UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 10-35642

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, et al.,

Plaintiffs/Appellants,

v.

THURSTON COUNTY BOARD OF EQUALIZATION, et al.

Defendants/Appellees.

BRIEF OF APPELLEES, THURSTON COUNTY, THURSTON COUNTY ASSESSOR AND THURSTON COUNTY TREASURER

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February 1, 2011

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INTRODUCTION

This appeal concerns a challenge to state taxing jurisdiction where the Thurston County Assessor placed a property tax assessment on personal property owned by CTGW, LLC ("CTGW"), a Delaware limited liability company, located on leased tribal trust land. The District Court conducted a "particularized inquiry" into the tribal, federal and state interests and considered whether the taxation interfered with the Tribe's sovereign right of self-government, as required under *White Mountain Apache Tribe v. Bracker*, and denied preemption. 448 U.S. 136, 145, 100 S. Ct. 2578 (1980); Excerpts of Record ("ER") 25-26; ER 8-9. In an order entered July 2, 2009, the District Court also ruled as a matter of law that the permanent improvements to tribal trust land are not per se tax exempt, because the law presented, including *United States v. Rickert*, is inapplicable to the facts of this case. 188 U.S. 432, 23 S. Ct. 478 (1903); ER 40; ER 7. Because the District Court properly decided these issues, Appellees, Thurston County, Thurston County Assessor and Thurston County Treasurer ("County") request this Court to affirm the District Court's decision.

STATEMENT OF JURISDICTION

The County disputes the jurisdictional statement submitted by the Appellants, Confederated Tribes of the Chehalis Reservation ("Tribe") and CTGW (collectively "the Tribe and CTGW") only regarding the issue of

whether the County may tax permanent improvements on Indian land as a matter of law, because appeal of that issue is not timely pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A). The issue was decided on July 2, 2009, and the notice of appeal was filed more than a year later on July 19, 2010. Further, this Court lacks jurisdiction of the appeal because the Tribe and CTGW did not respond to this issue in the cross motions for summary judgment before the District Court, thus waiving the issue for failure to respond pursuant to Federal Rule of Civil Procedure 56(e)(2).

ISSUES PRESENTED FOR REVIEW

The County identifies four issues for review:

1. Appeal of the District Court's July 2, 2009 determination that, as a matter of law, permanent improvements on tribal trust land are not preempted from state property taxation is not timely, or was waived, and should be dismissed.

2. Permanent improvements at the Lodge are subject to Washington State property tax because they are owned in fee by CTGW.

3. CTGW's property should not be preempted from state tax because the state interests outweigh the federal and tribal interests.

4. Taxing CTGW's property does not infringe on the Tribe's sovereignty.

STATEMENT OF THE CASE

The County does not dispute the Tribe and CTGW's statement of the case, but submits the following clarifications:

The March 2009 summary judgment motion filed by the Tribe and CTGW requested summary judgment on their claim regarding taxation of permanent improvements to tribal trust land presenting the issue: "Whether, as a matter of federal law, the Court should grant Plaintiffs' requested relief because permanent improvements to tribal trust land are not subject to taxation." ER 1037.

On December 31, 2009, the County moved for summary judgment on all remaining claims and requested dismissal of all Plaintiffs' claims. ER 991; ER 1017.

STATEMENT OF FACTS

In 2005, the Tribe and Great Wolf Resorts, Inc. ("Great Wolf"), a non-Indian corporation with water park expertise, formed CTGW, a Delaware limited liability company, for the purpose of building and owning the Great Wolf Lodge ("Lodge"), and executed a Limited Liability Agreement of CTGW ("LLC Agreement"). Supplemental Excerpts of Record ("SUPP ER") 246; ER 761-762; ER 1089. The LLC Agreement makes Great Wolf the "Managing Member" of CTGW, giving Great Wolf the power and authority to conduct the business and affairs of CTGW. SUPP ER 272-273 at Article IV.

