UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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-Appellants, vs. THURSTON COUNTY BOARD OF EQUALIZATION, a political subdivision of the State of Washington, et al., Defendants-Appellees.	No. 10-35642 D.C. No. 3:08-cv-05562-BHS Western Washington (Tacoma)

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, appellant Confederated Tribes of the Chehalis Reservation states that it is a federally recognized Indian Tribe. Appellant CTGW, LLC states that it is a limited liability company organized under Delaware law; the Tribe is the majority owner of CTGW, LLC. Great Wolf Lodge of Chehalis, LLC, a Delaware limited liability company, owns 49% of CTGW, LLC. Great Wolf Lodge of Chehalis, LLC is a subsidiary of Great Wolf Resorts, Inc., a publicly traded corporation; no publicly held corporation owns ten percent or more of Great Wolf Resorts, Inc. stock.[1]

[1] Great Wolf Resorts, Inc. has one shareholder with more than 14% of its stock.

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INTRODUCTION

The Confederated Tribes of the Chehalis Reservation ("Chehalis Tribe" or "Tribe") is a federally recognized tribal government that governs a reservation in southwest Washington. The Chehalis Tribe has approximately 800 members.

The Chehalis Tribe is the majority owner of CTGW, LLC ("CTGW"), a limited liability company. CTGW, in turn, owns a hotel, indoor waterpark, and conference center commonly known as Great Wolf Lodge. These buildings are permanent improvements on tribal land that was purchased by the Chehalis Tribe, and is now part of its Reservation and held by the United States in trust for the Chehalis Tribe.

Thurston County, Washington (the "County") has attempted to impose a property tax on the buildings, even though they are permanent improvements on reservation land held by the United States in trust for the Chehalis Tribe. The issue on appeal is whether the County is barred from imposing such a property tax on permanent improvements on Indian reservation land.

STATEMENT OF JURISDICTION

The basis for the district court's subject-matter jurisdiction is 28 U.S.C. §§ 1331, 1362 and 1367.

This Court has jurisdiction of this appeal under 28 U.S.C. § 1291.

The appeal is timely. Judgment was entered on April 2, 2010. A timely motion under Rule 59 of the Federal Rules of Civil Procedure was filed on April 21, 2010; the district court entered an order disposing that motion on June 23, 2010. A notice of appeal was filed on July 19, 2010.

ISSUE PRESENTED FOR REVIEW

The principal issue on appeal is whether the County is barred from imposing a property tax on buildings that are: (1) on tribal reservation land that was purchased by the Chehalis Tribe and is now held in trust by the United States, and (2) owned by a limited liability company that is majority-owned by the Chehalis Tribe, because:

- The County may not tax permanent improvements on Indian land, as a matter of law.
- The County's tax would be preempted under a balancing test, if applicable.

- The County's tax also is invalid because it infringes on the sovereign authority of the Chehalis Tribe.

STATEMENT OF THE CASE

The Chehalis Tribe and CTGW filed this action for declaratory and injunctive relief in September 2008. Excerpts of Record ("ER"), at 1144; *see* ER 1066 (Answer). In its first amended complaint, the Chehalis Tribe and CTGW alleged, among other things, that: (1) permanent improvements to tribal trust property are not subject to state taxation—Count I (ER 1060); (2) Thurston County's imposition of a personal property tax on the hotel, indoor water park, and conference center at Great Wolf Lodge violates federal law—Count II (ER 1061); (3) the County's tax interferes with the Chehalis Tribe's inherent sovereign right of self-governance—Count III (ER 1062), and (4) the County's actions conflict with an opinion of the State of Washington Department of Revenue ("State Department of Revenue") that the personal property tax on the hotel, indoor waterpark, and conference center violates federal law—Count V (ER 1062-1063). *See* ER 1018 (Answer).

In March 2009, the Chehalis Tribe and CTGW moved for summary judgment on their Fifth Claim, which alleged that the

County's actions conflict with an opinion of the State Department of Revenue. ER 1031. In that motion, the Chehalis Tribe and CTGW also argued that the County "cannot tax the improvements because they are permanent improvements to tribal trust land." ER 1044.

Ruling on the motion, the district court dismissed the Fifth Claim for relief brought by the Chehalis Tribe and CTGW, concluding that the court "either does not have or declines to exercise supplemental jurisdiction over the claim." ER 38. The district court also construed the Chehalis Tribe/CTGW motion as moving for summary judgment on their "first claim for relief alleg[ing] that 'Permanent improvements to tribal trust property are not subject to state taxation.'" ER 38. The district court denied that motion "because Plaintiffs have failed to show that they are entitled to judgment as a matter of law." ER 41.

In December 2009, the County and other defendants moved for summary judgment, arguing that "the property tax assessment on the Great Wolf Lodge improvements is a valid exercise of state taxing authority and not preempted by federal law." ER 992; *see* ER 922. Also in December 2009, the Chehalis Tribe and CTGW moved for summary judgment, on the limited ground that the County's taxes are

preempted under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), because the interests of the United States and the Chehalis Tribe outweigh those of the County. ER 516.

In March 2010, while the summary judgment motions were pending, the Chehalis Tribe and CTGW requested the district court to take judicial notice of a Proclamation by the Assistant Secretary-Indian Affairs of the U.S. Department of the Interior that added the land in question to the Reservation of the Chehalis Tribe. ER 80.

On April 2, 2010, the district court granted the County's motion for summary judgment and denied the Chehalis Tribe/CTGW motion. ER 13. Judgment in favor of the County and other defendants was entered on April 2, 2010. ER 12.

The Chehalis Tribe and CTGW moved to amend the judgment. ER 47. The motion observed that the County had not sought summary judgment on several of the claims in the first amended complaint. ER 48. The district court granted in part and denied in part the motion to amend by order on June 23, 2010. ER 1. The court noted that the "motion is properly filed pursuant to Rule 59(e)." ER 6. The court then ruled:

> "[S]ummary judgment has been granted on all of Plaintiffs' claims and … the case was properly closed following the Court's April 2, 2010, order. However, in an abundance of caution, the Court concludes that Plaintiffs' motion to amend the judgment is granted in part to the extent that the Court will clarify its order dismissing all of Plaintiffs' claims."

ER 6. The district court went on to explain why its prior order was sufficient to dismiss any remaining claims in the first amended complaint. ER 7-11.

The Chehalis Tribe and CTGW filed a notice of appeal on July 19, 2010. ER 42.

STATEMENT OF FACTS

A. Overview: The Chehalis Tribe and CTGW

The Chehalis Tribe is a federally recognized tribal government. ER 30. It governs a 4,200-acre reservation in southwest Washington. *Id.* The Chehalis Tribe has approximately 800 enrolled members. ER 760.

