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' REPLY BRIEF

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INTRODUCTION

The Chehalis Tribe is the majority owner of CTGW. Each of the contentions advanced by the County ignores or obscures this salient fact. Indeed, the County's various arguments make little mention of numerous facts that form an essential background for the issues of law before this Court:

- The Chehalis Tribe owns an undivided 51% of CTGW. CR 109, Ex. 1 thereto, at 11. Great Wolf Resorts, Inc. ("GWR") owns an undivided 49% interest in CTGW, through a subsidiary of GWR. *Id.*

- The Chehalis Tribe and GWR borrowed $102 million for CTGW, with the Tribe guarantying 51% and GWR guarantying 49% of that amount. ER 762.

- In addition to that financing, the Chehalis Tribe and GWR contributed another $70 million to pay for the project. ER 762. The Tribe's contribution to its CTGW joint venture included $6.3 million in cash as common capital, $10.95 million in state construction excise tax savings (subject to true up), the leasehold interest in the land valued at $3.64 million, and $8 million in preferred equity. ER 762-763.

- The Chehalis Tribe selected GWR as its joint venture partner for a number of reasons: GWR is a premier hotel-waterpark proprietor, with valuable experience and skill in developing and operating hotel-waterparks. Also, 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 itself. ER 761-762.

- The Chehalis Tribe purchased the 42.99-acre tract of land ("Land"), which is now the location of Great Wolf Lodge, at the request of the County — the County hoped to spur development in the area and add users to the County's new sewer system. ER 616-617, 942, 1089.

- The Land was taken into Trust by the Unites States for the Chehalis Tribe pursuant to 25 U.S.C. § 465, and is thus "exempt from State and local taxation." 25 U.S.C. § 465.

- 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. ER 615, 620. It was further understood that the County would lose property taxes once the Land was taken into trust. ER 618. Nevertheless, the

County supported taking the Land into trust. ER 616-617; *see* App. Opn. Br., pp. 9-10.

- Ultimately, the United States concluded that "the Tribes have a need to acquire this property for self sufficiency and economic purposes" and that "the Tribes' justification of anticipated benefits from the acquisition (i.e., hotel and convention center — an economic development activity)" withstands "utmost scrutiny." ER 618.

In reviewing the district court's grant of summary judgment, this Court must give the Chehalis Tribe and CTGW "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)), viewing the evidence in the light most favorable to Chehalis Tribe and CTGW (*id.*). The summary judgment should be reversed.

ARGUMENT

I. THE APPEAL IS TIMELY, AND THE ISSUES WERE RAISED IN THE DISTRICT COURT.

The appeal is timely: (1) judgment was entered on April 2, 2010 (ER 12); (2) a timely motion to amend the judgment was filed under Rule 59(e) of the Federal Rules of Civil Procedure (ER 47; *see* ER 6); (3) the district court disposed of the motion in an order on

June 23, 2010 (ER 1); and (4) the Chehalis Tribe and CTGW filed a timely notice of appeal on July 19, 2010 (ER 42), within 30 days of the district court's order.

The County nevertheless argues that the Chehalis Tribe and CTGW should have filed a notice of appeal within 30 days of the district court's "Order Dismissing Plaintiff's Fifth Claim for Relief and Denying Plaintiff's Motion for Summary Judgment," which was filed on July 2, 2009. County Br., p. 16. That is nonsense. An order granting partial summary judgment is not an appealable final order; it does not dispose of all claims. *See American States Ins. Co. v. Dastar Corp.*, 318 F.3d 881, 884 (9th Cir. 2003). The district court's July 2, 2009 order was not a final appealable order or judgment.

The County is equally wrong in arguing that the Chehalis Tribe and CTGW waived their claim that the County may not tax permanent improvements on Indian land. *See* County Br., pp. 17-18. The issue was raised in the district court:

- In its first amended complaint, the Chehalis Tribe and CTGW alleged that "[p]ermanent improvements to tribal trust property are not subject to state taxation." ER 1060.

