SET NO. 6

ARIZONA COURT OF APPEALS

DIVISION ONE

CALPINE CONSTRUCTION FINANCE COMPANY, a Delaware limited liability partnership, Plaintiff/Appellant, v. ARIZONA DEPARTMENT OF REVENUE, an agency of the State of Arizona, MOHAVE COUNTY, a political subdivision of the State of Arizona, Defendants/Appellees.	No. 1 CA-TX 07-0012 Tax Court No. TX 2004-000696

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INTRODUCTION

The Plaintiff/Appellant in this appeal is Calpine Construction Finance Company, LLP ("Calpine"). The Defendants/Appellees are the Arizona Department of Revenue ("Department") and Mohave County.

Calpine is claiming that the property tax statutes at issue in this case are illegal under Arizona law for the 2003 and 2004 tax years because Calpine's power plant, the South Point Energy Center, is located on the Fort Mojave Indian Tribe ("Tribe") reservation in Mohave County. In that regard, Calpine urges that the dispositive issue in this matter is that it does not own the improvements at the power plant, but that the Tribe instead owns them.

The Tribe, Calpine, the Department, and Mohave County have already litigated this and related issues in the United States District Court for the District for Arizona. That federal action concluded in March of 2005 with a final judgment in favor of the Department and Mohave County. The final judgment and relevant court orders are attached under tabs one and two of the Appendix (they are also in the record). (R. 24, Exs. 1, 2.) The federal court ruled that Calpine, not the Tribe, owns the improvements. The federal court made several other important rulings and ultimately entered a final judgment for the Department and Mohave County. Under collateral estoppel principles and the U.S. Supremacy Clause, the federal judgment,

including the federal court's holding that Calpine owns the improvements, bars relitigation of the issues that Calpine has raised in this case.

Although the tax court held that the federal judgment does not bar Calpine from litigating the ownership issue in this case, it nevertheless correctly agreed with the federal court, the Department, and Mohave County on the merits, holding that Calpine owns the property at issue. The tax court also held that this property is legally subject to property taxation by the State of Arizona and/or Mohave County.

Both a federal court and the tax court have now ruled in favor of the Department and Mohave County on these issues. The Department and Mohave County respectfully request that this Court affirm the tax court's Final Judgment.

STATEMENT OF THE CASE

On June 28, 2002, the Tribe filed a complaint in federal court against the Director of the Department styled *Fort Mojave Indian Tribe v. Director of Arizona Department of Revenue*, United States District Court for the District of Arizona, No. CIV 02-1212-PCT-MHM. (R. 24, ¶ 9.)[1] The Tribe claimed that it had entered into a ground lease with Calpine in connection with the South Point Energy Center on the Tribe's reservation in Mohave County. (*Id.* ¶ 10.) The Tribe alleged that it,

[1] The Department and Mohave County's Statement of Facts will be referred to as "SOF," and the clerk's record will be referred to as "R." Calpine did not controvert with admissible evidence any material or significant facts set forth in the Department and Mohave County's Statement of Facts. (*Compare* R. 24 *with* R. 34.)

not Calpine, owned the power plant improvements. (*Id.* ¶ 11.) The Tribe claimed that the Department intended to assess property tax on the land and improvements in violation of state and federal law. (*Id.* ¶ 12.) It sought declaratory and injunctive relief, alleging that assessment and collection would violate (1) the U.S. Supremacy Clause, (2) federal preemption and infringement principles, and (3) Arizona's Enabling Act, Constitution, and taxation system. (*Id.* ¶ 13.)

On July 29, 2002, Calpine filed a motion to intervene and join Mohave County. (*Id.* ¶ 21.) On January 23, 2003, the federal court granted the motion. (*Id.* ¶ 22.)

On April 4, 2003, Calpine filed its complaint-in-intervention against the Department and Mohave County.[2] (*Id.* ¶ 14.) At that point, there were four parties in the federal action: the Tribe, Calpine, the Department, and Mohave County. (*Id.*) Like the Tribe, Calpine alleged that the Tribe owned the improvements. (*Id.* ¶ 16.) Calpine sought a "judgment declaring that the assessment and/or levy and collection of Arizona's property tax on the Improvements and/or Calpine's leasehold interest in the Improvements [was] illegal and improper." (*Id.* ¶ 17.)

Mohave County moved to dismiss Calpine's complaint, arguing that the federal court did not have subject-matter jurisdiction under the Tax Injunction Act, 28

[2] Paul Mooney of Fennemore Craig, P.C., represented the Tribe and Calpine in the federal action. (*Id.* ¶¶ 18-19.) He is also the attorney representing Calpine in this state-court action.

U.S.C. § 1341. (*Id.* ¶ 23.) On January 29, 2004, the federal court granted Mohave County's motion to dismiss Calpine's complaint for lack of jurisdiction under the Tax Injunction Act. (*Id.* ¶ 24.)

The Department then moved to dismiss the Tribe's complaint, arguing (among other things) that the Tribe lacked standing to challenge the Arizona property tax statutes at issue because Calpine, not the Tribe, owned the improvements. (*Id.* ¶ 20.) On March 30, 2004, the federal court granted the Department's motion to dismiss the Tribe's complaint, finding that Calpine owned the improvements. (*Id.* ¶ 1.) The federal court entered a final judgment against the Tribe and in favor of the Department and Mohave County on April 1, 2004. (*Id.* ¶ 2.)

After the federal court entered the final judgment against the Tribe, the Tribe moved to alter or amend the judgment, arguing that it owned the improvements. (*Id.* ¶ 5.) The federal court denied that motion on March 18, 2005, again finding that Calpine owned the improvements. (*Id.* ¶¶ 6-7.) At that point, the federal judgment was final. The parties did not appeal.

On October 29, 2004, while the parties were waiting for the federal court to rule on the Tribe's motion to alter or amend the judgment, Calpine filed this case in tax court. The newly filed case raised the same issue concerning ownership of the improvements. (R. 1.) Subsequently, the parties filed the following relevant motions: (1) Calpine's Motion for Summary Judgment dated September 30, 2005

(R. 21); (2) Defendants' Cross-Motion for Summary Judgment on Calpine's Complaint dated October 27, 2005 (R. 27); (3) Defendants' Motion to Strike Attachments A and B to Plaintiff's Motion for Summary Judgment dated October 27, 2005 (R. 26); (4) the Department's Motion for Summary Judgment on the Department's Counterclaim dated October 27, 2005 (R. 28); and (5) Defendants' Motion to Strike Exhibit A to Calpine's Combined Reply and Response dated December 20, 2005 (R. 42).

On August 11, 2006, the tax court ruled on all of these motions. (R. 53.) That ruling is attached under tab three of the Appendix. The tax court denied Calpine's Motion for Summary Judgment and granted all of the Department and Mohave County's motions. (*Id.*)

After the ruling, the parties were able to stipulate to a form of proposed judgment. (R. 54.) In that regard, the parties agreed that the tax court's ruling should be modified in the Final Judgment to reflect that (1) Calpine was *not* challenging the valuation of the personal property or improvements that are the subject of this action in this case and (2) paragraph two on the bottom of page five of the ruling was to be stricken and replaced with the following language: "Defendants' Cross-Motion for Summary Judgment is granted to the extent that they seek a judgment that the personal property and improvements that are the subject of this action are legally subject to property taxation by the State of Arizona

and/or Mohave County." (R. 55.) The Tax Court entered the proposed form of Final Judgment on September 11, 2007, which is attached under tab four of the Appendix. (*Id.*) Calpine filed a Notice of Appeal on September 17, 2007. (R. 57.)

STATEMENT OF FACTS

1. The Ground Lease.

The parties have not disputed which documents are the applicable lease agreements governing the property that is the subject of this action. A complete copy (including the exhibits) of the original ground lease dated August 4, 1999, is attached under exhibit 13 of the Department and Mohave County's Statement of Facts filed on October 27, 2005. (R. 24.)

Under the lease, the only thing that the Tribe is leasing to Calpine is raw land—it is not leasing improvements or personal property. (R. 24, ¶ 76.) The initial lease term for the Calpine facility is a period of up to five years for financing and construction of the electrical generation facility, plus fifty years. (*Id.* ¶ 77.) Calpine has the option to extend the fifty-year lease for a fifteen-year term. (*Id.* ¶ 78.) The lease further provides that "[t]hroughout this Lease Term, all buildings, improvements, fixtures, machinery and equipment of whatever nature at any time constructed, placed or maintained on any part of the Leased Land *shall be the property of Calpine*. Upon the expiration or earlier termination of the Lease,

Calpine may remove any inventory and personal property then located at the Improvements or Lease Land." (*Id.* ¶ 79 [emphasis added].)

The lease also provides that if the Tribe takes any property at the Calpine facility in condemnation proceedings, "any awards by the condemning authority shall be distributed to Calpine, including, without limitation, any portion of the award representing the value of the Leased Land without Improvements." (*Id.* ¶ 80.) The lease provides that if an entity other than the Tribe takes any property at the Calpine facility in condemnation proceedings, the proceeds of such proceedings will be allocated as follows and in the following priority: (1) to the Tribe for the value of the raw land without improvements; (2) to Calpine for the value of the improvements; (3) to the Tribe for the reversionary interest in the improvements; and (4) to Calpine for the value of the leasehold and the improvements. (*Id.* ¶ 81.)

2. Lease Modification No. 1.

The Tribe and Calpine executed a document called Lease Modification No. 1 that became effective on or about May 24, 2001. (*Id.* ¶ 83.) Under this lease modification, the Tribe agreed to file a lawsuit against the Department (the State of Arizona) if it attempted to levy a property tax on Calpine's power plant, challenging the legality of the tax. (*Id.* ¶ 86.) Calpine agreed to reimburse the Tribe for fifty percent of its reasonable attorneys' fees and costs incurred in any

such property tax litigation. (*Id.* ¶ 87.) Calpine also agreed to intervene in any such litigation. (*Id.* ¶ 88.)

3. Lease Modification No. 2.

The Tribe and Calpine executed a document entitled Lease Modification No. 2 that became effective on or about October 17, 2001. (*Id.* ¶ 89.) This lease modification allowed Calpine to extend the lease for another fifteen years at the end of the fifty-year lease. (*Id.* ¶ 90.)

This lease modification also allowed Calpine to remove and/or replace at any time, *without the consent* of the Tribe or the Secretary of the Interior, any improvements on the leased land that were damaged, worn out, obsolete, defective, or no longer useful for their intended purpose of electrical generation. (*Id.* ¶ 91.)

The Tribe agreed that if the Department (the State of Arizona) attempted to levy a property tax on Calpine's power plant, the Tribe would file a lawsuit against it challenging the legality of the tax. (*Id.* ¶ 92.) In this lease modification, the Tribe and Calpine agreed that Calpine would have the right to control and make decisions in any such lawsuit with respect to all issues and matters involving Calpine's rights and obligations. (*Id.* ¶ 93.) This lease modification also provides that on or about October 18, 2001, Calpine was in the process of completing a sale-and-leaseback transaction of the improvements involving South Point Energy Center, LLC, and State Street Bank and Trust Company. (*Id.* ¶ 94.)

4. The Useful Life of Calpine's Plant.

The record does not reflect any dispute concerning the fact that the estimated useful life of Calpine's power plant does not exceed thirty years. (*Id.* ¶¶ 4, 8, 41, 55.) In that regard, the Department and Mohave County submitted affidavits from qualified witnesses (Robert Williams and Gary Harpster) that establish this fact. (*Id.* ¶¶ 41, 55.) Calpine did not submit any admissible evidence to controvert it. (R. 34, ¶¶ 22, 29.) The federal court also determined that the plant's estimated useful life is thirty years. (R. 24, ¶¶ 4, 8.) There is also no dispute in the record that at the end of the fifty-year lease term the improvements will be obsolete and will no longer be useful. (*Id.* ¶¶ 41, 55, 59.)

5. The Valuation and Taxation of Calpine's Property.

The Department centrally values electrical generation facilities (like Calpine's) that are operating in Arizona. A.R.S. § 42-14151(A)(4) (2003).[3] The Department determines the "full cash value" of a taxpayer's property and then reports that value to the Arizona counties. *Id.* § 42-14153. The counties, not the Department, fix, levy, assess, and collect the property taxes. *Id.* §§ 42-17151(A)(1), -18001. The Department's role is to determine the values and then

[3] In the 2003 session, the Arizona Legislature amended the statutes governing the valuation of electrical generation facilities. 2003 Ariz. Sess. Laws, ch. 37, §§ 1-8. This legislation was effective as of December 31, 2002. *Id.* § 8. Unless otherwise noted, all references herein to the statutes governing the valuation of electrical generation facilities will be to the applicable version—the statutes that became effective on December 31, 2002.

transmit that information to the appropriate counties. *Id.* § 42-14153.

The Department is authorized to determine annually the valuation of "all property, owned or leased, and *used* by taxpayers in the following businesses: . . . [o]peration of an electric generation facility." *Id.* § 42-14151(A)(4) (emphasis added). The statutes set forth three distinct types of electrical generation property: (1) land, (2) real property improvements, and (3) personal property. *Id.* § 42-14156(A). Each of these three types of property is subjected to specified valuation methodologies. *Id.*

The statutes define personal property and real property improvements. *Id.* § 42-14156(B). Personal property is defined as "all tangible property except for land and real property improvements as defined in this section." *Id.* § 42-14156(B)(1). Personal property includes "foundations or supports for the machinery or apparatus for which they are provided, including water cooling towers." *Id.* Some examples of personal property would include office furniture, computers, non-Arizona licensed vehicles, business machines, and business equipment, including equipment used to generate electricity.[4] (R. 24, ¶ 36.) The term "real property improvements" is defined as "buildings, including administration buildings, maintenance warehouses and guard shacks, water

[4] The legislative history for 2000 Ariz. Sess. Laws, ch. 384, §§ 1-3 states that eighty to ninety percent of an electrical generation facility's investment is in personal property. (R. 24, ¶ 105.)

retention ponds, sewage treatment ponds, reservoirs, sidewalks, drives, curbs, parking lots, tunnels, duct banks, canals, fencing and landscaping." *Id.* § 42-14156(B)(2). Since the Arizona Legislature has defined these terms for the valuation and taxation of electrical generation facilities, common-law definitions of personal property, improvements, and fixtures do not apply. *See Ariz. Dep't of Revenue v. Great W. Publ'g, Inc.*, 197 Ariz. 72, 74, ¶ 8, 3 P.3d 992, 994 (Ct. App. 1999), *review denied*, (Mar. 14, 2000); *Wells Fargo Credit Corp. v. Tolliver*, 183 Ariz. 343, 345, 903 P.2d 1101, 1103 (Ct. App. 1995).

The Department valued Calpine's property for tax years 2003 and 2004. (R. 24, ¶ 28.) It valued the property at $88,000,000 for the 2003 tax year and at $122,876,000 for the 2004 tax year. (*Id.*) *All of that valuation (100%) is Calpine's personal property. (Id. ¶¶ 29-30.) The Department has not valued any of Calpine's land or real property improvements for tax years 2003 and 2004.* (*Id.* ¶ 29.) Moreover, the Department has not valued any of the Tribe's property, whether land, real property improvements, or personal property. (*Id.* ¶ 37.) Therefore, the $88,000,000 and $122,876,000 valuations are for Calpine's personal property only. (*Id.* ¶¶ 28-29.)

Mohave County fixed, levied, and assessed property taxes for tax years 2003 and 2004 against Calpine for its personal property located in Mohave County that

the Department had valued. (*Id.* ¶ 43.) Mohave County has not fixed, levied, or assessed any property taxes against the Tribe. (*Id.* ¶ 44.)

ISSUES PRESENTED FOR REVIEW

1. Does the federal judgment bar relitigation of the issues concerning ownership of the improvements that Calpine has raised in this action?

2. Did the tax court correctly hold that the taxation of Calpine's improvements is legal?

3. Did the tax court correctly strike the two unpublished decisions and the photograph from the record?

4. Did the tax court properly enter judgment for the Department on its counterclaim?

ARGUMENT

I. The Federal Judgment Bars Relitigation of the Issues Concerning Ownership of the Improvements that Calpine Has Raised in This Action.[5]

A. Standard of Review.

A lower court's ruling on collateral estoppel is a question of law that an appellate court reviews de novo. *Campbell v. SZL Props., Ltd.*, 204 Ariz. 221, 223, ¶ 8, 62 P.3d 966, 968 (Ct. App. 2003).

