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North Carolina Local Property Taxes on Military Bases and Native American Tribal Lands

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Military personnel and Native Americans are two very different populations that play large roles in North Carolina's culture and economy. North Carolina hosts nine military bases[1] with a total active-duty military population of 115,000, the fourth largest in the U.S.[2] North Carolina is also home to eight Native American tribes,[3] more than 180,000 residents of Native American descent,[4] and the largest federally recognized Native American tribal territory east of the Mississippi River, the Eastern Band of Cherokee Indians' Qualla Boundary.[5]

Both populations share connections with the federal government. Military bases are owned by the federal government, of course. So, too, is the Qualla Boundary, which consists of land owned by the U.S. Bureau of Indian Affairs and held in trust for the Eastern Band of Cherokees tribe.[6]

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1. The nine bases are Pope Air Force Base (Manchester, NC), Seymour Johnson Air Force Base (Goldsboro, NC), Camp Mackall Army Base (Southern Pines, NC), Fort Bragg Army Base (Fayetteville, NC), Air Station Elizabeth City Coast Guard Base/National Strike Force Coast Guard (Elizabeth City, NC), Camp Lejeune Marine Corps Base (Onslow County, NC), Marine Corps Air Station (MCAS) Cherry Point Marine Corps Base (Havelock, NC), MCAS New River Marine Corps Base (Jacksonville, NC), and the Army's Military Ocean Terminal Sunny Point (Brunswick County, NC). *North Carolina Military Bases*, Military Bases.com, https://militarybases.com/north-carolina/.

2. *Military Active-Duty Personnel, Civilians by State*, Governing.com, www.governing.com/gov-data/military-civilian-active-duty-employee-workforce-numbers-by-state.html.

3. The state recognizes eight Native American tribes: the Coharie, the Eastern Band of the Cherokee Indians, the Haliwa-Saponi, the Lumbee, the Meherrin, the Occaneechi Band of the Saponi Nation, the Sappony, and the Waccamaw Siouan. N.C. Commission of Indian Affairs, "North Carolina's First People" (Oct. 2013), www.doa.state.nc.us/cia/documents/brochures/FirstPeople-Brochure-08.pdf.

4. North Carolina's Native American population is the eighth largest in the United States and the largest east of the Mississippi. U.S. Census Bureau, "The American Indian and Alaska Native Population: 2010" (Jan. 2012), www.census.gov/prod/cen2010/briefs/c2010br-10.pdf.

5. The only two federally recognized Native American tribal territories east of the Mississippi are the Cherokee's Qualla Boundary and the Choctaw Indian Reservation in Mississippi. U.S. Census Bureau, "The American Indian and Alaska Native Population," *supra* note 4.

6. For a history of the Eastern Band of Cherokee Indians and their land, please see the "History & Culture" page of the tribe's official website, http://nc-cherokee.com/historyculture/. The United States Court

Federal ownership raises many complex questions as to the extent of state and local authority over these lands, including the one that is the focus of this bulletin: May local governments levy property taxes on military bases or on tribal lands?

At first glance the answer seems to be a quick "no." Both federal and state law have long made clear that property owned by the federal government is exempt from local property taxes unless the federal government consents to the taxation.[7]

But that quick answer only raises more questions. Has the federal government consented to taxation on North Carolina's military bases and tribal lands? What about privately owned property located on federally owned land? Is the answer different for privately owned *real* property versus privately owned *personal* property sited on these lands?

Legal guidance on these questions from the North Carolina Attorney General's office and the Department of Revenue has varied over the years.[8] Local tax office practice has also varied. Some cities and counties attempt to tax property on military bases and tribal lands, while others consider all such property exempt.

This bulletin seeks to eliminate this confusion by asserting two main conclusions.

First, no property sited on Fort Bragg, Camp Lejeune, or Marine Corps Air Stations Cherry Point and New River is subject to local property taxes, regardless of ownership, unless Congress has specifically authorized the taxation. Local taxation on other North Carolina military bases depends on when and how the federal government acquired the land.

Second, the only property sited on Native American tribal land that is subject to North Carolina local property taxes is personal property owned by non-tribal members.

The details and analysis supporting these conclusions follow.

I. Property Sited on Military Bases

The key question regarding local taxation authority on a military base is whether the federal government obtained exclusive jurisdiction over the land. If so, then local governments may not tax any property on the military base, even privately owned property, without Congressional approval. The United States Supreme Court made this principle clear more than fifty years ago when it ruled in *Humble Pipeline Co. v. Waggoner* that Louisiana could not levy property taxes on privately owned drilling equipment and pipelines located on land that was transferred to the federal government subject only to the state's reservation of civil and criminal process rights.[9]

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of Appeals for the Fourth Circuit summarized the legal relationship between the tribe, the United States, and North Carolina in *Eastern Band of Cherokee Indians v. Lynch*, 632 F.2d 373 (4th Cir. 1980).