Neither federal loans nor federal guarantees were used to build or develop the Lodge. ER 931 at 31:8-23; ER 762 ¶16. Great Wolf and the Tribe borrowed

$102 million from the Marshall Financing Group with the Tribe guaranteeing repayment of 51%. ER 762 ¶17. In addition, Great Wolf contributed $19.2 million in cash, a $14.9 million loan, and $8 million in preferred equity. DktEntry: 23-1 at 22; ER 763. The Tribe contributed $6.3 million in cash and $8 million in preferred equity. DktEntry: 23-1 at 21-22; ER 762-763. The Tribe also contributed the value of the leased land, valued at $3.64 million, and was credited with contributing $10.95 million in non-payment of taxes. *Id.* The Tribe calls this non-payment of taxes "sovereign benefits," which is the value of the state taxes that the State of Washington determined should be preempted. *Id*; *see* SUPP ER 287-288 (describing the "Exemption Amount"); *see also* ER 1129-1138. Omitting these "sovereign benefits" results in the Tribe holding a far less than a majority equity interest in CTGW.

The Lodge opened in March 2008. ER 99. It consists of 398 guest suites, restaurants, and related retail and services operations, 78,000 square feet of indoor entertainment area largely consisting of an indoor water park, a 30,000 square foot conference center, a 10,800 square foot ballroom, various meeting rooms, a business center, and catering services. *Id*. The Indian Health Service inspects the Lodge food service once annually. ER 767 ¶49.

The Lodge is located on 39 acres of land ("the Land") held in trust by the United States for the benefit of the Tribe. ER 1089. The Tribe leases the Land

to CTGW under a business development lease ("Lease") approved by the Secretary of the Interior. ER 1098-1127. The Lease states that all buildings and improvements on the Land shall be owned in fee by CTGW during the term of this Lease. ER 1101-1102 at Article 11. The Lease also states that CTGW is responsible for payment of all taxes and assessments on the leased property and property thereon. ER 1110 at Article 26.

Under the LLC Agreement, the Tribe receives a 51% "proportionate share" of CTGW's profits and losses, and Great Wolf receives a 49% "proportionate share" of profits and losses. SUPP ER 256 (defining "Proportionate Share"); SUPP ER 292. Gross revenues from the Lodge were in the tens of millions of dollars for 2008; however, the Tribe received no net profit from CTGW. [1] SUPP ER 175 (see "Total revenues" and "Net loss applicable to members" rows); SUPP ER 30 at 138:20-24.

The Tribe imposes a 3% sales tax and a 3% room tax on transactions at the Lodge. ER 768; SUPP ER 168. The Tribe also regulates the Land through zoning and other regulations. ER 766 ¶41. CTGW charges a 7% hospitality fee on room rentals that is retained by CTGW. ER 766-767; SUPP ER 319.

CTGW, as "Owner" entered into a Management Services Agreement ("Management Agreement") with Great Lakes Services, LLC, a wholly owned

[1] The evidence in the record covers the period of time up to the discovery cutoff date on December 15, 2009.

subsidiary of Great Wolf, ("Great Lakes") as "Manager." SUPP ER 36 at 12:2-13:2; SUPP ER 185-186; ER 764. The Management Agreement authorizes Great Lakes to act as the exclusive operator and manager of the Lodge, with full control and discretion in the operation, direction, management and supervision of the Lodge, and prohibits CTGW from interfering or involving itself in the daily operation of the Lodge, except as expressly provided in the Management Agreement. SUPP ER 199.

Great Wolf, through Great Lakes, receives a Base Management Fee (3% of gross revenue), an Incentive Management Fee (up to 5% of profit), a License Fee (4% of gross revenue), a Brand Marketing Fee[2] (1% of room revenue), and a Central Reservation Fee (2% of room revenue). SUPP ER 209, 231, 277, 331, 346-347, 399; SUPP ER 37 at 82:4-14; SUPP ER 26 at 88:20-89:14; SUPP ER 27 at 92:9-93:1.

In 2007, during construction of the Lodge, the Assessor issued a property tax assessment for 2008 taxes on the Lodge buildings and improvements ("Improvements") at $10,115,462. SUPP ER 7 ¶ 9; ER 1059 ¶ 34. When construction was complete, the Assessor issued the 2008 assessment for 2009 taxes at $82,066,200. ER 726. The 2009 assessment for 2010 taxes was $85,954,700. ER 731. In 2009, the first year the Lodge was operating on January

[2] As of December 15, 2009, the Brand Marketing Fee had not been charged. SUPP ER 37 at 82:7-9.

1, the furniture and fixtures were assessed at $8,039,600. ER 733. These property tax assessments include levies for Rochester and state schools, the county, Medic One, county roads, Timberland library, the Port of Olympia, Fire District 1, cemetery district, and public utility district. SUPP ER 7 ¶ 10.

