The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, a federally recognized Indian tribe on its own behalf and as *parens patriae* for its members, and CTGW, LLC, a limited liability company organized under Delaware law, Plaintiffs, v. THURSTON COUNTY BOARD OF EQUALIZATION, a political subdivision of the state of Washington; Thurston County Board of Equalization members JOHN MORRISON, BRUCE REEVES and JOE SIMMONDS, in their official capacities; THURSTON COUNTY ASSESSOR PATRICIA COSTELLO, in her official capacity; THURSTON COUNTY, a political subdivision of the State of Washington; and THURSTON COUNTY TREASURER ROBIN HUNT, in her official capacity, Defendants.	NO. C08-5562 PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT RE: DEPARTMENT OF REVENUE DECISION NOTE ON MOTION CALENDAR: APRIL 3, 2009 ORAL ARGUMENT REQUESTED

I. RELIEF REQUESTED

Plaintiffs Confederated Tribes of the Chehalis Reservation ("Tribe") and CTGW, LLC, a Delaware limited liability company doing business only on trust land owned by the Tribe ("CTGW" – collectively "Plaintiffs") request that the Court grant them summary judgment pursuant to Fed. R. Civ. P. 56(a). Summary judgment is appropriate because there are no

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genuine issues of material fact regarding Defendants' failure to comply with an August 2008 decision issued by the Washington State Department of Revenue ("Revenue") pursuant to the requirements of state and federal law.

Plaintiffs are entitled to judgment as a matter of law, specifically: (1) a declaratory judgment pursuant to 28 U.S.C. § 2201 that Defendants are in direct conflict with an act, order or direction issued by Revenue regarding the preemption of the taxation of the Improvements, and thus the County's taxation and attempts to collect taxes on the Improvements violate state law and federal preemption law; and (2) a permanent injunction prohibiting Defendants from assessing, taxing, seeking to collect, collecting or enforcing the collection of tax on Plaintiffs' personal property.

Defendants have failed to adhere to a decision rendered by Revenue, in violation of both federal preemption law and RCW 84.08.010, *et seq.* Defendants' taxes are additionally inappropriate because federal law – without reference to the federal balancing test – prohibits taxes on permanent improvements to tribal trust land. Furthermore, notwithstanding any argument advanced by Defendants that either the statutory basis for Revenue authority over them is ambiguous, or that the Assessor need not conform her behavior to Revenue's decision; federal law required a preemption balancing test analysis, Revenue and not Defendants performed that balancing test analysis, and Revenue, as the agency with the appropriate expertise, is entitled to deference in the interpretation of its own enabling statutes and in its preemption analysis.

II. FACTS

This matter stems from Defendants' attempts to illegally assess, tax, seize and sell buildings permanently affixed and located on the Tribe's trust land (herein "Improvements," commonly known as "Great Wolf Lodge"). While Plaintiffs reserve the right to bring an additional motion for summary judgment addressing the facts allowing this Court to engage in its own federal preemption analysis, if necessary, the instant request for dispositive relief focuses on the failure of Defendants to heed, respect or conform their behavior to Revenue's decision that

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the tax at issue is preempted as a matter of federal law, and the impropriety of taxing permanent improvements to tribal trust property.

Defendants dispute whether federal law preempts their personalty tax, and contend that they are not in violation of above-described federal preemption law or state law, by failing to comply with a decision made by Revenue as required by RCW 84.08.010, *et seq*.

The events leading up to the assessment of the subject tax, Revenue's analysis of that tax and preemption determination, and Defendants' subsequent actions, along with the law outlining Defendants' statutory obligations and their apparent failure to heed those obligations, form the factual basis for the instant Motion as described below.

1. **The Improvements**

The Confederated Tribes of the Chehalis Indian Reservation ("Tribe") undertook the joint venture at issue to economically diversify and increase its ability to provide essential governmental services to tribal members and reservation residents. *See* Declaration of Chairman Burnett (Dkt.# 3) at ¶ 7 ("Burnett Decl.").

In 2005, the Tribe and Great Wolf Resorts Inc. ("GW"), a non-Indian corporation with waterpark expertise, formed a joint venture limited liability company, CTGW, LLC, under Delaware law, for the purpose of building and owning Great Wolf Lodge Grand Mound ("Lodge"). The Tribe owns 51% of CTGW and GW owns 49%. *Id.* at ¶ 8. The Lodge is located on 39 of 43 acres of land held in trust for the Tribe by the United States ("Trust Property"), consisting of a hotel, conference center, indoor water park and other improvements ("Improvements"). *Id.* at ¶ 9.