7. *See* Van Brocklin v. Tennessee, 117 U.S. 151 (1886); Section 105-278.1(a) of the North Carolina General Statutes (hereinafter G.S.).

8. *See, e.g.*, Letter from Johnny C. Bailey, Director, N.C. Department of Revenue Property Tax Division, to Suzanne M. Allison, Business Personal Property Appraiser, Jackson County Assessor's Office, dated Sept. 29, 2000 (advising that buildings, leasehold improvements, and business personal property sited on tribal lands are taxable if owned by non-tribal members); Letter from Thomas W. Bruton, N.C. Attorney General, to George P. Davis, Jr., dated Dec. 19, 1967 (advising that personal property owned by tribal members and sited on tribal land may be taxed by Swain County).

9. 376 U.S. 369 (1964) (transfer was subject to state's express reservation of civil and criminal process authority but not taxation authority).

Reservation of Taxation Rights by the State

Some states have reserved taxation rights on all land ceded to the federal government.[10] North Carolina is not one of these states.

Until 1887 the North Carolina General Assembly authorized the sale of public land to the federal government by individual public laws under which the retention of state jurisdiction varied from transaction to transaction. To determine what state jurisdiction, if any, was retained by North Carolina in federal land acquisitions prior to 1887, one must locate the specific state legislation that authorized the transfer.

In 1887 the General Assembly gave blanket approval to the sale of land to the federal government without retaining any specific jurisdiction over the land.[11] The North Carolina Supreme Court subsequently ruled that the 1887 act granted the federal government exclusive jurisdiction over lands transferred in accordance with the act and with the Federal Enclave Clause of the U.S. Constitution.[12]

In the early 1900s, the General Assembly passed two laws relating to state authority over federal land. Section 104-1 (1905) of the North Carolina General Statutes (hereinafter G.S.) ceded to the federal government all jurisdiction over land transferred to the federal government except for the right to serve civil and criminal process and to punish criminal offenses concurrently with the federal government.[13] G.S. 104-7 (1907) again granted exclusive jurisdiction to the federal government, this time retaining only the right to serve criminal and civil process.[14] This second law expressly waived the right of taxation over such lands so long as they are owned by the federal government.

Decades later, the state supreme court ruled that both statutes were effective prospectively, meaning that the 1905 law (G.S. 104-1) covered transactions from 1905 to 1907, and the 1907 law (G.S. 104-7) covered transactions from 1907 forward.[15]

G.S. 104-7 was amended in 2005 to expand state jurisdiction over land acquired by the federal government to permit enforcement of state laws concerning crime, public health, the environment, marriage, and probate matters.[16] Despite the amendment, G.S. 104-7 continues to exempt federal land from state and local taxes.

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10. *See* Md. Code Ann., Gen. Provisions § 6-201 (reserving "jurisdiction and authority over the land and over persons, property and transactions on the land to the fullest extent that is permitted by the United States Constitution"); IBM Corp. v. Evans, 99 S.E.2d 220 (Ga. 1957) (concluding that the Georgia constitution prohibits the state from ceding right of taxation of private property on federal lands); 1949–51 Op. Wash. Att'y Gen. 476, 1951 WL 43526 (concluding that the state reserved concurrent jurisdiction over lands ceded to the federal government after 1939). Other states have retained the right to reassert jurisdiction if federal land is sold or leased to a private party and used for private business or industry. *See* 1940 Va. Acts, ch. 422, § 19-c-(6).

11. 1887 N.C. Pub. L. ch. 136.

12. *See* State v. De Berry, 224 N.C. 834 (1945); and U.S. Const. art. I, § 8, cl. 17 (Federal Enclave Clause).

13. Revisal of 1905, Sect. 5426.

14. 1907 N.C. Sess. Laws ch. 25, *now codified as* G.S. 104-7. *See also* State v. Smith, 328 N.C. 161 (1991) (affirming that under the original version of G.S. 104-7 the state waived all jurisdiction over federal lands acquired under that statute except for service of process).

15. *De Berry,* 224 N.C. 834.

16. S.L. 2005-69.

In 1979 the scope of jurisdiction retained by North Carolina over land ceded to the federal government for use as a national park was expanded to include the power of taxation.[17] But this provision does not apply to land acquired for other federal purposes such as military bases.

Federal Acceptance of Exclusive Jurisdiction

Beginning in 1940, Congress required the federal government to formally accept exclusive jurisdiction over land acquired from the states.[18] If the federal government fails to accept jurisdiction as required by this statute, then North Carolina retains jurisdiction over the land for all purposes, including taxation.[19]

Local Taxation by Federal Statute

Regardless of when or how the federal government obtained certain land, Congress has the power to permit state and local governments to tax certain property or transactions on that land. For example, state and local sales, use, and income taxes have been permissible since 1940 on transactions occurring on federal lands that are otherwise subject to exclusive federal jurisdiction.[20] Certain military housing construction leases have also been made subject to state and local taxation by federal statute.[21] Another federal law authorizes "enhanced use leases" under which land leased to private parties is subject to state and local taxation.[22] Outside of these few exceptions, Congress has not specifically authorized North Carolina and local governments to tax property sited on the state's military bases.