- In March 2009, the Chehalis Tribe and CTGW argued, in a motion for summary judgment on their Fifth Claim, that the County "cannot tax the improvements because they are permanent improvements to tribal trust land." ER 1044. The district court construed the Chehalis Tribe/CTGW motion as seeking 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 their motion to amend the judgment, the Chehalis Tribe and CTGW reiterated their claim that "[p]ermanent improvements to tribal trust property are not subject to state taxation," based primarily on *United States v. Rickert*, 188 U.S. 432 (1903). ER 48, 50-51. The district court granted the motion in part, clarifying that it intended to dismiss all of the claims brought by the Chehalis Tribe and CTGW. ER 6. The district court explained that, by its July 2, 2009 order on the Chehalis Tribe/CTGW motion for partial summary judgment, the district court had previously "concluded that Plaintiffs' legal theory based on *Rickert* was not applicable to the taxation issue

in this case." ER 7. Further, the district court stated that in its July 2, 2009 order "[t]he Court was clear . . . that it was not only denying Plaintiffs' motion for summary judgment on its *Rickert* claim, but was concluding, as a matter of law, that *Rickert* did not apply in this case." ER 7.

The County's "waiver" argument asserts: "Nowhere in the Tribe and CTGW's response to the County's summary judgment motion did they ever assert a '*Rickert* claim' or argue their legal theory regarding taxation of permanent improvements to tribal trust land. The Tribe and CTGW chose not to argue this legal theory." County Br., p. 17. That argument is directly contrary to the conclusion of the district court (and the County's own argument) that the *Rickert* claim had already been considered and rejected by the district court in its July 2, 2009 order. ER 7; County Br., p. 16. In its waiver argument, the County fails to explain why the Chehalis Tribe and CTGW had any duty to re-raise the *Rickert* claim in their opposition to the County's summary judgment motion in 2010 if, as the district court and the County conclude, the *Rickert* argument had already been previously considered and rejected by the district court in its July 2, 2009 order.

Moreover, the County's waiver theory misperceives the burden of proof on a motion for summary judgment. As a defendant, the County had both the initial burden of production and the ultimate burden of persuasion on its motion for summary judgment. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). To carry its burden of production, the County had to either produce evidence negating an essential element of the claims brought by the Chehalis Tribe and CTGW, or show that the Chehalis Tribe and CTGW did not have enough evidence of an essential element to carry their ultimate burden of persuasion at trial. *Id.* "If a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial." *Id.* at 1102-03.

Here, the County failed to carry its initial burden of production. In Count I of its first amended complaint, the Chehalis Tribe and CTGW alleged that "permanent improvements to tribal trust property are not subject to state taxation." ER 1060. In its summary judgment motion, the County failed to produce evidence negating an essential

element of this claim. Indeed, the County never squarely addressed this claim in its motion for summary judgment.

Yet, the County boldly asserts that it "clearly moved for summary judgment on Count I of the amended complaint . . . ." County Br., p. 17. What the County actually said in its motion was simply:

> "CTGW is a separate entity from its members, and thus it is a nonIndian entity, regardless of the Tribe's proportionate share in CTGW. The Plaintiffs' claim that the property tax is *per se* invalid should be dismissed."

ER 996. Nowhere did the County specifically identify Count I or the claim by Chehalis Tribe and CTGW that permanent improvements to tribal trust property are not subject to state taxation.

There was no waiver. The issues were raised in the district court.

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

As set forth in appellants' opening brief, 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). Three decades after *Rickert*, Congress enacted what is now 25 U.S.C. § 465, which authorizes the Secretary of the Interior to acquire trust lands and provides that "such lands . . . shall be exempt from State and local taxation." 25 U.S.C. § 465. And, the Supreme court in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), found that section 465 applies to permanent improvements on a tribe's tax-exempt land, explaining that "use 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." *Id.* at 158-159; *citing Rickert*, 188 U.S. at 442.

The County essentially ignores section 465, has little of substance to say about *Mescalero*, and makes several erroneous arguments attempting to distinguish *Rickert*. The County fails to disprove that it is barred from taxing permanent improvements on Indian land.

The County hardly mentions section 465, which was enacted by Congress as part of the Indian Reorganization Act of 1934, subsequent to the Supreme Court's decision in *Rickert*. 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." 25 U.S.C. § 465.

In *Mescalero*, the Supreme Court stated that in view of section 465, permanent improvements (in that case, ski lifts) to a tribe's tax-exempt land "would certainly be immune from the State's ad valorem property tax," *citing Rickert*. *Mescalero*, 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.

