Circuit held that Florida could not tax rent paid to the Seminole Tribe of Florida by non-Indian lessees but that a state utility tax was not preempted by federal law. Seminole Tribe of Fla. v. Stranburg, 799 F.3d 1324 (11th Cir. 2015).
[7] 411 U.S. 145 (1973) (holding New Mexico could not impose a use tax on property installed as permanent improvements on trust lands at ski resort operated by the Mescalero Apache Tribe).
[8] 724 F.3d at 1157 n.6. In another footnote, the court suggested that had the county assessed a tax on the non-Indian's possessory interests, i.e., its interest in the full cash value of the land, rather than the land itself, the court might have reached a different result. It implied that taxes on interests other than land ownership and associated rights are not prohibited by 25 U.S.C. § 465 and *Mescalero. Id.* at 1158 n.7.
[9] *See* 25 U.S.C. § 415(b).
[10] Mem. Op. at 2–3, Tulalip Tribes v. Wash., No. 15-CV-940 (W.D. Wash. Oct. 4, 2018) ECF No. 258 (hereinafter, "Mem. Op.").
[11] *Id.* at 2.
[12] Decl. of Joshua Weissman Exh. C at 22, Tulalip Tribes v. Wash., No. 15-CV-940 (W.D. Wash. Sept. 22, 2016), ECF No. 73.
[13] Mem. Op. at 23.
[14] *Id.* at 7–8.
[15] Brief for Respondent at 2, Wash. State Dep't of Licensing v. Cougar Den, Inc., a Yakama Nation Corp., No.

©2005-2021 K&L Gates LLP. All Rights Reserved.

16-1498 (Sept. 17, 2018).
[16] Washington also argues that tens of millions of dollars in later assessments are stayed pending the outcome of the case. Brief for Petitioner at 11, Wash. State Dep't of Licensing v. Cougar Den, Inc., a Yakama Nation Corp., No. 16-1498, (Aug. 9, 2018).
[17] Washington's current fuel tax statutes can be found in Chapter 82.38 RCW.
[18] Brief for Petitioner at 6, Wash. State Dep't of Licensing v. Cougar Den, Inc., a Yakama Nation Corp., No. 16-1498, (Aug. 9, 2018).
[19] Treaty with the Yakama Nation, art. III, 12 Stat. 951, 953 (June 9, 1855, ratified Mar. 8, 1859, proclaimed Apr. 18, 1859).
[20] Cougar Den Inc. v. Wash. State Dep't of Licensing, 188 Wash. 2d 55, 392 P.3d 1014 (2017).

KEY CONTACTS

BART J. FREEDMAN
PARTNER

SEATTLE
+1.206.370.7655
BART.FREEDMAN@KLGATES.COM

BENJAMIN A. MAYER
PARTNER

SEATTLE
+1.206.370.8074
BEN.MAYER@KLGATES.COM

CHRISTINA A. ELLES
ASSOCIATE

SEATTLE
+1.206.370.7849
CHRISTINA.ELLES@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2021 K&L Gates LLP. All Rights Reserved.