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STATES - FEDERAL PAYMENTS IN LIEU OF TAXES - DISTRIBUTION TO UNITS OF LOCAL GOVERNMENT - STATE STATUTORY PROVISIONS DIGEST: 1. IN VIEW OF THE WORDING OF THE PAYMENTS IN LIEU OF TAXES ACT, 31 U.S.C. SEC. 6901, ET SEQ. (1982), AS AMENDED, WE HOLD THAT 1983 WISCONSIN ACT 470 IS WITHIN SCOPE OF AND CONFORMS WITH SECTION 6907(A). SECRETARY OF THE INTERIOR IS REQUIRED, THEREFORE, TO MAKE ONE PAYMENT TO STATE OF WISCONSIN IN ACCORDANCE WITH SECTION 6907(B). STATES - FEDERAL PAYMENTS IN LIEU OF TAXES - DISTRIBUTION TO UNITS OF LOCAL GOVERNMENT - PROPOSED REGULATIONS - GENERAL ACCOUNTING OFFICE COMMENTS 2. PROPOSED REGULATIONS, 43 C.F.R. SEC. 1881.1-5(A)(3), 49 FED. REG. 31473 (AUGUST 7, 1984), PROVIDE THAT A STATE MAY NOT DIFFERENTIATE BETWEEN MONEYS RECEIVED FROM THE VARIOUS TYPES OF ENTITLEMENT LANDS IN REALLOCATING PAYMENTS IN LIEU OF TAXES. THE CONTROLLING STATUTE, 31 U.S.C. SEC. 6907(A), CONTAINS NO SUCH LIMITATION, BUT PROVIDES THAT ANY PAYMENTS MAY BE REALLOCATED AND REDISTRIBUTED IN WHOLE OR IN PART, IF OTHERWISE PROPER. ACCORDINGLY, THIS RESTRICTION IN THE PROPOSED REGULATIONS SHOULD BE RECONSIDERED BY THE DEPARTMENT OF THE INTERIOR.

PAYMENTS TO UNITS OF LOCAL GOVERNMENT IN STATE OF WISCONSIN UNDER PAYMENT IN LIEU OF TAXES ACT.:

THIS DECISION IS IN RESPONSE TO A REQUEST DATED AUGUST 20, 1984, FROM THE CHIEF, DIVISION OF FINANCE, BUREAU OF LAND MANAGEMENT (BLM), DEPARTMENT OF THE INTERIOR, FOR AN ADVANCE DECISION REGARDING PAYMENTS FOR FISCAL YEAR 1984 TO UNITS OF LOCAL GOVERNMENT IN THE STATE OF WISCONSIN AUTHORIZED UNDER THE PAYMENTS IN LIEU OF TAXES ACT (PILT), 31 U.S.C. SEC. 6901, ET SEQ. (1982), AS AMENDED.

BLM'S QUESTIONS CONCERN THE APPLICATION OF 31 U.S.C. SEC. 6907, WHICH PROVIDES FOR MAKING PILT PAYMENTS DIRECTLY TO STATES IN CERTAIN CIRCUMSTANCES, TO 1983 WISCONSIN ACT 470, ENACTED ON MAY 10, 1984, WHICH PROVIDES FOR STATE ALLOCATION OF DIRECT PILT PAYMENTS FOR NATIONAL FOREST LANDS BUT IS SILENT REGARDING ALLOCATION OF PILT PAYMENTS FOR ENTITLEMENT LANDS OTHER THAN NATIONAL FOREST LANDS. BLM ASKS WHETHER THE WISCONSIN ACT CONFORM TO THE PROVISIONS OF SECTION 6907 AND, IF SO, WHETHER A SINGLE PAYMENT COVERING NATIONAL FOREST LANDS AND OTHER ENTITLEMENT LANDS WITHIN WISCONSIN MAY BE MADE TO THE STATE. WE CONCLUDE, BASED ON OUR REVIEW OF THE PILT PROVISIONS INVOLVED AND THEIR LEGISLATIVE HISTORY, THE STATE STATUTE, AND INFORMAL DISCUSSIONS WITH BLM STAFF AND WISCONSIN STATE OFFICIALS, THAT THE WISCONSIN ACT DOES CONFORM TO PILT.