Under *Mescalero*, permanent improvements on land that is tax-exempt pursuant to section 465 are immune from local taxation. The ownership of such permanent improvements is irrelevant under

Rickert, *Mescalero* and section 465. The County points to language in *Mescalero* noting that "[i]t has long been recognized that 'use' is among the 'bundle of privileges that make up property or ownership' of property and, in this sense at least, a tax upon 'use' is a tax upon the property itself." *Mescalero*, 411 U.S. at 158; *cited in* County Br., p. 25. That statement in *Mescalero* is not surprising, since *Mescalero* involved a use tax. Here, the County is imposing its property tax on permanent improvements on Indian land, and *Mescalero* applies with equal or greater force: "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." *Mescalero*, 411 U.S. at 158; *citing Rickert*, 188 U.S. at 441-443.

Moreover, this is not a case "where a tribe leases out land and has no involvement in the ownership or operation of the commercial buildings on the land," as the County erroneously suggests. *See* County Br., p. 24. Like the district court, the County fails to appreciate the significance of the fact that CTGW is majority-owned by the Chehalis Tribe. When the Bureau of Indian Affairs ("BIA") approved taking the Land into trust, BIA 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. *See* App.Opn.Br., pp. 10-14; ER 620. It would frustrate that policy if the Tribe's joint venture property were made subject to tax because the Tribe formed a limited liability company for its venture.

Notably, the County does not dispute that federal policy recognizes the advantages of joint venturing and the LLC corporate structure for tribal government enterprises. *See* App.Opn.Br., p. 36; ER 101-102. Nor does the County dispute that the Chehalis Tribe's joint venture and use of the LLC organizational form in this case furthers the federal interests in tribal self-determination through self-sufficiency and self-governance. *See* App.Opn.Br., pp. 36-37; ER 103-120. "Congress' primary objective in Indian law for several decades has been to encourage tribal economic independence and development." *Pourier v. South Dakota Dept. of Revenue*, 2003 SD 21, 658 N.W.2d 395, 405 (2003). The County's position—that using an LLC joint venture subjects permanent improvements on Indian land to property tax—would hinder economic development by forcing tribes to forego the recognized benefits of LLCs "in order to maintain their guaranteed protections under federal Indian law." *Id.* The

County's position is inconsistent with federal policy, section 465, *Mescalero*, and *Rickert*.

The County's various attempts to distinguish *Rickert* are without merit. Each of the County's arguments ignore *Mescalero* and its application of section 465:

- The County suggests that *Rickert* must be limited to instances where permanent improvements are "allotted to, occupied by, or owned by individual Indians." County Br., p. 21.

The Supreme Court's decision in *Mescalero* disproves that theory. In *Mescalero*, the Supreme Court held that a state could not tax ski lifts at a ski resort owned by the Mescalero Apache Tribe, located on land leased by the tribe from the U.S. Forest Service. *See* 411 U.S. at 146, 158. Neither the land nor the ski lifts were "allotted to, occupied by, or owned by individual Indians." Nonetheless, *Mescalero* cites, quotes, and relies upon *Rickert* in concluding that "[i]n view of § 465, these permanent improvements [the ski lifts] on the Tribe's tax-exempt land would certainly be immune from the State's ad valorem property tax." *Id.* at 158.

- The County also argues that "*Rickert* was based on the federal-instrumentality doctrine which the Court no longer considers a

basis for the invalidating state taxation of Indians." County Br. p. 22. While *Mescalero* itself rejects a claim of tax immunity under the federal-instrumentality doctrine as applied to a ski resort (*id.* at 150), the Supreme Court nonetheless went on to "consider[] the scope of the immunity specifically afforded by § 5 of the Indian Reorganization Act. 25 U.S.C. § 465." *Id.* at 155. In considering and applying section 465, the Supreme Court concluded that permanent improvements on a Tribe's tax-exempt land would be immune from a state property tax, citing *Rickert.* *Id.* at 158-159.

- The County suggests that the "primary impetus of the *Rickert* holding" was that "state taxation would impair the federal policy set forth in the Allotment Act, including the obligation to convey fee title to the allottee, free of encumbrances, at the end of the allotment period." County Br., p. 21. What the County misses is that its attempt to tax the permanent improvements here impairs current federal policy even more seriously. As previously mentioned, "Congress' primary objective in Indian law for several decades has been to encourage tribal economic independence and development." *Pourier*, 658 N.W.2d at 405. Here, the United States specifically found 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 — an economic development activity)" withstands "utmost scrutiny." ER 618. The County's tax impairs the federal policy of fostering tribal economic development and independence: "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 joint ventures and associated opportunities for investment risk-tasking and business development by the Chehalis Tribe." ER 122. That is at least as much of an impairment of federal policy as in *Rickert.*