The Lodge employs over 500 workers. ER 99; ER 955 at 50:22-51:3. The number of Chehalis Tribal members employed at the Lodge has fluctuated to as many as eight, and as few as three, with a total of, at most, 25 members having worked at the Lodge. ER 933 at 37:7-23; ER 99; ER 956 at 68:14-21; ER 542 ¶ 118.

The Lodge draws in excess of 400,000 customers per year. SUPP ER 4. The Lodge is accessed from Old Highway 99, a county road maintained by Thurston County. ER 1058 ¶ 26; SUPP ER 50 at 46:2-7.

Important services funded by the property tax are used and relied upon by CTGW. ER 26; SUPP ER 7-8 at 2:22-3:3; SUPP ER 10-11; SUPP ER 67 at 32:2-13. The Thurston County Sheriff provides law enforcement services that include responding to 911 emergency calls from the Lodge and all non-emergency calls where the suspect is not Native American. SUPP ER 66 at 14:18-15:21. The Sheriff responds approximately 30 times each year to the Lodge for calls other than traffic stops and DUIs. SUPP ER 65-66 at 13:4-14:5.

The Sheriff also operates a corrections division that runs the Thurston County jail. SUPP ER 67 at 30:4-31:1-3.

During the first year of Lodge operations, two felony cases were prosecuted in Thurston County Superior Court involving customers who stole property from the Lodge. SUPP ER 10 ¶ 3(a), (b). In both cases, no-contact orders were entered for the benefit of the Lodge and the defendants were ordered to pay restitution to the Lodge. *Id.* Another felony investigation by the Sheriff was referred to the Prosecuting Attorney involving allegations made by one Lodge employee against another regarding an incident at the Lodge. SUPP ER 10-11 ¶ 3 (c). In addition, three misdemeanor cases were filed in Thurston County District Court stemming from incidents involving guests at the Lodge. SUPP ER 11 ¶ 4. Each criminal prosecution necessarily involved services of the Courts, the Court Clerk, the Prosecuting Attorney, the Office of Assigned Counsel, and the Sheriff.

The Thurston County Roads Department maintains all County roads. SUPP ER 48 at 14:24-15:18; SUPP ER 49 at 29:7-25, 30:1-2.

Fire District 1 provides fire and emergency basic life support services to the Tribe and CTGW. ER 910; ER 971-977. In addition, the Fire District provides employee training, emergency response planning, hydrant testing, and fire safety inspections for the Lodge. ER 969 at 26:1-21. From the Lodge

opening in March 2008 to September 22, 2009, the Fire District provided 117 fire and medical responses to the Lodge. ER 971 at 40:18-21; ER 972 at 41:6-9. The Fire District has responded to medical emergencies for employees and exposure to a chemical leak at the Lodge. ER 981-982 at 65:11-66:4.

Thurston County Medic One responds to medical emergencies at the Lodge that require advanced life support ("ALS"). From January 1, 2008 to September 15, 2009, Medic One responded to 22 ALS calls at the Lodge. SUPP ER 43 at 28:2-17.

Thurston County Emergency Management provides disaster preparedness, mitigation and response, and coordination of intergovernmental responses in the event of emergencies. SUPP ER 44 at 42:14-43:3; SUPP ER 57 at 62:4-10, 63:4-7. An example of the emergency management services is snow and ice removal from the roads by the Lodge in the event of significant snowfall to open up roads for medical and police response, utility crews repairing power outages, and to get people to work. SUPP ER 57 at 61:25-62:10; SUPP ER 58-59 at 65:1-16, 66:13-68:22; SUPP ER 60 at 77:12-19.

The Rochester School District provides education to 115 students who are members of the Tribe, approximately 51 students who are children of Lodge employees, and 28 students who are themselves employed at the Lodge. SUPP ER 77 at 13:16-18; SUPP ER 79 at 19:8-25. In addition, the state school

property tax levy pays for the common schools and Rochester School District obtains approximately 75% of its funding from its state apportionment. RCW 84.52.065; RCW 84.52.067; SUPP ER 73-74 at 8:22-9:1; SUPP ER 76 at 11:1-10. The tribal members in school are evenly divided between Rochester and Oakville public schools. ER 941-942 at 132:20-133:3.

STANDARD OF REVIEW

The County does do not dispute the standard of review statement submitted by the Tribe and CTGW.

