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Environmental Indian Reservations

In the absence of specific Congressional permission to subject Native Americans or their tribal corporations to the environmental fee, such tribal corporations are not subject to the fee. 7/3/92.

Memorandum

To: Mr. Robert M. Frank
Environmental Fees Section

Date: July 3, 1992

From: Janet Vining
Tax Counsel

Subject: **APPLICABILITY OF ENVIRONMENTAL FEE TO INDIAN RESERVATIONS**

In your April 8, 1992 memorandum, you requested an opinion concerning the application of the environmental fee imposed in Health and Safety Code Section 25205.6 to a tribal corporation that operates on an Indian reservation. For the reasons set forth below, I conclude the corporation is not subject to the fee.

(Redacted) is a corporation that provides health services for Indians at the (redacted), (redacted), (redacted), (redacted) and (redacted) Indian reservations. All the clinics are on federal Indian reservations except for one, and that clinic employs fewer than 49 employees.

Health and Safety Code Section 25205.6 imposes a fee on each corporation identified in a list of SIC codes that consists of corporations which use, generate, store, or conduct activities in the state related to hazardous materials. The list of SIC codes which the Department of Toxic Substances Control provided to the Board includes all SIC codes except the code for households. Therefore, any corporation doing business in California is subject to the fee.

While the area of federal and state environmental regulation of Indian lands is quite complicated, the United States Supreme Court has established a per se rule that a state may not tax tribes or tribal members absent congressional consent. California v. Cabazon Band of Indians (1987) 480 U.S. 202; Montana v. Blackfeet Tribe (1985) 471 U.S. 759; McClanahan v. Arizona State Tax Comm'n. (1973) 411 U.S. 164; Mesacalero Apache Tribe v. Jones (1973) 411 U.S. 145.

Although the imposition described in Health and Safety Code Section 25205.6 is described as a "fee", it is difficult to argue that it meets the three-prong test set forth in Massachusetts v. U.S. (1978) 435 U.S. 444 for distinguishing a tax from a fee. Specifically, in order to be a fee, a charge must be a fair approximation of the use of the system by those who pay it. The environmental fee is imposed on all

corporations doing business in the state, whether or not an individual corporation makes any use of, or could make use of, the Department's regulatory program.

Given the difficulty in arguing that the environmental fee is a "fee" rather than a "tax", and the absence of any express permission from Congress to subject Native Americans or their tribal corporations to the environmental fee, I conclude that such tribal corporations are not subject to the fee imposed in Section 25205.6.

Please let me know if I can be of further assistance.

Janet Vining

cc: Mr. E. V. Anderson
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