Table 1, below, summarizes how and when exclusive federal jurisdiction over North Carolina land arises.[23] The only situations in which a local government might have taxation authority over property sited on a North Carolina military base is when the federal government acquired the land (1) prior to 1887 subject to a grant that retained state taxation authority or (2) after 1940 and failed to accept exclusive jurisdiction.

Marine Corps Base Camp Lejeune, Air Station New River, and Air Station Cherry Point

The most extensive judicial analysis of local taxation authority over North Carolina's military bases occurred in *Atlantic Marine Corps Communities, LLC v. Onslow & Craven Counties.*[24] This 2007 federal case involved the attempted taxation of privately owned improvements on real property located on several Marine bases in eastern North Carolina. Although the case focused

17. G.S. 104-32.

18. 40 U.S.C. § 255, *now codified as* 40 U.S.C. § 3112.

19. *See* State v. Burell, 256 N.C. 288 (1961) (concluding that G.S. 104-7 does not waive state jurisdiction if the federal government does not accept jurisdiction pursuant to 40 U.S.C. § 255 for lands acquired after 1940).

20. 4 U.S.C. §§ 105, 106.

21. See *Offutt Housing Co. v. County of Sarpy*, 351 U.S. 253 (1956), the holding of which was applied to the same housing program on Fort Bragg in *Bragg Investment Co. v. Cumberland County*, 245 N.C. 492 (1957).

22. 10 U.S.C. § 2667

23. Shea Riggsbee Denning, *Guide to the Listing, Assessment, and Taxation of Property in North Carolina* (UNC School of Government, 2009), 175.

24. 497 F. Supp. 2d 743 (E.D.N.C. 2007) (holding that counties could not tax privately owned improvements to real property and privately owned personal property located on Marine Corps Air Station New River, Marine Corps Base Camp Lejeune, and Marine Corps Air Station Cherry Point).

Table 1. State and Federal Jurisdiction over Federal Lands in North Carolina

Date Acquired	Nature of Jurisdiction	Power to Impose Local Property Taxes	Controlling Authority
Before March 2, 1887	Depends upon language in grant	Depends upon language in grant	See particular act granting property
March 2, 1887, and July 31, 1905	Exclusive federal jurisdiction if acquired pursuant to Federal Enclave Clause	No	G.S. 104-1; U.S. Const. art. 1, § 8, cl. 17
August 1, 1905, through January 31, 1940	Exclusive federal jurisdiction	No	G.S. 104-1, 104-7
February 1, 1940, through present	Exclusive federal jurisdiction if acceptance filed with governor	No, unless the federal government did not formally accept exclusive jurisdiction	40 U.S.C. § 3112 (former 40 U.S.C. § 255); G.S. 104-7

on real property, the court's analysis of G.S. 104-7 is also applicable to the taxation of privately owned personal property on these lands.

The court's decision barred all local taxation of property, both real and personal, on Marine Corps Air Station New River, Marine Corps Base Camp Lejeune, and Marine Corps Air Station Cherry Point. To reach this conclusion, the court had to address both the scope of G.S. 104-7 and the federal acceptance of exclusive jurisdiction over the land in question.

First, the court concluded that the waiver of state jurisdiction in G.S. 104-7 applied to all land granted to the federal government regardless of how the land is used. The counties had argued that this waiver was limited to lands used by the federal government for specific purposes, none of which included use as military training grounds. The court rejected this argument based on the broad catch-all language included in the original version of the statute:

> The consent of the state is hereby given, in accordance with the [Federal Enclave Clause,] to the acquisition by the United States, by purchase, condemnation or otherwise, of any land in the state required for customhouses, courthouses, post offices, arsenals or other public buildings whatever, *or for any other purposes of the government*.[25]

Second, the *Atlantic Marine* court concluded that the federal government had appropriately accepted exclusive jurisdiction over the land on which all three Marine Corps bases sit. The United States obtained title to this land in 1941, after the passage of Title 40, Section 255 of the

25. 1907 N.C. Sess. Laws ch. 25 (emphasis added). Note that such a dispute would not arise under the current version of G.S. 104-7 because the statute now expressly waives state jurisdiction over land acquired by the federal government to be added to Fort Bragg, Pope Air Force Base, Camp Lejeune, New River Marine Corps Air Station, Seymour Johnson Air Force Base, Cherry Point Marine Corps Air Station, Military Ocean Terminal at Sunny Point, or the United States Coast Guard Air Station at Elizabeth City. The newly acquired land must be contiguous to and within twenty-five miles of the existing bases.