SUMMARY OF ARGUMENT

1. The Appeal Regarding Property Taxation of CTGW's Permanent Improvements to Tribal Trust Land Should be Denied as Untimely or Waived.

On July 2, 2009, the District Court denied summary judgment as a matter of law on the issue of whether permanent improvements on tribal trust land are subject to taxation. ER 41. The notice of appeal filed a year later on July 19, 2010 is untimely under Federal Rule of Appellate Procedure 4(a)(1)(A) and should be dismissed. ER 42. Furthermore, when the County moved for summary judgment on all claims, the Tribe and CTGW did not respond with their argument regarding taxation of the permanent improvements as required by Federal Rule of Civil Procedure 56(e)(2), thereby waiving this issue. ER 991; SUPP ER 84-108.

2. Permanent Improvements at the Lodge Are Subject to Washington State Property Tax Because They Are Owned in Fee By CTGW.

The Improvements at the Lodge are personal property pursuant to RCW 84.04.080 because they are located on land to which the United States holds title and owned by lessee CTGW. RCW 84.04.080; *Washington Mutual v. Dept. of Revenue*, 77 Wn. App. 669, 676, 893 P.2d 654 (1995).

The Tribe and CTGW rely on two cases, *Rickert* and *Mescalero Apache Tribe v. Jones*, to support their contention that the tax on the Improvements is barred. *Rickert*, 188 U.S. 432, 23 S. Ct. 478 (1903); *Mescalero*, 411 U.S. 145, 155, 93 S. Ct. 1267 (1973). Both are inapplicable because their facts are distinct from the facts here. *Rickert* held that permanent improvements "upon lands *allotted to and occupied by* Indians" are not subject to local taxation. 188 U.S. at 442 (emphasis added). *Mescalero* held that permanent improvements owned by a tribe that are located on land the tribe leases from the United States are not subject to state tax. 411 U.S. at 158. CTGW, being neither a tribe nor an individual Indian, is not exempt from taxation under either *Rickert* or *Mescalero*.

3. CTGW's Property Should Not be Preempted from State Tax Because the State Interests Outweigh the Federal and Tribal Interests.

A state tax borne by non-Indians on a reservation is not preempted under the test in *Bracker* if, upon conducting a "particularized inquiry," the state

interests outweigh the federal, and tribal interests. 448 U.S. at 145. The tax on CTGW's Improvements, including a hotel, conference center, and indoor water park, are not preempted because significant state interests are established in the state and local services provided, while the lack of federal funding or regulation establish weak federal interests, and the lack of tribal management, control, minimal tribal regulation and services, limited tribal employment, and lack of impact on the Tribe establish weak tribal interests.

Yavapai-Prescott Indian Tribe v. Scott, a case where preemption was denied, establishes a framework for considering the various interests because the facts are so similar to those of the Lodge. 117 F.3d 1107 (9th Cir. 1997), *cert. denied*, 522 U.S. 1076 (1998); ER 22. *Yavapai-Prescott* concerned taxes imposed at a hotel and convention center on leased tribal trust land, much like the Lodge. 117 F.3d at 1108.

The tribal interests include the Tribe's interest in CTGW. The Tribe argues that it holds 51% interest in CTGW making the Tribe the "majority owner." DktEntry: 23-1 at 46. The Tribe's actual contributions and share of debt show that the Tribe's interest in CTGW is far less than 51%. Additionally, the Tribe leased the Land to CTGW and executed agreements relinquishing control and management of the Lodge to Great Wolf, thus diminishing tribal interests. ER 24. In addition, the state taxation does not interfere with the Tribe's

sovereign interests, because the Tribe imposes and collects its own taxes at the Lodge and regulates the Land through building, zoning, taxation, and other ordinances.

Strong state interests are established by CTGW's use and reliance on numerous services funded by the property tax, including emergency management, law enforcement, the court system, prosecution, County roads, and schools. Given the weak federal and tribal interests, the significant state interests created by CTGW's use and reliance on property tax-funded services dictate against preemption.

4. Taxing CTGW's Property Does Not Infringe on the Tribe's Sovereignty.

The Tribe and CTGW argue that the state property tax conflicts with the Tribe's sovereignty because the Improvements are part of the reservation lands, and because the Tribe considers the Lodge to be tribal property and does not tax property. DktEntry: 23-1 at 59-60.

