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Hot Federal Issues: Taxes, Transport, endangered species and Community Development

IMLA Annual Meeting
Baltimore
September 11, 2014

PRESENTED BY

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AGENDA

• Endangered Species	Michelle Ouellette
• Trains & Oil Transport	Harriet Steiner
• Transportation /Taxes	Gerry Lederer

- Caveat – These materials may need to be updated in Baltimore as they were assembled before Congress had adjourned for the summer.



Endangered Species



Rail Safety

See paper distributed by Harriett Steiner (PowerPoint will be provided prior to the Conference)





TAXES

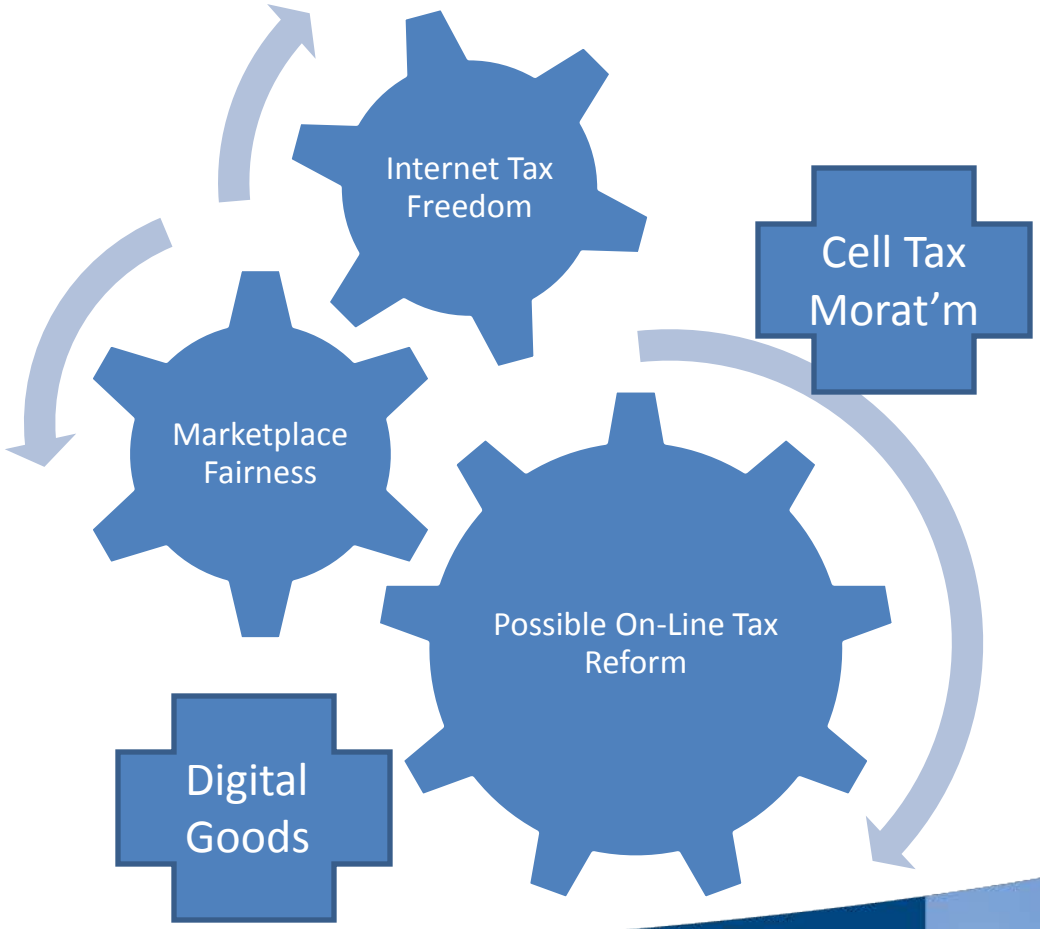
WHAT IS TAXABLE

N.B. This is not only a federal issue!



CAN CONGRESS HARMONIZE ELECTRONIC TAXATION?









The Permanent Internet Tax Freedom Act
Internet Tax Freedom Forever Act ("ITFFA")

- ITFA has been in effect since 1998, currently scheduled to expire in November, 2014
- ITFA "walls off" from state and local taxation the largest, and fastest growing, form of communications — broadband
- ITFA must be repealed or allowed to expire as a condition of reform or this is simply an industry tax reduction exercise, not true tax reform
- PITFA passed House on voice vote – Senate will only extend for a short term.



ITFA



- As what was formerly telecom is supplanted by broadband, states and locals are left with a shrinking communications service tax base.
- Left in place, the ITFA will eventually "tax exempt" all, or almost all, of the entire telecommunications industry's services.
- Unless telecom tax "reform" is coupled with ITFA repeal, industry will have no incentive to ever let ITFA expire.