B. Collateral Estoppel Bars the Issues that Calpine Has Raised.

The res judicata or collateral estoppel effect of a federal judgment is a question of federal law that a state court is bound to apply under the U.S. Supremacy Clause. *California v. Chevron Corp.*, 872 F.2d 1410, 1416 (9th Cir. 1989). Thus, in determining the preclusive effect of a federal judgment, state courts must apply federal res judicata/collateral estoppel law. *Id.*

Under general principles, although a dismissal for lack of jurisdiction does

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[5] An appellee's answering brief may, without the need for a cross-appeal, include in the statement of issues and in the argument section any issue properly presented in the superior court. Ariz. R. Civ. App. P. 13(b)(3). The appellate court may affirm the judgment based on any such ground. *Id.* Here, the Department and Mohave County raised this argument concerning the preclusive effects of the federal judgment in their Amended Answer to the Complaint and when briefing the dispositive motions that led to the Final Judgment. (R. 10, at 3; R. 27, at 10-16.) In this appeal, the Department and Mohave County are asking the Court to affirm the Final Judgment, but they are not seeking to enlarge their rights or to lessen Calpine's rights. Therefore, a cross-appeal on this argument was not required. *See* Ariz. R. Civ. App. P. 13(b)(3); *Aegis of Ariz., LLC v. Town of Marana*, 206 Ariz. 557, 564, ¶ 26, 81 P.3d 1016, 1023 (Ct. App. 2003).

not bar a second action as a matter of res judicata (claim preclusion), it does preclude relitigation of the issues determined in ruling on the jurisdictional question as a matter of collateral estoppel (issue preclusion). *E.g.*, *Atl. City Mun. Utils. Auth. v. Reg'l Adm'r*, 803 F.2d 96, 103 (3d Cir. 1986) (holding that a dismissal for lack of federal subject-matter jurisdiction is "conclusive as to matters actually adjudged"); 18A Charles A. Wright et al., *Federal Practice & Procedure* § 4436, at 154 (2002); *Restatement (Second) of Judgments* § 27, at 252, illus. 3 (1982). This principle is founded in the notion that a court has jurisdiction to determine its own jurisdiction. *Id.* Thus, even though the federal court determined that the Tribe lacked standing to bring its claim in federal court, all issues that the federal court determined in ruling on the standing/jurisdictional question must be given collateral estoppel effect in this action.

Under the doctrine of collateral estoppel (issue preclusion), once an issue is actually litigated and determined, that determination is conclusive in subsequent lawsuits based on the same or different claims involving a party *or privy* to the prior litigation. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 99 S. Ct. 645, 649 (1979); *Still v. Michaels*, 791 F. Supp. 248, 251 (D. Ariz. 1992). The elements of collateral estoppel are as follows: (1) there was a full and fair opportunity to litigate the issue; (2) the issue was actually litigated and necessary to support the judgment; (3) there was a valid and final decision; and (4) the second proceeding

involves a party or privy with a party in the prior proceeding. *Resolution Trust Corp. v. Keating*, 186 F.3d 1110, 1114 (9th Cir. 1999); *Sunkist Growers, Inc. v. Fisher*, 104 F.3d 280, 284 (9th Cir. 1997).

Here, all of these elements are satisfied with respect to the issue of who owns the improvements at the South Point Energy Center. First, there was a full and fair opportunity to litigate the issue because the Tribe, Calpine, the Department, and Mohave County all raised the ownership issue in the federal case in their pleadings and/or motions, and the federal court fully considered and discussed the ownership issue in its rulings. (R. 24, ¶¶ 3, 7, 11, 16, 20.) In fact, both the Tribe and Calpine were represented in the federal case by the same attorney and law firm, Fennemore Craig, P.C., which represents Calpine in this state-court action. (*Id.* ¶¶ 18-19.)

Second, the issue was actually litigated and necessary to support the judgment because the Tribe, Calpine, the Department, and Mohave County all raised the ownership issue in the federal case in their pleadings and/or motions, and the federal court ruled on that issue. (*Id.* ¶¶ 3, 7, 11, 16, 20.) The rulings on the ownership issue were not dicta, but rather necessary and essential parts of the federal court's holding that led to a final judgment in favor of the Department and Mohave County. (*Id.* ¶¶ 3, 7.)

Third, the federal court rendered a valid and final decision. (*Id.* ¶¶ 2-3, 6-7.)

The federal court entered its final judgment against the Tribe and Calpine on April 1, 2004, and the ruling denying the Tribe's motion to alter or amend judgment was entered on March 18, 2005. (*Id.* ¶¶ 1-2, 5-6.) The parties did not appeal that final decision.

Fourth, all of the parties in this state case were parties in the federal case. (*Id.* ¶ 14.) Moreover, even if Calpine had never been a party to the federal action, that would not affect the collateral estoppel analysis in this case because Calpine and the Tribe are in privity with each other. Privity traditionally has been found with respect to landlord-tenant, contractual, and successor-in-interest relationships like the Tribe-Calpine relationship. *E.g.*, *Headwaters Inc. v. U.S. Forest Serv.*, 399 F.3d 1047, 1053 (9th Cir. 2005) (holding that privity exists with respect to co-owners and co-tenants of property, parties to a contract, and successors in interest); *United States v. Schimmels*, 127 F.3d 875, 881 (9th Cir. 1997) (ruling that privity exists where a nonparty has succeeded to a party's interest in property); *Hurley v. S. Cal. Edison Co.*, 183 F.2d 125, 135 (9th Cir. 1950) (finding that the landlord-tenant relationship is a typical case where privity exists). Calpine and the Tribe are privies in light of their landlord-tenant, contractual, and successor-in-interest relationships.

In addition to these traditional privity relationships, courts have recently expanded the definition of privity to include many other types of relationships that

are deemed "sufficiently close" to justify a finding of privity, such as (1) where a nonparty controlled the original suit; (2) where the nonparty's interests were represented adequately by a party in the original suit; (3) where there is substantial identity between the party and nonparty; (4) where the nonparty had a significant interest in and participated in the prior action; or (5) where the interests of the nonparty and the party are closely aligned. *Schimmels*, 127 F.3d at 881. Here, most of these circumstances apply to the Tribe-Calpine relationship.

As a point in fact, the two modifications to the lease demonstrate that Calpine controlled the original litigation in federal court, the Tribe adequately represented Calpine's interests in the suit, Calpine had a significant interest in and participated in the federal case, and the Tribe and Calpine's interests were closely aligned. For example, under Lease Modification No. 1 and No. 2, the Tribe agreed to file a lawsuit against the Department (the State of Arizona) if it attempted to levy a property tax on Calpine's power plant, challenging the legality of the tax. (R. 24, ¶¶ 86, 92.) Calpine agreed to reimburse the Tribe for fifty percent of its reasonable attorneys' fees and costs incurred for that property-tax litigation. (*Id.* ¶ 87.) Calpine also agreed to intervene in that lawsuit. (*Id.* ¶ 88.) In Lease Modification No. 2, the Tribe and Calpine agreed to the following terms:

> The outside counsel retained by the Tribe for said [property tax] lawsuit [against Arizona] shall be reasonably acceptable to Calpine. *Calpine shall have the right to control and make decisions in said lawsuit with respect to all issues and matters* which involve only the

> rights and obligations of Calpine. Calpine and the Tribe shall keep each other fully informed as to all events occurring in connection with the lawsuit, and each shall have the right to participate in all meetings with the State of Arizona and to review and approve all submissions to the court or the State of Arizona. Neither Calpine nor the Tribe shall enter into any settlement of the lawsuit without the prior written consent of the other, which consent shall not be unreasonably withheld. Calpine and the Tribe shall cooperate fully with legal counsel retained for said lawsuit, including, without limitation, providing witnesses, documents and/or other evidence as may be required or requested.

(*Id.* ¶ 93 [emphasis added].) This lease term is extremely persuasive in demonstrating the elements of the "sufficiently close" test discussed above.

In addition, it is relevant to this privity analysis that the same attorney and law firm (Fennemore Craig, P.C.) represented the Tribe and Calpine in the federal case and this state-court action. *See Schwartz v. Prudential Ins. Co. of Am.*, 233 B.R. 334, 336 (Bankr. E. D. Pa. 1999) (finding that the presence of the same legal counsel and interests established sufficient privity).

The lease modifications, coupled with the fact that both Calpine and the Tribe had the same legal counsel in the federal case and in this state-court action, conclusively demonstrate that Calpine and the Tribe are "sufficiently close" to justify a finding of privity.

For these reasons, the judgment against the Tribe on the ownership issue is fully binding on Calpine under the doctrine of collateral estoppel.

C. The Doctrine of Virtual Representation Also Bars Relitigating the Issues that Calpine Has Raised.

The Arizona Supreme Court has explained the doctrine of virtual representation as follows:

> [W]hen a taxpayer or property owner brings an action against the state or other governmental subdivision, in the absence of fraud or collusion, a judgment for or against the state or political subdivision, upon a matter of public and general interest, is binding and conclusive upon all other taxpayers and property owners similarly situated.

El Paso Natural Gas Co. v. State, 123 Ariz. 219, 222, 599 P.2d 175, 178 (1979). This holding establishes that the doctrine of virtual representation is binding and conclusive on owners that are "similarly situated." Here, both the Tribe and Calpine are similarly situated because of their landlord-tenant, contractual, and successor-in-interest relationship. They are also similarly situated because, as discussed in the previous section, they are "sufficiently close."

Federal law also recognizes the doctrine of virtual representation. Under federal law, a nonparty to the prior litigation can be bound by that litigation if that nonparty has a "close relationship" with a party. *Irwin v. Mascott*, 370 F.3d 924, 929 (9th Cir. 2004). Here, both the Tribe and Calpine have a close relationship because of their landlord-tenant, contractual, and successor-in-interest relationship. They are also close for the reasons discussed in the previous section.

Thus, all rulings in the federal action with respect to the Tribe are fully

binding on Calpine under the doctrine of virtual representation.

D. The Federal Judgment Is an In Rem Judgment Determining Ownership to Property that Binds the Whole World, Including Calpine.

An in rem judgment binds the whole world, and specifically persons who have rights or interests in the subject property—whether or not those persons were parties to the action. *Mims v. Valley Nat'l Bank*, 14 Ariz. App. 190, 194, 481 P.2d 876, 880 (Ct. App. 1971); *Darlak v. Columbus-Am. Discovery Group, Inc.*, 59 F.3d 20, 22 (4th Cir. 1995). A judgment in personam imposes personal liability or obligations on one person in favor of another, whereas a judgment in rem binds the interests of all persons in the subject property. *Mims*, 14 Ariz. App. at 194, 481 P.2d at 880.

A judgment in a tax proceeding determining ownership or title to property is an action in rem. *See, e.g., Santos v. Simon*, 60 Ariz. 426, 429, 138 P.2d 896, 897 (1943) (holding that a proceeding involving collection of taxes is in rem); *Brophy v. Powell*, 58 Ariz. 543, 562, 121 P.2d 647, 655-56 (1942) (ruling that a proceeding to determine ownership for purposes of assessing taxes is an action in rem). Here, since the federal court action determined the ownership and title to property and was in the nature of an in rem action, the federal judgment will fully bind Calpine (and any other party or nonparty).

Thus, the federal court's determination that Calpine owns the improvements

located at the South Point Energy Center binds Calpine. Further, all other issues that the federal court decided binds Calpine. For these reasons, the federal judgment bars the issues that Calpine has raised in this case.

II. The Tax Court Correctly Held that the Taxation of Calpine's Improvements Is Legal.

A. Standard of Review.

A de novo standard of review applies to the tax court's determination that Calpine owns the property at issue and that the State of Arizona and/or Mohave County may legally tax the subject property under the tax statutes at issue. *See Ariz. Dep't of Revenue v. Questar S. Trails Pipeline Co.*, 215 Ariz. 577, 579, ¶ 7, 161 P.3d 620, 622 (Ct. App. 2007); *State v. Jeffrey*, 203 Ariz. 111, 113, ¶ 5, 50 P.3d 861, 863 (Ct. App. 2002) (holding that the legality of statutes should be reviewed de novo, with a presumption that the statutes are legal).

B. The County May Legally Tax the Improvements.

Calpine argues that the Tribe owns the improvements and that taxation of the improvements is illegal under Arizona law. (Opening Br., at 14-27.) Even though the Department did not value and Mohave County did not tax any improvements in the 2003 and 2004 tax years with respect to the South Point Energy Center, that hypothetical issue will be addressed here in case the Court wishes to address that

matter.[6] As discussed below, Calpine's analysis is flawed.

Property valuations and classifications are presumed to be correct and lawful. A.R.S. § 42-16212(B). A "strong presumption" exists that statutes are constitutional. *Republic Inv. Fund I v. Town of Surprise*, 166 Ariz. 143, 148, 800 P.2d 1251, 1256 (1990). The party challenging a tax statute's constitutionality must prove its case "beyond a reasonable doubt." *Aileen H. Char Life Interest v. Maricopa County*, 208 Ariz. 286, 291, ¶ 11, 93 P.3d 486, 491 (2004); *Magellan S. Mountain Ltd. P'ship v. Maricopa County*, 192 Ariz. 499, 504, ¶ 23, 968 P.2d 103, 108 (Ct. App. 1998); *Tucson Elec. Power Co. v. Apache County*, 185 Ariz. 5, 11, 912 P.2d 9, 15 (Ct. App. 1995). A court should "interpret statutes to uphold their constitutionality, if that is possible." *Bus. Realty of Ariz., Inc. v. Maricopa County*, 181 Ariz. 551, 559, 892 P.2d 1340, 1348 (1995). The Legislature's taxing authority "is very broad." *Kotterman v. Killian*, 193 Ariz. 273, 279, ¶ 9, 972 P.2d 606, 612 (1999). Thus, "courts extend considerable deference and great latitude" to the Legislature. *Id.*

First, the Arizona Legislature passed legislation that authorizes the taxation of all property, whether owned or leased, that is *used* for the operation of an

[6] Since Calpine has not alleged that taxation of its personal property is illegal in the Complaint, that issue is not properly before the Court. (R. 1, at 2-3.) Moreover, no Arizona law exists that states or holds that taxation of personal property in a situation like this is illegal.

electrical generation facility. A.R.S. § 42-14151(A)(4) (emphasis added). *Thus, the Court does not need to address the issue of who owns the improvements, since it makes no difference—the only relevant inquiry is whether Calpine owns or leases property that is used for the operation of an electrical generation facility. Id.* Second, if the Court reaches the issue of who owns the improvements, Calpine is the owner.

The Arizona Constitution provides that "[t]he power of taxation shall never be surrendered, suspended, or contracted away." Ariz. Const. art. 9, § 1. The object of taxing property is to produce revenues so that the government can conduct the people's business. *Recreational Ctrs. of Sun City, Inc. v. Maricopa County*, 162 Ariz. 281, 284, 782 P.2d 1174, 1177 (1989). All property in Arizona shall be taxed, unless the Arizona Constitution specifically exempts it. Ariz. Const. art. 9, § 2(13); A.R.S. § 42-11002; *Recreational Ctrs.*, 162 Ariz. at 284, 782 P.2d at 1177. The Legislature's policy is that "all property in this state *shall* be taxed, excepting only the classifications permitted by the constitution." *Recreational Ctrs.*, 162 Ariz. at 284, 782 P.2d at 1177 (emphasis added). Property is not exempt from property taxation unless "expressly or unequivocally exempted." *Hillman v. Flagstaff Cmty. Hosp.*, 123 Ariz. 124, 125, 598 P.2d 102, 103 (1979). Laws exempting property from taxation "must be strictly construed and the presumption is against the existence of an exemption." *Id.* at 125-26, 598 P.2d at 103-04. Even

if a statutory exemption is ambiguous, "every ambiguity in the statute will be construed against" allowing an exemption from taxation. *Verde Valley Sch. v. Yavapai County*, 90 Ariz. 180, 182, 367 P.2d 223, 225 (1961). Here, the Arizona Constitution does not "expressly or unequivocally" exempt Calpine's improvements from taxation. Ariz. Const. art. 9, § 2.

The Legislature may constitutionally tax a lessee's leased property even if the lessor is the federal government or an Indian tribe. *E.g., Maricopa County v. Fox Riverside Theatre Corp.*, 57 Ariz. 407, 409, 114 P.2d 245, 247 (1941); *Pimalco, Inc. v. Maricopa County*, 188 Ariz. 550, 556-58, 937 P.2d 1198, 1204-06 (Ct. App. 1997). All the Legislature must do is pass legislation and "machinery by which such a taxation could be carried into effect." *Fox Riverside Theatre Corp.*, 57 Ariz. at 410, 114 P.2d at 248. No magical words are needed, just the machinery. *See id.*

In statutory construction, "tax statutes relating to the same subject should be read together and construed as a whole." *Ariz. Dep't of Revenue v. Maricopa County*, 120 Ariz. 533, 535, 587 P.2d 252, 254 (1978). The Legislature has authorized the Department to value "all property, owned or leased, and *used* by taxpayers in the operation of an electric generation facility."[7] A.R.S. § 42-

[7] Prior to the legislation in 2003 Ariz. Sess. Laws, ch. 37, §§ 1-8, the statute referred to "[g]eneration of electricity, the sale of which is not subject to regulation by the Arizona Corporation Commission." A.R.S. § 42-14151(A)(4) (2002).

14151(A)(4) (emphasis added). The Department determines the full cash value and then reports that value to the Mohave County Assessor. *Id.* § 42-14153. Mohave County then fixes, levies, assesses, and collects the property taxes based on the Department's valuations. *See* A.R.S. §§ 42-14153, -15051, -15151 to -15153, -17052 to -17053, -17151, -17152, -17251, -18001, -18003, -18051, -18052. These laws authorize Mohave County to tax Calpine's improvements.

Calpine argues that Arizona law does not authorize the taxation of a "possessory interest" right. (Opening Br., at 31-32.) Although Calpine admits that Arizona allows a tax on possessory interests if "enabling legislation" exists, Calpine believes that no such legislation exists. (*Id.*) Calpine's argument has several flaws.

First, the statutes do not purport to tax any possessory interests. Instead, they value and tax all property "owned or leased, and *used* by taxpayers" in the operation of an electric generation facility. A.R.S. § 42-14151(A)(4) (emphasis added). Nowhere does the statute refer to a possessory interest or purport to value or tax a possessory interest. No Arizona law exists that would make it illegal to tax property *used* to generate electricity.