In asserting the Improvements are part of the Land, the Tribe and CTGW rely on *Crow Tribe of Indians v. Montana*, where a state tax on coal mined from tribal lands infringed on the Tribe's sovereignty because the coal was deemed a "component of the reservation land itself." 819 F.2d 895, 902 (9th Cir. 1987) ("*Crow II*"), *aff'd* 484 U.S. 997 (1988). Here, CTGW's Improvements are

owned separately from the tribal trust property and are not part of the reservation land.

The Tribe also points out that it does not impose property taxes and considers the Improvements to be tribal property. The Tribe does not own the Improvements, however. Furthermore, a lack of tribal tax on property does not bar state taxing jurisdiction, particularly because, in the area of taxation, concurrent state jurisdiction does not interfere with tribal sovereignty. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 189, 109 S. Ct. 1698 (1989); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 158, 100 S. Ct. 2069 (1980).

ARGUMENT

I. APPEAL OF THE DISTRICT COURT'S JULY 2, 2009 DETERMINATION THAT, AS A MATTER OF LAW, PERMANENT IMPROVEMENTS ON TRIBAL TRUST LAND ARE NOT PREEMPTED FROM STATE PROPERTY TAXATION IS NOT TIMELY, OR WAS WAIVED, AND SHOULD BE DISMISSED.

A. Appeal of the July 2, 2009 Summary Judgment Order Denying the Tribe and CTGW's Claim as a Matter of Law Is Not Timely.

Federal Rule of Appellate Procedure 4(a)(1)(A) provides that a party must file a notice of appeal "within 30 days after the judgment or order appealed from is entered." Fed. R. App. P. 4(a)(1)(A). This Court has held that "Rule 4(a)'s

timeliness requirement 'is both mandatory and jurisdictional.'" *Harmston v. City & County of San Francisco*, No. 09-16562, 2010 U.S. App. LEXIS 25253 at *15 (9th Cir. 2010) (citing *United States v. Sanders*, 480 F.3d 932, 937 (9th Cir. 2007)).

On March 12, 2009, the Tribe and CTGW filed "Plaintiffs' Motion for Summary Judgment Re: Department of Revenue Decision." ER 1031. Despite the title, the following issue was included in the motion: "Whether, as a matter of federal law, the Court should grant Plaintiffs' requested relief because permanent improvements to tribal trust land are not subject to taxation." ER 1037. The Tribe and CTGW argued, "Permanent improvements to land held in trust by the United States for the benefit of a tribe are not subject to state personal property taxes. *See U.S.* v. *Rickert,* 188 U.S. 432, 442 (1903)." ER 1044. The Tribe and CTGW considered this to be a "purely legal question." ER 1038, n.2. They asserted: "Summary judgment is appropriate here because these straightforward legal questions can be answered without factual dispute." ER 1038. The proposed order that accompanied their summary judgment motion sought declaratory judgment "that Defendants' taxes are additionally preempted under federal law because the Improvements are permanent improvements to the above-described tribal trust property." ER 1051.

On July 2, 2009, the District Court entered an "Order Dismissing Plaintiffs' Fifth Claim for Relief and Denying Plaintiffs' Motion for Summary Judgment." ER 28. The District Court very clearly analyzed the claim that "permanent improvements to tribal trust property are not subject to state taxation." ER 38. The Court "concluded that Plaintiffs' legal theory based on *Rickert* was not applicable to the taxation issue in this case. Dkt. 61 at 13." ER 7. The District Court then denied the Tribe and CTGW's motion for summary judgment. ER 41.

In its order filed June 23, 2010, the District Court explained its July 2, 2009 order stating, "The Court was clear in its order 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 (emphasis added). Because the District Court entered its order on July 2, 2009 denying the motion for summary judgment, which included the "*Rickert* claim," the Tribe and CTGW's notice of appeal filed on July 19, 2010 is well past the 30-day requirement for timely appeals under Federal Rule of Appellate Procedure 4(a)(1)(A) and should be dismissed.

B. The Tribe and CTGW Waived Their Claim Regarding Taxation of Permanent Improvements to Tribal Trust Land by Failing to Respond to Summary Judgment Seeking Dismissal.