BACKGROUND

THE PAYMENTS IN LIEU OF TAXES ACT MANDATES THAT THE SECRETARY OF THE INTERIOR

MAKE PAYMENTS ON A FISCAL YEAR BASIS TO EACH UNIT OF GENERAL LOCAL GOVERNMENT OF A STATE IN WHICH ENTITLEMENT LAND IS LOCATED. U.S.C. SEC. 6902. "ENTITLEMENT LAND" IS FEDERALLY OWNED LAND WITHIN A STATE WHICH IS EXEMPT FROM TAXATION AND WHICH IS ADMINISTERED BY VARIOUS FEDERAL AGENCIES. LAND OWNED BY THE GOVERNMENT THAT IS IN THE NATIONAL FOREST SYSTEM COMPRISES APPROXIMATELY 90 PERCENT OF ENTITLEMENT LAND IN WISCONSIN ELIGIBLE FOR PILT PAYMENTS. PILT PAYMENTS FOR THIS LAND ARE THE SUBJECT OF WISCONSIN ACT 470.

PRIOR TO 1983, PAYMENTS FOR ENTITLEMENT LANDS WERE MADE BY BLM, PRIMARILY TO COUNTIES, UNDER ITS "PRINCIPAL PROVIDER OF GOVERNMENTAL SERVICES" TEST SET FORTH IN PILT REGULATIONS, 43 C.F.R. SEC. 1881.0 5(B)(1). USE OF THIS TEST WAS STRUCK DOWN BY THE U.S. COURT OF APPEALS, HOWEVER, IN MEADE TOWNSHIP V. ANDRUS, 695 F.2D 1006 (6TH CIR. 1982), ON THE GROUND THAT BLM ERRED IN PROVIDING PILT PAYMENTS TO COUNTIES RATHER THAN TO TOWNSHIPS IN MICHIGAN, SINCE PILT STATES A CLEAR CONGRESSIONAL PREFERENCE FOR PAYMENTS TO SMALLER UNITS OF LOCAL GOVERNMENT (31 U.S.C. SEC. 6903(A)(4)) WHEN TWO GOVERNMENTAL UNITS EXERCISE JURISDICTION OVER TAX-EXEMPT FEDERAL LANDS. 695 F.2D, SUPRA, AT 1009-1010.

TO PREVENT BLM FROM HAVING TO MAKE PAYMENTS TO NUMEROUS SMALLER UNITS OF GOVERNMENT BECAUSE IT LACKED SUFFICIENT DATA TO CALCULATE PAYMENTS FOR THESE SMALL UNITS, AN AMENDMENT TO PILT WAS PROPOSED TO DELETE THE PREFERENCE FOR PAYMENT TO SMALLER UNITS OF LOCAL GOVERNMENT REQUIRED BY SECTION 6903(A)(4) AND TO DEFINE "UNIT OF GENERAL LOCAL GOVERNMENT" IN SECTION 6901(2) TO BE CONSISTENT WITH BLM REGULATIONS, AND THUS TO PERMIT CONTINUED PAYMENTS TO PRINCIPAL PROVIDERS OF SERVICES. S. REP. NO. 98-141, 98TH CONG., 1ST SESS. 4-5, 6.

AFTER THIS PROPOSED AMENDMENT WAS REPORTED OUT OF THE SENATE ENERGY AND NATURAL RESOURCES COMMITTEE, A FLOOR AMENDMENT WAS INTRODUCED BY SENATOR DAVID DURENBURGER TO "ALLOW A STATE TO PASS A LAW, IF IT SO DESIRED, TO REALLOCATE THE FUNDS WITHIN THE UNIT OF GOVERNMENT RECEIVING THE FUNDS BETWEEN THAT UNIT AND OTHER UNITS OF LOCAL GOVERNMENT CONTAINED WITHIN IT." 129 CONG. REC. S 8444 (DAILY ED. JUNE 15, 1983). SENATOR DURENBERGER FURTHER STATED THAT HIS AMENDMENT "WOULD SIMPLY GIVE THE STATES AN OPPORTUNITY TO REALLOCATE THOSE MONEYS WITHIN THE SAME COUNTY, IN A MANNER THAT FITS THE UNIQUE WAY SERVICES MAY BE PROVIDED IN THAT PARTICULAR COUNTY AREA." ID. THIS AMENDMENT BECAME THE NEW 31 U.S.C. SEC. 6907, WHICH STATES IN PART:

"(A) NOTWITHSTANDING ANY OTHER PROVISION OF THIS CHAPTER, A STATE MAY ENACT LEGISLATION WHICH REQUIRES THAT ANY PAYMENTS WHICH WOULD BE MADE TO UNITS OF GENERAL LOCAL GOVERNMENT PURSUANT TO THIS CHAPTER BE REALLOCATED AND REDISTRIBUTED IN WHOLE OR PART TO OTHER SMALLER UNITS OF GENERAL PURPOSE GOVERNMENT WHICH (1) ARE LOCATED WITHIN THE BOUNDARIES OF THE LARGER UNIT OF GENERAL LOCAL GOVERNMENT, (2) PROVIDE GENERAL GOVERNMENTAL SERVICES AND (3) CONTAIN ENTITLEMENT LANDS WITHIN THEIR BOUNDARIES. SUCH REALLOCATION OR REDISTRIBUTION SHALL GENERALLY REFLECT THE LEVEL OF SERVICES PROVIDED BY, AND THE NUMBER OF ENTITLEMENT ACRES WITHIN, THE SMALLER UNIT OF GENERAL LOCAL GOVERNMENT.

"(B) UPON ENACTMENT OF LEGISLATION BY A STATE, DESCRIBED IN SUBSECTION (A), THE SECRETARY SHALL MAKE ONE PAYMENT TO SUCH STATE EQUALING THE AGGREGATE AMOUNT OF PAYMENTS WHICH HE OTHERWISE WOULD HAVE MADE TO UNITS OF GENERAL LOCAL GOVERNMENT WITHIN SUCH STATE PURSUANT TO THIS CHAPTER. IT SHALL BE THE RESPONSIBILITY OF SUCH STATE TO MAKE ANY FURTHER DISTRIBUTION OF THE PAYMENT PURSUANT TO SUBSECTION (A). SUCH REDISTRIBUTION SHALL BE MADE WITHIN 30 DAYS AFTER RECEIPT OF SUCH PAYMENT. NO PAYMENTS, OR PORTION THEREOF, MADE BY THE SECRETARY SHALL BE

USED BY ANY STATE FOR THE ADMINISTRATION OF THIS SUBSECTION OR SUBSECTION (A)."

FOLLOWING ENACTMENT OF SECTION 6907, IN MAY 1984, WISCONSIN ACT 470 WAS ENACTED, WHICH STATES IN RELEVANT PART:

"SECTION 1. 16.54(11) OF THE STATUTES IS CREATED TO READ:

"16.54(11) THE STATE BOARD, COMMISSION OR DEPARTMENT DESIGNATED BY THE GOVERNOR UNDER SUB. (2) TO ADMINISTER FEDERAL PAYMENTS IN LIEU OF TAXES ON NATIONAL FOREST LANDS SHALL DISTRIBUTE THOSE PAYMENTS TO TOWNS, CITIES AND VILLAGES, BUT NOT TO COUNTIES, THAT PROVIDE GENERAL GOVERNMENTAL SERVICES AND CONTAIN NATIONAL FOREST LANDS. THAT DISTRIBUTION SHALL REFLECT THE LEVEL OF SERVICES PROVIDED BY, AND THE NUMBER OF ACRES OF NATIONAL FOREST LAND WITHIN, THE TOWN, CITY OR VILLAGE IN ACCORDANCE WITH 31 U.S.C. 6907.

"SECTION 2. NONSTATUTORY PROVISIONS; NOTICE. THE STATE BOARD, COMMISSION OR DEPARTMENT DESIGNATED TO ADMINISTER FEDERAL PAYMENTS IN LIEU OF TAXES ON NATIONAL FOREST LANDS UNDER SECTION 16.54(2) OF THE STATUTES SHALL NOTIFY THE SECRETARY OF THE U.S. DEPARTMENT OF THE INTERIOR OF THAT DESIGNATION WITHIN 30 DAYS AFTER THAT DESIGNATION AND SHALL SUBMIT PROPOSED RULES INTERPRETING SECTION 16.54(11) OF THE STATUTES, AS CREATED BY THIS ACT, UNDER SECTION 227.018(2) OF THE STATUTES WITHIN 90 DAYS AFTER THE EFFECTIVE DATE OF THIS ACT."