Second, the Department has not valued Calpine's possessory interest. (R. 24, ¶¶ 32, 34.) The term "possessory interest" has been defined as "rights to

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While that statute was in effect, the sale of Calpine's electricity was not subject to regulation by the Arizona Corporation Commission. (R. 24, ¶¶ 40, 54.)

possess and actual possession of land or improvements under non-freehold rights." *Airport Props. v. Maricopa County*, 195 Ariz. 89, 91, ¶ 3, 985 P.2d 574, 576 (Ct. App. 1999), *review denied*, (Sept. 21, 1999). The valuation methodologies under A.R.S. § 42-14156 apply to owned and leased property. (R. 24, ¶ 31.) Under A.R.S. § 42-14156, the Department is not determining the value of a taxpayer's possessory interest right in real property or improvements, even when it is valuing leased property. (*Id.* ¶ 32.) Instead, it is valuing the physical property itself—that is, it is valuing the hard assets, not the possessory interest right. (*Id.* ¶ 33.) Thus, the valuation statutes themselves and the Department's appraisals do not value possessory interest rights, just the value of the hard assets themselves.[8] (*Id.* ¶ 34.)

Third, Calpine has overlooked the enabling legislation in 2000 Ariz. Sess. Laws, ch. 384, §§ 1-3 and 2003 Ariz. Sess. Laws, ch. 37, §§ 1-8. That legislation specifically targets the leased property of electrical generation facilities and provides the machinery to put the tax into effect. After the Department transmits the value to Mohave County, the County is authorized to fix, levy, assess, and collect the property taxes based on the Department's valuations. *See* A.R.S. §§ 42-

[8] Even if the statutes did value possessory interest rights, that would be legal under Arizona law. *Pimalco*, 188 Ariz. at 556-58, 937 P.2d at 1204-06 (holding that the taxation of possessory interest rights in Indian land is legal). At one time, possessory interest rights in Indian land were exempt from taxation. 1993 Ariz. Sess. Laws, ch. 191, § 4 (codified at A.R.S. § 42-271.01 (1993)). However, the Legislature subsequently repealed that exemption. 1994 Ariz. Sess. Laws, ch. 293, § 2.

14153, -15051, -15151 to -15153, -17052 to -17053, -17151, -17152, -17251, -18001, -18003, -18051, -18052. These laws authorize Mohave County to tax Calpine's improvements.

Calpine cites some older Arizona cases that discuss the taxation of leasehold interests (i.e., *Maricopa County v. Fox Riverside Theatre Corp.*, 57 Ariz. 407, 114 P.2d 245 (1941); *Peabody Coal Co. v. Navajo County*, 117 Ariz. 335, 572 P.2d 797 (1977); and *Pima County v. ASARCO*, 21 Ariz. App. 406, 520 P.2d 319 (1974)). (Opening Br., at 31-32.) None of those cases supports Calpine's position because they did not address, and were decided before, the more recent legislation that targets leased property of electrical generation facilities. Unlike A.R.S. § 42-14151(A)(4), the tax statutes in those older cases did not authorize the valuation or taxation of leased property and did not contain the term "leased."

Calpine also argues that the Legislature repealed some possessory interest statutes in 1995. (*Id.*) Although that may be true, it is not relevant because (1) neither the valuation statutes themselves nor the Department's appraisals purport to value or tax possessory interest rights (R. 24, ¶ 34) and (2) the Legislature subsequently passed new legislation that targets "owned or leased" property of companies like Calpine. 2000 Ariz. Sess. Laws, ch. 384, §§ 1-3 and 2003 Ariz.

Sess. Laws, ch. 37, §§ 1-8.[9]

Although Mohave County has not taxed Calpine's improvements, the County may nevertheless legally tax Calpine's improvements, whether owned or leased.

C. Calpine Owns the Improvements.

Arizona has defined ownership for property tax purposes as the "collection of rights to use and enjoy property, including the right to transmit it to others." *Cutter Aviation, Inc. v. Ariz. Dep't of Revenue*, 191 Ariz. 485, 490, 958 P.2d 1, 6 (Ct. App. 1997), *review denied*, (June 25, 1998). When analyzing whether a lessee is the owner of improvements for tax purposes, the courts have considered several factors. They have looked at the lease documents. *Havasu Springs Resort Co. v. La Paz County*, 199 Ariz. 349, 350, ¶ 5, 18 P.3d 143, 144 (Ct. App. 2001); *Airport Props.*, 195 Ariz. at 95, ¶ 3, 985 P.2d at 580; *Cutter Aviation*, 191 Ariz. at 491-92, 958 P.2d at 7-8; *Maricopa County v. Novasic*, 12 Ariz. App. 551, 553-54, 473 P.2d 476, 478-79 (Ct. App. 1970). **The courts in *Havasu Springs*, *Airport Properties*, *Cutter Aviation*, and *Novasic* did not hold, however, that the analysis is limited to the lease's four corners.** *See id.*

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[9] Calpine also cites *Airport Props.* (Opening Br., at 32.) That case is not relevant because it did not address, and was decided before, the legislation in 2000 Ariz. Sess. Laws, ch. 384, §§ 1-3 and 2003 Ariz. Sess. Laws, ch. 37, §§ 1-8. In addition, unlike the circumstances that existed when the Court decided *Airport Props.*, specific enabling legislation now exists for taxing the property at issue. 2000 Ariz. Sess. Laws, ch. 384, §§ 1-3 and 2003 Ariz. Sess. Laws, ch. 37, §§ 1-8.

Havasu Springs, *Airport Properties*, *Cutter Aviation*, and *Novasic* do not support Calpine's position here because they (1) did not involve an electrical generation facility, (2) did not involve the recent legislation that authorizes the taxation of owned or leased property, (3) did not have the statutory definitions of "personal property" and "real property improvements" that now exist under A.R.S. § 42-14156(B) to rely upon (thus, the Courts had to resort to common-law principles concerning improvements), and (4) did not have any evidence in the record establishing that the life of the property at issue was shorter than the lease term.[10] Moreover, those cases involved airport properties and a resort—comparing this type of property to an electrical generation facility is not meaningful because of the unique nature of electrical generation plant assets. (R. 24, ¶ 61.)

Other jurisdictions addressing this issue have looked beyond a lease's four corners to analyze a transaction's substance and realities. *See, e.g.*, *Frank Lyon Co. v. United States*, 435 U.S. 561, 573, 98 S. Ct. 1291, 1303 (1978); *Liona Corp., N.V. v. PCH Assocs.*, 804 F.2d 193, 197 (2d Cir. 1986); *Interwest Aviation v. County Bd. of Equalization*, 743 P.2d 1222, 1226-27 (Utah 1987). *Frank Lyon* held that a court should focus on the "substance over form" and the "economic

[10] As discussed earlier, since the Legislature has defined these terms for valuation and taxation of electrical generation facilities, common-law definitions of personal property, improvements, and fixtures do not apply. *See Great W. Publ'g, Inc.*, 197 Ariz. at 74, ¶ 8, 3 P.3d at 994; *Wells Fargo Credit Corp.*, 183 Ariz. at 345, 903 P.2d at 1103.

realities of a transaction rather than to the particular form the parties employed." 435 U.S. at 573, 98 S. Ct. at 1298. The Court enunciated these "general and established" principles:

> The Court has never regarded the simple expedient of drawing up papers as controlling for tax purposes when the objective economic realities are to the contrary. In the field of taxation, administrators of the laws and the courts are concerned with substance and realities, and formal written documents are not rigidly binding. Nor is the parties' desire to achieve a particular tax result . . . .

Id. (citations and quotations omitted).

With these principles in mind, Calpine owns the improvements for four reasons: (1) the federal judgment bars relitigation of this ownership issue, (2) the lease term exceeds the estimated useful life of Calpine's power plant, (3) the sale-and-leaseback transaction shows that the Tribe does not own the improvements, and (4) the lease documents, Calpine's financial records, and Calpine's website show that Calpine is the owner.

1. The federal judgment bars relitigation of ownership.

One of the many issues that the parties fully litigated in the federal case was whether the Tribe or Calpine owned the improvements. (R. 24, ¶¶ 3, 7.) The federal court analyzed the lease and other evidence in the record and determined that Calpine owns the improvements. (*Id.*) As discussed above, the U.S. Supremacy Clause and collateral estoppel bar relitigation of that issue.

2. The lease exceeds the power plant's useful life.

In *Offutt Housing Co. v. County of Sarpy*, the U.S. Supreme Court decided a case involving a taxpayer that brought an action against a Nebraska county and its treasurer for a declaratory judgment concerning property taxes in leasehold interests on federal land. 351 U.S. 253, 254, 76 S. Ct. 814, 816 (1956). The taxpayer was a Nebraska corporation that entered into a contract with the Secretary of the Air Force to lease land and to build a housing project on Offutt Air Force Base. *Id.* The lease was for seventy-five years. *Id.* The lease provided that the buildings and improvements that the lessee erected would become a part of the leased land and would be owned by the United States. *Id.* The lease also provided that upon termination of the lease, the improvements would remain on the property without compensation to the lessee. *Id.* The building and improvements had an estimated useful life of thirty-five years. *Id.* at 261, 76 S. Ct. at 819.

The Court analyzed who owned the improvements for state property tax purposes—the lessor (the federal government) or the lessee (the Nebraska corporation). *Id.* The Court held the following:

> Labeling the Government as the 'owner' does not foreclose us from ascertaining the nature of the real interests created and so does not solve the problem. The lease is for 75 years; the buildings and improvements have an estimated useful life of 35 years. The enjoyment of the entire worth of the buildings and improvements will therefore be petitioner's [lessee's].
>
> . . . The Government may have 'title,' but only a paper title, and, while

> it retained the controls described in the lease as a regulatory mechanism to prevent the ordinary operation of unbridled economic forces, this does not mean that the value of the buildings and improvements should thereby be partially allocated to it. . . . In the circumstances of this case, then, the full value of the buildings and improvements is attributable to the lessee's interest.

Id. at 261-62, 76 S. Ct. at 819-20 (citation and footnote omitted). The U.S. Supreme Court has thus made it clear that if the lease term is longer than the estimated useful life of the improvements on government land, the lessee is the owner of the improvements for state property tax purposes. *Id.*

The record in the present case does not reflect any dispute concerning the fact that the estimated useful life of Calpine's power plant does not exceed thirty years. (R. 24, ¶¶ 4, 8, 41, 55.) The federal court also determined that the estimated useful life of the plant is thirty years, so the federal judgment bars relitigation of that issue as well in this proceeding. (*Id.* ¶¶ 4, 8.) Calpine's lease term is fifty years. (*Id.* ¶ 77.) At the end of the lease term, the improvements will be obsolete and no longer useful. (*Id.* ¶¶ 41, 55, 59.) The enjoyment of the entire worth of the improvements therefore belongs to Calpine. Moreover, *the lease allows Calpine to remove at any time* ***without the Tribe's consent*** *any improvements that are worn out, obsolete, defective, or no longer useful for their intended purpose.* (*Id.* ¶ 91.) The conclusion is obvious: Calpine owns the improvements.

3. The sale-and-leaseback transaction establishes that Calpine is the owner.

Ownership is the "collection of rights to use and enjoy property, including the right to transmit it to others." *Cutter Aviation*, 191 Ariz. at 490, 958 P.2d at 6. On October 18, 2001, Calpine assigned its interest in the lease to an entity not affiliated with the Tribe or Calpine, and a Calpine-affiliated entity (South Point Energy Center, LLC) then leased the asset back. (R. 24, ¶¶ 72-75, 96-97.) Since Calpine assigned its interest in the lease and now a Calpine affiliate has the right to use and enjoy the asset in excess of the plant's useful life, Calpine is the owner.

4. The lease documents, Calpine's financial records, and Calpine's website show that Calpine owns the improvements.

The following lease terms prove that Calpine owns the improvements.

- Section 8.6: "Throughout this Lease Term, *all* buildings, *improvements*, fixtures, machinery and equipment of whatever nature at any time constructed, placed or maintained on any part of the Leased Land *shall be the property of Calpine*." (R. 24, ¶ 79) (emphasis added).
- Sections 13.1 and 13.2: If any property at the Calpine facility is taken by the Tribe in condemnation proceedings, "any awards by the condemning authority shall be distributed to Calpine, including, without limitation, any portion of the award representing the value of the Leased Land without Improvements." (*Id.* ¶ 80.)

- Sections 13.6.1 - 13.6.4: If any property at the Calpine facility is taken by an entity other than the Tribe in condemnation proceedings, the proceeds of such proceedings are allocated in the following priority: (1) to the Tribe for the value of the raw land and then (2) to Calpine for the value of the improvements. (*Id.* ¶ 81.)
- Section 6.3 & Ex. H: The contingent rent is $0 during the first sixteen years of the lease. (*Id.* ¶¶ 66, 82); *see also Interwest Aviation*, 743 P.2d at 1223 (holding that the fact that the taxpayer had paid no rent for the improvements for the tax year in issue was a significant factor in the court's conclusion that the lessee rather than the government lessor owned the improvements).
- Section 8.2.5 of Lease Modification No. 2: Calpine can remove and/or replace at any time, *without the consent* of the Tribe or the Secretary of the Interior, any improvements that are damaged, *worn out, obsolete, defective, or no longer useful* for their intended purpose of electrical generation. (R. 24, ¶ 91.)

According to the Department and Mohave County's expert witness (Gary Harpster), the other lease terms that Calpine has cited in this case to support its position do not transfer ownership of the improvements to the Tribe from the standpoints of accounting, power plant economics, or the realities of the transaction. (*Id.* ¶¶ 68-70.) Calpine did not controvert this expert testimony with any admissible evidence. (*Id.*; R. 34, ¶ 33.)

In the Opening Brief, Calpine argues that the Tax Court "ignored" relevant terms of the lease and Arizona case law that bear on the ownership analysis. (Opening Br., at 27-30.) Calpine and the Tribe's counsel argued the same thing in federal court after it had initially ruled that the Tribe does not own the improvements. (R. 24, Ex. 2, at 5-9.) In its order, the federal court explained in detail how it reviewed the entire lease, all of its terms and modifications, and the Arizona cases, before reaching its decision that Calpine (rather than the Tribe) owns the property at issue. *Id.*

Similarly, the tax court's ruling in this matter demonstrates that it reviewed the entire lease, its terms and modifications, and the Arizona cases before reaching its decision that Calpine owns the property at issue. (R. 53, at 1-5.) Moreover, a review of the parties' dispositive motions below demonstrates that the issues and evidence in question were fully argued and litigated. (R. 21; R. 27.) Thus, Calpine's argument that the tax court somehow "ignored" key arguments or evidence is completely devoid of merit.

In its Opening Brief, Calpine also argues that the tax court's ruling "assumes Calpine will breach the implied covenant of good faith and fair dealing." (Opening Br., at 30-31.) This is not true either. A review of the ruling shows no evidence that the tax court made such an assumption. To the contrary, the ruling shows that

the tax court contemplated that the parties would comply with the lease terms and not breach them. (R. 53, at 1-5.)

In addition, a Calpine affiliate (South Point Energy Center, LLC) actually lists the power plant improvements as assets in its financial statements. (R. 24, ¶¶ 98-99, 101.) This accounting treatment of the power plant in Calpine's financial statements is directly at odds with Calpine's arguments concerning ownership of the same property in this proceeding.

Finally, Calpine's own website stated that Calpine owns the facility:

> Executives of Calpine Corporation, the nation's leading independent power company and developer, builder, *owner* and operator of the South Point Energy Center, and Fort Mojave Tribal leaders are celebrating operations of Arizona's first merchant power plant.

(*Id.* ¶ 42 [emphasis added].)

The proper analysis focuses on the transaction's substance and the realities, not on its mere form. Under that analysis along with the tax court and federal court's analysis on the ownership issue, it is clear that Calpine owns the improvements.

III. The Tax Court Correctly Struck the Two Unpublished Decisions and the Photograph from the Record.

A. Standard of Review.

The standard of review applicable in reviewing a lower court's ruling on a motion to strike is abuse of discretion. *State Bd. of Barber Exam'rs v. Walker*, 67

Ariz. 156, 162, 192 P.2d 723, 727 (1948); *Gen. Motors Corp. v. Ariz. Dep't of Revenue*, 189 Ariz. 86, 98, 938 P.2d 481, 493 (Ct. App. 1996). An appellate court should uphold a lower court's ruling on the exclusion of evidence unless a clear abuse of discretion appears and prejudice results. *Selby v. Savard*, 134 Ariz. 222, 227, 655 P.2d 342, 347 (1982).

B. Calpine Has Improperly Cited the Unreported Decisions Because the Exception for Collateral Estoppel Does Not Apply.

Calpine argues that it can cite this Court's two unpublished memorandum decisions, which it originally included as attachments A and B of its Motion for Summary Judgment dated September 30, 2005 (*Ariz. v. Pima Grande Dev. II/Vestar*, 1 CA-TX 97-0013 (June 2, 1998) and *AlliedSignal, Inc. v. Ariz. Dep't of Revenue*, 1 CA-TX 96-0018 (Aug. 14, 1997)). (Opening Br., at 33-40.) In fact, Calpine argues that no rule in Arizona prohibits the citation of unpublished decisions, citing Ariz. R. Civ. App. P. 1. (*Id.* at 33 n.8.) Calpine is wrong on both of these arguments, and citing these cases in the tax court and in this Court is improper.