The County also asserts that "[t]he Tribe and CTGW fail to establish that the improvements at the Lodge are permanent improvements to Tribal trust land." County Br., p. 18. In so arguing, the County ignores the ample evidence in the record that the Lodge sits on a structural fill and concrete foundation several feet deep in the ground, with one major component of the Lodge more than 15-feet deep in the Land. ER 572. The various components of the Lodge —

the conference center, water park and hotel — are constructed as a single structure, with all water, electrical, heating and other operating systems fully interconnected. ER 572-573. The buildings are permanently attached to the Land—which the United States holds in trust for the Chehalis Tribe—and the County would have to attempt to sell these permanently attached buildings in order to collect the taxes.

Finally, the County cites several Washington state cases in asserting that "the Improvements are defined as personal property under Washington law" and that "the Improvements are subject to Washington State property tax and CTGW is liable for the tax." County Br., p. 19. That, of course, is only the starting point for the analysis. Even if something is defined as taxable property under state law, the issue remains whether the County is barred from imposing a tax on such property because it is a permanent improvement on Indian land. Here, the Department of Revenue of the State of Washington itself issued an opinion stating that "it appears that the balance of the federal, state, and tribal interests tilt in favor of federal preemption for this property." ER 1143.

In short, the permanent improvements on the Land may not be taxed by the County. That the improvements are owned by CTGW,

which is majority-owned by the Chehalis Tribe, does not alter the exemption from state and local taxation.

III. 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's tax would also 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.

The County erroneously suggests that the Supreme Court in *Bracker* "has identified factors to consider when determining if a state tax borne by non-Indians on a reservation should be preempted." County Br., p. 26. In fact, what the Supreme Court actually addressed in *Bracker* was the inquiry where "a State asserts authority over the conduct of non-Indians engaging in activity on the reservation." 448 U.S. at 144.

Here, the County is not taxing "the conduct of non-Indians" — rather, the County is attempting to impose a property tax on buildings owned by a limited liability company that is majority-owned by the Chehalis Tribe. Such a tax should be barred *per se*; no "balancing" of

interests under *Bracker* should be needed. *Rickert, Mescalero,* and section 465 establish that the County may not tax permanent improvements on Indian land.

In any event, as discussed in appellants' opening brief and below, the County's property tax would be preempted under the *Bracker* balancing test, if applicable. Echoing the district court, the County argues that this Court's decision in "*Yavapai-Prescott* establishes the framework in which to conduct a Bracker analysis," suggesting that *Yavapai-Prescott* "is the most factually similar precedent." County Br., p. 27; *citing Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997). Yet, the County simply ignores the distinction explained by the Chehalis Tribe and CTGW in appellants' opening brief:

- This Court's decision in *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. 117 F.3d 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 a majority owner of CTGW, the limited liability that owns the buildings. That tribal interest is overwhelming in any *Bracker* analysis.

- 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. *See* App.Opn.Br., pp. 49-50.

As set forth below, the County's tax would be preempted under "a particularized inquiry into the nature of the state, federal and tribal interests at stake." *Bracker*, 448 U.S. at 145.

A. <u>The Chehalis Tribe's Interest</u>.

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. Moreover, under Tribal law, Chehalis Tribal property (such as the buildings at issue here) is not taxable. ER 767.

The County concedes that "[u]nder the LLC Agreement, the Tribe is entitled to a 51% 'proportionate share' of CTGW's profits and losses …." County Br., p. 36. Nonetheless, the County asserts that "the Tribe is not the majority owner of CTGW," arguing that "[o]mitting … 'sovereign benefits' results in the Tribe holding a far less than a majority equity interest in CTGW." County Br., p. 36. The County offers no justification for its attempt to rewrite the terms of the agreement reached by the Chehalis Tribe and GWR in forming and funding CTGW. The Chehalis Tribe and GWR expressly addressed the "sovereign benefits" that the County now attempts to ignore. ER 762-763. The Chairman of the Chehalis Tribe explained in his declaration:

> "22. The Tribe's estimated $10.5 million (at the time) sovereign benefits capital contribution was based on state construction excise tax savings to CTGW based on savings calculated from the LLC's actual costs during

> construction (and not after completion), and reflected in the final construction budget approved by the Members.
>
> . . . . .
>
> 24. The Tribe and GWR met in July 2008 to discuss the calculation of the Tribe's (actual) Exemption Amount capital contribution. Estimated state construction excise tax savings, and thus the Tribe's Estimated Exemption Amount capital contribution, currently total $10,964,213.00, subject to the Members' forthcoming 'true up' of construction costs as contemplated by the LLC Agreement."