The Tribe, pursuant to a federally approved lease, leases the Trust Property to CTGW for a 25-year term, with a 25-year option to renew. *Id.* at Ex. A ("Lease"), Art. 5. While CTGW owns the Improvements during the Lease term, ownership reverts to the Tribe upon the Lease's expiration or termination and CTGW has no right to remove the Improvements upon its termination or expiration. *Id.* at Lease Art. 11, 16. The federally approved Lease provides, in relevant part:

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> All buildings and improvements on the Premises shall be owned in fee by Lessee during the term of this Lease provided that such buildings and improvements (excluding removable personal property and trade fixtures) shall remain on the Premises after the termination of this Lease and shall thereupon become the property of the Lessor. (Art. 11)
>
> Unless otherwise provided, all buildings and improvements, excluding removable personal property and trade fixtures of Lessee, on the leased premises shall remain on the leased premises after termination of this Lease and shall thereupon become the property of the Lessor. (Art. 16)

2. **Revenue's August 2008 Preemption Decision**

State statute defines "personal property" for purposes of taxation as including "all improvements upon lands the fee of which is still vested in the United States." RCW 84.04.080. The Washington Administrative Code further defines personal property as including "[a]ll privately owned improvements, including buildings and the like, upon publicly owned lands which have not become part of the realty." WAC 458-12-005 (emphasis added); *see also U.S. v. Rickert*, 188 U.S. 432, 442 (1903) (permanent improvements to tribal trust land exempt from personal property taxes); *Sohol v. Clark*, 78 Wn. 813, 816, 479 P.2d 925 (1971); AGO 1953 No. 101 (July 24, 1953).

Thurston County enforces its personal property taxes by placing liens on the assessed improvements through distraint and then selling them at a tax sale. RCW 84.60.020.

In 2007, the Assessor determined the value of the Improvements as partially completed for taxation in 2008. Burnett Decl. at ¶ 22. The Assessor then reduced that value by the Tribe's 51% ownership interest in CTGW, to a 2007 taxable value of $10,115,462, and then assessed CTGW a personal property tax based on the 49% interest of GW in CTGW. *Id.* For 2009, the Assessor has assessed the Improvements in their fully completed status at 100%, including the Tribe's 51% interest, as of 2008. *See* Declaration of Gabriel S. Galanda in Support of Plaintiffs' Motion for Leave to Amend (Dkt.# 41) ("Galanda Decl."), Ex. D.

In February of 2007, after a careful review required to determine the issue of federal preemption, Revenue applied state and federal law to the circumstances of this case, and found that Washington sales and use taxes were federally preempted as against CTGW. Burnett Decl.

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at Ex. B ("2007 Revenue Letter"). Revenue made this determination by applying a balancing test that weighs federal, tribal and state interests as established by the U.S. Supreme Court in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).

In 2008, after the initial assessment of the Improvements, Defendant Costello met with Revenue and requested that Revenue – not the Assessor – should undertake a new balancing test analysis specific to the Improvements and in turn issue an opinion with respect to federal preemption under *Bracker*, *supra*, as it related to the personal property tax issue. *See* Burnett Decl., Ex. C ("2008 Revenue Letter"). Defendant Costello has admitted that neither before her request to Revenue nor after her request did she, on behalf of the County, engage in any such balancing test analysis. *See* Galanda Decl., Ex. B, 53:9-20, 60:17-19, 134:9. In fact, her inability to get the answers she needed and her request to Revenue for analysis of the taxes at issue show that the Assessor herself recognized Revenue's expertise, experience and knowledge regarding matters of federal Indian tax preemption. *Id.* at 125:7-13; *see* 2008 Revenue Letter.

As a result of that meeting, in August of 2008, Revenue again reviewed state law and the updated circumstances of this case and applied the federal balancing preemption test to the County's personalty tax. 2008 Revenue Letter. Revenue determined that the instant tax was federally preempted. *Id.* On August 28, 2008, Revenue wrote to the Assessor and informed her that "this letter sets out the decision reached by the Department." *Id.* at 1 (emphasis added). Revenue informed the Assessor that "we have reached a conclusion" that "the balance of the federal, state, and tribal interests tilt in favor of federal preemption for this property." *Id.* at 4.