In 2005, the Tribe joined with the predecessor of Great Wolf Resorts, Inc. (then known as Great Lakes Companies, hereinafter,

"GWR") to form CTGW, LLC ("CTGW"), a limited liability company under Delaware law. District Court Clerk's Record Item 109 ("CR 109"), Ex. 1 thereto, at 1. The purpose of the joint venture was to develop a hotel, waterpark, and conference center (i*d.*); GWR has substantial hotel and waterpark development and operation expertise. The land identified for the project lies within the aboriginal territory of the Chehalis Tribe, and is part of the Tribe's reservation. ER 80, 613.

The Chehalis Tribe owns an undivided 51% of CTGW. CR 109, Ex. 1 thereto, at 11. GWR owns an undivided 49% interest in CTGW through its subsidiary Great Wolf Lodge of Chehalis, LLC. *Id.* *See* ER 1076 (Defendants admit that "Great Wolf owns 49% of the Great Wolf Lodge and the Tribe owns 51%"). The Chairman of CTGW is David Burnett, who is also the Chehalis Tribal Chairman. ER 759, 915.

B. The Tribe's Acquisition of Land and Petition to Take into Trust

In August 2002, the Chehalis Tribe purchased the 42.99-acre tract of land ("Land") that is now the location of Great Wolf Lodge. ER 613. The Tribe purchased the Land based on the initial suggestion

and request of Thurston County, which hoped to spur development in southern Thurston County and add users to the County's new sewer system. ER 616, 942, 1089.

In May 2004, the Chehalis Tribe petitioned the United States Department of the Interior, Bureau of Indian Affairs ("BIA") to take the Land into trust. ER 613. In so doing, the Tribe sought economic development to increase the Tribe's economic self-sufficiency. ER 615. The Chehalis Tribe recognized the necessity of diversifying its economic base—Indian gaming, which has been the principle source of revenue, is by nature economically and politically volatile; also, there has been a steady decline in the types and amounts of federal dollars available to tribal governments. ER 761.

The Tribe also sought to add to its viable land base. The Reservation of the Chehalis Tribe lies within the floodplain of the Black and Chehalis Rivers (ER 30), which limits the opportunity for new economic development on the Reservation. ER 615. For the Chehalis Tribe to achieve self-sufficiency, additional land outside the floodplain was needed. ER 615.

Together with its request to take the Land in trust, the Chehalis Tribe submitted a business plan for the hotel and convention center,

proposing a 200-room hotel and associated 125,000 square foot convention center. ER 624. The land-into-trust application made clear the Tribe planned to enter into a lease agreement with a joint venture for the hotel project, which lease would need to be reviewed and approved by the BIA. ER 620. *See also* ER 422-423.

C. County's Response to Petition to Take Land into Trust

Thurston County was provided with documentation regarding the proposed trust acquisition of the Land by the United States. ER 616. Pursuant to federal law (25 C.F.R. § 151.10 (2006)), the County was asked to furnish "written comments as to the acquisition's potential impacts on . . . real property taxes . . ." so that the BIA could consider "the impact on the State and its political subdivisions resulting from removal of the land from the tax rolls." 25 C.F.R. § 151.10 (2006). In response to the BIA's request, the County informed the BIA of the amount of property taxes currently levied on the property (totaling $10,537 annually), but did not express any concern about the removal of the Land from its tax rolls. ER 617, 631-632.

The County supported the acquisition of the Land by the United States. ER 617. State and County officials commented that

development of the hotel/convention center on the Land would be extremely important to the growth and economic vitality of southern Thurston County. ER 616. The hotel project was perceived as an "economic anchor" that would generate hundreds of jobs in the southern Thurston County region, for the benefit of tribal and non-tribal residents. ER 616. Thurston County's Board of County Commissioners wrote a letter of support for Tribe's request to take the Land in trust. ER 617. Specifically, the County indicated it was looking forward to having the hotel hook up to the County's new sewer and water system. ER 617.

D. Interior's Decision to Take Land into Trust and Add the Land to the Chehalis Tribe's Reservation

On February 17, 2006, the United States Secretary of Interior, through the BIA, acquired title to the Land in trust. At that time, the 42.99 acres became property held by the United States in trust for the Chehalis Tribe. ER 773.

In its decision to take the Land into trust, the BIA's Regional Director concluded that "the Tribes [sic][2] plan to use the subject property for a hotel and convention center and thus, I [the Regional Director] further find that this acquisition of the land is necessary to facilitate tribal self-determination and economic development." ER 614-615.

Noting that the Tribe's reservation lies within a floodplain (ER 615), the BIA found: "For the Tribes to achieve a reasonable level of self-sufficiency, they must acquire additional land outside the floodplain. In 2002 the Tribes acquired the subject property for the purpose of economic development and the land is also located outside the floodplain. The Tribes plan to construct a 125,000 square foot convention center and a 200-room hotel." ER 615. The BIA expressly contemplated that the Chehalis Tribe would lease the Land, once held in trust, to its "joint venture." ER 620. The BIA further concluded:

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[2] In its decision to take land into trust, the BIA repeatedly refers to "the Tribes" (plural) as its shorthand for the federally-recognized Confederated Tribes of the Chehalis Reservation (referred to herein as "Tribe").

> "[T]he acquisition of the parcel into trust status would greatly enhance the Tribe's economic development potential, which is the paramount objective of the Tribes. The proposed project will provide much needed economic and/or employment opportunities for tribal members, and thus, allow many to stay in their aboriginal homeland."

ER 615. In particular, the BIA noted that revenue from the project could be used to strengthen the tribal government, provide new tribal housing, improve the quality of life of the tribal members by enabling the Tribes to fund a variety of services, and provide capital for other economic development and investment opportunities.

ER 615.

The BIA expressly addressed the impact that taking the Land into federal trust would have on County property taxes. The BIA determined that the loss of property taxes was not "so significant as to weigh against the acquisition, especially since there is so much support for the fee-to-trust acquisition." ER 618. The County's Board of Commissioners stated its support for the Tribe's plans for a

hotel and convention center (subject only to the Board's concerns with environmental mitigation issues). ER 617, 631-632.

The United States "concluded that the Tribes have a need to acquire this property for self sufficiency and economic purposes … I confirm my foregoing conclusions and further conclude that the Tribe's justification of anticipated benefits from the acquisition (i.e., hotel and convention center—and economic development activity) withstands my utmost scrutiny when considering the distance of the subject property from the Tribes' reservation (i.e., approximately 7 miles)." ER 618.