ER 763. With these sovereign benefits properly considered, the Chehalis Tribe contributed at least 51% of CTGW's capital. ER 762-763.

Because the Chehalis Tribe is the majority owner of CTGW, the Chehalis Tribe's interest under the *Bracker* balancing test is significantly stronger than in *Yavapai-Prescott* and the other cases cited by the County (*see* County Br., pp. 39-40) — none of those cases involved a tax imposed upon an entity that was owned by an Indian tribe. The County attempts to avoid this distinction by

suggesting that "the property tax is simply another expense" for CTGW and can be paid from "its gross revenue." County Br., p. 40. That misses the point: requiring CTGW to pay this property tax, even if paid from CTGW's "gross revenue," will directly reduce the CTGW profits that are 51%-owned by the Chehalis Tribe. That is a direct impact on the Chehalis Tribe's interest.

The County asserts that "the Tribe has compromised its territorial autonomy by leasing its land to CTGW to conduct a commercial operation on the Land." County Br., p. 42. Again, the County obscures the fact that CTGW is majority-owned by the Chehalis Tribe itself. The Chehalis Tribe negotiated the terms of the LLC Agreement and co-managed the construction of the hotel-waterpark. *See* App. Opn. Br., pp. 15, 17. Moreover, the Chehalis Tribe regulates Great Wolf Lodge through zoning and building codes, primary law enforcement, Tribal preference employment policies, and health and safety governance. ER 768; *see, e.g.*, ER 875. That is hardly a surrendering of territorial autonomy by the Tribe, as the County erroneously suggests.

The Chairman of the Chehalis Tribe testified in his declaration: "Under Tribal law, Tribal property is not taxable; the Tribe considers

the Lodge to be Tribal property." ER 767. Nonetheless, the County urges that "the property may be subject to state property tax because the tax does not nullify the Tribe's authority," County Br., p. 43. As discussed in section IV below, that argument is clearly wrong. Imposing a state tax on property that is not taxable as a matter of Tribal law would be a direct affront to Tribal law.

Finally, the County asserts that "[t]he property tax does not affect the Tribe's economic or enterprise interests." County Br., p. 43. In fact, the effect on the economic interests of the Chehalis Tribe is direct and immediate: "It would do so … 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 …." ER 122.

B. The Federal Interest.

As discussed in appellants' opening brief, the federal interest is similarly important — the United States has title to the Land, which it holds in trust, and the buildings are permanently attached to the Land. 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* App. Opn. Br., pp. 41-45.

The County begins by suggesting that "the asserted federal interests concern the Land, not the personal property owned by CTGW." County Br., p. 31. Again, the County misses the teaching of *Rickert* and *Mescalero*: Permanent improvements "are essentially a part of the lands." *Rickert*, 188 U.S. at 442; *see Mescalero*, 411 U.S. at 158 (use of permanent improvements is "intimately connected" with use of the land itself).

The County argues that "preemption does not occur merely because a federal regulatory scheme exists." County Br., p. 32. But the federal interest here is much more than the mere existence of a federal regulatory scheme. 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 Indian Community v. Waddell*, 967 F. 2d 1404, 1411 (9th Cir. 1992) (*Gila River I*). The federal government specifically determined, among other things, that: (1) "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); (2) the loss of County property taxes is not "so significant as to weigh against the acquisition, especially since there is so much

support for the fee-to-trust acquisition" (ER 618); and (3) "the Tribes' justification of anticipated benefits from the acquisition (i.e., hotel and convention center — an economic activity) withstands … utmost scrutiny" (ER 618). 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. In so doing, the federal government 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.

Citing *Salt River Pima-Maricopa Indian Community v. Arizona*, 50 F.3d 734 (9th Cir. 1995), the County asserts that the federal interest in tribal economic development and self-sufficiency "'does not, *without more*, defeat a state tax on non-Indians.'" *Id.* at 739 (emphasis added). But here there is more: the County is imposing a

property tax on buildings owned by a joint venture that is majority-owned by the Chehalis Tribe. That is a far cry from the state tax in *Salt River* "on sales and rentals by non-Indian businesses selling products and services to non-Indians" on a reservation. *See id.* at 735. And here, there is yet "more": the federal interest the Land, which the United States holds in trust.

