ATTORNEY GENERAL OPINION NO. 96-2

To: Ms. Laurine Nightingale
Lewis County Commissioner
Route 2, Box 1M
Reubens, ID 83548

Per Request for Attorney General's Opinion

QUESTION PRESENTED

Whether lands within the boundaries of an Indian Reservation owned by Indians are exempt from *ad valorem* taxation by the county.

CONCLUSION

We conclude that lands within the boundaries of an Indian reservation, owned by Indians, are subject to *ad valorem* taxation by county governments, unless such lands are held in trust by the federal government or otherwise subject to restrictions on alienation.

ANALYSIS

As originally established, all lands within Indian reservations were held in common for the use of all tribal members, with legal title to the lands being held by the United States, as trustee for the tribe. In the mid-nineteenth century, however, the federal government began to "allot" reservation lands to tribal members, so that each Indian family would own an individual farm. Conference of Western Attorneys General, American Indian Law Deskbook 16 (1993). This policy was embodied in the General Allotment Act, enacted on February 8, 1887. 24 Stat. 388. The United States was to hold allotted lands in trust for a period of at least 25 years. *Id*. at 389. At the end of the 25-year period, the allottee could receive a patent to the land, and become subject to the laws of the state. *Id*. at 390. The policy of issuing patents to allottees continued until 1934, when the Indian Reorganization Act was enacted. Act of June 18, 1934, 48 Stat. 984. The Act ended the practice of issuing patents to allottees, but did not rescind patents issued prior to 1934.

As a result of the General Allotment Act and related statutes, tribal members acquired fee title to many lands within Indian reservations. Nonmember Indians have since acquired some of these lands through sale and devise. Such lands are not held in trust, and are therefore freely alienable.

Another method by which lands came to be patented to member and nonmember Indians was through surplus land acts. Congressional policy in the latter part of the nineteenth century and early twentieth century was to do away with the reservation system by allotting reservation lands and selling the remaining or "surplus" lands to non-Indians. It was thought that such policies would hasten the integration of tribal members into "traditional American society." Solem v. Bartlett, 465 U.S. 463, 468 (1984). Some of the lands patented to non-Indians have since been acquired by member and nonmember Indians.

The taxation of lands patented to tribal members under the General Allotment Act was the subject of a recent Supreme Court opinion, County of Yakima v. Yakima Indian Nation, 112 S. Ct. 683 (1992). The Court first reiterated the general principle that "[a]bsent cession of jurisdiction or other federal statutes permitting it," states are "without power to tax reservation lands and reservations *[sic]* Indians." *Id*. at 688, quoting Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973). It then undertook a detailed examination of the General Allotment Act to determine if the Act embodied an intent to allow taxation of allotted lands.

The Court first examined section 6 of the General Allotment Act, which provides that Indians receiving patents for land are thereafter "subject to the laws, both civil and criminal, of the State or Territory in which they may reside." 24 Stat. at 390. The Court concluded, however, that the *in personam* jurisdiction imposed by section 6 applied only to the original allottee of the land. Subsequent Indian owners are not automatically subject to state jurisdiction. 112 S. Ct. at 690.

The Court then examined section 5 of the General Allotment Act, which provides in part as follows:

> That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made . . . and that at the expiration of said period the United States shall convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or encumbrance whatsoever . . . .

24 Stat. at 389. The Court found that in providing for the issuance of fee patents to Indian allottees Congress impliedly subjected such lands to assessment and taxation by state authorities. The Court referred back to its earlier decision in Goudy v. Meath, 203 U.S. 146 (1906), wherein the Court stated as follows:

> That Congress may grant the power of voluntary sale while withholding the land from taxation on forced alienation may be conceded. . . . But while Congress may make such provision, its intent to do so should be clearly manifested, for the purpose of the restriction upon voluntary alienation is protection of the Indian from the cunning and rapacity of his white neighbors, and it would seem strange to withdraw this protection and permit the Indian to dispose of his lands as he pleases, while at the same time releasing it from taxation,---in other words, that the officers of a state enforcing its laws cannot be trusted to do justice, although each and every individual acting for himself may be so trusted.