For Arizona cases, the general rule is that "[m]emorandum decisions shall not be regarded as precedent nor cited in *any* court." Ariz. R. Civ. App. P. 28(c) (emphasis added). A memorandum decision is defined as a "written disposition of a matter not intended for publication." Ariz. R. Civ. App. P. 28(a)(2). This Court has also held that it is "improper" to cite unpublished cases from Arizona courts.

First Interstate Bank of Ariz. v. Ariz. Dep't of Revenue, 185 Ariz. 433, 437, 916 P.2d 1149, 1153 (Ct. App. 1995), *disapproved on other grounds*, *Rogers Corp. v. State of Ariz. Dep't of Revenue*, 187 Ariz. 157, 158 n.1, 927 P.2d 817, 818 n.1 (Ct. App. 1996).

A motion to strike is not only an appropriate procedure to use in seeking to exclude unpublished decisions, but a court should grant a motion to strike when a party is improperly citing unpublished decisions. *S.W. Airlines Co. v. Ariz. Dep't of Revenue*, 197 Ariz. 475, 478, ¶¶ 11-12, 4 P.3d 1018, 1021 (Ct. App. 2000).

Calpine argues that it can cite these unpublished decisions because it is asserting that collateral estoppel applies. (Opening Br., at 33-40.) The Arizona rules do provide an exception for unpublished decisions for purposes of establishing the defense of collateral estoppel. Ariz. R. Civ. App. P. 28(c). However, Calpine's attempted use of offensive collateral estoppel fails as a matter of law.

1. The federal court determined that the two unpublished decisions were inapplicable, and thus Calpine cannot relitigate that issue.

The federal court has already determined the applicability of the two unpublished decisions in this matter. (R. 24, Ex. 2, at 3-5.) In light of the fact that the Tribe and Calpine are in privity with each other (see discussion above), the federal-court judgment is fully binding on Calpine under collateral estoppel

principles.

In the federal proceeding, the Department and Mohave County moved to strike the same two unpublished decisions that Calpine is trying to cite in this case (*Pima Grande* and *AlliedSignal*). The federal court's ruling on that motion to strike is attached as tab two of the Appendix. (R. 24, Ex. 2, at 3-5.) The federal court determined that these two unpublished opinions were inapplicable to this matter because (among other reasons) offensive collateral estoppel cannot as a matter of law be used against governmental entities like the Department and Mohave County. (*Id.*) Under the doctrine of collateral estoppel and the U.S. Supremacy Clause, the federal judgment bars Calpine from relitigating that same issue again here.

2. Arizona law prohibits Calpine from using offensive collateral estoppel in this case.

Calpine argues that offensive collateral estoppel is permissible in this case, citing *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322, 99 S. Ct. 645 (1979), and *Wetzel v. Ariz. State Real Estate Dep't*, 151 Ariz. 330, 727 P.2d 825 (Ct. App. 1986). (Opening Br., at 34-35.) Calpine's reliance on *Parklane Hosiery* and *Wetzel* is misplaced.

First, Calpine has ignored the applicable choice-of-law rules. In determining the collateral estoppel effect of a state-court judgment, that state's law of collateral estoppel applies. *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481-82, 102 S. Ct.

1883, 1898 (1982); *Bugna v. McArthur*, 33 F.3d 1054, 1057 (9th Cir. 1994); *Garcia v. Gen. Motors Corp.*, 195 Ariz. 510, 513-14, ¶ 7, 990 P.2d 1069, 1072-73 (Ct. App. 1999). Here, Calpine is attempting to use Arizona state-court decisions to establish collateral estoppel. Thus, the Court should apply Arizona's law of collateral estoppel. *Kremer*, 456 U.S. at 481-82, 102 S. Ct. at 1898; *Bugna*, 33 F.3d at 1057; *Garcia*, 195 Ariz. at 513-14, ¶ 7, 990 P.2d at 1072-73.

In *Parklane Hosiery*, the U.S. Supreme Court analyzed the collateral-estoppel effect of a federal-court judgment in a subsequent federal-court action. 439 U.S. at 324-25, 99 S. Ct. at 648-49. That case did not address or involve Arizona's collateral-estoppel law. *Id.* Although *Parklane Hosiery* held that offensive collateral estoppel may be allowed in certain circumstances under federal law when federal-court judgments are involved, that holding does not apply here because this case involves Arizona state-court judgments. *Kremer*, 456 U.S. at 481-82, 102 S. Ct. at 1898; *Bugna*, 33 F.3d at 1057. In fact, this Court has recognized that Arizona law is different than federal law with respect to offensive collateral estoppel. *Campbell*, 204 Ariz. at 223 n.1, ¶ 11, 62 P.3d at 968 n.1. Thus, Calpine's reliance on *Parklane Hosiery* is misplaced.

Calpine also argues that Arizona law allows offensive collateral estoppel, citing *Wetzel*. (Opening Br., at 34-35.) Calpine's reliance on *Wetzel* is misplaced as well. In *Wetzel*, this Court allowed offensive collateral estoppel under the facts of

that case. 151 Ariz. at 333-34, 727 P.2d at 828-29. However, the Arizona Supreme Court had previously held that Arizona law does not permit offensive collateral estoppel, and that case is still good law. *Standage Ventures, Inc. v. State*, 114 Ariz. 480, 484, 562 P.2d 360, 364 (1977). Since *Wetzel* was only an intermediate appellate court decision, it did not overturn the Arizona Supreme Court's holding in *Standage Ventures*. Moreover, this Court more recently (in 2003) clarified that Arizona law does not permit offensive collateral estoppel. *Campbell*, 204 Ariz. at 223, ¶ 10, 62 P.3d at 968.

In addition, regardless of how offensive collateral estoppel may apply to private litigants, the use of offensive collateral estoppel is strictly prohibited against governmental parties like the Department and Mohave County for policy reasons. *First Interstate Bank*, 185 Ariz. at 436, 916 P.2d at 1152, *disapproved on other grounds, Rogers*, 187 Ariz. at 158 n.1, 927 P.2d at 818 n.1; *see also Aida Renta Trust v. Dep't of Revenue*, 197 Ariz. 222, 233 n.10, ¶ 30, 3 P.3d 1142, 1153 n.10 (Ct. App. 2000) (recognizing that Arizona law does not permit offensive collateral estoppel against the government); *United States v. Mendoza*, 464 U.S. 154, 159-60, 104 S. Ct. 568, 571-72 (1984) (holding that under federal law, offensive collateral estoppel cannot be used against the government).

In *First Interstate Bank*, this Court rejected the use of offensive collateral estoppel against the government. 185 Ariz. at 436, 916 P.2d at 1152, *disapproved*

on other grounds, *Rogers*, 187 Ariz. at 158 n.1, 927 P.2d at 818 n.1. There, the plaintiffs contended that the Department was equitably estopped to argue that the County Assessor had properly placed bank personal property on the unsecured roll because it had litigated, lost, and failed to appeal that issue against a different taxpayer. *Id.* The Court disagreed:

> It would be bad policy to require the government, in every instance, to appeal every adverse decision for fear of being foreclosed from relitigating the same issue against a different party in the future. Such a requirement would put an undue burden on the state.

Id. Although Calpine attempts to distinguish *First Interstate Bank*, that attempt fails because *First Interstate Bank* clearly holds that Arizona law does not permit offensive collateral estoppel against a governmental party. *Id.*; *see also Aida Renta Trust*, 197 Ariz. at 233 n.10, ¶ 30, 3 P.3d at 1153 n.10.

Calpine has also argued that the U.S. Supreme Court's holding in *Mendoza*, which barred offensive collateral estoppel against the federal government, is "limited to the United States Government, not the Arizona Department of Revenue." (R. 35, at 7.) That argument fails to acknowledge the fact that this Court discussed *Mendoza* and its policies in the *First Interstate Bank* case. 185 Ariz. at 436, 916 P.2d at 1152. Thus, although *Mendoza* does not provide controlling authority on this issue because Arizona law applies here, *Mendoza* certainly provides meaningful guidance and relevant policy considerations, which *First Interstate Bank* adopted when it held that offensive collateral estoppel is not

allowed against a governmental party like the Department under Arizona law. *Id.*

For these reasons, Arizona law prohibits Calpine's use of offensive collateral estoppel in this case against the Department and Mohave County.

3. The doctrine of virtual representation is irrelevant in determining the propriety of citing the unpublished cases.

Calpine argues that the doctrine of virtual representation supports its attempt to cite the unpublished decisions.[11] (Opening Br., at 39 n.9.) Calpine is wrong.

The Arizona Supreme Court has explained the doctrine of virtual representation as follows:

> [W]hen a taxpayer or property owner brings an action against the state or other governmental subdivision, in the absence of fraud or collusion, a judgment for or against the state or political subdivision, upon a matter of public and general interest, is binding and conclusive upon all other taxpayers and property owners similarly situated.

El Paso Natural Gas Co., 123 Ariz. at 222, 599 P.2d at 178. This holding establishes that the doctrine of virtual representation is binding and conclusive only on "taxpayers and property owners similarly situated," but not on the government. *Id.* In other words, the doctrine binds taxpayers and property owners to a judgment, but it

[11] In support of its virtual representation argument, Calpine cites *El Paso Electric Co. v. Maricopa County*, 171 Ariz. 489, 831 P.2d 865 (Ct. App. 1992). (Opening Br., at 39 n.9.) However, that case did not analyze virtual representation, but instead held that this Court did not have jurisdiction to consider that issue. 171 Ariz. at 491, 831 P.2d at 867. Moreover, the Arizona Supreme Court vacated that case. *El Paso Elec. Co. v. Maricopa County*, 172 Ariz. 335, 337, 837 P.2d 137, 139 (1992). It is possible that Calpine meant to cite *El Paso Natural Gas Co. v. State*, 123 Ariz. 219, 599 P.2d 175 (1979) instead, and thus this section will discuss virtual representation as analyzed in that case.

does not bind the government. *Id.* This is consistent with Arizona's prohibition against the use of offensive collateral estoppel against the government generally and the Department specifically. *First Interstate Bank*, 185 Ariz. at 436, 916 P.2d at 1152; *see also Aida Renta Trust*, 197 Ariz. at 233 n.10, ¶ 30, 3 P.3d at 1153 n.10; *Mendoza*, 464 U.S. at 159-60, 104 S. Ct. at 571-72.

The doctrine of virtual representation does not apply for other reasons as well. For example, the issues being litigated in this case are much different than the issues that were litigated in the two unpublished decisions (see discussion below).

Moreover, *El Paso Natural Gas* is distinguishable because it (1) discusses res judicata, not the elements of collateral estoppel, (2) does not discuss the general bar against offensive collateral estoppel, and (3) does not discuss the bar against using offensive collateral estoppel against governmental parties.

Therefore, the doctrine of virtual representation does not apply here.

4. Calpine has not established the five elements of collateral estoppel.

Collateral estoppel binds a party to a decision on an issue litigated in a previous lawsuit if the following factors are satisfied: (1) the parties actually litigated the issue in the previous proceeding, (2) the parties had a full and fair opportunity to litigate the issue, (3) the issue's resolution was essential to the decision, (4) the court entered a valid and final decision on the merits, and (5) a

common identity of parties exists.[12] *Hullett v. Cousin*, 204 Ariz. 292, 297-98, ¶ 27, 63 P.3d 1029, 1034-35 (2003); *Campbell*, 204 Ariz. at 223, ¶ 9, 62 P.3d at 968.

Calpine has not established the five elements of collateral estoppel. In this case, Calpine sued the Department and Mohave County. Neither Calpine nor Mohave County was a party in *Pima Grande* or *AlliedSignal*. Thus, no "common identity of parties" exists.

This matter also involves completely different issues than those litigated in the two unpublished decisions. For example, those decisions (1) did not address the specific tax statutes, constitutional provisions, and claims presented here; (2) did not address the specific lease documents, terms, and definitions presented here; (3) did not have the same evidence in their records as is in the record in this case; (4) did not involve the personal property classification involved here, but instead involved buildings/improvements only; (5) did not address the statutory definitions of improvements and personal property under A.R.S. § 42-14156(B) and consequently did not address "ownership" for property tax purposes under the current tax scheme; and (6) did not discuss or apply the holding in *Offutt Housing Co. v. County of Sarpy*, 351 U.S. at 253, 76 S. Ct. at 819-20. Thus, the pertinent issues in this case were never litigated in the cases that resulted in those

[12] Since Calpine is attempting to use offensive collateral estoppel, rather than defensive, it must show common identity of parties. *Campbell*, 204 Ariz. at 223, ¶ 10, 62 P.3d at 968.

unpublished decisions.

For these reasons, Calpine has improperly cited the unpublished decisions. This Court should affirm the tax court's decision to strike the unpublished opinions because Calpine has not demonstrated that the tax court clearly abused its discretion or that Calpine has been prejudiced.

C. Calpine's photograph is inadmissible evidence.

On December 20, 2005, the Department and Mohave County filed a Motion to Strike Exhibit A to Calpine's Combined Reply and Response, which appears to be a photo of the plant. (R. 42.) They based the motion on the argument that the photo lacked authentication and identification as Ariz. R. Evid. 901(a) requires and was not sworn or certified as Ariz. R. Civ. P. 56(e) requires.

Calpine never filed a response to that motion, which alone warranted the granting of the motion. Ariz. R. Civ. P. 7.1(b). Moreover, Calpine has not demonstrated that the tax court clearly abused its discretion on this evidentiary ruling or that the ruling prejudiced Calpine.

IV. The Tax Court Properly Entered Judgment for the Department on Its Counterclaim.

A. Standard of Review.

In reviewing the granting of a summary judgment motion, this Court reviews the facts in light most favorable to the nonmoving party and determines de novo whether the trial court correctly applied the law. *Chicago Ins. Co. v. Manterola*, 191

Ariz. 344, 346, ¶ 7, 955 P.2d 982, 984 (Ct. App. 1998). The Court will affirm if the facts that the nonmoving party has presented in support of its claims or defenses "have so little probative value that reasonable minds could not agree with the conclusion being advanced." *Id.* (quotation marks omitted).

B. The Tax Court Properly Entered Judgment for the Department on Its Counterclaim.

The Department filed a Counterclaim in this matter. (R. 10, at 3-5.) It based the Counterclaim on Calpine's failure and refusal to file annual reports with the Department for tax years 2003 and 2004 within the time that A.R.S. § 42-14152(A) requires and to pay the resulting penalties. (*Id.*) The Department sought a statutory penalty of $4,900 (49 days x $100) for the first report (2003) and of $4,900 for the second report (2004), for a total of $9,800. (*Id.*)

The Department moved for summary judgment on this Counterclaim. (R. 28.) The tax court entered the Final Judgment in the Department's favor on this Counterclaim. (R. 55, at 2-3.)

If a party does not raise an argument in its opening brief, it is waived. *Nelson v. Rice*, 198 Ariz. 563, 567 n.3, 12 P.3d 238, 242 n.3 (Ct. App. 2000). Although Calpine appealed the Final Judgment, it did not argue in the Opening Brief that the tax court's ruling on the Counterclaim should be reversed. Therefore, this Court should affirm the tax court's ruling on the Counterclaim because Calpine has waived any argument to the contrary.

CONCLUSION

Both a federal court and the tax court have ruled in favor of the Department and Mohave County on the key issues that Calpine has raised in this proceeding. The Department and Mohave County respectfully request that this Court affirm the tax court's Final Judgment in their favor. Finally, the Department and Mohave County request an award of costs on appeal pursuant to Ariz. R. Civ. App. P. 21.

Dated this 27th day of March, 2008.

Sanders & Parks, P.C.

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CERTIFICATE OF COMPLIANCE

Pursuant to Ariz. R. Civ. App. P. 14, I certify that this Answering Brief uses proportionately spaced type of 14 points or more, is double-spaced using a roman font, and contains 10,808 words.

Dated this 27th day of March, 2008.

Sanders & Parks, P.C.

By _____

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CERTIFICATE OF SERVICE

Original and six copies hand delivered this 27th day of March, 2008 to:

Clerk, Court of Appeals
Division One
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Phoenix, AZ 85007-3329

Two copies mailed this 27th day of March, 2008 to:

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APPENDIX

APPENDIX 1

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

FORT MOJAVE INDIAN TRIBE, a federally recognized Indian tribe,
Plaintiff,

v.

MARK W. KILLIAN, Director of the Arizona Department of Revenue; and MOHAVE COUNTY, a political subdivision of the State of Arizona,
Defendants,

JUDGMENT IN A CIVIL CASE

CIV 02-1212-PCT-MHM

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's order of March 31, 2004, granting Defendants' motion to dismiss the complaint, judgment is hereby entered for Defendants and against Plaintiff. Plaintiff shall take nothing by way of the complaint. The complaint and action are hereby dismissed.

April 1, 2004
Date

RICHARD H. WEARE
District Court Executive/Clerk

Ruth E. Williams
(By) Deputy Clerk

cc: (all counsel)

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FORT MOJAVE INDIAN TRIBE, a federally recognized Indian tribe,

Plaintiff,

vs.

MARK W. KILLIAN, Director of the Arizona Department of Revenue; and MOHAVE COUNTY, a political subdivision of the State of Arizona,

Defendants.

No. CIV 02-1212-PCT-MHM

ORDER

Pending before this Court are the following motions: Fort Mojave Indian Tribe's Motion for Summary Judgment (Dkt. #52); The Department's Motion to Dismiss the Tribe's Complaint (Dkt. #102); Defendants' Motion to Certify the State Law Issues to the Arizona

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Supreme Court (Dkt. #103); and The Department's Motion to Exclude and Strike Portions of Michele Blanco's Affidavit (Dkt. #126). Having reviewed the pleadings, and heard oral argument on March 22, 2004, the Court issues this Order.