Wireless Tax Fairness Act



- Last Congress passed the House, went nowhere in the Senate
  - Would impose a 5-year moratorium on any new "discriminatory", or any increase in existing, state or local taxes on wireless services; would grandfather existing taxes and exclude taxes imposed by vote of community
- Returned in 2013, but not action

The Digital Goods and Services Fairness Act of 2013 -- S.1364



- Legislation creates a nationwide "tax preference" for online goods and services over competing brick-and-mortar sales by limiting state and local taxes on "digital goods and services."
  - Downloaded music and videos;
  - Pay-per-View (PPV) and video-on-demand (VoD) revenue from the cable franchise fee revenue base

Main Street Fairness Act (S. 743 and H.R. 684)



- Passed Senate on a strong bi-partisan basis
- Pending in House Judiciary
- Allows states and local governments to collect sales and use taxes on remote (typically online) sales to their residents
- Aims to eliminate the current disadvantage suffered by brick-and-mortar retailers vis-à-vis online retailers
- Generate funds ($23B)





DON'T FORGET THE THREAT AT THE STATE LEVEL:

State Communications Tax Reform



Communications Tax "Reform"



- Basic approach
  - Collapse all communications-related taxes and fees (cable franchise fees, perhaps PEG fees, DBS, landline telecom & wireless) into a single tax
  - Move responsibility for imposition, collection and auditing of the tax to the state level
  - Examples include VA, FL, KY, OH, and NC
  - DOWNSIDE: Eliminate communications-related ROW fees



Communications Tax "Reform" (cont'd)



- Benefits for industry:
  - Lower tax administration costs
  - Lower taxes, except perhaps for DBS
  - Greater protection against future tax increases

- Risks to local governments:
  - Loss of ability to control local tax structure and policy, and thus control over local budget revenues
  - Loss of auditing authority to ensure correct amounts are paid



Transportation



TRUST FUND IS BROKE
Program needs to be rewritten

- Highway Trust Fund
  - Funds federal highway and transit programs at the local level
  - Expected to sink into insolvency sometime in August if Congress does not step in.
- The Department of Transportation has warned that reimbursements for highway projects could come to a halt transit payments could be halted sometime this fall.
- House and Senate have each developed short term “fixes” to fund the HTF.
  - In Baltimore we will discuss these fixes if in place and outline how this might impact local planning, finances and bonds.




Q&A

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Hot Federal Issues: Speeding Development by Planning for the Endangered Species Act

International Municipal Lawyers Association,
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Michelle Ouellette

- Ms. Ouellette joined Best Best & Krieger LLP in 1989 as a first year associate. She graduated from the University of California, Santa Cruz in 1980, *with honors*, and received her Juris Doctorate from the University of Southern California in 1989.

- Ms. Ouellette represents municipal, special district and private clients in environmental issues arising under the California Environmental Quality Act ("CEQA"), the National Environmental Policy Act ("NEPA"), the California ("CESA") and federal Endangered Species Acts ("ESA") and wetlands regulations.



The Problem

- The federal Endangered Species Act ("ESA") can stop or significantly delay development.



The Solution

- Cities can avoid the debilitating effects of the ESA by being proactive:
  - Habitat Conservation Plans ("HCPs").
  - Mitigation and conservation banking.



The Federal Endangered Species Act

- Listing of Species
  - ("Section 4," 16 USC § 1533).

- "Take" Prohibition
  - ("Section 9," 16 USC § 1538).



Listing of Species

- **Species** includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.
- An **endangered** species is any species which is in danger of extinction throughout all or a significant portion of its range.
- A **threatened** species is any species *likely to become* an endangered species within the foreseeable future throughout all or a significant portion of its range.

"Take" Prohibition

- It is unlawful for "any person" to "take" any endangered species.
- **Person** is defined to include both private individuals and government agencies and officials.
- **Take** means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."
  - Requires actual death or injury to identifiable member of species;
  - Or alteration of the site, threatening the survival of a listed species or plant.
    - *Babbitt v. Sweet Home Chapter of Comm. for a Great Oregon,* 515 U.S. 687 (1995)
- Violators may be subject to criminal penalties of up to $50,000 and one year imprisonment per violation.

Local Government Liability for "Take"

- Local governments have been held liable under the ESA:
  - *Palila v. Hawaii Department of Land and Natural Resources*, 639 F.2d 495 (9th Cir 1981) (holding the Hawaii Department of Land and Natural Resources liable for a "take" after it maintained herds of feral sheep and goats for sport hunting purposes within a listed bird's critical habitat);
  - *Strahan v. Coxe*, 127 F3d 155 (1st Cir 1997). (finding Massachusetts liable for "take" after it authorized commercial fishing methods in which Northern Right whales became entangled in the fishing gear).
  - *Loggerhead Turtle v. County Council of Volusia County*, 148 F3d 1231 (11th Cir 1998) (finding Volusia County, a coastal county in northeast Florida, liable for "take" after it refused to ban beachfront parking during nesting season to protect the loggerhead sea turtle, a threatened species, and the green sea turtle, an endangered species).
    - Note: the court dismissed the suit as moot after Volusia County obtained an incidental take permit from the USFWS.