203 U.S. at 149.

The Court found confirmation for its conclusions in the Burke Act, which amended section 6 of the General Allotment Act to allow the Secretary of the Interior to issue patents to allottees before the expiration of the 25-year trust period. Act of May 8, 1906, 34 Stat. 182 (codified at 25 U.S.C. § 349). The "premature" patents authorized by the Burke Act did not expressly subject the allottee to plenary state jurisdiction. They did, however, remove "all restrictions as to sale, encumbrance, or taxation of said land," implying that such taxation was independent of the general jurisdictional grant found in section 6 of the General Allotment Act. The Court interpreted this as reaffirming "for 'prematurely' patented land what § 5 of the General Allotment Act implied with respect to patented land generally: subjection to state real estate taxes." 112 S. Ct. at 691.

The one question left open by the Yakima decision was whether lands patented pursuant to statutes other than the General Allotment Act are also subject to *ad valorem* taxes. 112 S. Ct. at 694. This question was answered by the Ninth Circuit Court of Appeals in Lummi Indian Tribe v. Whatcom County, 5 F.3d 1355 (9th Cir. 1993). The court concluded that the key factor permitting taxation of reservation land patented in fee was not the jurisdictional provisions of the General Allotment Act, but the parcel's status as alienable or inalienable. *Id*. at 1357. Once restraints against alienability are lifted, lands are *per se* taxable because Indians holding lands in fee must "accept the burdens as well as the benefits of land ownership." *Id*. at 1358.

Other courts examining the issue have also concluded that so long as a parcel within an Indian reservation is alienable, the state may tax it, regardless of whether the owner is a member of the tribe, or even the tribe itself. United States v. Michigan, 882 F. Supp. 659 (E.D. Mich. 1995); Leech Lake Band of Chippewa Indians v. Cass County, 908 F. Supp. 689 (D. Minn. 1995). The only reported decision to the contrary is Southern Ute Indian Tribe v. Bd. of County Comm'rs, 855 F. Supp. 1194 (D. Colo. 1994). We do not, however, find its reasoning persuasive. The court in Southern Ute

believed that allotments made pursuant to acts other than the General Allotment Act must contain some expression of intent other than the removal of restrictions on alienability to make such lands liable to taxation. Such a holding, however, imposes a standard much stricter than that employed in Yakima where the Court found the dispositive language was section 5 of the General Allotment Act, which simply conveys the patent to the Indian allottee "in fee, discharged of said trust and free of all charge or encumbrance whatsoever." 25 U.S.C. § 348 (1988). This language, although "reaffirmed" by other statutes, was deemed sufficient to imply an intent to render such lands taxable. It thus follows that all similar conveyances of fee patents to members of Indian tribes imply an intent to allow taxation of the patented lands.

Further, the *in rem* nature of *ad valorem* taxation implies that alienability is the key feature distinguishing taxable and nontaxable lands. As the Supreme Court noted in Yakima, liability for *ad valorem* taxes "flows exclusively from ownership of realty" and such a tax "creates a burden on the property alone." 112 S. Ct. at 692. With the removal of federal restrictions on alienation, federal interests in the land itself are minimized, if not altogether eliminated. Thus, state taxation of the land does not thwart federal interests and is not preempted.

Although federal law does not prohibit states from imposing *ad valorem* taxes on reservation lands owned in fee by individual Indians, it is necessary to examine Idaho law to determine whether it embodies an independent barrier to taxation of lands owned in fee by Indians. Article 21, section 19 of the Idaho Constitution (the "disclaimer clause"), provides in part as follows:

> [T]he people of the state of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indians or Indian tribes; and until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States . . . . That no taxes shall be imposed by the state on the lands or property therein belonging to, or which may hereafter be purchased by, the United States, or reserved for its use.

The disclaimer clause presents two potential barriers to state taxation of reservation lands: the recognition that Indian lands are under the "absolute control and jurisdiction of the United States," and the prohibition on taxation of property belonging to the United States or reserved for its use. Neither barrier withstands scrutiny. In State v. Marek, 112 Idaho 860, 736 P.2d 1314 (1987), the Idaho Supreme Court found that the disclaimer clause could not prevent Congress from ceding control and jurisdiction over

Indian lands to the state. *Id*. at 866, 736 P.2d at 1320. Such cession is found in the General Allotment Act and other acts providing for the conveyance of fee patents to Indian lands. As the Supreme Court found in Yakima, the removal of restrictions on alienation is sufficient indication of Congress' intent to cede to the states taxation authority over such lands.