I. Factual and Procedural Background

On June 28, 2002, the Fort Mojave Indian Tribe ("the Tribe"), a federally recognized Indian tribe, filed a claim for Declaratory and Injunctive Relief against Mark W. Killian, director of the Arizona Department of Revenue ("the Department of Revenue").

The Tribe alleges that the Department of Revenue is undertaking to assess and collect tax on an electric generation plant and related facilities that are located on the Fort Mojave Indian Reservation and belong to the Fort Mojave Indian Tribe, in violation of the Constitution and laws of the United States and the Constitution and laws of Arizona. See Complaint ¶¶ 10, 17, 27; see generally Complaint.

The Complaint alleges that the Tribe entered into a lease (the "Lease") with the predecessor of Calpine Construction Finance Company ("Calpine") in 1999. See Complaint ¶3. The Lease, which was subsequently assigned to Calpine, granted Calpine's predecessor the use of part of the Tribe's trust land in the State of Arizona for the development and operation of an electric generation power plant and related facilities. See Complaint ¶3. Pursuant to the terms of Lease, Calpine is restricted from removing or demolishing improvements to the leased land without prior written consent of the Tribe. See Complaint ¶6. At the end of the Lease term, which is for an initial period of 50 years, or its earlier

termination, all improvements made to the leased land by Calpine or its successor or assigns, become property of the Tribe. See Complaint ¶7.

By its Order of January 29, 2004, the Court dismissed the claim of Calpine Construction Finance Co. as Plaintiff in Intervention, on grounds its claim was barred by the Tax Injunction Act. Dkt. #99. The Department has in the meantime valued, pursuant to A.R.S. § 42-14153, the personal property used by Calpine in operating the electrical generation facility on the Fort Mojave Indian Reservation at $88,000,000 for the 2003 tax year. See Ex. 1 to Dkt. #103, ¶¶41-42.

The Tribe alleges that during the term of the lease, Calpine's obligation to pay taxes to the Tribe will be reduced on a dollar-for-dollar basis by the amount of state, county, or local taxes paid by Calpine. Complaint ¶9. As a result, if the state, county, or local governments are allowed to tax Calpine, the Tribe alleges, it will lose tax revenue assessed under the Tribe's tax ordinance. Id.

The Tribe alleges that as a result of the Department of Revenue's undertakings to assess and collect tax on its property from Calpine, the Tribe is suffering or will suffer a diminishment of the sovereign governmental authority that it exercises over the land, exposure of tribal property to state tax enforcement actions, and creation of a chilling effect on future non-Indian investment and development in Indian Country as well as a reduction of the rent it will receive in due course under the lease. See Complaint ¶¶ 20 and 29.

For its causes of action, the Tribe specifically alleges: 1) assessment of the tax violates the U.S. Supremacy Clause; 2) collection of the tax violates the U.S. Supremacy Clause; 3)

assessment and collection of the tax violates the Arizona Enabling Act; 4) assessment and collection of the tax is preempted by federal law; 5) assessment and collection of the tax unduly infringes on the Tribe's rights to self-determination; 6) assessment and collection of the tax is prohibited by the Arizona Constitution; 7) assessment and collection of the tax is not authorized by Arizona tax statutes. See Complaint ¶¶18, 23, 38, 32, 36, 40, 42.

For its relief, the Tribe seeks a declaration that these property taxes, both real and personal, which the Department of Revenue is undertaking to assess and collect from Calpine on the property located on the Fort Mojave Indian Reservation and belonging to the Tribe, are illegal under the Constitution and laws of the United States and Constitution and laws of Arizona. See Complaint Prayer for Relief ¶1. The Tribe also seeks an injunction against the assessment and collection of these taxes. See Complaint Prayer for Relief ¶2.

In The Department's Motion to Dismiss the Tribe's Complaint (Dkt. #102), Defendant argues that the Tribe has not presented a live case or controversy as required for federal jurisdiction under Article III of the U.S. Constitution. Specifically, Defendant argues, the Tribe has failed to show that it suffered or will imminently suffer an injury in fact "fairly traceable" to the Department's assessment of taxes on the property at issue, because the Department has not assessed any property taxes on the Tribe's property or pursued any tax collection procedures against the Tribe, or for that matter, Calpine, and any reduction in the Tribe's tax revenues pursuant to the Lease provisions is the result of its negotiations and Calpine's conduct, not the Department's actions. See id.

In Fort Mojave Indian Tribe's Motion for Summary Judgment (Dkt. #52), the Tribe seeks to have this Court rule as a matter of law that certain property tax statutes, specifically A.R.S. §§42-14151(A)(4), 42-14156(A)(1) and A(2) and 42-17153(A), are unconstitutional on their face because they fail to carefully target only the private possessory interest in the Tribe's property, and thus violate the Supremacy Clause. In its response to a Rule 56(f) motion from defendants, the Tribe stated that it was challenging by its Motion for Summary Judgment only the facial validity of the Arizona statutes. See Dkt. #65.

In Defendants' Motion to Certify the State Law Issues to the Arizona Supreme Court (Dkt. #103), Defendants seek to have this Court certify the state law issues in this case to the Arizona Supreme Court for determination pursuant to A.R.S. §12-1861. Specifically, Defendants ask this Court to certify to the Arizona Supreme Court "the state law issues in the Tribe's Complaint and Motion for Summary Judgment." See Dkt. #103, p.12.

II. Standard of Review

Standing is a threshold issue in every federal case. See Warth v. Seldin, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205 (1975). To satisfy the Article III standing requirement, a plaintiff must show 1) an "injury in fact – an invasion suffered of a legally-protected interest" that is neither "conjectural" nor "hypothetical"; 2) that the injury is caused by the conduct complained of, *i.e.*, that it is "fairly traceable" to the challenged action; and 3) that it is likely, not speculative, that the relief requested, if granted, will redress the plaintiff's injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136-37 (1992).

A question may be certified to the Arizona Supreme Court under the following circumstances:

> The supreme court may answer questions of law certified to it by the supreme court of the United States, a court of appeals of the United States, a United States district court or a tribal court when requested by the certifying court if there are involved in any proceedings before the certifying court questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court and the intermediate appellate courts of this state.

A.R.S. §12-1861.

A motion for summary judgment may be granted only if the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). To defeat the motion, the non-moving party must show that there are genuine factual issues "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511 (1986). The party opposing summary judgment "may not rest upon the mere allegations or denials of [the party's] pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1356 (1986).

III. Discussion

The Court must first address the issue whether it has subject matter jurisdiction over the Tribe's Complaint. Federal courts are courts of limited jurisdiction, and subject matter jurisdiction is a threshold matter that must be established by the plaintiff. Lujan v. Defenders

of Wildlife, 504 U.S. 555, 561, 112 S.Ct. 2130, 2136 (1992). Challenges to subject matter jurisdiction may be raised any time, by any party, or by the Court, even after final judgment is entered. See Emrich v. Touche Ross & Co., 846 F.2d 1190, 1194 n.2 (9th Cir. 1988); Fed. Civ. Pro. Rule 60(b)(4).

Standing is a key component of the Article III "case and controversy" requirement for subject matter jurisdiction. See Warth v. Seldin, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205 (1975). To satisfy the Article III standing requirement, a plaintiff must show 1) an "injury in fact – an invasion suffered of a legally-protected interest" that is neither "conjectural" nor "hypothetical"; 2) that the injury is caused by the conduct complained of, *i.e.*, that it is "fairly traceable" to the challenged action; and 3) that it is likely, not speculative, that the relief requested, if granted, will redress the plaintiff's injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136-37 (1992).

The mere existence of a statute or the generalized threat of enforcement of a statute is not sufficient to create a case or controversy. Thomas v. Anchorage Equal Rights Comm., 220 F.3d 1134, 1139 (9th Cir. 2000). A federal court may not adjudicate challenges to statutes absent a showing of actual impact on the challenger. See Arizonans for Official English v. Arizona, 520 U.S. 43, 48, 117 S. Ct. 1055, 1059 (1997). Moreover, "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish." Lujan, 504 U.S. at 562, 112 S. Ct. at 2137.

In The Department's Motion to Dismiss the Tribe's Complaint (Dkt. #102), Defendant argues that the Tribe has not presented a live case or controversy as required for federal jurisdiction under Article III of the U.S. Constitution. Specifically, Defendant argues, the Tribe has failed to show that it suffered or will imminently suffer an injury in fact "fairly traceable" to the Department's assessment of taxes on the property at issue, because the Department has not assessed any property taxes on the Tribe's property or pursued any tax collection procedures against the Tribe, or for that matter, Calpine, and any reduction in the Tribe's tax revenues pursuant to the Lease provisions is the result of its negotiations and Calpine's conduct, not the Department's actions. See id. The Department also argues that because the Tribe has failed to show that it owns any interest in the property being taxed, its claim is barred by the Tax Injunction Act, 28 U.S.C. § 1341.

The Tribe's ability to bring an action in federal court challenging the imposition of state taxes depends on the capacity in which the Tribe initiates the litigation and the basis of the Tribe's standing to bring such a challenge. Here, the Tribe's claim of standing relies on its allegations in its Complaint that the Defendant is undertaking to assess and collect taxes on property, including real property improvements and land, belonging to the Tribe. See Complaint ¶¶ 17, 23, 29, 41, 45. Specifically, the Tribe alleges that the Defendant is undertaking to assess and collect taxes on the electric generation plant operated by Calpine on the Fort Mojave Indian Reservation, and on the Tribe's lands leased to Calpine for its operation. See Complaint ¶¶10, 33. The Tribe further alleges that pursuant to the Lease between Calpine and the Tribe, the electric generation plant becomes property of the Fort

Mojave Indian Tribe upon expiration of the Lease between the Tribe and Calpine in 50 years, or its earlier termination. See Complaint ¶7. The Tribe further alleges that while the Lease is in effect, Calpine is prohibited from removing or demolishing the electric generation power plant (or any portion thereof) without obtaining prior written consent of the Tribe. See Complaint ¶6. The Tribe further alleges that by terms of the Lease, Calpine's obligations to pay taxes to the Tribe are reduced by any amount of state, county, or local taxes paid by Calpine. See Complaint ¶9.

The Tribe alleges that as a result of the Department of Revenue's undertakings to assess and collect tax on its property from Calpine, the Tribe is suffering or will suffer the following injuries: 1) a diminishment of the sovereign governmental authority that it exercises over the land; 2) exposure of tribal property to state tax enforcement actions; 3) creation of a chilling effect on future non-Indian investment and development in Indian Country; and 4) a reduction of the rent it will receive in due course under the Lease. See Complaint ¶¶ 20 and 29.

It is the Tribe's burden to persuade the Court that subject matter jurisdiction exists. See Hexom v. Oregon Department of Transportation, 177 F.3d 1134, 1135 (9th Cir. 1999). Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction may be facial, in which case the Plaintiff's allegations are taken to be true, and all reasonable inferences are construed in Plaintiff's favor. See McLachlan v. Bell, 261 F.3d 908, 909 (9th Cir. 2001). Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence brought before the Court, however, as has occurred here, the Court need not presume that Plaintiff's factual allegations are true, need not accept

conclusory allegations as true, and may if necessary resolve factual disputes. See White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2002); St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir. 1989). To meet its burden in the face of a factual motion, the plaintiff, here the Tribe, must furnish affidavits or other evidence necessary to establish subject matter jurisdiction. See Savage v. Glendale Union High School, 343 F.3d 1036, 1040 n.2 (9th Cir. 2003).

It is undisputed on the record of this case that the Department has not fixed, levied or assessed any property taxes against the Tribe, and does not intend to do so. See Affidavit of Bob Williams, ¶47, attached as Ex. 1 to Motion to Dismiss. It is also undisputed that the Department has never sent the Tribe a property tax statement/bill for any property for any tax year and does not intend to do so. See id., ¶48. It is also undisputed that the Department has not pursued or initiated any tax collection procedures against the Tribe or Calpine. See id., ¶50.

It is, however, disputed whether the Department has valued, or intends to value, any property in which the Tribe holds "some interest." Defendant offers the sworn statement of the appraiser assigned to value electric utility property for the Department that the Department's valuations with respect to the Calpine power plant did not include land or real property improvements, and involved solely $88 million in "personal property" as defined A.R.S. 42-14156(B)(1)(2003)[1] that is owned by Calpine. See id. ¶¶41-45. The Department's

[1]The term "personal property" is defined under A.R.S. §42-14156(B)(1) (2003) as "all tangible property except for land and real property improvements as defined in this section. Personal property includes foundations or supports for the machinery or apparatus for which they are provided, including water cooling towers." A.R.S. §42-14156(B)(1) (2003). "Real property improvements" are defined as including "buildings, including administration buildings, maintenance warehouses and guard shacks, water retention ponds, sewage treatment ponds . . .". A.R.S. §42-14156(B)(2) (2003).

appraiser has further avowed that the Department has not valued (and does not intend to value) any property of the Tribe for any tax year (whether land, real property improvements, personal property, leased, owned or otherwise). See id. ¶46. The Tribe, on the other hand, offers in an affidavit from the commercial manager for Calpine's Power Company business unit stating that the $88 million value set by the Department "appears to" include the entire electric generation power plant operated by Calpine at the Fort Mojave Indian Reservation, including its gas turbines, heat recovery steam generators, cooling towers and all other major assets necessary to operate the power plant. See Ex. A, ¶3 to Response to Defendant's Motion to Certify. It is this sworn statement that the Department moves to exclude in The Department's Motion to Exclude and Strike Portions of Michele Blanco's Affidavit (Dkt. #126), on the ground this witness has not submitted evidence to support a finding that she has personal knowledge of the basis for the Department's appraisals, her opinion is based on speculation, and her opinion constitutes improper and inadmissible expert testimony. This Court finds that Michele Blanco's statement that it appears that the Department's appraisal covered the entire electrical generation facility must be stricken on the basis that Ms. Blanco has not provided any foundation of personal knowledge for this statement and it therefore constitutes inadmissible speculation. See Fed. Evid. Rule 602 (witness may only testify as to matters of which witness has personal knowledge).

The term "personal property," however, is defined under A.R.S. §42-14156(B)(1) (2003) as follows:

> all tangible property except for land and real property improvements as defined in this section. Personal property includes foundations or supports for the machinery or apparatus for which they are provided, including water cooling towers.

A.R.S. §42-14156(B)(1) (2003). For purposes of this motion, based on this definition of "personal property," the Court will therefore assume that the Department's $88 million valuation of the "personal property" "owned or leased" by Calpine and "used in the operation of an electric generation facility" on the Fort Mojave Indian Reservation reaches some portion of the facility's gas turbines, heat recovery steam generators, and cooling towers in which the Tribe claims some property interest by virtue of the terms of its Lease with Calpine. See Defendant's Controverting Statement of Facts ¶170, and Ex. 13 thereto, p.2.

This brings the Court to the question of whether the Tribe has shown that it has a property interest in the $88 million electric generation power plant sufficient to establish that the Department's levy of taxes on Calpine, a third party, has caused it injury in fact "fairly traceable" to the levy itself, as necessary to contest that tax in this lawsuit, keeping in mind that "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish." Lujan, 504 U.S. at 562, 112 S. Ct. at 2137; see also Warth v. Seldin, 422 U.S. 490, 499, 95 S. Ct. 2197, 2205 (1975) ("[T]his Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."). The Department's appraiser has avowed that it has valued only property "owned" by Calpine and has not and does not intend to value any property owned by the Tribe. See Affidavit of Bob Williams, ¶¶44-46. The Tribe has offered as evidence that

it has "some interest" in this property only the allegations in its Complaint, supported by the Lease attached thereto as an exhibit.

The Tribe argues that the United State Supreme Court has held in other cases where a state or county government has assessed for tax purposes property in which an entity such as the Tribe "has some claim of right," the Tribe is the real party in interest with standing to protect its sovereignty over the property in question. See v. County of Allegheny, 322 U.S. 174, 177-85, 64 S. Ct. 908, 911-15 (1944); United States v. State of Colorado, 627 F.2d 217, 218 (10th Cir. 1980), aff'd sub nom Jefferson County v. United States, 450 U.S. 901, 101 S. Ct. 1335 (1981). This Court, however, finds the cases cited by the Tribe are distinguishable, and do not control the Court's ruling on standing of the Tribe here. In each of those cases, the record showed that the United States owned the property for which the private third party was being taxed, either by title, or in fee simple. See United States v. County of Allegheny, 322 U.S. at 178-81, 64 S. Ct. at 911-914 (pursuant to the government contract, title to the property vested in the government upon delivery to the site and acceptance); United States v. State of Colorado, 627 F.2d at 218 (the parties stipulated that the land and buildings were owned in fee simple by the United States). Here, the record does not show that the Tribe owns the property at issue, either by title or in fee simple. Rather, the Lease shows only that upon termination of the Lease in 50 years or upon earlier expiration, Calpine "shall leave all improvements in place on the Leased Land . . .." See Complaint ¶¶6,7; Lease at Ex. A to Complaint, p. 7, ¶4.3. The Lease, however, also specifically provides that "[t]hroughout this Lease Term, all buildings, improvements,

fixtures, machinery and equipment of whatever nature at any time constructed, placed or maintained on any party of the Leased Land shall be the property of Calpine." Lease at Ex. A to Complaint, pp.16-17, ¶8.6 (emphasis added). On this record, the Court holds that the Supreme Court's rulings in County of Allegheny and Jefferson County do not support standing in this case. See States v. County of Allegheny, 322 U.S. at 178-81, 64 S. Ct. at 911-914; United States v. State of Colorado, 627 F.2d at 218, aff'd sub nom Jefferson County v. United States, 450 U.S. 901, 101 S. Ct. 1335 (1981).