When the County moved for summary judgment on all claims, the Tribe and CTGW then had an obligation to respond. Fed. R. Civ. P. 56(e)(2); ER 991. They did not respond regarding taxation of the permanent improvements. SUPP ER 84-108. By not asserting their legal theory based on *Rickert* in response to the County's summary judgment motion, or in any way refuting the County's assertions on any aspect of the per se claim, the Tribe and CTGW conceded to dismissal and waived their per se claim. In the absence of any response, the County was entitled to the summary judgment order dismissing Count I.

The County clearly moved for summary judgment on Count I of the amended complaint, asserting "Plaintiffs' claim that the property tax is per se invalid should be dismissed." ER 996 at 6:13-14. 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. SUPP ER 84-108. The Court should reject their contention that they had a separate "*Rickert* claim" that was erroneously dismissed. Therefore, the April 2, 2010 District Court order "was sufficient to dismiss any remaining claims under Count I of the amended complaint." ER 7.

Appeal of this issue is also untimely because the Tribe and CTGW did not present their legal theory that taxation of permanent improvements to tribal trust land is per se invalid in the cross motions for summary judgment. This Court should decline to consider the untimely appeal. *Iowa Tribe of Kansas and Nebraska, et al. v. Salazar*, 607 F.3d 1225, 1231 (10th Cir. 2010) (The appellate court has discretion to eschew untimely raised legal theories.).

II. PERMANENT IMPROVEMENTS AT THE LODGE ARE SUBJECT TO WASHINGTON STATE PROPERTY TAX BECAUSE THEY ARE OWNED IN FEE BY CTGW.

Even if this Court decides the appeal regarding taxation of permanent improvements to tribal trust land is neither untimely nor waived, the Tribe and CTGW fail to establish the Improvements are not subject to state property taxation.

A. The Tribe and CTGW Fail to Establish That the Improvements at the Lodge Are Permanent Improvements to Tribal Trust Land and, Even if Permanent, They Fail to Establish That the Improvements Are Not Subject to Taxation as a Matter of Law.

The property taxes at issue in this appeal are assessed upon the Improvements. DktEntry: 23-1 at 7 & 8. However, only portions of the Improvements are permanent. ER 523 ¶11. The Tribe and CTGW have not established which of the taxed property is permanent improvements. This failure is of no consequence, however, because the law does not support their argument that the permanent improvements are exempt from state taxation.

The Improvements are defined as personal property under Washington law. "'Personal property' for the purposes of taxation, shall be held and construed to embrace and include, without especially defining and enumerating it . . . all improvements upon lands the fee of which is still vested in the United States . . ." RCW 84.04.080. Improvements on leased Indian trust land are personal property subject to personal property tax. *Chief Seattle Properties v. Kitsap County*, 86 Wn.2d 7, 21, 541 P.2d 699 (1975). If a non-Indian leases Indian trust property, then the improvements on that property are considered personal property under RCW 84.04.080. *Id*. The owner of the personal property is liable for the property taxes on that personal property. *Timber Traders, Inc. v. Johnston*, 87 Wn.2d 42, 49, 548 P.2d 1080 (1976). Improvements that are the property of the lessee during the term of the lease are subject to personal property tax. *Washington Mutual*, 77 Wn. App. at 676. Here, CTGW's lease expressly states that CTGW owns the Improvements in fee during the term of the lease. ER 1101-1102 at Article 11; ER 1057 ¶ 18; ER 1062 ¶54. Therefore, the Improvements are subject to Washington State property tax and CTGW is liable for the tax.

The amici state in error that the Improvements are "majority-owned by the Tribe" and refer to the personal property as "the Tribe's permanent

improvements." DktEntry: 26 at 4. Their legal contentions appear to stem from their misunderstanding as to the ownership of the taxed property.

In contrast to CTGW, all three amici are business enterprises "wholly owned" by their respective tribes. DktEntry: 26 at 5. Marine View Ventures, Inc. and Island Enterprises, Inc. are tribal corporations. DktEntry: 26 at 5. Port Madison Enterprises is a tribal agency. DktEntry: 26 at 6. Because these entities are tribally owned, the tax considerations applicable to CTGW do not apply to the amici, and none of the amici will be directly impacted by the outcome of this litigation deciding whether the property of a non-Indian Delaware company is subject to state property taxation.

