LETTER OPINION
96-L-12

February 5, 1996

James O. Johnson
Sioux County State's Attorney
P.O. Box L
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Dear Mr. Johnson:

Thank you for your December 26, 1995, letter in which you ask whether Sioux County can tax land owned in fee by the Standing Rock Sioux Tribe and located within the tribe's reservation. Until resolution of cases pending before the Eighth Circuit Court of Appeal, a conclusive answer to your question is premature. I will review the recent decisions that have led to the somewhat uncertain state of the law regarding the taxability of Indian fee land.

In County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992), the Court addressed the question whether Yakima County could tax land originally allotted to individual Indians under the 1887 General Allotment Act, 24 Stat. 388 (codified as amended at 25 U.S.C.A. § 331 et seq.), and currently owned by individual Indians and the Yakima Indian Nation. The Court held that such land is taxable.

The Court's rationale was somewhat unclear. It referred to and discussed section 6 of the General Allotment Act. The original section provided that "'each and every member of the respective bands and tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside.'" Id. at 254. This section was amended by the 1906 Burke Act, 34 Stat. 182 (codified at 25 U.S.C.A. § 349), to provide that state jurisdiction commenced "'at the expiration of the trust period . . . when the lands have been conveyed to the Indians by patent in fee.'" Id. at 255. The Burke Act also provided that upon patenting and conveyance in fee "'all restrictions as to sale, encumbrance, or taxation of said land shall be removed.'" Id.

While the Court discussed section 6 of the General Allotment Act in deciding that Indian-owned fee land is taxable, it also discussed section 5 and its decision in Goudy v. Meath, 203 U.S. 146 (1906). In Goudy the Court held that an Indian who was an allottee under a treaty was liable for property taxes assessed by the State of Washington. Id. at 150. In Yakima Nation the Court stated that its decision in Goudy rested upon the alienability of the land. Yakima Nation, 502 U.S. at 263. Section 5 of the General Allotment Act also refers to alienability. The Court stated that "when § 5 rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes." Id. at 263-64.

Prior to the Yakima Nation decision, this office recognized that the General Allotment Act allowed taxation of allotted land. N.D. Att'y Gen. Op. 85-12. We qualified that conclusion in 1990. Letter from Attorney General Nicholas J. Spaeth to Sioux County States Attorney Maury Thompson (April 25, 1990). We did so, however, by analyzing the Court of Appeals' decision in Yakima Nation, which was later rejected in part by the Supreme Court.

After Yakima Nation there was a question whether alienability subjected Indian fee land to state taxation, or whether only the express authorization of state taxation under the General Allotment Act did so. Shortly after Yakima Nation was issued, this office took the view that the decision was premised upon Congressional authorization in the General Allotment Act. Letter from Attorney General Nicholas J. Spaeth to Parshall City Attorney William Woods (June 17, 1992). Four courts have since interpreted Yakima Nation.

In Lummi Indian Tribe v. Whatcom County, 5 F.3d 1355, 1356 (9th Cir. 1993), cert. denied, 114 S. Ct. 2727 (1994), the tribe contended "that its fee-patented reservation land is exempt from taxation because it was allotted to the Tribe under the Treaty of Point Elliott rather then the General Allotment Act, which permits such taxation." The court disagreed. "Because the Court in Yakima Nation focused on the Yakima's ability to alienate their land, rather than on how it was allotted, we conclude that if the Lummi land is alienable, it is taxable." Id. at 1357. The dissenting judge believed an unmistakably clear intent of Congress was necessary to

subject the land to taxation. Id. at 1360 (Beezer, J., dissenting.) After Lummi, in a brief and general review of state taxation authority on reservations, I stated that "states may tax Indian-owned fee land on a reservation because federal law allows such a tax." Letter from Attorney General Heidi Heitkamp to Rolette County State's Attorney Mary O'Donnell (August 25, 1994). This was an implicit reference to the General Allotment Act.

Since the Lummi decision, three district courts have addressed the question. In United States ex rel. Saginaw Chippewa Tribe v. Michigan, 882 F.Supp. 659, 661 (E.D. Mich. 1995), the court considered a controversy arising from Michigan's levy of property taxes "upon lands owned by individual members of the plaintiff Tribe or collectively by the Tribe itself." The tribal land had been patented pursuant to a treaty and was held in fee. The court agreed with the way in which Lummi interpreted Yakima Nation. It concluded: "If land is subject to alienation, then it is subject to taxes." Id. at 677. We have been told by the Michigan Attorney General's Office that this decision is on appeal to the Sixth Circuit Court of Appeals. The case has been briefed but oral argument has not yet been scheduled.

In Leech Lake Band of Chippewa Indians v. Cass County, 1995 W.L. 739028 (Dec. 5, 1995)(D. Minn.), the Band challenged property taxes imposed by Cass County on land owned by the Band. "Despite the Supreme Court's general rule that state taxation of Indian land requires that Congress make its intent to authorize state taxation unmistakably clear, the strong language of the Yakima decision leads the Court to the inescapable conclusion that, if Congress has made Indian land freely alienable, states may tax the land." Id. at 3. The Cass County Attorney's Office informs us that this decision has been appealed to the Eighth Circuit Court of Appeals.

Only Southern Ute Indian Tribe v. Board of County Commissioners, et al., 855 F. Supp. 1194 (D. Colo. 1994), has disagreed with the proposition that alienability equals taxability. The land in Southern Ute was not patented pursuant to the General Allotment Act but under other federal statutes. Id. at 1200-01. The Court interpreted Yakima Nation to allow state taxation of Indian fee land only if Congress has sufficiently indicated its intent to allow taxation. Id.

at 1200. Alienability is not determinative, but an unmistakable Congressional intent is. Id. The district court's decision, however, was vacated by the Court of Appeals. Southern Ute Indian Tribe v. La Plata County, et al., 61 F.3d 916 (10th Cir. Ct. App. 1995). The court's unpublished opinion states that it vacated the decision because "this action is not ripe for adjudication." 1995 W.L. 427683 at 3 (10th Cir. Ct. App. 1995).

In summary, a non-unanimous opinion of the Ninth Circuit Court of Appeals concluded that alienability of Indian land determines its taxability. Federal courts in Michigan and Minnesota have followed this reasoning. Both of those decisions, however, are on appeal, and the Federal court in Colorado, although its decision has been vacated, has rejected the Ninth Circuit's interpretation of Yakima Nation. Consequently, the issue is unsettled. Until the Eighth Circuit Court of Appeals issues a definitive decision, it is not useful to review past opinions of this office. We will keep you apprised of the status of the cases before the Court to Appeals.

Sincerely,

Heidi Heitkamp
Attorney General

CMC/dmm