The Court also finds that the additional cases cited by the Tribe in support of its argument that a tribe has standing to challenge a state tax on a third party are not helpful to the issue of the Tribe's standing to proceed in U.S. District Court. In each of these cases, the record showed the plaintiff owned the property on which a tax was being assessed against a third party. More significantly, none of these cases specifically addressed the issue of an Indian tribe's or the United States's standing to object to tax imposed on a third party. See United States v. City of Detroit, 355 U.S. 466, 468, 78 S. Ct. 474, 476 (1958) (United States challenged taxes assessed against third party on plant owned by the government); United States v. County of Fresno, 429 U.S. 452, 453, 97 S. Ct. 699, 700 (1977) (United States challenged state taxation of federal employees in housing owned by the federal government); Cotton Petroleum v. New Mexico, 490 U.S. 163, 170, 109 S. Ct. 1698, 1704 (1989) (Jicarilla Apache Tribe participated in the case challenging taxes imposed by state on third party, in state proceedings below and at the U.S. Supreme Court, only as an amicus curiae); lle Reservation, 447 U.S. 134, 139-44, 100

S. Ct. 2069, 2074-775 (1980) (tribes complained of state sales taxes applied to on-reservation transactions, specifically involving Indian-owned vehicles and the tribal cigarette businesses); Squaxin Island Tribe v. Washington, 781 F.2d 715, 717 (9th Cir. 1986) (tribes challenged the authority of the state to regulate and tax tribal liquor sales to non-Indians); Fort Mojave Tribe v. County of San Bernadino, 543 F.2d 1253, 1256 (9th Cir. 1976)(tribes challenged the authority of the state to tax third party non-Indians on their leasehold interests in tribal land); Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184, 1185 (9th Cir. 1971) (tribe challenged the authority of county to tax third parties on their leasehold interests in tribal land).

The Tribe alleges ownership of the personal property at issue, specifically the improvements that constitute the electrical generation power plant, solely based on its allegations and the Lease provisions themselves that restrict Calpine's rights with respect to these improvements, and dictate that these improvements will remain on the Leased Land at the expiration of the Lease in 50 years, or upon earlier termination of the Lease. See Complaint ¶¶6,7. Because of its control over the improvements, and the provision directing that the improvements remain on the Leased Land when the Lease expires in 50 years or by earlier termination, the Tribe argues, the improvements belong to the Tribe. In its Response to Defendants' Motion to Certify (Dkt. #113), the Tribe again cites a trilogy of opinions in which the Arizona Court of Appeals held that for purposes of the tax statutes then in existence, where a lease significantly restricts the lessee's authority to control and dispose of the improvements thereon, the lessee should not be considered owner of the improvements.

See Airport Properties v. Maricopa County, 195 Ariz. 89, 93-97, 985 P.2d 574, 578-92 (Ct. App. 1999) (holding that lessees did not own the improvements they had built on airport land, but held only possessory interests in the improvements, based on the lease provisions restricting their control over the improvements and vesting title in the lessor upon expiration of the lease); Cutter Aviation, Inc. v. Arizona Dept.of Revenue, 191 Ariz. 485, 491, 958 P.2d 1, 7 (Ct. App. 1997) (holding that lessees did not own the improvements they had built on airport land, but held only possessory interests in those improvements, based on the lease provisions restricting their control over the improvements and vesting title in the lessor upon expiration of the lease); Maricopa County v. Novasic, 12 Ariz. App. 551, 553, 473 P.2d 476, 478 (1970) (holding that building belonged to tax-exempt entity based on general rule that permanent structures placed by a tenant upon leased premises belong to the lessor, unless the parties by express agreement state otherwise).

In the Airport Properties, Cutter Aviation, and Novasic cases, the Arizona Court of Appeals construed the common law definition of the term "ownership" in the context of statutes that provided for lower tax rates for "possessory interests," see Airport Properties, 195 Ariz. at 92-94, 985 P.2d at 577-79, Cutter Aviation, 191 Ariz. at 491, 958 P.2d at 7, and the common law principle that permanent structures placed by a tenant on leased premises are generally deemed to be "real property improvements" owned by the lessor, and cannot be taxed as "unsecured personal property" of the lessee. See Novasic, 12 Ariz. App. at 555, 473 P.2d at 480. In the current tax scheme, the terms "real property improvements" and "personal property" are defined terms, and the statute taxes "property, owned or leased, and *used* by the

taxpayer" for operation of an electrical generation facility. A.R.S. 42-14151(A)(4) (emphasis added). Based on these differences, the Court is not convinced that the Arizona Court of Appeals, in this trilogy of cases cited by the Tribe, has addressed "ownership" for property tax purposes under the current tax scheme.

Moreover, this Court is no longer convinced, after reviewing the briefing that has been filed in the six months since its Order of September 4, 2003 (Dkt. #64), in which the Court denied without prejudice Defendants' Rule 56(f) Motion, that this trilogy of cases limits this Court's inquiry as to ownership for standing purposes to the four corners of the Lease. In none of these cases does the Court of Appeals expressly exclude evidence beyond the four corners of the leases to determine ownership. See generally Airport Properties, 195 Ariz. 89, 985 P.2d 574; Cutter Aviation, Inc., 191 Ariz. 485, 958 P.2d 1; Novasic, 12 Ariz. App. 551, 473 P.2d 476, 478. Moreover, in determining whether the government landlord owns property for purposes of a lessee's challenge of state taxation, notwithstanding a provision in the lease that the improvements would remain on the government land at the termination of the lease, the United States Supreme Court held that if the lease term is longer than the useful life of the improvements on the government land, the lessee owns the improvements for tax purposes. See Offutt Housing Company v. County of Sarpy, 351 U.S. 253, 261-62 and n.1, 76 S. Ct. 814, 819-20 and n.1 (1956). Here it is undisputed that term of the Lease is longer than the estimated useful life of the electric generation power plant. See Affidavit of Gary C. Harpster, ¶32, attached as Ex. 4 to Defendants' Controverting Statement of Facts; Complaint, at Ex. A ¶4.1. The Lease is for a term of 50 years, while the estimated useful life of the

electric generation plant is 30 years. See id. Moreover, the Lease allows Calpine to remove, without consent of the Tribe, any portion of the plant that is worn out, obsolete, defective, or not useful. Lease Modification No. 2, Ex. 8 to Defendants' Controverting Statement of Facts 8, ¶8.2.5. On these facts, under the rule of Offutt Housing Company, the electric generation plant is owned by Calpine for tax purposes. See Offutt Housing Company, 351 U.S. at 261-62 and n.1, 76 S. Ct. at 819-20 and n.1.

To the extent that the Airport Properties, Cutter Aviation, and Novasic cases provide guidance to this Court on the Tribe's ownership of the personal property at issue here under the present tax scheme, however, this Court finds that these cases do not support the Tribe's claim of standing to challenge the current property tax scheme, because they do not address the specific Lease provisions or issues presented here. The Lease at issue here does provide, like the leases interpreted in the Airport Properties, Cutter Aviation, and Novasic cases, that "Calpine shall leave all Improvements in place on the Leased Land in good repair and in safe condition" at the expiration of the Lease in 50 years or its earlier termination. See Complaint, Ex. A ¶4.3. The Lease defines "Improvements" as including the electric generation power plant at issue in this lawsuit, as follows:

> 1.8. "Improvements" means all buildings, structure, improvements comprising the electric generation power plant specified in Section 5.1 and other improvements now existing or hereafter constructed on the Leased Land and any and all betterments thereof, including, without limitation, the Infrastructure Improvements.

Complaint, Ex. A ¶1.8. This Lease, however, unlike the leases at issue in the Airport Properties, Cutter Aviation, and Novasic cases, provides that Calpine may remove or replace any Improvements without prior consent of the Tribe in order to preserve their value if they

become obsolete, defective or worn out. See Lease Modification No. 2, ¶3, modifying ¶8.2.5 of the Lease, attached as Ex. 8 to Defendants' Controverting Statement of Facts.

More significantly, this Lease expressly provides, unlike the leases at issue in the Airport Properties, Cutter Aviation, and Novasic cases, that the electric power generation plant "shall be the property of Calpine" during the term of the Lease. Paragraph 8.6 of the Lease specifically provides as follows:

> 8.6 Calpine's Ownership of Improvements and Fixtures. Throughout this Lease Term, all buildings, improvements, fixtures, machinery and equipment of whatever nature at any time constructed, placed or maintained on any part of the Leased Land shall be the property of Calpine.. ..

Complaint, Ex. A ¶8.6 (emphasis added). On the record before it, where the Lease expressly provides that the improvements, here the electric power plant, belong to Calpine during the term of the Lease, the Court finds that the trilogy of cases cited by the Tribe do not support its claim of ownership. See Airport Properties, 195 Ariz. at 93-97, 985 P.2d at 578-92; Cutter Aviation, Inc., 191 Ariz. at 491, 958 P.2d at 7; Novasic, 12 Ariz. App. at 553, 473 P.2d at 478.

At oral argument, counsel for the Tribe informed this Court that an identical provision stating that the property belong to the tenant during the lease term was contained in the lease at issue in Cutter Aviation, Inc., and that the Arizona Court of Appeals nevertheless found that the government entity owned the property for purposes of assessment of property taxes. This Court has reviewed the published opinion in Cutter Aviation, Inc., however, and finds no reference to a provision in that lease stating that the property belonged to the tenant during the term of the lease. Moreover, in each of the trilogy of cases cited by the Tribe, the Arizona

Court of Appeals specifically held that the property would be considered real property improvements with ownership in the lessor because of the absence in the lease of clear and express language evidencing an intent to treat the property as personal property owned by the tenant. See Airport Properties, 195 Ariz. at 95, 985 P.2d at 580; Cutter, 191 Ariz. at 492, 958 P.2d at 8; Novasic, 12 Ariz. App. at 554, 473 P.2d at 479. Here, on the other hand, there is clear and express language in the Lease providing that the improvements "shall belong to Calpine" during the term of the Lease. See Complaint, Ex. A, ¶8.6. On this record, the Court finds that Airport Properties, Inc., Cutter Aviation, and Novasic are distinguishable, and the record fails to support the Tribe's claim that the electric generation facility "belongs to the Tribe" for purposes of determining whether the Tribe has been injured by the assessment of taxes against Calpine, necessary to afford the Tribe standing in federal court to bring this lawsuit. Cf. Airport Properties, 195 Ariz. at 95, 985 P.2d at 580; Cutter, 191 Ariz. at 492, 958 P.2d at 8; Novasic, 12 Ariz. App. at 554, 473 P.2d at 479

The Court further finds that while the Tribe may have some interest in exercising sovereign governmental authority that may be peripherally affected by the taxes imposed on Calpine's use of the electrical generation power plant on the Tribe's land, this interest is insufficient to create standing in U.S. District Court for the Tribe to challenge the taxes imposed on Calpine. See Lujan, 504 U.S. at 562, 112 S. Ct. at 2137 ("when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish"); see also Warth v. Seldin, 422 U.S. 490, 499, 95 S. Ct. 2197, 2205 (1975) ("[T]his Court has held that the

plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."). This Court also finds that any reduction in the Tribe's own tax revenue resulting from the State's imposition of taxes on Calpine is the direct result of the Tribe's and Calpine's negotiated Lease, and is not "fairly traceable" to the conduct of the Arizona Department of Revenue, as necessary to show the second element of standing, causation. See Lujan, 504 U.S. at 560-61, 112 S.Ct. at 2136-37. Finally, it is undisputed that the State has not undertaken any collection procedures against the Tribe, or for that matter, Calpine, and thus any injury from such procedures is merely hypothetical at this point and does not give rise to standing. For these reasons, on the record here, the Court finds that the Tribe has not met its burden to show that it has suffered an injury "fairly traceable" to the imposition of taxes on Calpine.

The Court is further convinced that the Tribe's exemption from the bar of the Tax Injunction Act, 28 U.S.C. § 1341, is not intended for circumstances such as this. The exemption is designed to allow an Indian tribe to bring a lawsuit to protect its own property from state taxation in federal court, not to allow an Indian tribe to bring a lawsuit to protect a private party's property, located on the Indian tribe's land, from taxation. On this record, the Court finds that the Tribe's lawsuit is barred by 28 U.S.C. §1341. See United States v. County of Nassau, 79 F.Supp.2d 190, 191-92 (E.D.N.Y. 2000) (holding that the federal government is entitled to an exemption from the Tax Injunction Act only when it establishes that it is challenging taxes on its instrumentalities or to effectuate its own statutes and policies).

For the foregoing reasons, this Court finds that the Tribe lacks standing to bring this lawsuit.

Accordingly,

IT IS HEREBY ORDERED granting The Department's Motion to Dismiss the Tribe's Complaint (Dkt. #102);

IT IS FURTHER ORDERED denying for lack of subject matter jurisdiction Fort Mojave Indian Tribe's Motion for Summary Judgment (Dkt. #52);

IT IS FURTHER ORDERED denying for lack of subject matter jurisdiction Defendants' Motion to Certify the State Law Issues to the Arizona Supreme Court (Dkt. #103);

IT IS FURTHER ORDERED directing the Clerk to enter Judgment accordingly.

DATED this 30th day of March, 2004.

Mary H. Murguia
United States District Judge

I hereby attest and certify on 10-18-05 that the foregoing document is a full, true and correct copy of the original on file in my office and in my custody.

CLERK, U.S. DISTRICT COURT
DISTRICT OF ARIZONA

by _____ Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Fort Mojave Indian tribe, a federally recognized Indian Tribe,

Plaintiff,

vs.

Mark W. Killian, Director of the Arizona Department of Revenue; and Mohave County, a political subdivision of the State of Arizona,

Defendants.

No. CIV-02-1212-PCT-MHM

ORDER

Currently, before the Court is Plaintiff Fort Mojave Indian Tribe's ("Tribe") motion to alter or amend judgment of the Court's Order granting Defendants' motion to dismiss the complaint, which the Court will construe as a motion for reconsideration. Also, before the Court is Defendants' ("the Department") motion to exclude and strike the Tribe's exhibits to its motion to alter or amend judgment, and Defendants' motion for ruling on pending motions.

I. Background

On June 28, 2002, the Fort Mohave Indian Tribe ("the Tribe"), a federally recognized Indian tribe, filed a claim for Declaratory and Injunctive Relief against Mark W. Killian, director of the Arizona Department of Revenue (the Department of Revenue"). The Tribe

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alleged that the Department of Revenue was undertaking to assess and collect tax on an electric generation-plant and related facilities that are located on the Fort Mohave Indian Reservation and that belong to the Tribe, in violation of the Constitution and laws of the United States and the Constitution and laws of Arizona.

The Complaint alleged that the Tribe entered into a lease ("the Lease") with Calpine Construction Finance Company ("Calpine") in 1999. The Lease granted Calpine the use of part of the Tribe's trust land in the State of Arizona for the development and operation of an electric generation power plant and related facilities ("power plant"). The Department of Revenue valued the personal property used by Calpine in operating the electrical general facility on the Fort Mohave Indian Reservation at $88,000,000 for the 2003 tax year. The Tribe alleged that during the term of the lease, Calpine's obligation to pay taxes to the Tribe will be reduced on a dollar-for-dollar basis by the amount of state, county, or local taxes paid by Calpine to the Department.

On March 31, 2004, the Court granted the Department's motion to dismiss the Tribe's complaint for lack of subject matter jurisdiction, concluding the Tribe lacked standing to challenge the tax because the record failed to support the Tribe's claim that the power plant belonged to the Tribe for purposes of determining whether the Tribe had been injured by the assessment of taxes against Calpine. Currently, before the Court is the Tribe's motion to alter or amend the March 31, 2004 order granting the Department's motion to dismiss the Tribe's complaint.

II. Legal Standard

Motions for reconsideration are disfavored and are only appropriate if the Court "(1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." Sch. Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993). A motion for reconsideration is not the place for the moving party to make new arguments not raised in its original briefs. Northwest Acceptance Corp. v. Lynnwood Equip., Inc., 841 F.2d

918, 925-926 (9th Cir. 1988). Nor is it the time to ask the Court to rethink what it has already thought. United States v. Rezzonico, 32 F. Supp. 2d 1112, 1116 (D. Ariz. 1998).

III. Discussion

The Tribe's motion for reconsideration raises several arguments. The Tribe does not present the Court with newly discovered evidence or an intervening change in controlling law. Accordingly, to prevail on its motion for reconsideration, the Tribe must demonstrate that the Court committed clear error when granting Defendants' motion for summary judgment.

A. Unpublished Arizona Court of Appeals opinions are inapplicable to this matter because offensive collateral estoppel cannot be used against the Department.

The Tribe's first argument supporting its motion for reconsideration is premised on two Arizona Court of Appeals unpublished opinions. Arizona Court's unpublished dispositions are not precedent any may not be cited to any court unless " relevant under the doctrine of law of the case, res judicata, or collateral estoppel." ARIZ. R. APP. PRO. 9TH CIR. 28 (c) (2005). In clarifying why citation to unreported cases is improper, the Ninth Circuit reasoned:

> That a case is decided without a precedential opinion does not mean it is not fully considered, or that the disposition does not reflect a reasoned analysis of the issues presented. What it does mean is that the disposition is not written in a way that will be fully intelligible to those unfamiliar with the case, and the rule of law is not announced in a way that makes it suitable for governing future cases.