Likewise, the disclaimer clause's prohibition on taxation of lands owned by the United States or reserved for its use has no application to *ad valorem* taxation of fee patented lands. By issuing a fee patent to lands, the United States disclaims all interests in such lands. Even where fee lands remain within the boundaries of an Indian reservation, they are not specifically reserved for the use of the United States, and therefore may be taxed.

A search of the Idaho Code does not disclose any statutory barriers to state taxation of lands held in fee by Indians. In 1963, Idaho, pursuant to Public Law 280, 67 Stat. 588, (1953), assumed civil and criminal jurisdiction over certain matters within Indian reservations. Idaho Code § 67-5101 (1995).[i] The statute specifically disclaims, however, any authority to tax "any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States." Idaho Code § 67-5103 (1995) (emphasis added). The prohibition on taxation is limited to those lands for which alienability is restricted. Thus, it does not affect the ability of the state to tax reservation lands held in fee by Indians.[ii]

The only other state statute addressing taxation of Indian lands is Idaho Code § 63-1223 (1989), which provides as follows:

> All taxable improvements on government, Indian, state, county, municipal, or other lands exempt from taxation, and all improvements on all railroad rights of way owned separately from the ownership of the rights of way upon which the same stands or in which nonexempt persons have possessory interests shall be assessed as personal property and entered upon the personal property assessment roll.

The statute addresses the taxation of improvements on "Indian lands . . . exempt from taxation." Nothing in the section implies what land may or may not be taxable or exempt. Absent a statute specifically broadening the tax exemption of Indian lands beyond that required by federal law, it must be assumed that the legislature intended to recognize the tax-exempt status of Indian lands only to the extent required by federal treaties and statutes.

Thus, we conclude that counties may impose *ad valorem* taxes on real property owned in fee by individual Indians, regardless of whether such property is within the boundaries of a federally recognized Indian reservation.

AUTHORITIES CONSIDERED

1. Idaho Constitution:

Art. 21, § 19.

2. Idaho Code:

§ 63-1223 (1989).
§ 67-5101 (1995).
§ 67-5103 (1995).

3. Idaho Cases:

State v. Marek, 112 Idaho 860, 736 P.2d 1314 (1987).

4. Federal Cases:

Bryan v. Itasca County, 426 U.S. 373 (1976).

County of Yakima v. Yakima Indian Nation, 112 S. Ct. 683 (1992).

Goudy v. Meath, 203 U.S. 146 (1906).

Leech Lake Band of Chippewa Indians v. Cass County, 908 F. Supp. 689 (D. Minn. 1995).

Lummi Indian Tribe v. Whatcom County, 5 F.3d 1355 (9th Cir. 1993).

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

Southern Ute Indian Tribe v. Bd. Of County Comm'rs, 855 F. Supp. 1194 (D. Colo. 1994).

United States v. Michigan, 882 F. Supp. 659 (E.D. Mich. 1995).

5. Other Authorities:

25 U.S.C. § 348 (1988).

25 U.S.C. § 1323(b) (1988).

Act of February 8, 1887, 24 Stat. 388 (codified at 25 U.S.C. § 331 *et seq.*).

Act of June 18, 1934, 48 Stat. 984 (codified at 25 U.S.C. § 461 *et seq.*).

Act of May 8, 1906, 34 Stat. 182 (codified at 25 U.S.C. § 349).

American Indian Law Deskbook (1993).

Public Law 280, 67 Stat. 588 (1953).

DATED this 18th day of April, 1996.

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Analysis by:

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[i] The provisions of Public Law 280 allowing states to assume jurisdiction over Indians within Indian reservations were repealed in 1968, but such repeal did not affect jurisdiction assumed prior to that time. 25 U.S.C. § 1323(b) (1988).

[ii] It should be noted that Public Law 280 cannot be used as an independent source of authority for states to tax Indians or Indian property on reservations. Bryan v. Itasca County, 426 U.S. 373, 381 (1976).