The United States also found that the "(1) Fee to Trust Acquisition, and (2) hotel and convention center development and operation" would "provide the greatest socioeconomic benefit to the Tribes. In addition to providing local economic opportunities for the Tribes, it would also provide an economic benefit for the community. The Grand Mound community and Thurston County recently invested, through the bond process, $12.5 million to upgrade water and waste water infrastructure serving the project area. Development of the proposed hotel and convention center would result in the

payments to the local utility district and would assist in paying down debt from this infrastructure investment." ER 620-621.

Several years later, in March 2010, the United States added the Land (which by then was trust property) to the Reservation of the Chehalis Tribe. ER 80. That was accomplished in a proclamation by the Assistant Secretary of the U.S. Department of Interior. ER 80. In the Memorandum Decision leading to that proclamation, it was recognized that: "Expanding the boundaries of the Reservation will enhance the ability of the Tribe to continue to develop those currently off-reservation trust land areas it has identified for economic development and clarify any claims of jurisdictional interferences, which the Tribe is currently experiencing. This will ensure additional funds to the Tribe's programs for economic development." ER 71-72.

E. Creation of the Joint Venture and Leasing the Trust Property

In 2005, the Chehalis Tribe formed its joint venture with GWR to lease a portion of the Land and build a conference center and hotel thereon, as contemplated in the fee-to-trust application then pending before the BIA. CR 109, Ex.1 thereto. The Tribe selected GWR as its joint venture partner for a number of reasons. For one thing, GWR is

a premier hotel-waterpark proprietor, with valuable experience and skill in developing and operating hotel-waterparks. In addition, the Tribe recognized that GWR would bring a balance sheet and a history of financial performance that could attract millions of dollars of financing, which the Tribe could not obtain by itself. ER 761-762.

The Chehalis Tribe and GWR engaged in a substantial commercial negotiation, which included the various potential terms for the proposed joint venture. The negotiations led to the signed, binding Limited Liability Agreement of CTGW, LLC ("LLC Agreement"), which was signed in June 2005. ER 762, 790. The Land was taken into federal trust a year later, in June 2006. ER 773.

The Chehalis Tribe's chief financial officer and GWR's financial staff jointly drafted and issued a request for proposal to banks and other financiers. ER 762, 789-796. Ultimately, the Tribe and GWR borrowed $102 million from the Marshall Financing Group, of which the Tribe guarantied 51% and GWR guarantied 49%. ER 762. In addition to the Marshall financing, the Tribe and GWR contributed another $70 million to pay for the project. ER 762.

The Chehalis Tribe's contributions to the CTGW joint venture included the following: $6.3 million in cash as common capital;

$10.95 million in state construction excise tax savings (subject to true up), which was referred to as "sovereign benefits"; the leasehold interest in the land valued at $3.64 million; and $8 million in preferred equity. ER 762-763. GWR contributed to CTGW $19.2 million in cash as common capital, loaned CTGW $14.9 million in subordinated debt for construction cost modifications, and contributed $8 million in preferred equity. ER 763.

In 2007, the Chehalis Tribe leased 39 acres of the Trust Property to CTGW for a 25-year term, with a 25-year option to renew ER 1099. Upon expiration or termination of CTGW's lease, the Chehalis Tribe's ownership interests in the buildings will rise to 100%. ER 1101-1102. The lease was subject to an extensive review and approval process by the BIA. *See Gila River Indian Community v. Waddell ("Gila River I")*, 967 F.2d 1404, 1411 (9th Cir. 1992) (describing federal regulation of leases of reservation property). The lease was ultimately approved and recorded by BIA in July 2007. ER 1095.

F. Permitting and Construction of the Lodge

The Tribe regulates all facets of the Land through numerous laws, ordinances and Tribal government departments. ER 1091.

Construction of the hotel, waterpark and conference center was permitted in accordance with these Tribal law (rather than state or County authority), including the Tribe's Comprehensive Land Use Ordinance, Zoning Ordinance, Tribal Building Code and Construction Safety Ordinance. ER 1091. The Tribe issued electrical, building and utility permits to every contractor or subcontractor involved in the project. ER 766.

The Tribe co-managed the construction of the hotel-waterpark through the Tribe's construction company, Saxas Construction, LLC. ER 569-570. Saxas, as prime contractor (before the Land was taken in trust and the lease approved with CTGW) and as subcontractor (after BIA approvals), performed or provided various services, including: earth work; subgrade building pads and utilities; the sewer main along the Highway 12 frontage; dewatering on the 39-acre site; structural work on the Lodge; and construction management of the 30,000-square-foot conference center wing. ER 532. Saxas was paid over $5.2 million on its contracts for construction of the Lodge, and was paid an additional $275,000 to provide security to the project from June 2006 through March 2008. ER 764-765.

Construction of the hotel, waterpark, and conference center on the Land was completed in March 2008. ER 765; *see* ER 567-573. The total cost for the project was $172 million. ER 762. The facility is commonly known as the Great Wolf Lodge. ER 760.

G. The Tribe Provides Governmental Services to the Lodge

The Tribe provides numerous governmental services to the Lodge and the Land on which it sits. The Tribe provides the Lodge with 24-hour daily police protection: Tribal officers regularly visit the site and are the first-responders for any police-related calls. ER 1090.

In addition, the Tribe contracts with Thurston County for sewer, sanitation and water services—for which the Tribe already has paid in excess of $1.6 million. ER 127, 1090. *See also* ER 765, 799-862 (intergovernmental agreements between Tribe and Thurston County for road, water and sewer services). The Tribe also entered into a memorandum of understanding with the Thurston County Fire Protection District, pursuant to which the Tribe pays $160,000 per year for fire protection on the Reservation, including the Lodge. ER 910.

H. The County's Attempt to Tax the Buildings, and the State's Opinion Letter

Beginning in 2007, the County's Assessor assessed a property tax on the buildings owned by CTGW. ER 724-733. By October 2009, the County's Assessor had increased the assessed "value" of the "structures" to more than $85 million. ER 731. The "Legal Description" was stated to be the "Lease to CTGW LLC 25 Yr. Lease Ending 04-05-2." ER 731.

In August, 2008, the Department of Revenue of the State of Washington issued an opinion letter on "Property Taxation of Great Wolf Lodge"—in particular, whether "imposition of property tax on the improvements at Great Wolf violates federal law." ER 1140. The Department of Revenue was provided access to the LLC Agreement, the lease agreement between the Chehalis Tribe and GWR, and other material. ER 1143. Noting that "[t]his is a situation that is a matter of 'first impression'" (ER 1143), the Department of Revenue concluded:

> "Although the relevant facts are still not as clear as we would like, and although a legitimate argument could be made either for federal preemption or for state taxation, it appears that the balance of the federal, state, and tribal

interests tilt in favor of federal preemption for this property."