3. **Assessor's Failure to Execute Revenue's August 2008 Decision**

Under these circumstances, Defendants must follow any act, order or direction of Revenue as to any matter relating to the administration of the assessment and taxation laws of the State of Washington pursuant to RCW 84.08.010, *et seq*. State statute mandates that Revenue:

> Exercise general supervision and control over . . . county assessors, . . . county treasurers . . . and all other county officers, in the performance of their duties relating to taxation, and [shall] perform any act or give any order or direction . . . to any county assessor or to any other county officer as to . . . any other matter relating to the administration of the assessment and taxation laws of the state,

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> which, in the department's judgment may seem just and necessary, to the end that . . . all taxes shall be collected according to the provisions of law.

RCW 84.08.010(1) (emphasis added).

Conversely, the Thurston County Assessor testified in her recent deposition as follows:

> Q. Who has the authority with respect -- the overall authority with respect to assessment matters, as you understand it?
> A. I do.
> Q. Do you believe that there's any limitation on your authority with respect to assessment matters?
> A. I think that there are probably the courts that you could go through if somebody challenged my decision, yes.
> Q. Other than the courts, or other than administrative boards or the courts, is there any governmental entity that has authority over your actions as an assessor?
> A. You mean subject to the RCWs, to the laws as written?
> Q. Sure.
> A. And interpretation?
> Q. Sure.
> A. I have no idea. It's never come up. I would have to research that.

See Galanda Decl., Ex. B, 178:17-179:11.[1]

Not only did the Assessor fail to execute Revenue's opinion, she failed to undertake any of the interest-balancing required to justify taxation in Indian Country. *Id.* at 53:9-20, 60:17-19, 134:9. Rather than engage in the requisite balancing, the Assessor conceded:

> The 2007 assessment was purely my interpretation of – it wasn't even interpretation. I could get no information from anybody. It was a struggle at that time trying to get any kind of information, and I just felt that we had a responsibility to . . . put a value on the rolls."

Id. at 125:7-13 (emphasis added).

There is no evidence that any of the Defendants or those acting on their behalf undertook the analysis required under well-settled federal Indian jurisprudence. Only Revenue analyzed the state, federal, and tribal interests affected by Defendants' taxation efforts. When the Assessor requested guidance and supervision from Revenue, even she recognized what is

[1] Defendant Robin Hunt, however, acknowledged she and the Assessor are subject to Revenue's superior authority. Galanda Decl., Ex. B 23:2-18.

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apparent under state tax regulations: Revenue has the experience, knowledge and expertise to make decisions regarding federal tax preemption. *See* WAC 458-20-192(7).

III. ISSUES

1. Whether, as a matter of law, the Court should grant Plaintiffs' requested relief because there are no issues of material fact regarding Defendants' obligation and failure to comply with Revenue's August 2008 decision that the taxes at issue are preempted under federal law.

2. Whether, as a matter of federal law, the Court should grant Plaintiffs' requested relief because permanent improvements to tribal trust land are not subject to taxation.

3. Whether, as a matter of state law, the Court should grant Plaintiffs' requested relief because Revenue has full authority and control over the Assessor's actions and the decision issued by Revenue in August 2008 is binding on the Assessor.

4. Whether, as a matter of law, the Court should grant Plaintiffs' requested relief because Revenue, the agency with specialized knowledge, expertise and authority, engaged in the only *Bracker* balancing test analysis in this case and accordingly, Revenue's determination should be given deference by the Court and applied in this case.

IV. EVIDENCE RELIED UPON

Plaintiffs rely on those portions of the Court's record cited herein, Declaration of Leslie Cushman, Deputy Director of the Washington State Department of Revenue ("Cushman Decl.") and the Declarations of Gabriel S. Galanda in support of Plaintiffs' Motion for Leave to Amend Complaint (Dkt #41) and David Burnett (Dkt. #3) previously filed with this Court.

