GODFREY & KAHN S.C.

Indian Nations Law *Flash*

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The Godfrey & Kahn Indian Nations Law Practice Group provides a full range of legal services to Indian nations, tribal housing authorities, tribal corporations and other Indian country entities, with a focus on business and economic development, energy and environmental protection, and housing development.

Eleventh Circuit decides important tax case

The Supreme Court (Court) has described the rule that state and local governments may not tax Indians in Indian county as "categorical." The rule is far less clear where non-Indians are concerned, however, and state and local governments have often sought to reach inside Indian country to tax business activities involving tribal joint ventures with non-Indians. The Ninth Circuit has decided a number of cases permitting state taxation of Indian country activities, including on land leased from tribes, where the Court has deemed Indian ownership and control insufficient. Bureau of Indian Affairs (BIA) leasing regulations published in 2012 attempted to tilt the balance in tribes' favor by prohibiting taxation of activities on leased land "subject to federal law." On August 26, 2015, the Eleventh Circuit handed down *Seminole Tribe of Florida v. Stranburg,* 2015 WL 5023891 (11th Cir. 2015), an important decision that, on balance, will be helpful to tribes seeking to prevent taxation of activities on leased land. An appeal to the U.S. Supreme Court would not be surprising.

In *Stranburg*, the Seminole Tribe of Florida had entered into 25-year leases in 2005, approved by the BIA, with two non-Indian corporations—Ark Hollywood, LLC, and Ark Tampa, LLC (Ark Entities)—to provide food-court operations at each of its casinos. The leases required the Ark Entities to pay "applicable" taxes. The state of Florida sought to impose (1) a commercial rent tax on the "privilege of engaging in the business of renting, leasing, letting, or granting a license for the use of any real property" in the state, assessed against the lessee and collected by the lessor, based on the total amount of rent paid and (2) a tax "on gross receipts from utility services that are delivered to a retail consumer" in Florida (Utility Tax), "imposed upon every person for the privilege of conducting a utility or communications services business, and each provider of the taxable services remains fully and completely liable for the tax, even if the tax is separately stated as a line item or component of the total bill." Administrative regulations specified that even when stated on the consumer's bill, the "tax is imposed on the privilege of doing business, and it is an item of cost to the distribution company," who "remains fully and completely liable for the payment of the tax, even when the tax is wholly or partially separately itemized on the customer's bill."

The Tribe and the Ark Entities successfully challenged both taxes in the district court. On appeal, the Eleventh Circuit, citing the Supreme Court's 1973 decision in *Mescalero Apache v. Jones*, held that the rental tax was barred by 25 U.S.C. § 465, which provides that land taken into trust under the Indian Reorganization Act "shall be exempt from State and local taxation": "In our view, *Mescalero* stands for the proposition that § 465 precludes state taxation of that 'bundle of privileges that make up property or ownership of property.' … The ability to lease property is a fundamental privilege of property ownership. … By taxing the 'privilege' of 'engaging in the business of renting, leasing, letting, or granting a license for the use of any real property,' the State of Florida is

taxing a privilege of ownership." Importantly, the Court questioned Ninth Circuit decisions prohibiting taxation of Indian land or permanent improvements on Indian land but upholding a state's right to impose a tax on non-Indians' "possessory interests" in Indian land.

Alternatively, the Court held that even if Section 465 did not apply, the tax was preempted by federal Indian law under the rule of *White Mountain Apache Tribe v. Bracker* because federal and tribal interests outweighed the state's interests. The court expressly disclaimed any deference to the BIA's blanket *Bracker* analysis codified at 25 C.F.R. § 162.007.

With respect to the utility tax, the Court reversed the district court, concluding that the "fairest" interpretation of the law was that the tax fell on the utility, not the Tribe: "Although an itemized amount of the Utility Tax becomes a component of the consumer's bill that is, in a sense, transmitted by the utility to the state once collected, it is key in our view that nothing about this section requires a utility provider ever to itemize the tax. Ultimately, then, there is no requirement from the legislature to pass the tax through to the consumer, and it is the requirement that matters."

Notwithstanding the setback relating to the utility tax, the Eleventh Circuit's decision on the rental tax is a victory for Indian country, especially if other courts are persuaded by the Court's critique of the Ninth Circuit's distinction between taxes on Indian land and taxes on a "possessory interest" in Indian land.

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