ER 1143.

STANDARD OF REVIEW

A district court's grant of summary judgment is reviewed *de novo*. *Arakaki v. Hawaii*, 314 F.3d 1091, 1094 (9th Cir. 2002). In reviewing a district court's ruling on cross-motions for summary judgment, this Court "evaluate[s] each motion separately, giving the nonmoving party in each instance the benefit of all reasonable inferences." *American Civil Liberties Union of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1097 (9th Cir. 2003). In other words, this Court "must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Id.*

If neither side contends there are any genuine disputed issues of material fact, this Court's "task is to determine whether the district court correctly applied the relevant substantive law." *Arakaki*, 314 F.3d at 1094.

SUMMARY OF ARGUMENT

The principal issue on appeal is whether the County is barred from imposing a property tax on buildings that are: (1) on tribal reservation land purchased by the Chehalis Tribe and now held in trust by the United States, and (2) owned by a limited liability company that is majority-owned by the Chehalis Tribe.

The Chehalis Tribe is the majority owner of CTGW, which owns the buildings and other permanent improvements that the County is now attempting to tax. Those buildings are on tribal land — reservation land that is part of Indian Country (18 U.S.C. § 1151) and subject to the Chehalis Tribe's exclusive jurisdiction. The buildings are used by CTGW to operate Great Wolf Lodge on the Tribe's Reservation.

1. The County may not tax permanent improvements on Indian land. The U.S. Supreme Court has made clear that permanent improvements on Indian land are not subject to local taxation. In *United States v. Rickert*, 188 U.S. 432 (1903), the Supreme Court explained:

> "While the title to the land remained in the United States, the permanent improvements could no more be sold for

> local taxes than could the land to which they belonged. Every reason that can be urged to show that the land was not subject to local taxation applies to the assessment and taxation of the permanent improvements."

188 U.S. at 442. "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." *Id*.

Subsequent to the Supreme Court's decision in *Rickert*, Congress enacted the Indian Reorganization Act of 1934. *See* 48 Stat. 984, as amended, 25 U.S.C. § 461 *et seq*. Section 5 of that Act, codified as 25 U.S.C. section 465, provides that "any lands or rights acquired" pursuant to any provision of the Act "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation."

In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), the Supreme Court stated that in view of section 465, permanent improvements on a tribe's tax-exempt land (in that case, ski lifts) "would certainly be immune from the State's ad valorem property tax," citing *Rickert*. 411 U.S. at 158. The Supreme Court explained

that permanent improvements are "so intimately connected with use of the land itself" that the explicit provision in section 465 relieving the land of state tax burdens must be construed to encompass an exemption for the permanent improvements. *Id.* "'Every reason that can be urged to show that the land was not subject to local taxation applies to the assessment and taxation of the permanent improvements.'" *Id.* at 158-159; citing *Rickert*, 188 U.S. at 442.

Here, the Land was taken in trust by the United States for the Chehalis Tribe pursuant to section 465, and is thus "exempt from State and local taxation." 25 U.S.C. § 465. As the Supreme Court has concluded in *Rickert* and *Mescalero*, permanent improvements on the Land are exempt from state and local taxation.

Indeed, when the Land was taken into trust, it was known by the United States that the Chehalis Tribe would lease the Land to its "joint venture" and construct a convention center and hotel. It was further understood that the County would lose property taxes once the Land was taken into trust. Nevertheless, the County supported taking the Land into trust; and ultimately, the United States concluded that "the Tribes have a need to acquire this property for self sufficiency and economic purposes" and that "the Tribe's justification of

anticipated benefits from the acquisition (i.e., hotel and convention center — and economic development activity)" withstands "utmost scrutiny." ER 618.

The district court erroneously held the County could tax the buildings because they are owned by CTGW, which the trial court viewed as a "privately owned business venture []." However, for purposes of property tax, the ownership of the joint venture is irrelevant under *Rickert*, *Mescalero* and section 465. Because the buildings are permanent improvements and hence part of the Land held in trust, they cannot be taxed.

Moreover, the district court overlooked that CTGW is majority owned by the Chehalis Tribe. The policy of the United States, when it took the Land into trust, contemplated that the Chehalis Tribe would enter into a joint venture and construct a convention center and hotel, in order to promote the Tribe's self sufficiency and economic development. It would frustrate that policy if the Chehalis Tribe were stripped of its immunity from local taxes because it entered into a joint venture or formed a limited liability corporation for its venture.

2. Moreover, the County's tax would be preempted under the balancing test set forth in *Bracker*, if applicable. The County is

barred from imposing its property tax for a second, independent reason: The County's tax would be preempted under the balancing test established by the Supreme Court in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) ("*Bracker*"), if applicable.

In *Bracker*, the Supreme Court set forth the scope of inquiry where "a State asserts authority over the conduct of non-Indians engaging in activity on the reservation" (*id.* at 144): "This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 145.

Here, the County is not taxing "the conduct of non-Indians." Rather, the County is taxing property (buildings) not "conduct." That property is owned by a limited liability corporation that is majority-owned by the Chehalis Tribe, not a "non-Indian". Such a tax should be barred *per se*; no "balancing" is needed.

In any event, the County's tax would be preempted under the *Bracker* balancing test, if applicable. Certainly, the Chehalis Tribe's interest is paramount; the Chehalis Tribe is the majority owner of

CTGW, which owns the buildings being taxed by the County. The federal interest is similarly important — the United States has title to the Land, which it holds in trust. The buildings are permanently attached to the Land; indeed, the County would have to attempt to sell those permanently attached buildings in order to collect the taxes. The federal government comprehensively regulated the conveyance by the Chehalis Tribe of its land into trust, as well as the lease of the Land to CTGW.

For its part, the County's only interest is in raising revenue. As shown in the trial court, the County provides *de minimis* services to the hotel, waterpark and conference center operated in the buildings being taxed.

The district court wrongly concluded that state interests are strong and the tribal and federal interests are "relatively weak," citing this Court's decision in *Yavapai-Prescott Indian Tribe v. Scott,* 117 F.3d 1107 (9th Cir. 1997). That case involved a state tax on business transactions; in *Yavapai-Prescott*, the state assessed that tax on room rentals and food sales at a hotel located on a reservation. This Court focused on whether the Yavapai-Prescott Tribe had "an active role" in the creation of the value taxed — there, food sales and room rentals.