U.S. Code. If the federal government had failed to accept exclusive federal jurisdiction, North Carolina would have retained concurrent jurisdiction, including taxation authority, over the bases. After a lengthy analysis of the various land transactions involving the Marine Corps land, the court found sufficient evidence of federal acceptance of exclusive jurisdiction.

Finally, the court analyzed whether the United States had lost its exclusive jurisdiction by transferring ownership of the land in question to a private entity. The court conceded that G.S. 104-7 terminates the state's waiver of jurisdiction over land granted to the federal government if the federal government later transfers ownership to another party:

> So long as land acquired with the consent of the State under subsection (a) of this section remains the property of the United States, *and no longer*, the land shall be exempt and exonerated from all State, county, and municipal taxation, assessment, or other charges that may be levied or imposed under the authority of this State.[26]

This limitation did not apply to the Marine Corps land, according to the court, because the long-term leases by the federal government to a private party for the construction and operation of housing units on the bases did not equate to a transfer of ownership of the land.[27] As a result, the United States had not lost exclusive jurisdiction over the land.

The *Atlantic Marine* decision effectively bars all local property taxes on all property, real and personal, sited on land owned by the federal government within Marine Corps Air Station New River, Marine Corps Base Camp Lejeune, and Marine Corps Air Station Cherry Point.[28] While this ruling technically is not binding on other courts, it would be persuasive and likely decisive were North Carolina local governments to litigate the same taxation issue on other military bases that were acquired subject to exclusive federal jurisdiction.

Fort Bragg Army Base

The courts have not addressed local taxation authority over Fort Bragg, but the result likely would be the same as it was for the Marine bases in eastern North Carolina: no local taxation is permitted absent specific Congressional approval of taxes on particular property.

A 1993 opinion letter on this issue from the North Carolina Attorney General concluded that the federal government has exclusive jurisdiction over Fort Bragg, with the exception of service

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26. G.S. 104-7(d) (emphasis added). Similar language, including the phrase "and no longer," existed in the original 1907 version of the statute. 1907 N.C. Sess. Laws ch. 25 .

27. One question not addressed in *Atlantic Marine* is the possibility of taxing a private company's leasehold interest in exempt military base property. This type of property is taxable in North Carolina under G.S. 105-275(31). In 2014, an Illinois state court concluded that a county could tax a private company's leasehold interest in the same type of military housing property at issue in *Atlantic Marine*. St. Clair Cnty. v. Scott Air Force Base Props., LLC, No. 5-12-0570, 2014 IL App (5th) 120570-U (Ill. App. Ct. Feb. 13, 2014). However, even if similar leasehold interests on North Carolina's military bases were taxable, if those leases were for market-value rent then those leases would likely have no taxable value. For more on the taxation and valuation of leasehold interests in exempt property under North Carolina law, see Chris McLaughlin, *Government Property, Private Leases, and Property Taxes*, Coates' Canons: NC Local Government Law, UNC Sch. of Gov't Blog (Dec. 16, 2010), http://canons.sog.unc.edu/?p=3701.

28. The only local taxation permitted on the three bases would be that specifically authorized by a federal statute, such as those referenced *supra* notes 21 and 22.

of civil and criminal process.[29] The opinion observed that because the history of how and when the federal government acquired the lands on which Fort Bragg sits is muddled, it is difficult to determine with complete accuracy what authority over the lands was ceded by the state. But the attorney general inferred "from how the State and the federal government have historically treated Fort Bragg that the federal government has in fact acquired exclusive jurisdiction over Fort Bragg, with the exception of service of process. It therefore appears that Cumberland County may not impose a tax upon personal property which has acquired a tax situs on Fort Bragg."[30]

Absent new evidence to the contrary, Cumberland, Harnett, and Hoke counties likely do not have taxation authority within Fort Bragg.

Other North Carolina Military Bases

The first step for any county wishing to levy taxes on property sited on a military base is to determine exactly when and how those lands were acquired by the federal government. A good starting point for that investigation would be the Inventory Report on Jurisdictional Status of Federal Areas, issued periodically by the U.S. General Services Administration.[31]

As the discussion above demonstrates, the timing of a federal acquisition matters only if it occurred prior to 1887 or after 1940. If the acquisition occurred before 1887, then North Carolina may have reserved taxation authority when it transferred the land to the federal government. If the acquisition took place after 1940, it is possible that the federal government may have failed to accept exclusive jurisdiction as required by Title 40, Section 255 of the U.S. Code. But if the acquisition took place between 1887 and 1940, North Carolina and its local governments did not retain the right to tax private property on that federal land.

If exclusive federal jurisdiction exists, it will bar local taxation of all property sited on the military base in question. This includes real and personal property owned by private parties, such as cars and boats registered to military personnel.