V. ANALYSIS

1. Plaintiffs Satisfy the Standard for Summary Judgment

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Where there are no disputes as to material facts, resolution of claims via summary

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judgment is an integral and necessary facet of the overall purpose of the Federal Rules of Civil Procedure to secure the just, speedy and inexpensive determination of every action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Once the moving party has presented those portions of the record that it believes demonstrate an absence of material fact, unless the non-moving party can come forward with evidence that creates a genuine issue as to a material fact, summary judgment should be entered. *Id.*

Summary judgment is appropriate here because these straightforward legal questions can be answered without factual dispute. Defendants cannot reasonably contend that there is any material factual dispute as the only relevant facts with respect to this Motion are: (1) Defendants have sought to tax, seize and sell the Improvements; (2) Revenue decided that the Improvements were not subject to such taxes because federal law preempted the assessments; (3) Defendants engaged in no independent *Bracker* balancing test analysis as required as a matter of federal preemption law; (4) Defendants have failed to comply with the decision of Revenue; and (5) Defendants are attempting to tax permanent improvements to tribal trust land. Because there are no factual disputes, and because Plaintiffs are entitled to judgment as a matter of law, summary judgment is the appropriate way to efficiently resolve this matter.[2]

2. **Defendants Cannot Tax the Improvements Because Revenue Decided the Improvements Could Not Be Taxed**

(a) Revenue has plenary authority to decide that Thurston County property taxes are preempted by federal law.

Pursuant to Washington law, Revenue shall:

> Exercise general supervision and control over the administration of the assessment and tax laws of the state, over county assessors, and county boards of equalization . . . in the performance of their duties relating to taxation, and perform any act or give any order or direction to any county board of equalization or to any county assessor or to any other county officer . . . as to any other matter relating to the administration of the assessment and taxation laws of the state . . . so that . . . all taxes shall be collected according to the provisions of law.

[2] Importantly, all of the relevant facts surrounding this purely legal question are available to Defendants and the Court. No Rule 56(f)(2) discovery is necessary with regard to Defendants' failure to comply with Revenue's decision or their attempts to tax, seize, and sell permanent improvements to tribal trust property.

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RCW 84.08.010(1). To accomplish these duties:

> The department of revenue shall have power to . . . perform or complete any other duty required by statute.

RCW 84.08.060.

Revenue is, therefore, charged with performing any act or giving any order or direction to any county assessor or county officer as to any matter relating to the administration of the assessment and property tax laws of the state which, in Revenue's judgment may seem just and necessary, to ensure that all taxes are collected according to applicable laws. Cushman Decl. ¶ 3.

Taken together, these provisions *mandate and permit* Revenue to perform any act or give any order or direction to any county officer as to any matter relating to tax laws so that taxes are collected according to law. The statute does not specify state law or exclude federal law.

Revenue's broad power has been repeatedly recognized and affirmed by the Washington Supreme Court:

> It is evident that the sweeping grants of power contained in RCW 84.08.060 were intentional. The legislature recognized the need for an agency clothed with sufficient supervisory authority to ensure 'equality of taxation and uniformity of administration' in a tax structure badly fractionalized by 39 different county units. . . . Not only is the authority clearly expressed in the aforementioned statute, but the same grant of authority is found in RCW 84.48.010, which relates to the authority of county boards of equalization [and other county officers].

Boeing Co. v. King County, 75 Wn.2d 160, 165, 449 P.2d 404 (1969), *citing State ex rel. Barlow v. Kinnear*, 70 Wn.2d 482, 423 P.2d 937 (1967). Washington's Court of Appeals has likewise observed:

> [I]t can hardly be questioned that in the sweeping language of RCW 84.08.010 and .060, the Legislature intended to authorize the Department to take action consistent with the language of the taxing statutes to achieve uniformity and equality in the tax system. In light of article 7, section 1 (amend. 14) of the state constitution, requiring uniformity in taxation, the legislative language should be liberally interpreted to achieve that goal.

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Ridder v. Department of Revenue, 43 Wn.App. 21, 28, 714 P.2d 717 (1986).

In *State ex rel. Barlow v. Kinnear*, *supra*, the Snohomish County Assessor contested the authority of the State Tax Commission (now Revenue) to direct the County Board of Equalization to assess all real estate in the County at twenty percent. 70 Wn.2d at 483-484. In upholding the Commission's statutory authority to act, the State Supreme Court invoked RCW 84.08.010, holding that:

> These statutes are clear and express. It is the duty of the Tax Commission to supervise and control the county assessors and the boards of equalization in the administration of the tax laws to the end that equalization and uniformity is secured throughout the state. . . . [T]he power of the legislature [as properly delegated to the Tax Commission] over political or civil subdivisions of the state is plenary unless restrained by a provision of the constitution.