Here, in contrast, the County is imposing a property tax on the buildings that are permanent improvements on tribal reservation land. The logical inquiry is the Chehalis Tribe's role in the ownership of the buildings. Its role is direct and indisputable — the Tribe is majority-owner of the limited liability corporation that owns the buildings, and ownership of the buildings will revert to the Tribe at the end of the lease term. The tribal ownership interest is overwhelming in any *Bracker* balancing.

The judgment should be reversed.

ARGUMENT

I. THE COUNTY MAY NOT TAX PERMANENT IMPROVEMENTS ON INDIAN LAND.

The principle that permanent improvements on Indian land may not be taxed by a county was made clear by the U.S. Supreme Court more than a century ago in *United States v. Rickert*, 188 U.S. 432 (1903).

In *Rickert*, the Supreme Court considered two questions. First, the Court addressed whether lands held by the United States in trust for Indians could be taxed by a county. *Id.* at 435. The Court held that a county could not assess such a tax: "[N]o authority exists for

the State to tax lands which are held in trust by the United States for the purpose of carrying out its policy" relating to Indians. *Id.* at 441.

Second, the Supreme Court addressed whether permanent improvements, such as houses and other structures, on lands held by the United States in trust for Indians could be taxed by a county. *Id.* at 441-442. The Court held that a county could not assess such a tax on permanent improvements upon trust land: "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." *Id.* at 442. The Court explained:

> "While the title to the land remained in the United States, the permanent improvements could no more be sold for local taxes than could the land to which they belonged. Every reason that can be urged to show that the land was not subject to local taxation applies to the assessment and taxation of the permanent improvements."

Id.

Three decades after *Rickert*, Congress enacted the Indian Reorganization Act of 1934. *See* 48 Stat. 984, as amended, 25 U.S.C.

§ 461 *et seq.* Section 5 of that Act, codified as 25 U.S.C. § 465, now authorizes the Secretary of the Interior to acquire trust lands and:

> "Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and **such lands shall be exempt from State and local taxation**."

25 U.S.C. § 465 (emphasis added). Thus, under section 465, lands taken by the United States in trust "shall be exempt from State and local taxation."

The application of section 465 to permanent improvements was examined by the Supreme Court in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). In that case, the Mescalero Apache Tribe owned and operated a ski resort, known as Sierra Blanca Ski Enterprises, on land outside the boundaries of the tribe's reservation in New Mexico. *Id.* at 146. The State of New Mexico asserted the right to impose various taxes, including a use tax on personal property "permanently attached to the realty." *Id.* at 158.

The Supreme Court initially found that section 465 applied to the situation (*id.* at 156, n.11) noting that "[s]ection 465 provides, in

part, that 'any lands or rights acquired' pursuant to any provision of the Act 'shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.'" *Id.* at 155. Applying section 465 to the use tax imposed on ski lifts at the resort, the Court stated: "In view of § 465, these permanent improvements on the Tribe's tax-exempt land would certainly be immune from the State's ad valorem property tax. *See United States v. Rickert*, 188 U.S. 432, 441-443 (1903). We think the same immunity extends to the compensating use tax on the property." *Id.* at 158. The Court further explained:

> "[U]se of permanent improvements upon land is so intimately connected with use of the land itself that an explicit provision relieving the latter of state tax burdens must be construed to encompass an exemption for the former. 'Every reason that can be urged to show that the land was not subject to local taxation applies to the assessment and taxation of the permanent improvements.' *United States v. Rickert*, *supra*, at 442."

411 U.S. at 158-159. Thus, under *Mescalero*, permanent improvements on land that is tax-exempt pursuant to section 465 are immune from local taxation.

Here, the hotel, indoor waterpark, and conference center are permanent improvements on the Land. Prior to the construction of these permanent improvements, the Land was taken into trust by the United States for the benefit of the Chehalis Tribe pursuant to section 465. In consequence, the Land became trust property and, pursuant to section 465, was thus "exempt from State and local taxation." 25 U.S.C. § 465. As the Supreme Court concluded in *Rickert* and *Mescalero*, permanent improvements on trust land are exempt from state and local taxation.

Before the United States took the Land into trust, the BIA made extensive findings in support of its decision to approve acceptance by the United States of the property into trust. ER 613-626. In its findings, the BIA recognized the Chehalis Tribe's plan to construct a convention center and hotel (ER 615), as well as the Chehalis Tribe's plan to lease the Land to its "joint venture": "The Tribes plan to enter into a lease agreement with their joint venture. The lease agreement

will need to be reviewed and approved by The Bureau of Indian Affairs." ER 620.

Moreover, the United States knew that the County would lose property taxes once the Land was taken into trust. In this regard, the BIA regional official determined:

> "According to Thurston County the property taxes are $10,537.25; however, I do not consider the amount of property taxes to be a loss to the County, if the land is taken into trust, to be so significant as to weigh against the acquisition, especially since there is so much support for the fee-to-trust acquisition."

ER 618. And the BIA found that "[m]ost of all the letters of support indicate that the development of a hotel and convention center would have a positive impact/influence on the economy, which is much needed due to the national economy and the federal timber policies." ER 618.

Knowing of the planned construction, lease and joint venture, and knowing that the County would lose property taxes, the BIA nevertheless approved taking the Land into trust. The BIA concluded: "The acquisition of the parcel into trust status would greatly enhance

the Tribes' economic development potential, which is the paramount objective of the Tribes." ER 615. "[T]he Tribes have a need to acquire this property for self-sufficiency and economic purposes." ER 618. "[T]he Tribes justification of anticipated benefits from the acquisition (i.e. hotel and convention center — an economic development activity) withstands . . . utmost scrutiny. . . ." ER 618.

Notwithstanding the BIA's findings, the district court held, erroneously, that the Tribe's and CTGW's "legal theory based on *Rickert* was not applicable to the taxation issue in this case." ER 7. The district court's view was that "[a]lthough the site in Grand Mound is held in trust by the United States for the benefit of the Tribe, the Lessee, CTGW, owns the improvements in fee during the terms of the Lease." ER 7. The district court added:

> "Moreover, it cannot be said that the improvements are 'occupied' by the Tribe as CTGW currently uses the improvements to operate a hotel, conference center, and indoor water park. Therefore, the *Rickert* rule that was implemented to protect a homestead and associated livestock is, in this Court's opinion, **inapplicable to privately owned business ventures even though the**

improvements are on land held in trust by the United States."

ER 7 (emphasis in original).