Finally, the County asserts that "there is no 'Indian title' at issue" because "CTGW, not the federal government or the Tribe, holds title to the Improvements." County Br., p. 35. Based on this assertion, the County concludes that "[a]ny federal interest against alienation of Indian title does not apply." County Br., p. 35. The County's argument artificially narrows the broad policy against alienation of Indian lands. Indeed, 25 U.S.C. § 177 specifically declares invalid any lease, grant or conveyance of tribal lands without consent of the tribe. 25 U.S.C. § 177; *see* 25 U.S.C. § 415 (requiring approval of Secretary of Interior for any lease of Indian lands). Any unilateral attempt by the County to take possession of the Lodge without a lease from the Chehalis Tribe would be void. *See* 25 C.F.R. § 162.106 (unauthorized use of Indian land without a lease is a trespass).

Thus, there is a paramount federal interest in both the Land and the Lodge.

C. The County's Interest.

As in *Bracker* and in *Ramah Navajo School Board, Inc. v. Bureau or Revenue of New Mexico*, 458 U.S. 832 (1982), the County's "ultimate justification for imposing this tax amounts to nothing more than a general desire to increase revenues." *Id.* at 845; *see Bracker*, 448 U.S. at 150-151. In *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989), this Court struck down a tax on timber harvested from an Indian reservation, explaining:

> "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 law enforcement and the court system are made available for all in the County, not specifically Great Wolf Lodge or CTGW.

In attempting to distinguish *Hoopa Valley*, the County asserts that "[t]he evidence here is that important services are used by and provided directly to the Tribe and CTGW." County Br., p. 50. Each of the County's claims misreads the evidence:

- The County asserts that it "provides law enforcement services and prosecution of crimes committed at the Lodge." County Br., p. 46. However, the County does not dispute that 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. 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 County's discussion of that payment carefully avoids disputing that it covers secondary law enforcement at the Lodge. *See* County Br., p. 51.

- 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. The County again does not point to any evidence disputing this fact. *See* County Br., p. 52.

- The County asserts that "the roads to access the Lodge are built, maintained and policed by Thurston County." County Br., p. 48. In fact, the roads are maintained and made available for all in the County; there are no County roads specifically for Great Wolf Lodge or CTGW. *See* ER 738-741. Nonetheless, the Chehalis Tribe did contract and pay for a road widening project near the Lodge — paying the County $90,000 for road design and over $150,000 for construction costs. ER 572. This government-to-government cooperation facilitated the completion of road widening by the time the Lodge was ready to open. ER 572.

- Finally, the County argues that "the state and local school districts bear the burden of educating the Tribe's children and providing an educated workforce from which CTGW draws its employees." County Br., p. 48. That is precisely the type of service addressed in *Hoopa Valley*—services that are "provided to all residents" and "benefit both tribal and non-tribal members" *Hoopa Valley*, 881 F.2d at 661. Even if the Lodge did not exist, the state and local districts would be providing these services.

This is not a case like *Gila River II* where the state is providing "governmental functions critical to the success" of special events

being held on Indian land. *See Gila River Indian Community v. Waddell*, 91 F.3d 1232, 1238 (9th Cir. 1996). Nor is this a case like *Yavapai-Prescott*, where state law governed a hotel's employment, workers' compensation, liens, and mortgages, and the state was taxing "sales by non-Indians to non-Indians." *Yavapai-Prescott*, 117 F.3d at 1108, 1112.

Citing *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), the County argues that "taxation is not premised on a strict quid pro quo relationship between the taxpayer and the tax collector. County Br., p. 52. In *Cotton*, however, there had been a finding that "[n]o economic burden falls on the tribe by virtue of the state laws." 490 U.S. at 186. Here, in contrast, the majority of the economic burden of the property tax falls on the Chehalis Tribe.

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

As discussed in appellants' opening brief, the County's tax is also invalid because it infringes on the sovereign authority of the Chehalis Tribe. *See* App. Opn. Br., pp. 50-54. 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 building 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 Tribe of Indians v. State of Montana* ("*Crow II*"), 819 F.2d 895, 902 (9th Cir. 1987), *affirmed*, 484 U.S. 997 (1988). The County's tax "is invalid because it erodes the Tribe's sovereign authority." *Id.* at 903.