Hart v. Massanari, 266 F.3d 1155, 1177-78 (9th Cir. 2001).

At issue, is whether the two unpublished opinions may be used to collaterally estop the Department from relitigating whether the Tribe had ownership interest in the taxed property so as to be cited and relevant material for the Court to review. In determining whether a Plaintiff may utilize an Arizona judgment to offensively collateral estop the Department, the Court applies Arizona's law of collateral estoppel. See 28 U.S.C. § 1738; In re Bugna, 33 F.3d 1054, 1057 (9th Cir. 1994). Arizona does not permit nonmutual or

offensive collateral estoppel against the government. First Interstate Bank of Ariz. v. Ariz. Dep't of Revenue, 916 P.2d 1149, 1152 (Ariz. Ct. App. 1995), *disapproved on other grounds by* Rogers Corp. v. Ariz. Dep't of Revenue, 927 P.2d 817, 818 n.1 (Ariz. Ct. App. 1996).

Plaintiff argues in First Interstate, the Arizona Court of Appeals limited its holding to the unique facts of that case. In First Interstate, the plaintiffs contended that the Department should be estopped from arguing the county assessor had properly placed Bank personal property on the unsecured tax roll because it had litigated, lost, and failed to appeal that issue against a different taxpayer. The Court of Appeals held that offensive collateral estoppel was unavailable against the government. Although the Court of Appeals stated the application of offensive collateral estoppel was impermissible in the "present case," the Court went on to discuss the strong public policy for prohibiting the use of offensive collateral estoppel against the government in general. Id.

> It would be bad policy to require the government, in every instance, to appeal every adverse decision for fear of being foreclosed from relitigating the same issue against a different party in the future. Such a requirement would put an undue burden on the state.

Id. at 1152.

Furthermore, review of subsequent Arizona decisions belays Plaintiff's argument. See Aida Renta Trust v. Dep't of Revenue of State of Ariz. 3 P.3d 1142, 1152-53 (Ariz. Ct. App. 2000). In Aida Renta, at issue in pertinent part, was whether the trial court had permitted Plaintiff to use offensive collateral estoppel against the Department. The Court of appeals concluded the trial court had based its ruling on alternative grounds, and "most definitely did not hold that the taxpayers were entitled to summary judgment due to the collateral estoppel effect of the Evans-Withycombe settlement." Id. at 1153.

Although not addressing the result had the trial court permitted offensive use of collateral estoppel, what is particularly relevant is the Court of Appeal's analysis regarding the use of collateral estoppel against the Government. Specifically, the Court cited First Interstate as "holding offensive collateral estoppel unavailable against [the] government" and commented "ADOR and the County contend that the taxpayers thus used collateral estoppel

against the government 'offensively' *in contravention of our holding in First Interstate Bank*." Id. at 1152-53 (emphasis added). Furthermore, Plaintiff does not cite, nor could the Court locate any Arizona case permitting the use of offensive collateral estoppel against the government. Therefore, pursuant to Arizona law, the Tribe cannot use offensive collateral estoppel against the Department.

Plaintiff appears to argue that regardless of whether offensive collateral estoppel is permitted against the Department, collateral estoppel is irrelevant because Arizona recognizes the doctrine of virtual representation. El Paso Natural Gas Co. v. Arizona, 599 P.2d 175, 178 (1979) *cert. denied* 445 U.S. 938 (1980). Furthermore, the doctrine of virtual representation, is binding on subsequent taxpayer litigants and not the government. Martin v. Whiting, 181 P.2d 819, 821(Ariz. 1947); El Paso Natural Gas Co., 599 P.2d at 178. Accordingly, virtual representation is not applicable to bind the Department and even if it were, virtual representation is not a basis to cite an unpublished opinion in the Ninth Circuit.

Therefore, Plaintiff has failed to establish a permissible basis for the Court to review the two cited unpublished Arizona Court of Appeals decisions. The ARIZ. R. APP. PRO. 28(c) makes it clear that it is improper to cite their unpublished opinions to the Court. Therefore, the Court will grant Defendant's motion and strike Plaintiff's citation to unpublished opinions and the attachments thereto. See Reed v. Avis Rent-A-Car, 29 F. Supp.2d 1121, 1128 (N.D. Cal.,1998) (granting Plaintiff's motion to strike all references to unpublished dispositions).

B. The Court reviewed the entire Lease and based its decision on the terms of the Lease as a whole.

Secondly, the Tribe argues that the Court committed clear error by focusing solely on ¶ 8.6 of the Lease, instead of reading all portions of the lease together as required by the Cutter line of cases. The Court carefully and thoroughly reviewed the Lease, all of its provisions, and the Cutter line of cases, when concluding that the Tribe had failed to allege an injury fairly traceable to the tax assessment because the power plant did not "belong to the Tribe." Accordingly the Tribe's second argument is not a permissible basis for

reconsideration because a motion for reconsideration is not a time to ask the Court to rethink what it has already thought. Rezzonico, 32 F. Supp. 2d at 1116.

Nonetheless, the Tribes' argument is without merit. In granting the Department's motion to dismiss, the Court concluded the Cutter trilogy was inapplicable to the instant Lease for several reasons. First, the Court noted under the Cutter line of cases Arizona Courts applied the common law principles that permanent structures placed by a tenant on lease premises are generally deemed real property improvements owned by the lessor, whereas, under the instant Lease the current tax scheme defined real property improvements and personal property as "property, owned or leased, and used by the taxpayer." Ariz. Rev. Stat. §42-14151(A)(4) (2004). The Cutter trilogy is distinguishable from the instant Lease because under the current tax scheme the Department taxes the use of the facility instead of a possessory interest in the property as in the Cutter line of cases. In contrast to the Cutter line of cases the 2003 amendments to the Arizona Revised Statutes, specifically provided for tax assessment of Calpine's use of the facility. In the Cutter cases there was no statutory provision providing for taxation of the possessory interest in the airport property.

Secondly, the Court distinguished the Cutter cases because the term of the Lease was longer than the estimated useful life of the electrical generation power plant. There was no evidence in the Cutter cases that the lease term was longer than the useful life of the taxed property. Third, reading the Lease in its entirety, the Court noted marked differences between the instant Lease and those in the Cutter line of cases. Specifically, while the Lease provided that Calpine shall leave all improvements "in good repair and safe condition" it also permitted Calpine to remove or replace any improvements without prior consent of the Tribe in order to preserve their value. See ¶ 4.3, Lease Modification no. 2, ¶3; (4). Specifically, the Lease provided that the improvements "shall be the property of Calpine" during the term of the Lease. ¶ 8.6.

Turning to the actual Cutter lease.[1] Counsel noted during oral argument "I argued the cutter cases all the way through the trial court to the court of appeals. The lease at issue in Cutter says the exact same thing this lease said. It said that during the term of the lease, the Southwest maintenance facility belonged to Southwest Airlines. At the end of the lease, it belonged to the City of Phoenix." Transcript, 3.22.2440, pg. 88, l. 17-23.

However, the Cutter lease provides:

> Lessee's improvements upon the termination of the lease for any cause, shall become the property of the Lessor, subject only to the rights of approved leasehold encumbrance holders, with trade fixtures remaining the property of Lessee so long as the removal of such fixtures, at Lessee's sole expense, does not result in material damage to the demised premises which cannot be repaired to the satisfaction of the Aviation Director. Ex. C at ¶ 10, 23.

The Cutter lease provision provides restrictions of the lessee's rights to remove trade fixtures only if removal of the improvements, a maintenance facility and hangar, would not materially damage the premises. In Cutter, the Court concluded because the lease "significantly restricted the lessee's authority to control and dispose of the improvements thereon, the lessee should not be considered to be the 'owner of the improvements." Cutter, 958 P.2d at 7. However, the instant Lease does not have any similar "materially damage" restriction on the right of Calpine to remove the personal property. Morever, as stated above the term of the instant Lease was longer than the estimated useful life of the power plant. There was no evidence in the Cutter cases that the lease term was longer than the useful life

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[1]The Department moved to strike the Cutter lease because it is not newly discovered evidence and because it lacks authentication and identification. Motions to strike are disfavored because they are "often used as delaying tactics, and because of the limited importance of pleadings in federal practice." Colaprico v. Sun Microsystems, Inc., 758 F. Supp. 1335, 1339 (N.D. Cal.1991). As the Tribe's counsel was also counsel for Southwest Airlines, a party in the Cutter case, the Court concludes, counsel's avowal that the Cutter lease is a true and correct copy of the Lease reviewed in Cutter is sufficient authentication for purposes of this motion. Cf. FED. R. EVID. 901(b)(1) (providing "testimony that a matter is what it is claimed to be" satisfies authentication and identification requirements).

of the maintenance facility and hangar. Therefore, the Court concluded based on the marked differences in the instant Lease, the Cutter line of cases was inapplicable.

C. The Court reviewed the entire Lease, including paragraph 14.1 when concluding that the Lease term exceeded the useful life of the electrical generation facility.

Plaintiff next argues that the Court failed to take into consideration ¶ 14.1 of the Lease, when determining the useful life of the plant was only 30 years. The Court reviewed the entire Lease, including ¶ 14.1 when concluding that the Lease term exceeded the useful life of the electrical generation facility. Accordingly the Tribe's third argument is not a permissible basis for reconsideration because a motion for reconsideration is not a time to ask the Court to rethink what it has already thought. Rezzonico, 32 F. Supp. 2d at 1116. Nonetheless, ¶ 14.1 provides:

> Calpine's Duty to Maintain. Throughout the term of the Lease, Calpine shall, at Calpine's sole cost and expense, maintain the Property and all Improvements thereon in proper working condition and repair (including landscaping and parking), making all necessary substitutions and replacements.

"For motions to dismiss under Rule 12(b)(1), unlike a motion under Rule 12(b)(6), the moving party may submit affidavits or any other evidence properly before the court.... It then becomes necessary for the party opposing the motion to present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction." Association of Am. Med. Colleges v. United States, 217 F.3d 770, 778-79 (9th Cir.2000). Plaintiff did not present any evidence, contradicting evidence presented by the Department that the useful life of the plant was 30 years. Additionally, Plaintiff has not presented any evidence that ¶ 14.1 would extend the useful life. Instead, the Court looked to the affidavit of Gary Harpster which provided: "once constructed the plant does not have any other economically viable uses, the power plant facilities have a finite physical life and is subject to technical obsolescence." Harpster affid. at ¶¶44, 46. Furthermore, in preparing the estimate of 30 years Burns & McDonnel incorporated

maintenance within the 30 year estimate, stating "[t]his design life is based on normal maintenance and operation." Harpster affid. pg. 6.

Burns & McDonnel thoroughly evaluated the effect of ongoing maintenance of the power plant, stating "[the design life] estimate is an average, and can be altered depending on the degree of maintenance . . . Maintenance is a key activity that affects the life of a combined-cycle plant. Id. at pp 2-3. Furthermore, a significant factor in estimating the useful life of the power plant was functional obsolescence, new technology making power plants more efficient

Accordingly, the estimate factored in the maintenance required by ¶14.1 What is more, the Tribe to date has not provided any evidence to contradict the 30-year estimate. Accordingly, the Court did not commit clear error when reviewing the Lease as a whole and determining Calpine owned the facility under the terms of the Lease, because the term of the Lease is longer than the estimated useful life of the electric generation power plant.

D. Affidavits of Gary Harpster and Robert Williams

The Tribe asserts that the Court committed clear error by relying on the affidavits of Gary Harpster and Robert Williams. The Tribe asserts that it controverted their respective affidavits in its March 17, 2004 Controverting Statement of Facts, but due to the complicated procedural posture of the case, the Court did not review its information. However the Court reviewed all of the papers and attachments thereto when granting Defendants motion to dismiss. Accordingly the Tribe's third argument is not a permissible basis for reconsideration because a motion for reconsideration is not a time to ask the Court to rethink what it has already thought. Rezzonico, 32 F. Supp. 2d at 1116.

Despite that, the Tribe is raising these objections now, so the Court will consider them to the extent the Court can discern the nature of the objections. The Court notes that the Tribe has failed to provide any citations to specific exhibits or objections, and has merely requested the Court to review Calpine's statement of facts in support of its response to

Defendant's cross-motion for summary judgment (Dkt. 81) and the Tribe's controverting statement of facts (Dkt. #130).

In regards to Gary Harpster's affidavit, the Tribe objects to its relevance because it is based on accounting principles that are not relevant to Arizona law and to the estimate that the useful life of the plant did not exceed 30 years "as being completely irrelevant to the application of Arizona case law holding that, for property tax purposes, this Facility is treated as if owned by the Tribe." Based on the discussion herein, the Court concluded that the useful life of the plant was relevant based on its conclusion that the Cutter line of cases was distinguishable, the rule from Offhut Housing, and Article III's standing requirement that an injury be fairly traceable to the statute,

In regards to Robert Williams' affidavit, it appears to the Court that the Tribe primarily argues that Mr. William's affidavit contains improper legal conclusions. The Court disagrees. Mr. Williams personally valued the property at issue and explained his valuation methodology. ¶ 1, 25-31. Furthermore, the only controverting evidence provided was Michele Blanco's statement that it appeared that the Department appraisal covered the entire power plant. The Court struck Ms. Blanco's affidavit because it failed to provide a foundation of personal knowledge. The Tribe's argument it need not contradict the Department's affidavit in a motion to dismiss for lack of subject matter jurisdiction is an erroneous interpretation of the 12(b)(1) standard Association of Am. Med. Colleges, 217 F.3d at 778-79 (commenting it is "necessary for the party opposing the 12(b)(1) motion to present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction.")

E. Offutt Housing

Next, Plaintiff argues that the Court committed clear error in relying Offutt Housing because the facts and legal issues in Offutt Housing are distinguishable from the instant case. The Court has reviewed the factual and legal basis of this case and previously determined applied. Accordingly the Tribe's third argument is not a permissible basis

for reconsideration because a motion for reconsideration is not a time to ask the Court to rethink what it has already thought. Rezzonico, 32 F. Supp. 2d at 1116.

Nonetheless, the Tribe's argument fails. The Tribe primarily argues that Offutt Housing is distinguishable because there was nothing in Offutt Housing to indicate that the contractor was required to turn over virtually new buildings at the expiration of the lease term. As indicated above, there is likewise nothing in ¶ 14.1 that indicates Calpine was required to turn over a virtually new plant, instead ¶ 14.1 indicates Calpine was required to maintain the plant. However, the thirty year estimated useful life of the power plant included maintenance.

Furthermore, the lease at issue in Offutt Housing seemed to indicate that the corporation was required to maintain the premises, stating "[the corporation] agreed to comply with regulations prescribed by the Commanding Officer for military requirements for safety and security purposes, consistent with the use of the leased land for housing." Id. at 255. While not dispositive of the issue of maintenance, it seems reasonable to surmise that at a minimum the corporation would have had to maintain military housing for safety purposes.

Additionally, the Tribe argues that Offutt Housing is distinguishable because it was based on the interpretation of the Military Leasing Act of 1947 and the Wherry Military Housing Act of 1949. In Offutt Housing, a private corporation built housing improvements on government land, which the corporation had leased for 75 years. The state of Nebraska sought to tax those improvements. At issue was whether Congress had permitted taxation of these improvements through various acts. After interpreting the acts, the Court held that Congress had permitted taxation. Next, the Court addressed the lessee's interest in the value of the property for taxation purposes. Holding that the corporation owned the improvements, the Court reasoned that the lease was for a term of 75 years, while the building and improvements had a useful life of 35 years. Based on the sole fact that the life of the

improvements was less than the term of the lease, the Court concluded the corporation owned the improvements and affirmed Nebraska's taxation assessment. Id.

Therefore, while the Court did in fact construe whether Congress had permitted taxation of these improvements, after determining that distinct issue, the Court then evaluated the respective interests in the property. In the instant case, there was uncontroverted evidence that the useful life of the facility was 30 years, while the Lease term was 50 years. The Court correctly concluded "[o]n these facts, under the rule of Offutt Housing Company, the electric generation plant is owned by Calpine for tax purposes."

F. The Tribe lacks standing to challenge the constitutionality of Ariz. Rev. State. § 42-14151 because they have not suffered an injury fairly traceable to the enforcement of that statute.

The Tribe renews its argument that section 42-14151 (A)(4) is unconstitutional because it mandates the Tribe's reservation property that is leased to Calpine be made subject to the state's ad valorem tax. Additionally, the Tribe argues the test for property tax purposes under the Supremacy Clause of the Constitution does not turn on a determination of who owns the property.

Federal courts do not have jurisdiction to "adjudicate challenges to state measures absent a showing of actual impact on the challenger." See, e.g., Golden v. Zwickler, 394 U.S. 103, 110 (1969). The Tribe does not have standing to challenge the constitutionality to section 42-14151 (A)(4) because the Tribe has failed to show that it suffered or will imminently suffer an injury in fact "fairly traceable" to the Department's assessment of taxes on the property at issue because the record failed to support the Tribe's claim that the power plant belonged to the Tribe. Additionally, any impact on the Tribe's exercise of sovereign governmental authority was insufficient to create standing.