The district court's attempts to distinguish the *Rickert* rule are wrong. The Supreme Court's decision in *Mescalero* demonstrates that permanent improvements need not be "occupied" by a tribe — in *Mescalero*, the Court indicated that ski lifts on a tribe's tax exempt land "would certainly be immune from the State's ad valorem property tax," citing *Rickert*. 411 U.S. at 158. Section 465 is not limited to protecting "a homestead and associated livestock," as the district court erroneously suggested. *See* ER 7.

The district court was also wrong in holding that the County can tax the buildings because they are owned by CTGW, which the district court viewed as a "privately owned business venture[ ]." That is irrelevant under *Rickert*, *Mescalero* and section 465. Permanent improvements are immune from local property tax because they are "so intimately connected with use of the land itself." *Mescalero*, 411 U.S. at 158-159. "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 Unites States." *Rickert*, 188 U.S. at 442.

Moreover, the district court failed to appreciate the significance of the fact that CTGW is majority-owned by the Chehalis Tribe. The policy of the United States is reflected in the findings made by the BIA when it approved taking the Land into trust. Those findings contemplated that the Chehalis Tribe would enter into a joint venture and construct a convention center and hotel, in order to promote the Tribe's self-sufficiency and economic development. It would frustrate that policy if the Chehalis Tribe were deprived of its protection from local taxes because it used a limited liability corporation for its joint venture.

Joint ventures between Indian tribes and private parties have become quite common as tribes have sought economic development and associated revenue for the funding of tribal governmental functions. ER 101. The limited liability company ("LLC") structure is frequently used as the form of organization for such tribal-private joint ventures. ER 101.

The LLC organizational form provides for the holding of assets by one or more owners in a manner that protects owners with the

limitations on liability of a corporation. ER 101. It also provides for well-known and understood criteria for allocation of owner rights, responsibilities, share allocations and enterprise decision making. ER 101.

The advantages of joint venturing and the LLC corporate structure for tribal government enterprises are well-recognized in federal policy. ER 101. In one recent study, the U.S. Department of Interior noted that LLCs could be used by tribes to acquire specialized knowledge, create proper business incentives, or efficiently allocate tax benefits, for example. ER 101-102. Indeed, the Department of Interior study noted a specific example of a tribe, through an LLC, owning 59% of a hotel project, with the remaining 41% held by non-tribal partners. ER 102.

Here, the Chehalis Tribe's joint venture and use of the LLC organizational form furthers federal objectives and sound business practices. ER 102. The Chehalis Tribe availed itself of the economic and business advantages of utilizing the LLC corporate structure established in a jurisdiction, Delaware, that is widely recognized for its institutional expertise in corporate governance. ER 102. By using the LLC structure, the Chehalis Tribe gained access through

partnering to the knowledge, expertise, and business operations associated with running a waterpark facility. ER 102-103. The revenue generated by using the LLC structure allows the Chehalis Tribe to better ensure that it will be able to provide services needed by Chehalis tribal citizens. ER 103. All of this furthers the federal interests in tribal self-determination through economic self-sufficiency and self-governance. ER 103-120.

A similar point was made in *Pourier v. South Dakota Dept. of Revenue*, 2003 SD 21, 658 N.W.2d 395 (2003), which noted that "Congress' primary objective in Indian law for several decades has been to encourage tribal economic independence and development." 658 N.W.2d at 405.

> "By finding that incorporation under state law deprives a business of its Indian identity, we would force economic developers on reservations to forego the benefits of incorporation in order to maintain their guaranteed protections under federal Indian law. This could hinder economic development."

Id.

Thus, the permanent improvements on the Land may not be taxed by the County. The fact that the permanent improvements are owned by CTGW, which is majority owned by the Chehalis Tribe, does not alter the exemption from state and local taxation.

II. MOREOVER, THE COUNTY'S TAX WOULD BE PREEMPTED UNDER THE BALANCING TEST SET FORTH IN *WHITE MOUNTAIN APACHE TRIBE v. BRACKER*, 448 U.S. 136 (1980).

The County is barred from imposing its property tax for a second, independent reason: The County's tax would be preempted under the balancing test set forth by the Supreme Court in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), if applicable.

In *Bracker*, the Supreme Court considered "the extent of state authority over the activities of non-Indians engaged in commerce on an Indian reservation." *Id.* at 137. In particular, the Court addressed whether federal law preempted state taxes imposed on non-Indian corporations operating solely on the Fort Apache Reservation. *Id.* at 137-138. The Court set forth the inquiry where "a State asserts authority over the conduct of non-Indians engaging in activity on the

reservation." *Id.* at 144. The inquiry is "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 145.

Applying this test to the particular circumstances presented in *Bracker*, the Supreme Court held that the taxes were preempted by federal law (*id.* at 138) — a number of federal policies were threatened by the taxes (*id.* at 151). The State was "unable to justify the taxes except in terms of a generalized interest in raising revenue" (*id.*):

> "[The State's] argument is reduced to a claim that they may assess taxes on non-Indians engaged in commerce on the reservation whenever there is no express congressional statement to the contrary. That is simply not the law . . . ."

Id. at 150-151.

In contrast to *Bracker*, here the County is not taxing "the conduct of non-Indians" (*see id.* at 144) — rather, the County is attempting to impose a property tax on buildings owned by a limited liability corporation that is majority-owned by the Chehalis Tribe. As

discussed above, such a tax should be barred *per se*; no "balancing" of interests should be needed. *Rickert, Mescalero* and section 465 establish that the County may not tax permanent improvements on Indian land.

In any event, the County's property tax would be preempted under the *Bracker* balancing test, if applicable.[3] Certainly, the Chehalis Tribe's interest is paramount; the Chehalis Tribe is the majority owner of CTGW, which owns the buildings being taxed by the County. As a 51% interest holder in CTGW, the Chehalis Tribe would bear 51% of any taxes imposed by the County. *See* CR 109, Ex. 1 thereto, at 11. Under Tribal law, Chehalis Tribal property (such as the buildings at issue here) is not taxable. ER 767.

In addition, the Chehalis Tribe has an interest in its territorial authority and autonomy. The Chehalis Tribe regulates virtually every facet of Great Wolf Lodge—including through room and sales

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[3] The *Bracker* balancing test has been applied by this Court to preempt state and local taxes in various contexts. *See Crow Tribe of Indians v. State of Montana*, 819 F.2d 895 (9th Cir. 1987), *affirmed*, 484 U.S. 997 (1988) (coal taxes); *Hoopa Valley Tribe*, 881 F.2d 657 (9th Cir. 1989) (timber yield tax); *see also Segundo v. City of Rancho Mirage*, 813 F.2d 1387 (9th Cir. 1987) (rent control ordinance pertaining to mobile homes on leased lands).

taxation, zoning and building codes, primary law enforcement, Tribal preference employment policies, and health and safety governance. ER 768; *see, e.g.*, ER 875. The Chehalis Tribe contracts on a fee-for-service basis for fire and emergency services, as well as for sewer and water services. ER 765, 768, 799-872, 910-911. The Tribe pays the County over $50,000 per year, which is allocated to the County Sheriff's Office for secondary law enforcement to Great Wolf Lodge. ER 646.