Id. at 486. No provision of the Washington State Constitution limits Revenue's authority to prevent county assessors from violating bedrock federal Indian law.

Ridder and *Boeing* similarly dealt with Revenue authority to control County officers' assessment of property. In *Ridder*, Revenue sent letters to King County Assessor Harley Hoppe telling him that the levies should have included adjustments. 43 Wn.App. at 24-25. In response, Hoppe, declined to include the requested adjustment amounts in the respective levies. *Id.* Even after he was ordered to include the adjustments, Hoppe declined, arguing that Revenue lacked the authority to require him to do so. *Id.* at 25. The Supreme Court rejected Hoppe's argument and relied on the broad authority of Revenue to control and supervise assessors. *Id.*

In *Boeing*, the State Tax Commission (now Revenue) directed King County to reexamine Boeing's 1965 personal property tax assessment. 75 Wn.2d at 162-164. The Board of Equalization raised the assessed value of that property. *Id.* Boeing paid the increased tax and sued for a refund, arguing in part that Revenue lacked the authority to make the Board reexamine the assessment. *Id.* Again, the Court relied on RCW 84.08.010(1) and .060 in recognizing Revenue's power to touch the central function of a county taxing body to ensure the legality of tax laws. *Id.* at 164-165.

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The case at bar implicates the same issues of authority and disobedience found in *Ridder*, and the same robust supervisory control borne out in *Boeing*. Like its findings in *Ridder*, Revenue has made clear, via letter to Defendants in August 2008, that their assessment of Plaintiffs' property is inappropriate under federal law. As evidenced by the current proceedings, Defendants have, like the Assessor in *Ridder*, simply failed to obey Revenue's decision.

Revenue exercises "general supervision and control" over Defendants. It follows, therefore, that if Revenue and the Assessor have differing opinions regarding any aspect of state taxes, Revenue's opinion automatically trumps that of the Assessor. Indeed, because Revenue's "control" over the Assessor is "general," there can be no difference between an opinion of Revenue and one held by Defendants.

Although Plaintiffs do not contend for purposes of this Motion that Revenue has expressly ordered Defendants to do or not do anything; that level of specificity is not required under the statute. RCW merely requires Revenue to "perform any act." By making a "decision" at Defendants' request, Revenue has performed an act. Revenue's August 2008 letter was also an "opinion," "determination," and conclusion. Cushman Decl. ¶ 8. Defendant's have no discretion or authority to act in any way that contradicts Revenue's decision.

As in *Boeing*, Revenue's actions directly implicate the central purpose of the Assessor's official duties. Indeed, the acts of Revenue contemplated in *Boeing* were more intrusive and dominating than those contemplated in the instant facts. Here, Revenue responded to Defendants' request for supervision, control, and direction.

The Assessor's failure to comply with Revenue's decision appears to be due to lack of awareness rather than intentional insubordination. As the Assessor admitted at her deposition, she believes that she has "overall authority with respect to assessment matters" and could name no agency with authority over her actions as an assessor. Galanda Decl., Ex. B, 178:17-179:11. Treasurer Hunt acknowledged Revenue's authority, but stated that she had no discretion when faced with a decision by the Assessor to assess property. *Id.* at 22:5. However, the fact that the

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Assessor cannot identify any agency with authority over her administration of tax laws does not make her failure to heed that clear statutory authority any less inappropriate.

(b) Regardless of the quality or circumstances of Revenue's decision, Defendants must conform their behavior to such a decision.

Public officers like the Assessor and Treasurer have only those powers expressly granted or necessarily implied by statute. *State ex rel. Holcomb v. Armstrong*, 39 Wn.2d 860, 865, 239 P.2d 545 (1952); *accord, Port of Seattle v. Washington Util. & Transp. Comm'n*, 92 Wn.2d 789, 597 P.2d 383 (1979).