FOLLOWING PASSAGE OF THE WISCONSIN STATUTE, THE STATE DEPARTMENT OF REVENUE PROPOSED THAT BLM MAKE A SINGLE PILT PAYMENT TO THE STATE EQUAL TO THE AMOUNT WHICH OTHERWISE WOULD HAVE BEEN DISTRIBUTED TO UNITS OF LOCAL GOVERNMENT IN THE ABSENCE OF THE STATE STATUTE. THE STATE WOULD THEN DISTRIBUTE FUNDS ATTRIBUTABLE TO NATIONAL FOREST LANDS TO SUB COUNTY UNITS OF GOVERNMENT IN ACCORDANCE WITH THE STATE STATUTE. THE REMAINING PILT FUNDS FOR ENTITLEMENT LANDS OTHER THAN NATIONAL FOREST LANDS WOULD BE DISTRIBUTED BY THE STATE TO COUNTIES IN WHICH SUCH LANDS ARE LOCATED IN THE SAME MANNER AS THEY HAVE HISTORICALLY BEEN DISTRIBUTED BY BLM.

BLM'S CONCERN WITH THIS PROPOSAL IS THAT BECAUSE THE STATE STATUTE IS SILENT CONCERNING NON-NATIONAL FOREST LANDS, THE STATE, IN BLM'S VIEW, WOULD NOT BE COMPELLED TO DISTRIBUTE ENTITLEMENT FUNDS FOR NON NATIONAL FOREST LANDS TO THE COUNTIES IN WHICH SUCH LANDS ARE LOCATED.

WE DO NOT SHARE BLM'S CONCERN. IN OUR VIEW THE WISCONSIN STATUTE IS A PROPER IMPLEMENTATION OF SECTION 6907 NOTWITHSTANDING ITS SILENCE ON NON- NATIONAL FOREST LANDS, AND THE STATE PROPOSAL WITH RESPECT TO SUCH LANDS LIKEWISE IS WITHIN THE CONTEMPLATION OF THE FEDERAL STATUTE. WHILE THERE IS LITTLE GUIDANCE IN THE LEGISLATIVE HISTORY OF SECTION 6907, WE BELIEVE THAT THE PROVISIONS OF THE WISCONSIN ACT ARE WITHIN THE SCOPE OF SECTION 6907(A).

WE RECOGNIZED THAT ON ITS FACE THE WISCONSIN ACT IS LIMITED TO ALLOCATIONS BY A STATE BOARD OR COMMISSION OF PILT PAYMENTS ON NATIONAL FOREST LANDS, BUT WE SEE THIS AS NO IMPEDIMENT TO HAVING ANOTHER STATE OFFICIAL PERFORM THE MINISTERIAL FUNCTION OF DISTRIBUTING THE BALANCE OF PILT FUNDS TO ELIGIBLE COUNTIES IN AMOUNTS WHICH CAN BE CALCULATED AND PROVIDED BY BLM WHEN IT SENDS THE SECTION 6907(B) PAYMENT TO WISCONSIN. IN FACT, SUCH ACTIONS WOULD APPEAR TO BE A MANIFESTATION OF THE FLEXIBILITY CONTEMPLATED BY THE CONGRESS WHEN IT PROVIDED THAT PILT PAYMENTS COULD BE REDISTRIBUTED "IN WHOLE OR PART."

EVEN IF A STATE WERE TO ENACT LEGISLATION COVERING ALL OF ITS PILT PAYMENTS, BUT

REALLOCATING ONLY A PERCENTAGE OF THE FUNDS TO SMALLER UNITS, IT ALSO WOULD HAVE TO ARRANGE FOR ALLOCATION OF THE BALANCE TO ELIGIBLE COUNTIES. THE FACT THAT WISCONSIN ACT 470 DOES NOT AUTHORIZE COMMANDS WAS SUCCESSFUL AND, WHEN SPECIFICALLY ASKED, THE STATE TO REALLOCATE NON-NATIONAL FOREST PILT FUNDS, DOES NOT MEAN THAT THE WISCONSIN DEPARTMENT OF REVENUE OR ANOTHER STATE AGENCY LACKS THE AUTHORITY TO "PASS-THROUGH" THE FUNDS TO RECIPIENTS IN ACCORD WITH BLM'S ALLOCATIONS. FURTHER, ALTHOUGH NOT SPECIFICALLY STATED IN WISCONSIN ACT 470, THE STATE IS OBLIGATED TO MAKE DISTRIBUTION IN ACCORDANCE WITH PILT, INCLUDING THE REQUIREMENT THAT REALLOCATED NATIONAL FOREST LAND FUNDS ARE ONLY AVAILABLE FOR SMALLER UNITS OF GOVERNMENT WITHIN THE BOUNDARIES OF THE LARGER UNIT OF GOVERNMENT WHICH WOULD WOULD OTHERWISE HAVE RECEIVED PAYMENT. IN THIS REGARD, WE SUGGEST THAT BLM CONSIDER OBTAINING A FORMAL COMMITMENT FROM WISCONSIN TO THAT EFFECT.