The First Big Test of ESA: The Snail Darter Case. *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

- Construction of the Tellico Dam commenced before the ESA came into effect and over $100 million had been spent on dam construction.
- Litigants sought and obtained a temporary restraining order ("TRO") because construction and operation of the dam would likely jeopardize the continued existence of the snail darter.





- The Supreme Court upheld the TRO:
- “The ESA represents the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” (*TVA* at 180.)
- In balancing economic cost with protection of the species, the Court held that “neither the ESA nor Art. III of the Constitution provides courts with the authority to make such fine utilitarian calculations. On the contrary, the plain language of the Act . . . shows clearly that Congress viewed the value of endangered species as ‘incalculable.’” *(TVA* at 187.)

Horror Story



- **Delhi Sands Flower-loving Fly**
  - Adults only active in August and September;
  - Other than that, fly spends entire life underground

- After the fly was listed, the San Bernardino Medical Center (SBMC) had to be redesigned to provide 1.92 acres of protected habitat for eight flies believed to occupy the site.
- SMBC had to dedicate 200 acres of land to preserve habitat, resulting in elimination of 150 residential units, killing financial projections for the overall project.
- *The cost per fly amounted to $413,774 ($3,310,199 total) and a one-year construction delay.*

Some Solutions: Take Permits & HCPs

- ESA allows listed species to be *taken* "incidental to other lawful activity," with a Section 10(a) permit.
  - http://www.fws.gov/forms/3-200-55.pdf (10(a) permit form)
- Section 10(a) was added to ESA to expressly authorize the permitting of incidental take in accordance with an adopted HCP.
- Note: When there is no federal nexus, an *incidental take* of endangered species by a private developer or owner may be allowed on a finding that the *take* would not jeopardize the continued existence of the species.

Section 10(a) Requirements

- Section 10(a) authorizes take if:
  - The take is incidental;
  - The take occurs in accordance with an HCP that minimizes and mitigates “to the maximum extent practicable”;
  - The applicant ensures adequate HCP funding;
  - The taking will not “appreciably” reduce the likelihood of survival and recovery of the species; and
  - The HCP meets other “necessary or appropriate” measures.
- No Surprises Benefit:
  - Under Section 10(a)(1)(B), if “unforeseen circumstances” arise, USFWS will not require additional land, water, funding or restrictions beyond the requirements of the HCP.



Characteristics of HCPs

- HCPs can cover one species or hundreds of species.
- “Low Affect” HCP is a relatively easy, streamlined process.
- Can cover ten acres or millions of acres.
- Each one is individually negotiated with local Government, private property owners, State and Federal wildlife agencies.



How do HCPs Speed Development?

- Reduces uncertainty, delays, and costs.
- Streamlines the regulatory permitting process and reduces permitting delays.
  - In CA, HCPs have been estimated to speed development anywhere between three months and three years, depending upon project complexity.
  - In CA, HCP permitting is credited with saving public and private developers an estimated seventy million dollars *annually.*
  - Estimated to save ten to forty thousand dollars *per acre*.*

* *White Paper: Economic Effects of Regional Habitat Conservation Plans*, available at: http://www.epsys.com/wp-content/uploads/2014/05/White-Paper_3.18.14.pdf



The Water Resources Reform and Development Act of 2014

- Bill signed into law June 2014 that allows low interest, long term federal loans to provide funding for Habitat Conservation Plan land acquisitions.



Mitigation & Conservation Banking

- Jargon:
  - "Mitigation Bank" = Wetlands
  - "Conservation Bank" = Species & Related Habitats
- Purpose:
  - Attempt to provide, *in advance*, mitigation for anticipated impacts to wetlands and/or species
- Form:
  - Public, private, or combination thereof



Creating “Credits”

- Agencies with regulatory authority over the “impact” need to sign off on the “credit”
  - Wetlands:
    - U.S. Army Corps of Engineers
    - State agencies
      - Ex. Ca. Dept. of Fish and Wildlife
  - Species
    - USFWS
    - State Agencies



How Does Banking Speed Development?

- Certainty and predictability in terms of availability, price, and management.
- Better and more diverse ecological values and interconnectedness than “postage stamp” mitigation sites.
- Facilitates large-scale and long-term planning.
- You know how to mitigate up front.



Development (con't)

- Ownership and management is established in advance.
- No "temporal" impacts – mitigation on hand contemporaneous with impacts.
- Moves away from "on site" preference when it is not most beneficial ecologically.



Success Story: Delhi Sands Flower-loving Fly Conservation Bank

- Vulcan Materials Corporation
  - Had planned site with 18 buildings
- Bank opened in June 2005 and had sold first 3 credits by December
- Price: $150,000 per credit



ESA: Critical Habitat

- In addition to listing species as *threatened* or *endangered*, the Secretary must also list "critical habitat" for each species "to the maximum extent prudent and determinable." (16 U.S.C. 1533(a)(3)(A).)
- Critical habitat = areas *essential* to the conservation of the species.
- Recent proposed federal regulation and policy:
  - Revises definition of "destruction or adverse modification" of critical habitat.
  - Proposals to amend regulations for designating and revising critical habitats.

Thank you for attending.

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