It is well-settled Washington law that a public officer, charged with the performance of a ministerial duty, cannot refuse to perform that duty on the ground that a superior officer, under whose direction he is required to act, "has proceeded arbitrarily, capriciously and on a fundamentally wrong basis." *State v. Wiley,* 176 Wn. 641, 643, 30 P.2d 958 (1934). "There is practical unanimity of authority that he cannot [refuse to perform the duty.]" *Id.*

Wiley is instructive. 176 Wn. at 642. There, the defendant Assessor of Grays Harbor county assessed the value of all the property in the county to be $23,483,853. The state taxing authority raised the assessed valuation to $28,638,845, which it found to be fifty percent of the true and fair valuation of such property. The Assessor did not comply with the State's decision, arguing that it had acted "without any investigation whatever and without adequate knowledge." *Id.* at 643. The Supreme Court rejected the Assessor's arguments, and as the dissenting justice noted, the decision "makes the county assessors mere figureheads in the assessment of property for taxation purposes." *Id.* at 650.

There is no evidence that Revenue acted "arbitrarily, capriciously and on a fundamentally wrong basis" with regard to its August 2008 decision that Defendants' tax is preempted. On the contrary, Revenue made an exhaustive review of the state, tribal, and federal interests affected by

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the tax as it is obligated to do, per WAC 458-20-192(7).[3] *See* Cushman Decl., ¶ 6. However, even if Defendants claim that Revenue acted inappropriately or arbitrarily, under *Wiley*, they have no ability to refuse to act. In other words, an allegation that Revenue's analysis is somehow incomplete or otherwise flawed does not prevent the entry of summary judgment.

(c) Summary judgment is appropriate given the purpose behind the state statute.

As outlined above, Washington State's highest courts have repeatedly and unvaryingly recognized Revenue's broad authority to ensure that a "tax structure badly fractionalized by 39 different county units" is made uniform through Revenue's general oversight and general control. *Ridder*, 43 Wn.App. at 28; *Boeing*, 75 Wn.2d at 165-66. Revenue has the power and duty to ensure that taxes are legal and uniform. *See* RCW 84.08.010(1), .060.

Any contention that each of Washington's counties may determine whether personal property taxes are applicable to permanent improvements to the Tribe's trust land using 39 distinct and arbitrary mechanisms is unworkable. Revenue's decision that the tax is preempted provides the kind of clarity and uniformity that is crucial to both the administration of tax laws in Washington and to the recognition of Tribal sovereignty and land character. Thurston County officials have haphazardly determined that the Tribe's joint venture is subject to personal property taxes. Even more arbitrarily, the Assessor inexplicably issued a tax statement based in the first year on a 49% interest held by GW in CTGW and in the next year on a 100% interest basis of the entire CTGW (Tribe and GW) ownership. As unpredictable as it was in Thurston County, an identical arrangement in another county would be subject to disparate, unpredictable results if not for Revenue's broad authority and its decision here. Therefore, in addition to violating the letter of the law regarding Revenue authority, the Assessor has frustrated the goal behind Washington's tax law: legal, uniform, and fair taxation.

[3] Plaintiffs recognize that WAC 458-20-192(7) applies to only those taxes administered by Revenue, but the statutory obligation applies equally under the mandate found in RCW 84.08.010(1) that Revenue shall take actions to ensure taxes are assessed in concert with applicable law.

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(d) Defendants sought out Revenue's decision, having failed to undertake the analysis required as a matter of federal and state law.

Had the Assessor even analyzed or interpreted her authority to tax, seize and sell permanent improvements to Tribal trust land, she could argue that she is merely following a conflicting, subordinate interpretation of the law. Had she undertaken such an analysis, she could argue that she had not acted capriciously and arbitrarily with regard to the subject tax. That, however, is not the case.

The Assessor concedes that she undertook no analysis regarding the taxes at issue. *See* Galanda Decl., Ex. B, 53:9-20, 60:17-19, 134:9. The Assessor admits that, rather than weighing tribal (or any other) interests, she assessed the subject taxes to "put a value on the rolls." *Id.* at 125:7-13. Instead of even attempting to determine whether the taxes were appropriate under federal law, she simply listed the personal property on the tax rolls. The process leading up to the assessment "wasn't even interpretation." *Id.*

The Assessor expressly left the analysis to Revenue and the agency's property tax division. *See* Cushman Decl. ¶ 7. Apparently preferring her own non-interpretation of the law to Revenue's U.S. Supreme Court-mandated *Bracker* balancing analysis, the Assessor disregarded the careful application of federal law for the chance to collect more revenue. Not only was failing to analyze whether the property at issue is subject to state taxes inappropriate, but it directly violates the decision of the Assessor's controlling supervisor – Revenue.