The Chehalis Tribe has also offered to negotiate and pay the County a fee for any demonstrable impact to the County (or its taxing districts), caused by CTGW or Great Wolf Lodge. ER 913. The County has failed to respond to the Chehalis Tribe's offers by demonstrating or quantifying any impact. ER 768.

The federal interest is similarly important—the United States has title to the Land, which it holds in trust. As discussed above, the federal government comprehensively regulated the conveyance by the Chehalis Tribe of its land into trust, as well as the lease of the Land to CTGW. *See* 25 U.S.C. §§ 415, 465; *Gila River I*, 967 F.2d at 1411.

The buildings are permanently attached to the Land—indeed, the County would have to attempt to sell those permanently attached

buildings in order to collect the taxes, which itself would likely violate federal law. Since the nineteenth century, "the cornerstone of Congress' policy has been to impose strict restraints on alienation of Indian title—a policy grounded on the federal trust responsibility toward Indian tribes." *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 276 (1985). The policy against alienation is embodied in the Indian Nonintercourse Act, which in relevant part provides that:

> "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution . . . under the authority of the United States."

25 U.S.C. § 177. In the specific context of leasehold interests, 25 U.S.C. section 415 requires the approval of the Secretary of Interior on any lease of Indian lands. 25 U.S.C. § 415. *See also* 25 U.S.C. § 176 (tribe has power, under Indian Reorganization Act, to prevent the lease or encumbrance of tribal lands without its consent).

The expert report of Joseph P. Kalt, a professor at the John F. Kennedy School of Government at Harvard University, assessed the federal and tribal interests at stake. In summary, Professor Kalt's findings were that:

- "[T]he federal interest, as expressed in [the Federal Government's] policies of self-determination, include compelling interests in self-government and economic self sufficiency. . . . Similarly, for the Chehalis Tribe, meeting its citizens' needs for civil society and economic development in the contemporary era of federal policies of tribal self-determination requires effective tribal government. Effective tribal government, especially a self-sufficient tribal government, requires that the Chehalis Tribe develop and maximize the supporting and indispensable revenue streams upon which effective tribal government depends." ER 121.

- "[T]he Chehalis Tribe's Great Wolf Lodge development project represents precisely such a move by a self-governing American Indian tribe operating under federal policies of self-determination. . . . The Tribe's Great Wolf Lodge project constitutes development of a source of direct revenue to the Chehalis Tribal Government in the form of earnings to be derived from public (tribal)

ownership of a for-profit enterprise. Such ownership and resulting generalization of public funds for tribal government purposes are recognized as a key and ubiquitous strategy of effective self-governing tribes under federal policies of self-determination." ER 121.

- "The Tribe's Great Wolf project constitutes development of taxable economic activity, and the Chehalis Tribal Government exercises its taxing authority by levying tribal taxes on the economic activity (such as retail and tobacco sales to Lodge patrons, and employees and to contractors conducting business at other Chehalis enterprises). As a component of self-sufficiency for a self-governing federally recognized American Indian tribe and its tribal government, such generation of, and then taxation of, economic activity by the Chehalis Tribe is a key and increasingly common component of effective tribal governance under policies of self-determination." ER 121-122.

- "The County's asserted tax, if imposed, would impair the foregoing federal and tribal interests. It would do so not only by directly reducing the net income of Great Wolf Lodge and hence the revenue stream to be realized by the Chehalis Tribe as majority owner

of that net income stream, but also because the precedential effect of collection of the tax by Thurston County would have the economic effect of chilling future joint ventures and associated opportunities for investment risk-tasking and business and business development by the Chehalis Tribe." ER 122.

For its part, the County's only interest is in raising revenue. As shown in the district court, the County provides *de minimis* services to the hotel, waterpark and conference center operated in the buildings being taxed. ER 544-547. As in *Bracker*, the County essentially asserts a "general desire to raise revenue." *Bracker*, 448 U.S. at 150-151; *see Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 845 (1982) ("The State's ultimate justification for imposing this tax amounts to nothing more than a general desire to increase revenues").

In granting summary judgment in favor of the County, the district court asserted that "[l]aw enforcement, emergency fire and medical services, road maintenance, and the county court system are important services that are funded by the challenged property tax." ER 25. According to the district court, "[a]lthough some services supported by the instant taxes are provided to, but arguably not used

by, the Tribe, this fact does not dictate preemption of the taxes because the federal and tribal interests in this case are relatively weak and it would be inappropriate to require such narrow tailoring of the county taxes to the county services." ER 26.

The district court's reasoning misses the point: The Chehalis Tribe already pays the County for the services provided relating to Great Wolf Lodge.

The Chehalis Tribe pays the County over $50,000 annually to the County Sheriff for secondary law enforcement at the Lodge: that is, any arrests of non-Indian perpetrators on the premises. ER 643, 672. The Chehalis Tribal police are the first responders to any crimes and can detain all perpetrators, as well as arrest any Indian perpetrators there. ER 643, 672; *see Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (tribes lack criminal jurisdiction over non-Indians). The Chehalis Tribe also pays the County's Fire District $160,000 each year, pursuant to a contract with Fire District #1 for fire protection and emergency medical services. ER 746.[4]

[4] The Chehalis Tribe has offered to negotiate and enter into a fee-for-service arrangement to offset any demonstrable impact caused by Great Wolf Lodge. ER 913.

Contrary to the district court's suggestion, the County's property tax on the buildings cannot be justified by the fact that "road maintenance, and the county court system are important services that are funded by the challenged property tax." *See* ER 25. This Court rejected a similar argument in *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989), which struck down a tax on timber harvested from an Indian reservation:

> "The state's general interest in revenue collection is insufficient to outweigh the specific federal interests with which the timber yield tax interferes. The services provided by the state and county are provided to all residents. The road, law enforcement, welfare, and health care services provided by the state and county benefit both tribal and non-tribal members."

Id. at 661. That is the situation here, where the roads are maintained and the court system made available for all in the county, not specifically Great Wolf Lodge or CTGW.