Remember that it is possible for the federal government to lose its exclusive jurisdiction, and hence subject itself to local taxation, by selling land to a private party. Land on a military base might also be subject to local property taxes if it is being leased to a private party under a federal statute that explicitly authorizes local taxation. While the *Atlantic Marine* decision made clear that the "military housing privatization initiative" program at issue in that case does not permit local taxation, other statutes concerning private use of military land are more permissive of local property taxes.[32]

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29. Advisory Opinion—Ad Valorem Tax on Personal Property of Non-servicemembers Located on Fort Bragg, 1993 Op. N.C. Att'y Gen. (May 24, 1993*), available at* www.ncdoj.gov/About-DOJ/Legal-Services/Legal-Opinions/Opinions/Ad-Valorem-Tax-on-Personal-Property-of-Non-service.aspx.

30. *Id*. at *1.

31. The 1957 version of the report is available, on microfiche, through UNC University Libraries. *See* http://search.lib.unc.edu/search?R=UNCb5154920. The General Services Administration also issued this report in 1962, but an on-line search suggests that this edition is not readily available.

32. See *supra* notes 20 through 22.

II. Property on Native American Tribal Lands

With more than 1,100 hotel rooms, 3,800 slot machines, and 150,000 square feet of gambling space, Harrah's Cherokee Casino and Resort is one of the twenty largest casinos in the world. Operated by the Eastern Band of Cherokee Indians, the complex attracted 3 million visitors and generated more than $500 million in gambling revenue in 2013. Later this year, the Cherokee will open another casino on tribal land outside of Murphy, North Carolina. The new casino will be only about half the size of the Harrah's Cherokee facility, but that still means another 1,500 slot machines and 300-plus hotel rooms.[33]

Other tribes may soon get in on the action. The Catawba Indian Nation is seeking federal and state permission to build a huge casino just outside of Charlotte that would be 50 percent larger than Harrah's Cherokee Resort.[34] In eastern North Carolina, the Lumbees continue to work toward federal recognition that could open the door for tribal casinos along I-95.[35]

There's obviously money to be made here both for the tribes and for the state, which takes a slice of the gambling proceeds.[36] Local governments don't get a cut of the gambling money, but the property tax revenue from the casinos and related development on tribal lands would be substantial if that property were taxable.[37] Unfortunately for North Carolina's local governments, most of that property appears to be beyond the reach of local property taxes.

Tribal Trust Lands and the *Bracker* Preemption Balancing Test

The Cherokee's tribal land, as is true of most tribal land across the country, is owned by the United States government and held in trust for the benefit of the tribal members.[38]

In the early 1900s, the U.S. Supreme Court held in *United States v. Rickert* that Native American tribal trust lands and any improvements built on those lands were exempt from state and local taxes.[39] *Rickert* involved property owned by the federal government or by tribal members.

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33. John Frank and Rick Rothacker, *New Casino Games Fuel Growth in Cherokee, Even as Potential for Gambling Competition Looms*, NewsObserver.com, Aug. 23, 2014, www.newsobserver.com/2014/08/23/4091428_new-casino-games-fuel-growth-in.html?rh=1.

34. John Frank, *McCrory's Interest in Proposed Casino Faded Abruptly*, NewsObserver.com, Jan. 11, 2014, www.newsobserver.com/2014/01/11/3521541/on-proposed-casino-mccrorys-interest.html.

35. See the press release, dated Jan. 7, 2015, on the website of Congressman Richard Hudson entitled "Hudson Introduces Bill to Recognize Lumbee Tribe": http://hudson.house.gov/press-releases/hudson-introduces-bill-to-recognize-lumbee-tribe/#.VM_qhk10x9A.

36. The state currently receives 4 percent of gambling revenues from the existing casino in Cherokee, a percentage that rises every five years until it hits a maximum of 8 percent in twenty years. Tom Bennett, *Leaders Gamble on New Cherokee Casino*, The Daily Yonder, Oct. 22, 2013, www.dailyyonder.com/cherokee-break-ground-new-casino/2013/10/21/6874.

37. The most recent upgrades to the Cherokee's casino resort in Jackson County cost $633 million. The tribe's new casino in Murphy, Cherokee County, will cost in excess of $110 million. Using these values and the two counties' current property tax rates, those two properties alone would produce roughly $1.8 million and $570,000 in property tax revenue annually for the respective counties. For a listing of county tax rates, see N.C. Department of Revenue, "County Property Tax Rates and Revaluation Schedules," www.dor.state.nc.us/publications/countyrates.html.

38. *See* E. Band of Cherokee Indians v. Lynch, 632 F.2d 373 (4th Cir. 1980). For an explanation of the federal government's "Indian trust responsibility," see U.S. Department of the Interior, Bureau of Indian Affairs, "Frequently Asked Questions," www.bia.gov/FAQs/index.htm.

39. U.S. v. Rickert, 188 U.S. 432 (1903).

It did not answer the question of whether states or local governments could tax property sited on tribal trust land if that property (real or personal) was owned by non-tribal members.