3. **Defendant cannot tax the improvements because they are permanent improvements to tribal trust land**

Permanent improvements to land held in trust by the United States for the benefit of a tribe are not subject to state personal property taxes. *See U.S. v. Rickert*, 188 U.S. 432, 442 (1903).[4]

The Assessor is attempting to assess taxes on the Improvements under RCW 84.04.080, which defines taxable personal property as including "all leases of real property and leasehold

[4] This argument is brought without waiver or implication of the Plaintiffs' substantive claim that the tax at issue is preempted under *Bracker*, *supra*.

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interests therein for a term less than the life of the holder [and] all improvements upon lands the fee of which is still vested in the United States." The Washington Administrative Code further defines personal property as including "[a]ll privately owned improvements, including buildings and the like, upon publicly owned lands which have not become part of the realty." WAC 458-12-005 (emphasis added).

The Assessor has argued that its assessment is supported by *Chief Seattle v. Kitsap County*. 86 Wn.2d 7, 21, 541 P.2d 699 (1975). In *Chief Seattle*, the Washington State Supreme Court interpreted a county's ability to tax improvements on leased Indian trust land. *Id.* However, in that case, the court deemed the buildings "removable." *Id.* at 16.

The inquiry whether improvements are removable stems from the doctrine recognized in the U.S. Supreme Court's decision in *Rickert*. 188 U.S. 432. Although the Court decided *Rickert* over 100 years ago, it addressed an almost identical personal property tax statute to that of Washington state. *Id.* at 442.

In *Rickert*, a South Dakota county was prohibited from imposing a personal property tax on permanent improvements to allotted lands of an Indian. The Court held:

> It is true that the statutes of South Dakota, for the purposes of taxation, classify "all improvements made by persons upon lands held by them under the laws of the United States" as personal property. But that classification cannot apply to permanent improvements upon lands allotted to and occupied by Indians, the title to which remains with the United States, the occupants still being wards of the nation, and as such under its complete authority and protection. The fact remains that the improvements here in question are essentially a part of the lands, and their use by the Indians is necessary to effectuate the policy of the United States.

188 U.S. 432, 442 (1903) (emphasis added).

The Washington Supreme Court, echoing *Rickert*, observed that permanent improvements on Indian trust lands are exempt from taxation. *Sohol v. Clark*, 78 Wn.2d 813, 816, 479 P.2d 925 (1971). Prior to *Sohol*, the Washington State Attorney General likewise opined that permanent improvements upon land held in trust by Indians are not subject to property taxation as personalty. AGO 1953 No. 101 (July 24, 1953).

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The statutory definitions of personal and real property do not remove permanent improvements to tribal trust land from the definition of personal property. *See* RCW 84.04.090 (real property includes land "and all buildings, structures or improvements or other fixtures of whatsoever kind thereon, except improvements upon lands the fee of which is still vested in the United States.") But the same rationales underlying *Sohol* and *Rickert* apply here. The *Rickert* calculus focuses on the character of the land and the removability of the improvements. Moreover, permanent improvements to Indian land will always have some element of tribal ownership because of the individual Indian or tribal reversion interest.

Here, again, under the Lease, the Lodge buildings on the trust land at issue are expressly permanent. Lease, Art. 11, 16. The lessee – CTGW – has no right to remove any improvements to the land under the express language of the Lease as a result of the Tribe's reversionary interest. *Id.* at Art. 11.

Interpreting RCW 84.04.080, the Washington Supreme Court has held that absent a provision making improvements property of a lessee, "buildings permanently erected on real property become a part of the realty as soon as constructed." *Pier 67, Inc. v. King County*, 71 Wash.2d 92, 94, 426 P.2d 610 (1967). Although the improvements are the property of CTGW during the life of the Lease, the fact that they revert to the Tribe, and may not be removed, mandates that they be viewed as belonging to the Tribe. When examined as such, Defendants' tax directly implicates the goals behind the courts' decisions in *Rickert* and *Sohol*, and as recognized in *Makah v. Clallam County*:

> In the event of failure to pay an ad valorem tax, the property is subject to foreclosure and sale. An Indian would thus lose his property in clear contravention of federal policy that he keep it, use it and develop it . . . when kept used and maintained on the reservation, it was not taxable as personal property by Clallam County, even though one spouse was a non-Indian.