ONCE THE PROPOSED STATE RULES REQUIRED BY SECTION 2 OF WISCONSIN ACT 470 HAVE BEEN PROMULGATED, BLM CAN BETTER DETERMINE THE PROPRIETY OF PROPOSED ADMINISTRATIVE PROCEDURES FOR REALLOCATING THE PILT FUNDS, AND TAKE WHATEVER CORRECTIVE ACTIONS IT CONSIDERS NECESSARY AT THAT TIME. SIMILARLY, BLM MAY REVIEW THE STATE'S PROCEDURES FOR REDISTRIBUTING PILT PAYMENTS NOT INVOLVING NATIONAL FOREST LANDS TO THE COUNTY GOVERNMENTS AND TAKE ADMINISTRATIVE ACTION TO RECOVER ANY FUNDS THAT MAY BE ALLOCATED IMPROPERLY.

SUBSEQUENT TO THE BLM SUBMISSION, WE RECEIVED AN INFORMAL REQUEST THAT WE CONSIDER A RECENTLY PROPOSED REGULATION. THE REGULATION, 43 C.F.R. SEC. 1881.1-5(A)(3), 49 FED. REG. 31473, 31475 (AUGUST 7, 1984), PROVIDES IN ESSENCE THAT A STATE MAY NOT DIFFERENTIATE BETWEEN MONEYS RECEIVED FROM THE VARIOUS TYPES OF ENTITLEMENT LANDS IN REALLOCATING ITS PILT RECEIPTS.

THIS INTERPRETATION OF SECTION 6907, THAT "ANY PAYMENTS" IN FACT WAS INTENDED TO MEAN ALL PAYMENTS RECEIVED BY A STATE IS NOT SUPPORTED BY THE SPECIFIC TERMS OF SECTION 6907. THAT SECTION STATES, AS NOTED ABOVE, THAT STATE LEGISLATION WHICH REQUIRES THAT PAYMENTS WHICH WOULD OTHERWISE BE MADE BY BLM TO UNITS OF GENERAL LOCAL GOVERNMENT MAY "BE REALLOCATED AND REDISTRIBUTED IN WHOLE OR PART TO OTHER SMALLER UNITS OF GENERAL GOVERNMENT * * *." 31 U.S.C. SEC. 6907(A) (EMPHASIS ADDED). WE BELIEVE THAT THIS STATUTORY LANGUAGE CONFERS DISCRETION UPON STATE LEGISLATORS, AND, IN THE ABSENCE OF SPECIFIC LEGISLATIVE HISTORY TO THE CONTRARY, PRECLUDES THE RESTRICTIVE APPLICATION OF SECTION 6907 PROPOSED BY BLM. ACCORDINGLY, THE PROPOSED RESTRICTION SHOULD BE RECONSIDERED BY THE DEPARTMENT OF THE INTERIOR. WE ALSO NOTE THAT THIS PROPOSAL WAS NOT PUBLISHED UNTIL AFTER THE ENACTMENT OF THE WISCONSIN STATUTE. IN ANY CASE, AS A PROPOSED REGULATION, IT IS NOT BINDING ON THE STATE.

CONCLUSION

IN VIEW OF THE FOREGOING , WE CONCLUDE THAT WISCONSIN ACT 470 IS WITHIN THE SCOPE OF AND CONFORMS WITH SECTION 6907, AND THAT THE SECRETARY OF THE INTERIOR MAY, THEREFORE, MAKE ONE PAYMENT TO THE STATE OF WISCONSIN IN ACCORDANCE WITH SECTION 6907(B).

TO ENSURE STATE COMPLIANCE WITH PILT DISTRIBUTION REQUIREMENTS, WE SUGGEST THAT BLM PROVIDE THE STATE AT THE TIME OF PAYMENT WITH A LIST OF DISTRIBUTIONS TO BE MADE TO WISCONSIN COUNTIES THAT CONTAIN OTHER ENTITLEMENT LANDS THAN NATIONAL FOREST LANDS. ALSO, IT SHOULD MONITOR THE STATE'S SUBSEQUENT ACTION.