In 1980 the U.S. Supreme Court mandated a balancing test to decide whether federal laws and regulations preempt (and therefore prohibit) a particular state or local government tax on tribal land property or transactions.[40] Known as the *Bracker* preemption balancing test, this analysis requires a court to decide which is more important with respect to a particular tax: (1) the interest of the state or local government in exercising its taxation authority or (2) the interests of the federal government and the tribe in promoting economic development and maintaining tribal sovereignty over tribal lands.

Shortly after *Bracker* was decided, the U.S. Court of Appeals for the Fourth Circuit applied the preemption balancing test and concluded that Swain County could not levy taxes on personal property owned by Cherokee tribal members and sited on tribal lands.[41]

More than thirty years later, another federal appellate court applied the *Bracker* preemption balancing test and upheld local property taxes on personal property owned by *non*-tribal members. The case, *Mashantucket Pequot Tribe v. Town of Ledyard*,[42] focused on whether the town could tax more than 5,000 slot machines at the tribe's Foxwoods casino, the largest gambling resort in the United States. The slot machines were leased by the tribe from non-tribal gaming machine companies. This is the same dilemma facing several North Carolina counties concerning the Cherokee's casinos in western North Carolina.

Before it even got to the *Bracker* preemption balancing test, the federal appeals court had to decide whether federal gambling law[43] barred state and local taxation of slot machines used in tribal casinos. The judges said no; although federal law preempts state and local regulation of gambling on tribal lands, it does not affect generally applicable state laws, such as those covering property taxes, that might be applied to tribal gambling activity.

The court then applied the *Bracker* balancing test and concluded that economic and regulatory impact of the town's property tax on the leased slot machines (which totaled about $20,000 per year) was minor compared to the $600 million in annual gambling revenues earned by the tribe.

While this decision is not binding on the federal appellate court with jurisdiction over North Carolina (the U.S. Court of Appeals for the Fourth Circuit), it seems likely that the Fourth Circuit would reach the same conclusions if it were faced with the same question about taxing leased personal property used in North Carolina's tribal casinos.

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40. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

41. *Lynch*, 632 F.2d 373. In its decision, the Fourth Circuit relied on earlier U.S. Supreme Court decisions that prohibited state and local property taxes on tribal members in other states. *See* Bryan v. Itasca Cnty., 426 U.S. 373 (1976) (property taxes on mobile homes), *and* Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976) (property taxes on motor vehicles). In 2004, the N.C. Attorney General relied on *Lynch* when it concluded that the state could not levy an insurance tax on a Boys Club owned by the Cherokee. Advisory Opinion: Premium Tax on Surplus Lines Insurance; Exemption for Cherokee Indian Reservation, Op. N.C. Att'y Gen. (Aug. 18, 2004), *available at* www.ncdoj.gov/About-DOJ/Legal-Services/Legal-Opinions/Opinions/Premium-Tax-on-Surplus-Lines-Insurance-Exemption.aspx.

42. 722 F.3d 457 (2d Cir. 2013). Although the new regulation discussed below, 25 C.F.R. § 162.017, was in effect at time of this decision, the Second Circuit did not address it. This author assumes that the court ignored the new regulation because the case involved taxes on personal property (slot machines), while the new regulation is aimed at real property and improvements.

43. The Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*

New Regulations and Recent Cases: The End of the *Bracker* Test?

Legal developments over the past two years may mean the end of the *Bracker* balancing test and a flat prohibition against state and local taxes levied on non-tribal members for their use or lease of tribal land.

A federal regulation, 25 C.F.R. § 162.017, which became effective January 2013, states:

> (a) Subject only to applicable Federal law, permanent improvements on the leased land, without regard to ownership of those improvements, are not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Improvements may be subject to taxation by the Indian tribe with jurisdiction.
> (b) Subject only to applicable Federal law, activities under a lease conducted on the leased premises are not subject to any fee, tax, assessment, levy, or other charge (e.g., business use, privilege, public utility, excise, gross revenue taxes) imposed by any State or political subdivision of a State. Activities may be subject to taxation by the Indian tribe with jurisdiction.
> (c) Subject only to applicable Federal law, the leasehold or possessory interest is not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Leasehold or possessory interests may be subject to taxation by the Indian tribe with jurisdiction.[44]

The explanatory preamble to this regulation strongly suggests that the *Bracker* preemption balancing test is no longer necessary when a court is evaluating state and local taxes on improvements to tribal trust land: "The Federal statutory scheme for Indian leasing is comprehensive, and accordingly precludes State taxation. In addition, the Federal regulatory scheme is pervasive and leaves no room for State law."[45] In other words, the Interior Department's Bureau of Indian Affairs is asserting that Congress's intent is clear and that courts don't have the authority to decide the issue for themselves.