The Chairman of the Chehalis Tribe stated in his declaration: "Under Tribal law, Tribal property is not taxable; the Tribe considers the Lodge to be Tribal property." ER 767. The County does not dispute the Chairman's testimony as to Chehalis Tribal law. County Br., p. 54. Instead, the County complains that it was not provided with "evidence of any tribal code, ordinance, regulation, or law." County Br., p 54. No such evidence was required — the chairman of a tribe is fully qualified to testify as to tribal law, which may be oral or based on custom. *See Cohen's Handbook of Federal Indian Law* (2005 ed.), § 4.05[3], at 281 ("Federal law recognizes and respects the force of tribal customs and traditions, subject to alteration by tribal

constitutions or legislative enactments"). The County mischaracterizes the Chairman's testimony as stating only that the Chehalis Tribe will not assess property taxes. In fact, the Chairman testified that "[u]nder Tribal law, Tribal property *is not taxable***.**" ER 767 (emphasis added).

This is not a case of "concurrent taxation," as the County erroneously suggests. *See* County Br., pp. 55-56. The Great Wolf Lodge is Tribal property and is not taxable as a matter of Chehalis Tribal law. ER 767. Thus, the situation is completely different from the many cases cited by the County where both a tribe and a state or local government were imposing a tax (or otherwise imposing regulations). *See* County Br., pp. 53-56; citing *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 114 (2005) (tribe and state motor fuel taxes); *Cotton Petroleum Corp.*, 490 U.S. at 189 (tribe and state oil severance taxes); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 338-339 (1983) (tribe and state hunting and fishing regulations); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (tribe and state taxes on cigarette sales); *Williams v. Lee*, 358 U.S. 217 (1959) (tribe and state jurisdiction over civil suits); *Gila River II*, 91 F.3d at 1235 (tribe and

State taxes on event ticket sales); *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1393 (9th Cir. 1987) (dictum on enforcement of both tribe and state taxes); *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253, 1258 (9th Cir. 1976) (tribe and state taxes on possessory interests); *see also Crow Tribe of Indians v. State of Montana*, 650 F.2d 1104, 1115 (9th Cir. 1981) (dictum that tribe and state could both tax same activity).

In addition, this Court recognized in *Crow II* that "[t]ribal sovereignty contains a significant geographic component," in that case invalidating a Montana tax on "mineral resources that are 'a component of the reservation land itself.'" *Crow Tribe of Indians v. State of Montana*, 819 F.2d 895, 902 (9th Cir. 1987), *affirmed*, 484 U.S. 997 (1988). The County would like to narrowly limit *Crow II* to its facts (*see* County Br., p. 57), but cannot avoid the Supreme Court's teaching in *Rickert* that permanent improvements "are essentially a part of the lands." *Rickert*, 188 U.S. at 442.

The County attempts to rely upon *Chemeheuvi Indian Tribe v. California State Board of Equalization*, 800 F.2d 1446 (9th Cir. 1986), in which an Indian tribe was "importing a finished product and reselling it to residents and visitors." *Id.* at 1459. That is far afield

from the issue here, where the County is attempting to tax permanent improvements constructed by the Tribe and its joint venture, that are attached to Tribal land, and that are not taxable as a matter of Tribal law. *See* ER 767.

Finally, the County argues that "[i]f location on tribal land was determinative, this Court surely would have held that state taxation of the activities on the reservations in *Yavapai-Prescott*, *Gila River II*, and *Salt River* was preempted because each location was 'a component of the reservation itself.'" County Br., p. 58. That misses several critical points: None of those cases involved a property tax on the permanent improvement itself; none of those cases involved a property tax on buildings considered to be Tribal property and not taxable as a matter of Tribal law. *See Yavapai-Prescott*, 117 F.3d 1107 (state tax on room rentals and food sales); *Gila River II*, 91 F.3d 1232 (state tax on entertainment events); *Salt River*, 50 F.3d 734 (state tax on sales in shopping mall).

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, which require reversal of the judgment.

CONCLUSION

For the reasons stated above and in appellants' opening brief, appellants respectfully submit that the judgment should be reversed.

Dated: March 1, 2011.

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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 6,807 words.

Dated: March 1, 2011.

/s/ Kevin M. Fong
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