The district court quoted a statement in *Gila River Indian Community v. Waddell ("Gila River II")*, 91 F.3d 1232 (9th Cir. 1996), that "there is no requirement that a tax imposed on non-Indians

for reservation activities be proportional to the services provided by the State." ER 25. In fact, this Court's opinion in *Gila River II* illustrates the nexus required between a tax and the services provided. In *Gila River II*, this Court upheld imposition of a State tax on entertainment events held on an Indian reservation. The State's interest justifying the tax included a number of governmental functions critical to the success of [the] events," including law enforcement services and traffic control services at the events, at state expense. *Id.* at 1238-1239. Here, no such services are provided by the County to Great Wolf Lodge. *See* ER 738-741 (County Roads Department has not provided direct services to Great Wolf Lodge).

The district court wrongly concluded that the County's interests are strong and the Chehalis Tribe and federal interests are "relatively weak," citing this Court's decision in *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997). ER 26. *Yavapai-Prescott* involved a state tax on business transactions; there, the state assessed that tax on room rentals and food sales at a hotel located on a reservation. *Id.* at 1108-1109. This Court focused on whether the Yavapai-Prescott Tribe had "an active role" in the creation of the value taxed there, food sales and room rentals. *Id.* at 1112.

Here, in contrast, the County is imposing a property tax on the buildings that are permanent improvements on tribal reservation land. The logical inquiry is the Chehalis Tribe's role in the ownership of the buildings. Its role is direct and indisputable — the Tribe is majority-owner of CTGW, the limited liability company that owns the buildings. That tribal interest is overwhelming in any *Bracker* balancing.

The district court acknowledged the argument "that the Court should focus on the property in question because the taxes are property taxes." ER 22. However, the district court gave no weight to this point, stating simply that: "There is no precedent for this proposition. Moreover, the established precedent instructs that the Court should balance the federal, tribal, and state interests." ER 22.

The district court misperceived the essence of *Bracker* balancing, which calls for "a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Bracker*, 448 U.S. at 145. By its very nature, a property tax necessarily implicates interests that are quite different than the interests affected by a sales or business tax. A property tax directly impacts the ownership interests

of the buildings being taxed. Here, the Chehalis Tribe is directly affected as the majority owner of CTGW, which owns the buildings.

Thus, the County's tax would also be preempted under the balancing test set forth in *Bracker*. For this additional reason, the judgment should be reversed.

III. THE COUNTY'S TAX ALSO IS INVALID BECAUSE IT INFRINGES ON THE SOVEREIGN AUTHORITY OF THE CHEHALIS TRIBE.

There is one final reason the County's tax is invalid: It infringes on the sovereign authority of the Chehalis Tribe.

The courts have explained that the doctrine that state taxes may not infringe on a tribe's sovereign authority is distinct from preemption by federal law. *Crow Tribe of Indians v. State of Montana ("Crow II")*, 819 F.2d 895, 902 (9th Cir. 1987), *affirmed*, 484 U.S. 997 (1988)). In *Bracker* itself, the Supreme Court recognized "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members" (*Bracker*, 448 U.S. at 142):

> "First, the exercise of such authority may be pre-empted by federal law. Second, it may unlawfully infringe 'on

> the right of reservation Indians to make their own laws and be ruled by them.' The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop,' against which vague or ambiguous federal enactments must always be measured."

Bracker, 448 U.S. at 142-143 (citations omitted); *see Crow II*, 819 F.2d at 902 ("The self-government doctrine differs from the preemption analysis and is an independent barrier to state regulation. . . . Either is a sufficient basis to hold the state tax inapplicable . . . .").

This Court had an opportunity to explore the contours of this doctrine in *Crow II*, which addressed whether imposing Montana's coal taxes on coal mined on Indian tribal property impermissibly

infringed on the tribal sovereignty of the Crow Indians. *Crow II*, 819 F.2d at 896. This Court began by explaining the fundamental principles:

> "Whether state taxes infringe on tribal sovereignty depends on whether tribal self-government is affected. The power to tax members and non-Indians alike is an essential attribute of self-government. Any assertion of state authority over tribal interests must be assessed against the traditional notions of Indian sovereignty. State action may not infringe unlawfully 'on the right of reservation Indians to make their own laws and be ruled by them.'"

Id. at 902 (citations omitted).

This Court expressly noted that "[t]ribal sovereignty contains a significant geographic component, and tribes have the power to manage the use of their territory and resources by both members and nonmembers." *Id.* Thus, for example, "[t]axing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation is not permissible absent congressional consent." *Id.* Ultimately, this Court in *Crow II* concluded that "the

Montana tax is invalid because it erodes the Tribe's sovereign authority." *Id*. at 903 (noting that "Montana taxes mineral resources that are 'a component of the reservation itself'").

Here, similar to *Crow II*, the County is imposing a tax on something that is "essentially a part of the lands." *Rickert*, 188 U.S. at 442. Under Chehalis Tribal law, property on the Chehalis Reservation (including the buildings of the Great Wolf Lodge) is not taxable. ER 767. Allowing the County to tax those buildings would frustrate Chehalis Tribal law, and would "infringe unlawfully 'on the right of reservation Indians to make their own laws and be ruled by them.'" *Crow II*, 819 F.2d at 902. The County's tax "is invalid because it erodes the Tribe's sovereign authority." *Id*. at 903.

In rejecting the Chehalis Tribe's sovereign authority argument, the district court stated that "[i]n response to Defendants' motion for summary judgment, Plaintiffs failed to present evidence in support of its sovereignty claim sufficient to raise a genuine issue of material fact." ER 10. However, the district court made no attempt to address the evidence squarely presented by the Chehalis Tribe in opposition to the County's summary judgment motion. The declaration of the Chairman of the Chehalis Tribe unequivocally states: "Under Tribal

law, Tribal property is not taxable; the Tribe considers the Lodge to be Tribal property." ER 767.

At the very least, there are genuine issues of material fact bearing on whether the County's tax infringes on the sovereign authority of the Chehalis Tribe. For this additional reason, the judgment should be reserved.

CONCLUSION

For the reasons stated above, appellants respectfully submit that the judgment should be reversed.

Dated: December 16, 2010.

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STATEMENT OF RELATED CASES

Appellants are not aware of any related cases pending in this Court, pursuant to Ninth Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE PURSUANT TO

FED. R. APP. P. 32(A)(7)(C) AND CIRCUIT RULE 32-1

FOR CASE NUMBER 10-35642

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached appellants' opening brief is proportionately spaced, has a typeface of 14 points and contains 10,190 words.

Dated: December 16, 2010.

/s/ Kevin M. Fong
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