This assertion is problematic, however. A regulation does not have the same force and effect as a law, and courts do not always defer to regulatory conclusions reached by federal agencies.[46] What's more, the regulation states that its prohibition against state and local taxation is "subject to applicable Federal law." If U.S. Supreme Court decisions are considered part of "Federal law" (as the regulation's preamble indicates), how does the regulation interact with prior Supreme Court decisions approving certain state taxation on tribal lands?[47]

It remains unclear whether this new regulation will force courts to conclude that the *Bracker* test always favors the interests of Native American tribes when reviewing state and

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44. An authenticated version of this regulation is available at www.gpo.gov/fdsys/pkg/CFR-2014-title25-vol1/pdf/CFR-2014-title25-vol1-part162.pdf.

45. 77 Fed. Reg. 72440, 72447 (Dec. 15, 2012), *available at* www.gpo.gov/fdsys/pkg/FR-2012-12-05/html/2012-28926.htm.

46. Under the precedent set by *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), federal courts generally defer to an agency's regulations when the relevant federal law is silent or ambiguous on the matter and the agency's conclusions are permissible and reasonable under that law, even if the court might have reached a different conclusion.

47. *See* Dep't of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., Inc., 512 U.S. 61 (1994) (permitting state regulation and taxation of cigarette sales to non-tribal members on tribal land); Cotton Petrol. v. New Mexico, 490 U.S. 163 (1989) (permitting state oil and gas taxation on private lessees of tribal land).

local taxation on tribal land or whether, perhaps, it will eliminate the need for the *Bracker* test entirely.[48] Two court decisions issued after the adoption of 25 C.F.R. § 162.017 suggest that this may be the case.

A federal court in Florida relied on 25 C.F.R. § 162.017 to strike down rental taxes and utility taxes on a tribal casino operated by the Seminole Tribe.[49] The taxes were levied on non-tribal companies that operated portions of the casino resort.

The court referenced the *Bracker* preemption balancing test but also observed, "This court must give some weight and deference to the new regulations. . . . [We] now ha[ve] the benefit of a comprehensive analysis performed by the Secretary of the Interior showing how tribal interests are affected by state taxes on lessees of restricted Indian land. . . . The Secretary of the Interior's analysis on the issue of preemption of state taxes on leases of restricted Indian land merits the full amount of deference available under the law."[50] Because the Secretary's analysis was "thorough and persuasive," the court deferred to the agency's conclusion in 25 C.F.R. § 162.017 that *all* taxes on leased tribal lands are preempted by federal law.

Another court reached a similar conclusion using a different analysis. In *Confederated Tribes of Chehalis Reservation v. Thurston County Board of Equalization*,[51] the Ninth Circuit Court of Appeals struck down local property taxes on a Great Wolf Lodge Resort built on tribal trust land in the state of Washington. The resort was held exempt from local property taxes despite the fact that the buildings were owned by non-tribal members.

In reaching its conclusion, the court decided that the *Bracker* test was unnecessary, but not because of the new regulation. The court instead concluded that 25 U.S.C. § 465, the federal law under which 25 C.F.R. § 162.017 was issued, expressly exempts all real property and improvements on tribal land from state and location taxation regardless of ownership.

Some background on 25 U.S.C. § 465 may help explain the court's conclusion. 25 U.S.C. § 465 authorizes the Bureau of Indian Affairs to purchase and hold land in trust for Native Americans. It states that all "such lands or rights shall be exempt from State and local taxation." In 1973 the U.S. Supreme Court relied on this statute to strike down state taxes on a ski resort on Native American land in New Mexico, observing "[U]se of permanent improvements upon land is so intimately connected with use of the land itself that an explicit provision relieving the latter of state tax burdens must be construed to encompass an exemption for the former. . . . [T]he question of tax immunity cannot be made to turn on the particular form in which the Tribe chooses to conduct its business."[52]

In *Confederated Tribes*, the Ninth Circuit interpreted the Supreme Court's observation in the ski resort case to mean that all state and local taxation on improvements on tribal trust land is prohibited, regardless of who owns the improvements. This led the Ninth Circuit to conclude that it did not need to opine on the applicability of the 25 C.F.R. § 162.017 or on the level of

48. For more detailed analysis on the likely impact of 25 C.F.R. § 162.017, see F. Michael Willis, *The Power to Tax Economic Activity in Indian Country*, 28 Nat. Resources & Env't 8 (Spring 2014); James M. Susa, *Taxation on Indian Reservations: To Balance or Not to Balance, That Is the Question*, J. St. Tax'n (Sept.–Oct. 2013), *available at* www.swlaw.com/assets/pdf/news/2013/09/01/TaxationonIndianReservationsToBalanceorNot_Susa.pdf.

49. Seminole Tribe of Fla. v. Florida, ___ F. Supp. 2d ___, No. 12-621-40-Civ., 2014 WL 4388143 (E.D. Fla. Sept. 5, 2014).

50. ___ F. Supp. 2d at ___, 2014 WL 4388143, at *4.

51. 724 F.3d 1153 (9th. Cir. 2013).

52. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 158, 158 n.13 (1973).

deference owed to the new regulation because 25 C.F.R. § 162.017 "'merely clarifies and confirms' what [25 U.S.C.] § 465 'already conveys.'"[53] In other words, 25 C.F.R. § 162.017 was superfluous because federal law and Supreme Court precedent already compelled a finding that all improvements to real property on tribal lands are exempt from state and local taxation.

