LETTER OPINION
94-L-227

August 25, 1994

Ms. Mary K. O'Donnell
Rolette County State's Attorney
P.O. Box 1079
Rolla, ND 58367-1079

Dear Ms. O'Donnell:

Thank you for your letter asking for my opinion whether an excise tax imposed under N.D.C.C. ? 57-40.6-02 on the use of telephone access lines for the support of an emergency service communications system may be collected from an enrolled member of an Indian tribe when the member's telephone line is located and used on the member's reservation. For the following reasons, it is my opinion that an excise tax imposed under N.D.C.C. ? 57-40.6-02 on the use of telephone access lines for the support of an emergency service communications system may not be collected from an enrolled member of an Indian tribe when the member's telephone line is located and used on the member's reservation.

N.D.C.C. ? 57-40.6-02 authorizes the governing body of a county or a city to impose an excise tax on the use of telephone access lines to support an emergency service communications system if approved by the electors. The tax cannot exceed one dollar per month per telephone access line. In your letter, you raise doubt whether this is a "tax" or a "fee."[1] In 1993 N.D. Op. Att'y Gen. 25, 26 the following is stated:

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[1]Your letter further suggests that doubt exists whether this is a "sales tax" or an "excise tax." Used in its broad meaning, "excise tax" means any tax, including a transactional "sales tax", that is not a direct tax on property. Cooley, The Law of Taxation (1924) ? 42; 53 C.J.S. Licenses, ? 2; 68 Am.Jur.2d Sales and Use Tax, ? 5. Cf. Scott v. Donnelly, 133 N.W.2d 418, 424 (N.D. 1965); State ex rel. Lesmeister v. Olson, 354 N.W.2d 690, 698-699 (N.D. 1984).

The North Dakota Supreme Court has defined a "tax" as "an enforced contribution for public purposes which in no way is dependant upon the will or consent of the person taxed." Ralston Purina Co. v. Hagemeister, 188 N.W.2d 405, 409 (N.D. 1971); see also Menz v. Coyle, 117 N.W.2d 290, 297 (N.D. 1962). Thus, "any payment exacted by the State as a contribution toward the cost of maintaining governmental functions, where special benefits derived from their performance are merged in the general benefit, is a tax." Menz, 117 N.W.2d at 297. Conversely, fees "are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner 'not shared by other members of society,' they are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge, and the charges are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses." Emerson College v. City of Boston, 462 N.E.2d 1098, 1105 (Mass. 1984) (citations omitted).

> Based upon these standards, the excise tax on the use of telephone access lines for the support of an emergency service communications system is a "tax" and not a "fee" because it is collected as a contribution toward the cost of maintaining the emergency service communications system even if the party paying the tax does not use the system.
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> In general, Indians on reservations are not subject to state tax laws unless Congress consents. Conf. W. Attorneys General, American Indian Law Deskbook 113, 304 (1993). As the Supreme Court has stated: "Indian tribes and individuals generally are exempt from state taxation within their own territory." Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 764 (1985).

The Supreme Court has decided at least ten cases involving state taxation without congressional authorization of reservation Indians, tribes, or Indian activities. In every case but one, the Court invalidated the state tax. (The one exception . . . involved a state tax on tribal sale to non-Indians).

Steven Pevar, Rights of Indians and Tribes: The Basic ACLU Guide to Indian and Tribal Rights 175 (2d. ed. 1992).

I have been unable to locate any congressional authorization of an excise tax on telephone lines to support an emergency communications system. Nor is there case law on the legality of applying such a tax to the phone lines of Indians. Further, most state efforts to tax Indians have failed. Enrolled Indians do not have to pay state income taxes on income earned on their reservation. Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. ____, 124 L.Ed.2d 30, 41 (1993); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 173 (1973); White Eagle v. Dorgan, 209 N.W.2d. 621, 623 (1973). A tribal member's personal property on a reservation is exempt from state taxation. Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 480-81 (1976); Bryan v. Itasca County, 426 U.S. 373, 377 (1976). Enrolled Indians who purchase goods or services on the reservation cannot be taxed on their purchase. White Eagle v. Dorgan, 209 N.W.2d. at 623. A state may not tax Indian trust land. McCurdy v. United States, 264 U.S. 484, 486 (1924). However, states may tax Indian-owned fee land on a reservation because federal law allows such a tax. County of Yakima v. Confederated Tribes and Band of the Yakima Indian Nation, 502 U.S. ____, 116 L.Ed.2d 687, 703 (1992), although an excise tax on the sale of such property is invalid. Id. at 705. States may not tax a tribe's royalty interest under oil and gas leases issued to non-Indian lessees. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 768 (1985).

Other kinds of state taxes also have been ruled inapplicable to Indians. A state may not impose a vendor's license fee. Moe, 425 U.S. at 480-81. See also White Eagle v. Dorgan, 209 N.W.2d at 623. Nor may a state impose a sales or gross receipts tax on an Indian business located on a reservation. White Eagle v. Dorgan, 209 N.W.2d. at 623; Eastern Navajo Indus. Inc. v. Bureau of Revenue, 552 P.2d 805, 810 (N.M. Ct. App. 1976). See also Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685, 690 (1965). Also held invalid have been a cigarette sales tax applied to on-reservation sales by Indians to Indians, Moe, 425 U.S. at 480-81, and a tax on motor fuel purchased on the reservation by Indians. Marty Indian Sch. Bd., Inc. v. South Dakota, 824 F.2d. 684, 688 (8th Cir.

1987). Motor vehicle excise taxes and registration fees on vehicles owned by Indians and principally garaged on reservations are invalid. Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. ____, 124 L.Ed.2d 30, 42 (1993).

In recent opinions the Supreme Court has made general statements about the limited application of state tax laws to Indians on reservations. In California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), the Court discussed the scope of state regulatory jurisdiction and said it has not established an inflexible per se rule precluding such jurisdiction over tribes and tribal members. Id. at 214-15. However, in dicta, it then stated: "In the special area of state taxation of Indian tribes and tribal members, we have adopted a per se rule." Id. at 215 n.17. It then implied that the rule allows such taxation only if Congress clearly consents. Id. More recently the Court stated: "Absent explicit congressional direction to the contrary, we presume against a State's having the jurisdiction to tax within Indian country . . . ." Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. ____, 124 L.Ed.2d 30, 43 (1993).

This presumption of Sac and Fox Nation and the per se rule of Cabazon were applied in County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. ____, 116 L.Ed.2d 687 (1992). The court ruled that Yakima County could not impose an excise tax on the sale of reservation fee lands. Id. at 704-05. The Court's analysis was confined to a search for congressional authorization of the tax. Being unable to find any congressional authority, the court found it void. Id. at 704. But see Marty Indian Sch. Bd., Inc. v. South Dakota, 824 F.2d 684 (8th Cir. 1987) (The court did not apply a per se rule but applied a much different test and in doing so balanced federal, state, and tribal interests to determine if a state tax applied to a tribal entity.).

In light of the many rulings prohibiting the application of state taxes on Indians and the Supreme Court's recent statements, it is my opinion that a county excise tax on telephone lines cannot be collected from an enrolled member when the member's telephone line is located and used on the member's reservation.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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