IV. Conclusion

This Court has reviewed Plaintiff's motion for reconsideration and finds no grounds for reconsideration. See Sch. Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc., 5 F.3d at 1263 (setting forth three circumstances where reconsideration is appropriate); United

States v. Rezzonico, 32 F. Supp. 2d 1112, 1116 (D. Ariz. 1998) (motions for reconsideration should not be used to ask the court "to rethink what the court had already thought through – rightly or wrongly.").

Accordingly,

IT IS HEREBY ORDERED that Plaintiff's motion to alter or amend judgment is denied. (Dkt. # 142).

IT IS FURTHER ORDERED that Defendant's motion to exclude and strike Plaintiff's exhibits to its motion to alter or amend judgment is granted in part and denied in part. (Dkt. # 148) As to Exhibits A and B, Defendant's motion to granted. As to Exhibit C, Defendant's motion is denied.

IT IS FURTHER ORDERED that the Clerk of Court is directed to strike from the record Plaintiff's exhibits A and B to its motion to alter or amend judgment (Dkt. #148) in their entirety.

IT IS FURTHER ORDERED that Defendant's motion for a ruling on pending motions is granted. (Dkt. #154). Disposition of the pending motions is located herein.

DATED this 18th day of March, 2005.

Mary H. Murguia
United States District Judge

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
08/16/2006 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2004-000696 08/11/2006

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT
S. Brown
Deputy

CALPINE CONSTRUCTION FINANCE COMPANY PAUL J MOONEY

v.

ARIZONA STATE DEPARTMENT OF REVENUE, et al. JAY C JACOBSON

UNDER ADVISEMENT RULING

Plaintiffs' Motion for Summary Judgment, Defendants' Cross Motion for Summary Judgment, and Defendant ADOR's Motion for Summary Judgment on its Counterclaim, as well as Defendants' two Motions to Strike have been under advisement. The analysis of all of the motions for summary judgment is identical.

The salient facts are that Plaintiff Calpine Construction Finance Company is the builder and operator of an electrical generating plant constructed on land leased from the Fort Mojave Indian Tribe. All parties acknowledge that the tribal land on which the facility is built is exempt from state taxation by federal law. They differ on the ownership of the improvements. The Arizona Department of Revenue and Mohave County (collectively, the "Defendants") assert that the improvements are the property of Calpine, which itself can lay no claim to the tribal exemption. Calpine contends that the improvements are in fact not its property, but the property of the Tribe and thus beyond the reach of the Defendants.

The District decision

As a preliminary matter, the determination of the District Court for the District of Arizona in CIV 02-1212-PCT-MHM that the improvements are Plaintiff's property does not have preclusive effect in this Court. Two elements essential to a claim of collateral estoppel are (1) that there be a final judgment and (2) that the party to be estopped have been a party to that judgment. Neither of those elements is found here.

Under Arizona law, collateral estoppel "attaches only when an issue of fact or law is actually litigated and determined by a valid and final judgment." *In re General Adjudication of All Rights to Use Water in the Gila River System & Source*, 212 Ariz. 64, –, 127 P.3d 882, 888 n.8 (2006). A proceeding stopped for whatever reason before a final judgment on the merits lacks preclusive effect. *Id.* The District Court held that it lacked jurisdiction over the Tribe's claim, and therefore was powerless to issue a judgment at all; the question of ownership of the improvements, while necessary to the District Court's analysis of the statutes governing its jurisdiction, was merely ancillary to the ultimate ruling. Issue preclusion exists only when the action of the first court serves as a bar to action by other courts. RESTATEMENT (2D) OF JUDGMENTS § 27, comment n. The only issue decided by the District Court with finality was whether it possessed subject matter jurisdiction. Unlike the federal courts, whose jurisdiction is limited by Article III of the United States Constitution and by federal statute, the Superior Court has jurisdiction in all cases which involve the legality of an Arizona tax. A.R.S. Const. Art. 6 § 14(2). No other issue was, or could have been, decided by the District Court. There is therefore no issue preclusion in this action. The Supremacy Clause of the United States Constitution does not obligate this Court to follow the statutory interpretation of the District Court. "[T]here is no dispute that the Arizona courts are the definitive expositors of Arizona state law." *Yniguez v. State of Arizona*, 939 F.2d 727, 736 (9th Cir. 1991). The Court thus applies its own analysis.

Calpine was not a party to the federal action; its petition to intervene had been denied by the District Court, on the ground that its claim was not cognizable in federal court under the Tax Injunction Act. *See* CIV 02-1212-PCT-MHM, Order filed March 31, 2004, at 3:4-5. The only claim before the District Court, then, was that the improvements were exempt from state taxation because they were owned by the sovereign Tribe, a claim with which Calpine plainly was not in privity. Calpine therefore cannot be estopped by the District Court ruling.

Defendants further seek to invoke against Calpine the theory of virtual representation, as set forth in *El Paso Natural Gas Co. v. State of Arizona*, 123 Ariz. 219 (1979). It is true that the same property was at issue in the federal action as in this one. Defendants argue that, because the District Court found that the Tribe did not own the improvements, Calpine *a fortiori* must. However, virtual representation can create *res judicata* only when there is a final judgment rendered on the merits by a court of competent jurisdiction. *Id.* at 222. Here, there was no final

judgment on the merits and the District Court itself held that it lacked jurisdiction. The requirements of *El Paso Natural Gas* are thus not met, and the doctrine of virtual representation cannot create *res judicata* against Plaintiff.

The lease under Arizona law

The interplay between sovereignty and the power to tax requires careful scrutiny of the property rights of the respective parties. Utilizing the traditional metaphor of property rights as a bundle of sticks is helpful. Initially, the fee simple owner holds all of the sticks, and the ability to tax the property depends entirely on the owner's status: if the owner is exempt, then all the sticks are exempt, otherwise all are taxable. If the owner decides to lease the property, he retains some sticks and transfers others to the lessee. If both parties to the transaction are subject to tax, it does not matter which of the sticks is deemed the critical one, as it will necessarily be held by a taxable party. If one party is exempt from taxation, however, and the tax regime imposes taxes collectively on the entire bundle rather than on each individual stick (as is the situation in Arizona), it will normally be in the interest of both parties that the exempt party retain the stick that establishes him as "owner." This will be true even if the economic context of the transaction requires that the attributes generally associated with the critical stick be transferred.

Arizona case law provides two tests of ownership. The first, enunciated by the Supreme Court in *City of Phoenix v. State ex rel. Harless*, 60 Ariz. 369 (1943), and reaffirmed in *Cutter Aviation, Inc. v. Arizona Dept. of Revenue*, 191 Ariz. 485 (App. 1997), focuses on the attributes. In this analysis, "'ownership' should be given a liberal construction in order to effectuate the legislature's objective. ... 'The word "owner" has no technical meaning, but its definition will contract or expand according to the subject matter to which it is applied. As used in statutes it is given the widest variety of construction, usually guided in some measure by the object sought to be accomplished in the particular instance. [The] cases thus require us to interpret "ownership" by focusing on the context in which the term is used and on the legislature's objective in enacting the subject legislation.'" *Id.* at 490-91 (quoting *Harless, supra* at 377). The other, set forth by the Court of Appeals in *Maricopa County v. Novasic*, 12 Ariz.App. 551 (App. 1970), and also reaffirmed in *Cutter, supra* at 491, focuses on one particular stick, the reversionary right. Absent express language in the lease evidencing the lessee's ownership at the termination of the lease, the lessor is presumptively the owner of all improvements. *Novasic, supra* at 554-55; *Cutter, supra* at 491. Reconciling these two seemingly contradictory lines can be facilitated by the bundle of sticks analysis. Under *Novasic* and *Cutter*, the critical stick is the reversionary right. But under *Harless* and again *Cutter*, the Court must analyze, within the context of each case, what attributes make the reversionary right stick determinative of ownership, and whether those attributes have in fact been transferred from the exempt to the non-exempt party, regardless of the labels attached to each stick by the parties. Here, the Court must determine whether under

the terms of the lease there is a genuine reversionary right in the improvements that is retained by the Tribe.

Calpine's lease with the Tribe has an initial term of fifty years, with Calpine having an option to continue it for another fifteen years. During the lease period, the improvements are the property of Calpine. Calpine has the right to transfer the improvements and the water rights to another party; the Tribe is obligated not to unreasonably withhold its consent thereto. There are thus no significant restrictions on Calpine's right to control and dispose of the improvements for the duration of the lease. Calpine urges that the lease requires it to preserve the improvements in good order, thus denying it the right to destroy the plant. While the *Cutter* court stated that the right to destroy the property demonstrates ownership, *supra* at 491, it did not expressly state the converse, that absence of the power to destroy proves lack of ownership. The right to destroy is a right which holds more significance in property law theory than its relevance in real life can justify: no rational economic actor would destroy a multi-million dollar industrial facility merely because he has the right to do so. Therefore, the absence of that right weighs but little in the balance.

The State asserts, and Calpine does not appear to contest, that the improvements have an economic life of some thirty years at most; after fifty years, and certainly after sixty-five, their value will be essentially nil, even if they are kept in good repair and in a safe condition, as the lease requires. The lease requires Calpine to maintain the improvements in good repair, but all this means is that at the conclusion of the lease the Tribe will have fifty-year-old or sixty-five-year-old equipment. To look through the other end of the temporal telescope, it is as if the Tribe today took possession of 1940s or 1950s vintage power generating equipment. Even assuming that the equipment is still functioning, its usefulness would be virtually nil; it would be old and prone to breakdown, spare parts would be difficult if not impossible to obtain, and the cost of operation would be far greater than that of more current equipment in competing facilities. This distinguishes the present lease from those of buildings in *Novasic* and *Cutter*. Although buildings do lose some of their economic value as they age, the rate of obsolescence is far slower than that of productive facilities, which face the dual assault of wear and tear and technological advance. The lease permits Calpine to upgrade the improvements now in place with state of the art equipment as time goes on, and were it to do so that equipment would revert to the Tribe; but the lease does not require such modernization. It is Calpine's option to replace, repair, or simply allow the equipment to decline to a state of minimum functionality, and it must be assumed that Calpine will choose the option that maximizes its own profit, without regard to the future profit of the Tribe once it takes over the improvements. Thus, the possibility that the Tribe might in the end have improvements of a newer generation than the early 2000s cannot be considered an attribute of the Tribe's ownership.

To put the matter succinctly, unless Calpine decides otherwise, the terms of the lease insure that Calpine will receive one hundred percent of the productive value of the improvements over their lifetime. What will revert to tribal ownership at the conclusion of the lease is a husk exhausted of all economic potential. In no real sense does future ownership of this empty husk make the Tribe the owner of a multi-million dollar power generation facility. While the Tribe has formally retained the reversionary "stick," the parties have so structured the lease that this stick has been shaved down to a toothpick, leaving Calpine the rest of the bundle. *Harless* forbids, and *Novasic* and *Cutter* do not require, that the Court ignore the entire economic reality of the transaction and declare the toothpick alone determinative.

The Court finds helpful, though not controlling, the guidance provided by the United States Supreme Court in analyzing leasehold interests in the context of federal tax law. "[S]o long as the lessor retains significant and genuine attributes of the traditional lessor status, the form of the transaction adopted by the parties governs for tax purposes. What those attributes are in any particular case will necessarily depend upon its facts." *Frank Lyon Co. v. United States*, 435 U.S. 561, 584 (1978). Analytically, the Court must determine whether the formal allocation of rights under the lease transaction has economic substance beyond the creation of tax benefits. *Casebeer v. Commissioner of Internal Revenue*, 909 F.2d 1360, 1363 (9th Cir. 1990). The Supreme Court recognized that the structure of the lease may be "impelled by business or regulatory realities," and yet insisted that it be "imbued with tax-independent considerations." *Lyon, supra* at 583-84. This Court also recognizes that bona fide "sharing" of the benefits of a sovereign's tax-exempt status has long been employed in Arizona as a tool of economic development. *See, e.g., Maricopa County v. Fox Riverside Theatre Corp.*, 57 Ariz. 407 (1941). However, while the sticks may legitimately be allocated to take full advantage of the sovereign's tax exemption, the sovereign must preserve enough sticks to retain some significant and genuine attribute of its ownership. It cannot surrender everything but the bare title and use that title to cloak the lessee in its exempt status. Here, for the reasons stated, the Tribe's retention of the reversionary right, ordinarily a key indicium of the lessor's ownership, is so attenuated by the terms of the lease that it is no longer "significant and genuine." Nor has the Tribe retained any other significant attributes of ownership in the improvements.

Therefore, IT IS ORDERED:

1. Plaintiff's Motion for Summary Judgment is denied.

2. Defendants' Cross-Motion for Summary Judgment is granted to the extent that they seek a judgment that the improvements are subject to taxation by the State and Mohave County. There is still an issue as to the actual value of the improvements, so full summary judgment is denied.

3. Defendant ADOR's Motion for Summary Judgment on its counterclaim is granted.

Defendants' Motions to Strike

Defendants have filed their Motion to Strike Attachments A and B to Plaintiff's Motion for Summary Judgment and their Motion to Strike Exhibit A to Calpine's Combined Reply and Response. First addressing the former, Attachments A and B to Plaintiff's Motion for Summary Judgment are memorandum decisions of the Court of Appeals. The Arizona rule is that memorandum decisions are not to be cited, save in certain situations, none of which exists here. Ariz.R.Civ.App.P. 28(c); *Walden Books Co. v. Arizona Dept. of Revenue*, 198 Ariz. 584, 589 ¶ 21 (App. 2000). In particular, *Standage Ventures, Inc. v. State of Arizona*, 114 Ariz. 480 (1977), remains controlling with respect to their use to create offensive collateral estoppel. Moreover, Plaintiff's argument that these unpublished decisions create compelling or even binding precedent would hold this Court in every case relating generally to the issue of construction on Indian land to decisions whose holdings the Court of Appeals has not deemed worthy of publication. While this Court naturally welcomes instruction from the higher courts, it does not believe it appropriate to apply to this case analysis which the Court of Appeals chose to apply only to the specific cases before it and to which it may not have intended broader applicability. *See* Donn Kessler, *Memo Decisions: Online and Citable? Con*, ARIZ. ATTORNEY, June 2006, at 15.

Therefore, IT IS ORDERED granting Defendants' Motion to Strike Attachments A and B to Plaintiff's Motion for Summary Judgment.

Exhibit A to Calpine's Combined Reply and Response, a photograph of the South Point Energy Center, is not particularly enlightening, and its persuasive value is *de minimis*. While this attachment does not affect the Court's reasoning one way or the other of the case, Defendants are entitled to have it stricken.

Therefore, IT IS ORDERED granting Defendants' Motion to Strike Exhibit A to Calpine's Combined Reply and Response.

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Special Counsel for Arizona Department of Revenue and Mohave County

SUPERIOR COURT OF THE STATE OF ARIZONA

ARIZONA TAX COURT

CALPINE CONSTRUCTION FINANCE COMPANY, a Delaware limited liability partnership, Plaintiff, vs. ARIZONA DEPARTMENT OF REVENUE, MOHAVE COUNTY, Defendants.	CASE NO.: TX2004-000696 **FINAL JUDGMENT** (Assigned to the Honorable Thomas Dunevant, III)

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This action involves a challenge by Calpine Construction Finance Company, LLP ("Calpine") against the Arizona Department of Revenue ("Department") and Mohave County to an Arizona property tax assessed, levied, and collected for the 2003 and 2004 tax years in connection with a power plant called the South Point Energy Center located on the Fort Mojave Indian Tribe ("Tribe") reservation in Mohave County, Arizona. Calpine claims that it does not own the improvements located at the power plant, but instead the Tribe owns those improvements.

The parties filed various motions in the case, including (but not limited to) the following motions: (1) Calpine's Motion for Summary Judgment dated September 30, 2005; (2) Defendants' Cross-Motion for Summary Judgment on Calpine's complaint dated October 27, 2005; (3) Defendants' Motion to Strike Attachments A and B to Plaintiff's Motion for Summary Judgment dated October 27, 2005; (4) the Department's Motion for Summary Judgment on the Department's counterclaim dated October 27, 2005; and (5) Defendants' Motion to Strike Exhibit A to Calpine's Combined Reply and Response dated December 20, 2005.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. Judgment is entered in favor of Defendants and against Calpine on Calpine's complaint.

2. Judgment is entered in favor of the Department and against Calpine on the Department's counterclaim.

3. This Court's Under Advisement Ruling dated August 11, 2006 and filed on August 16, 2006 is incorporated herein by reference and adopted herein, with the following modifications pursuant to a Stipulation of the parties.

   a. Calpine is <u>not</u> challenging the valuation of the personal property or improvements that are the subject of this action, in this action.

   b. Therefore, paragraph 2 on the bottom of page 5 of the Under Advisement Ruling is stricken, and replaced with the following

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language: Defendants' Cross-Motion for Summary Judgment is granted to the extent that they seek a judgment that the personal property and improvements that are the subject of this action are legally subject to property taxation by the State of Arizona and/or Mohave County.

4. As to the Department's counterclaim in this action, Calpine shall pay $9,800 in penalties to the Department plus 10% pre-judgment and post judgment interest accrued thereon.

5. Calpine shall pay Defendants' taxable costs in the amount of $1,102.30.

DONE IN OPEN COURT this 7 day of September, 2007.

HON. THOMAS DUNEVANT III

Thomas Dunevant, III
Arizona Tax Court Judge

APPROVED AS TO FORM:

Paul J. Mooney
Attorney for Plaintiff

Jay C. Jacobson
Attorney for Defendants 9-6-07

II 017298

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