If other courts were to follow the Ninth Circuit's lead, the *Bracker* preemption test will no longer be necessary to evaluate state and location taxation on tribal lands. All such taxation will be preempted and prohibited by 25 U.S.C. § 465.

Another federal case involving 25 C.F.R. § 162.017 is still in its early stages. The Agua Caliente tribe near Palm Springs, California, has asked the Federal District Court for the Central District of California to use the new regulation and 25 U.S.C. § 465 to strike down both county property taxes levied on non-tribal lessees of tribal lands and water use fees levied by a regional water authority on tribal lands.[54]

A pre-trial filing by the Bureau of Indian Affairs in a related case, later dismissed and combined with the Agua Caliente case, suggests that the agency did not intend for its new regulation to entirely eliminate the traditional *Bracker* balancing test for evaluating state and local taxation and regulation on tribal lands.[55] In its filing, the Bureau stated, "Section 162.017 expressly provides that state taxation of permanent improvements, activities, and possessory interests on Indian land are 'subject only to applicable Federal law.' The section incorporates the federal common test articulated in *Bracker* and its progeny."[56] While the Bureau claimed that 25 C.F.R. § 162.017 does not automatically preempt all state and local taxation on tribal lands, it did emphasize its belief that "the Federal and tribal interests are very strong."[57] The court has yet to reach the merits of the case.

What Does It All Mean for Local Property Taxes on Tribal Lands?

Neither Congress nor the courts have completely resolved all of the questions involved with local property taxes on tribal lands. But the current state of the law is summarized in Table 2, below.

This table assumes that the federal courts with jurisdiction over North Carolina would concur with the court decisions discussed above. Assuming such concurrence, then the only property sited on North Carolina's tribal lands that could be taxed by local governments would be personal property owned by non-tribal members. The 5,000-plus slot machines featured at the Cherokee casinos, for example, would be taxable by Jackson and Cherokee counties if the machines are leased by the tribe rather than purchased outright. So, too, would be computers, furniture, or any other personal property owned by non-tribal members that is being used in those resorts and in other hotels on tribal land.

However, all buildings on tribal land should be exempt from local property taxes even if they are owned by non-tribal members. All personal property owned by tribal members would also be exempt.

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53. 724 F.3d at 1157 n.6.

54. Agua Caliente Band of Cahuilla Indians v. Riverside Cnty., No. 5:2014cv00007 (C.D. Cal. filed Jan. 2, 2014).

55. The Bureau's filing is discussed and quoted in Letter from Randy Ferris, Chief Counsel for the California Board of Equalization, to Jerome E. Horton, Chair, California Board of Equalization, dated Oct. 7, 2013, *available at* www.boe.ca.gov/meetings/pdf/102913_P2_Property_Tax_on_Indian_Land.pdf.

56. *Id.* at p. 3 (emphasis in original).

57. *Id.* (quoting and referencing the Preamble to 25 C.F.R. § 162.017, cited *supra* note 45).

Table 2. Property Tax Status of Property Sited on Tribal Lands

	Owned by Tribal Members	Owned by Non-Tribal Members
Real Property (land and buildings)	Not Taxable	Not Taxable
Personal Property (business personal property, cars, boats, planes)	Not Taxable	Taxable

These same tax rules would apply elsewhere in the state if the Catawba Indian Nation or the Lumbees were to earn approval for their own casinos.

Practical Concerns for Taxes on Tribal Lands

The Jackson County Assessor's Office reports that the main obstacle to taxing personal property sited on tribal land but owned by non-tribal members is simply finding it. Apparently, the Cherokees have not been entirely helpful with identifying what leased property is sited in their casinos.

The county can't force the tribe to provide such assistance because the state Machinery Act's provisions concerning leased property are not enforceable on tribal lands.[58] The few times that the county learned of potentially taxable personal property on tribal lands, it was told that the company that owned the property was now owned by the tribe and that, therefore, the property was exempt from county taxes.

What can a county do when faced with these practical problems? Some onsite investigation might be helpful to determine which gaming companies produced the slot machines used in the casinos. The county could then send discovery notices to those companies. The county could also send discovery notices to all of the hotels and restaurants built on tribal lands near the casinos, informing the owners of those businesses of their personal property tax obligations. The burden would fall on those companies to prove that they should be exempt from taxation. But at the end of the day, a county has limited means of enforcing property tax obligations on tribal lands.

58. *See generally* G.S. Ch. 105, Subch. II. G.S. 105-315 requires any person with custody of taxable personal property owned by another party to inform the county assessor of the amount and location of the property. A person who fails to make the required report is liable for the taxes owed on the property plus a penalty. But the federal statutes and court opinions discussed earlier in this bulletin would prevent a county from enforcing this obligation on tribal members.