73 Wn.2d 677, 685, 440. P.2d 442 (1968). Therefore, as was the case in *Rickert*, *Sohol*, and *Makah*, Plaintiffs are entitled to relief from inappropriate taxes on personal property or improvements to trust land.

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4. **Revenue is Entitled to Deference by this Court**

It is undeniable that someone or some agency, under the present circumstances, was required to engage in the federal preemption analysis required by *Bracker, supra.* All of the evidence shows that the Assessor did not engage in that analysis either before or after assessing the Improvements. Moreover, all of the evidence shows that Revenue, at the request of the Assessor, utilized its expertise, engaged in the necessary analysis and issued its opinion that the personalty tax was preempted by federal law.

Indeed, under Revenue's own regulations, when there is a question regarding taxation of non-members[5] in Indian Country, it must apply the balancing test to determine whether the tax is preempted:

> Nonmembers in Indian country - preemption of state tax. Generally, a nonenrolled person doing business in Indian country is subject to tax. Unless specifically described as preempted by this rule, the department will review transactions on a case-by-case basis to determine whether tax applies. WAC 458-20-192(7).

The Plaintiffs and this Court, respectively, should not be required to spend the time and money or judicial resources to re-analyze the information Revenue relied upon in forming its opinion and decision. Rather, as a matter of law, this Court should give deference to Revenue's August 2008 decision and grant summary judgment to Plaintiffs. *Cf. Hayes v. Yount*, 87 Wn.2d 280, 289, 552 P.2d 1038 (1976) (courts must duly defer to the "specialized knowledge and expertise of the administrative agency"); *see* WAC 458-16-1000, 458-20-192(1)(d).

Furthermore, if Defendants dispute the plain meaning of RCW 84.08.010(1) and .060, as it relates to this case, they will necessarily be arguing that such statutes are ambiguous. The plain and unambiguous reading of the statutes is set forth above.

The Supreme Court in *Boeing* held that the statutory basis for Revenue's authority is "plain and unambiguous[,] it needs no interpretation. It means exactly what it says." 75 Wn.2d at 166. However, Plaintiffs anticipate that despite Revenue's clear mandate, Defendants will

[5] Plaintiffs do not concede that any plaintiff in this matter is a "non-Indian" for tax purposes.

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somehow argue that RCW 84.08.010(1) and .060 do not require them to act in compliance with a determination or decision expressly provided them by Revenue. Once again, Plaintiffs urge this Court, under such circumstances, to defer to Revenue's interpretation of its own statute.

Courts will defer to agency interpretations when statutory language is ambiguous. *Western Telepage, Inc. v. City of Tacoma*, 95 Wn.App. 140, 974 P.2d 1270, 1274 (1999). While the ultimate authority for interpreting a statute belongs to the Court, considerable deference will be given to the interpretation made by the agency charged with enforcing a statute, in this case Revenue. *Impecoven v. Department of Revenue*, 120 Wn.2d 357, 363, 841 P.2d 752 (1992).

Here, Revenue's interpretation of RCW 84.08.010(1) and .060 supports Plaintiffs' contentions: Revenue, at the very least, performed an act to ensure that Defendants' taxes were assessed and collected according to applicable laws – in this instance, state and federal laws regarding permanent improvements to tribal trust land. Cushman Decl. ¶ ¶ 3-4. If there is any lack of clarity regarding the impact of RCW 84.08.010(1) and .060 on Defendants, Revenue's straightforward interpretation of state law should apply, and Defendants should be permanently enjoined from disobeying Revenue's August 2008 decision.

VI. CONCLUSION

For the reasons outlined above, Plaintiffs are entitled to the granting of summary judgment and the relief outlined in the proposed Order filed herewith.

DATED this 12th day of March, 2009.

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CERTIFICATE OF SERVICE

I, Gabriel S. Galanda, say:

1. I am now, and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of 18 years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

2. On March 12, 2009, I electronically filed the following documents with the Clerk of the Court using the CM/ECF system:

- Plaintiffs' Motion for Summary Judgment Re: Department of Revenue Decision; and
- [Proposed] Order Granting Plaintiffs' Motion for Summary Judgment Re: Department of Revenue Decision.

which will send notification to the following via e-mail:

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