
Coates' Canons Blog: Tribal Casinos and Property Taxes

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Article: <https://canons.sog.unc.edu/tribal-casinos-and-property-taxes/>

This entry was posted on January 30, 2015 and is filed under Finance & Tax, Property Taxes

UPDATE: *S.L. 2015-262 now excludes from local property taxes all property sited on land held in trust for the Eastern Band of Cherokee Indians, effective for the 2016 tax year and beyond.*

Gambling is a big business in North Carolina, and it's about to get bigger.



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 over \$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 Cherokee facility, but that still means 1,200 slot machines and 300-plus hotel rooms.

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% larger than Harrah's Cherokee Resort. In eastern North Carolina, the Lumbees continue to work toward federal recognition that could open the door for tribal casinos along I-95.

There's obviously money to be made here both for the tribes and for the state, which takes a slice of the gambling proceeds. How about local governments? They don't get a cut of the gambling money, but there's a heck of a lot of property value in these casinos. Can local governments at least benefit from increased property tax revenues?

The N.C. Attorney General and the N.C. Department of Revenue have offered varying opinions about property taxes on tribal lands multiple times over the past fifty years. But in light of recent new federal court decisions on the issue and the expected growth in our state's tribal casinos, I thought counties would benefit from some updated guidance.

In my view, the only taxable property on tribal land is **personal property owned by non-tribal members**. Those thousands of shiny new slot machines leased from non-tribal gaming companies are likely taxable. So too would be any

other personal property used in hotels and restaurants on tribal land and owned by non-tribal members. But all buildings on tribal land and all personal property owned by tribal members would be exempt.

Here's how I reach this conclusion:

Real Property (Land and Buildings) on Tribal Trust Land: *No taxes regardless of ownership*

The Cherokee's tribal land, as is true of most tribal land across the country, is actually owned by the United States government and held in trust for the benefit of the tribal members. (Here's a helpful explanation of Native American trust lands, which amount to roughly 2% of the entire U.S.)

More than a century ago the U.S. Supreme Court held that Native American tribal trust lands *and* any improvements built on those lands were exempt from state and local taxes. *U.S. v. Rickert*, 188 U.S. 432 (1903).

In 2013, a new federal regulation from the the U.S. Bureau of Indian Affairs and a federal court of appeals decision made clear that improvements on tribal land are exempt from state and local taxation regardless of who owns the improvements. 25 C.F.R. 162.017 and *Confederated Tribes of Chehalis Reservation v. Thurston County Board of Equalization*, 724 F. 3d 1153 (9th Cir. 2013).

The *Thurston County* case involved a Great Wolf Lodge Resort built on tribal trust land in the state of Washington. The court ruled that the resort was exempt from local property taxes despite the fact that the buildings were owned by non-tribal members.

I think this same reasoning applies to tribal casinos in North Carolina. If so, all of the buildings that make up those resorts are exempt from local property taxes even if they are owned by non-tribal members.

Personal Property on Tribal Trust Land: *Depends on ownership*

Personal property sited on tribal land and owned by tribal members is not subject to local property taxes in North Carolina. This conclusion was made clear more than 30 years ago by the U.S. Court of Appeals for the 4th Circuit (which includes North Carolina) when it struck down Swain County taxes on personal property owned by Cherokee tribal members. *Eastern Band of Cherokee Indians v. Lynch, et al.*, 632 F.2d 373 (1980).

The United States Supreme Court has reached the same conclusion in property tax cases involving tribes from other states. For example, see *Bryan v. Itasca County*, 426 U.S. 373 (1976)(striking down property taxes on mobile homes) and *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976)(invalidating property taxes on motor vehicles).

That leaves personal property owned by non-tribal members as the only property sited on tribal lands that is likely subject to local property taxes. I say "likely" rather than "certainly" because we don't have a United States Supreme Court case exactly on point.

Lacking direct guidance from the highest court in the land, lower courts examining the issue must conduct a balancing test. In a nutshell, a court must decide which is more important with respect to a particular tax, (i) the interest of the state or local government in exercising its taxation authority or (ii) the interests of the federal government and the tribe in promoting economic development and maintaining tribal sovereignty over tribal lands. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

Different taxes on different types of property might produce different results under the *Bracker* balancing test. Happily for North Carolina local governments, a federal appellate court recently tackled the exact property tax question at issue in Cherokee and ruled that a local government may tax slot machines used in a tribal casino but owned by non-tribal members. The case was *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F. 3d 457 (2nd Cir. 2013).

At issue in *Pequot* were the personal property taxes levied by the town on more than 5,000 slot machines at the tribe's Foxwoods casino in Connecticut, the largest gambling resort in the United States. The slot machines were leased by the tribe from non-tribal gaming machine companies.

Because gambling was involved, before it even got to the *Bracker* balancing test the court had to decide whether the

federal Indian Gaming Regulatory Act, 25 U.S.C. 261, (the "IGRA") barred state and local taxation of slot machines used in tribal casinos. The 2nd Circuit said no; although the IGRA preempts state and local attempts to regulate gambling on tribal lands, it does not affect generally applicable state laws such as 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.

I think the Fourth Circuit would reach the same conclusions if it were faced with the same questions about taxing leased personal property used in North Carolina's tribal casinos.

I'm confused. Could you summarize these property tax rules for tribal land in one handy table?

Sure!

	Owned by
Real Property (Land and Buildings)	Tribal Members
Personal Property (Business PP, cars, boats, planes)	Exempt

Assuming the Cherokee lease rather than own the 5,000+ slot machines featured at their casinos, they should be taxable by Jackson and Cherokee counties. So too would be computers, furniture, and any other personal property owned by non-tribal members and being used in the tribal resorts and other hotels and restaurants on tribal land.

These same tax rules should apply to all Native American tribal lands in the state, including the Cherokee tribal lands in Swain and Graham Counties and any tribal lands obtained by the Catawbans or the Lumbees.

Practical Concerns

Friends at the Jackson County assessor's office report that the main obstacle to taxing leased personal property sited on tribal land is simply finding it.

Apparently the tribe has not been entirely helpful with identifying what leased property is sited in their casinos. The county can't force the tribe to do so because the Machinery Act's provisions concerning leased property (G.S. 105-315) are not enforceable on tribal lands.

The few times the county has learned of leased property on tribal lands, it was soon told that the company that owns the property is now owned itself by the tribe and therefore exempt from county taxes.

What can a county do when faced with these practical problems? Some on-sight investigation might be helpful to determine the gaming companies that produced the slot machines used in the casinos. The county could then send discovery notices to those companies. The burden would fall on those companies to prove that they should be exempt from taxation.

If the owner of personal property owner claimed to be owned by the tribe, the county could demand that the property owner produce documentation of this change in corporate ownership. Again, the burden would fall on the taxpayer to prove that it should be exempt from taxation.



What about local property taxes on federal military bases in NC? They're similar to tribal land, right?

Military bases and tribal trust lands are similar in that they are both owned by the federal government. But different taxation rules apply to military bases depending on when and how the federal government acquired the land. As I discuss in this blog post, these rules lead to the conclusion that all property sited on North Carolina's military bases is exempt from local property regardless of who owns that property.

Links

- www.ncga.state.nc.us/EnactedLegislation/SessionLaws/HTML/2015-2016/SL2015-262.html
- canons.sog.unc.edu/wp-content/uploads/2015/01/Harrahs-Cherokee-Art-2.jpg
- www.carolinapublicpress.org/18726/ebsci-lambert-growing-cherokee-countys-valley-river-casino
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- www.1tribal.com/2014/04/native-american-trust-lands/
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