B. The District Court Correctly Concluded That, as a Matter of Law, Rickert Does Not Apply to the Present Case.

The Tribe and CTGW rely on *Rickert* for the proposition that permanent improvements on Indian land are not subject to local taxation. 188 U.S. at 442. Their reliance on *Rickert* is misplaced, as the District Court correctly determined. ER 7; ER 40-41. They contend that *Rickert* holds that permanent improvements on tribal trust land are never subject to state taxation, asserting "Because the buildings are permanent improvements and hence part of the Land held in trust, they cannot be taxed." DktEntry: 23-1 at 30. However, the narrow holding of *Rickert* is inapplicable to the facts here.

An important distinction exists between *Rickert* and the present case. *Rickert* states that permanent improvements cannot be taxed "upon lands *allotted to and occupied by* Indians." 188 U.S. at 442 (emphasis added). In *Rickert*, individual Indians who were allotted lands within the boundaries of their former reservation were assessed taxes in the years following the allotment. *Id*. at 442. A primary impetus of the *Rickert* holding—that the individual Indians' improvements on their allotments were not taxable—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. *Id*. As the Supreme Court explained in *West v. Oklahoma Tax Comm'n*:

> In *United States v. Rickert* … the same rule was held to apply where the United States holds legal title to land in trust for an Indian or a tribe. The United States there held legal title to certain lands in trust for *a band of Sioux Indians which was in actual possession of the lands*. This Court held that neither the lands nor the permanent improvements thereon were subject to state or local ad valorem taxes. It was emphasized that the fee title remained in the United States in *obvious execution of its protective policy toward its wards, the Sioux Indians*. To tax these lands and the improvements thereon, without congressional consent, would be to tax a means employed by the Government to accomplish beneficent objects relative to a dependent class of individuals.

334 U.S. 717, 724, 68 S. Ct. 1223 (1948) (emphasis added).

Here, the Improvements are not allotted to, occupied by, or owned by individual Indians, rather the Improvements are owned by CTGW, a Delaware

company, during the term of the lease. Nor is CTGW considered a "ward" of the United States in need of protective policies. *See Rickert*, 188 U.S. at 442. In *Rickert*, the improvements were houses and other structures owned by the allottees and were considered "essentially part of the lands," because the lands were occupied by or allotted to individual Indians. *Id*. at 441-42.

Rickert focused not only on the character of the land and the permanency of the improvements, but more importantly it focused on the fact that individual Indian allottees owned the improvements. *Id.* at 442. The Tribe and CTGW argue that, "for purposes of property tax, the ownership of the joint venture is irrelevant under *Rickert*, *Mescalero* and section 465," but quickly reverse their position, stating, "the district court overlooked that CTGW is majority owned by the Chehalis Tribe." DktEntry: 23-1 at 30. Regardless, the Improvements are owned by CTGW, and a tax on CTGW's property does not raise the same federal interests as a tax on houses owned by individual allottees.

Further, *Rickert* was based on the federal-instrumentality doctrine which the Court no longer considers a basis for invalidating state taxation of Indians. *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 475, n.13, 96 S. Ct. 1634 (1976); *Mescalero*, 411 U.S. at 155 (declining to resurrect the intergovernmental-immunity doctrine that has been consistently rejected in modern times). Rather than apply the federal-

instrumentality doctrine, the analysis should focus on principles of federal preemption. As the Supreme Court explained in *Mescalero*:

> The intergovernmental-immunity doctrine was once much in vogue in a variety of contexts and, with respect to Indian affairs, was consistently held to bar a state tax on the lessees of, or the product or income from, restricted lands of tribes or individual Indians. The theory was that a federal instrumentality was involved and that the tax would interfere with the Government's realizing the maximum return for its wards. This approach did not survive; [and] … the Court cut to the bone the proposition that restricted Indian lands and the proceeds from them were -- as a matter of constitutional law -- automatically exempt from state taxation.

411 U.S. at 150.

The District Court concluded that the Tribe and CTGW's legal theory based on *Rickert* was not applicable to the taxation issue in this case because:

> this case involves a significantly different factual scenario. Although 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. 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); ER 40-41. Because the facts here are significantly different from those presented in *Rickert*, and the rationale for the holding in *Rickert* does not apply, the *Rickert* decision is not controlling as to taxation of the Improvements.

C. The Holding in *Mescalero* Does Not Apply to the Lodge.

The Tribe and CTGW incorrectly assert that *Mescalero* stands for the proposition that "permanent improvements on land that is tax-exempt pursuant to section 465 [of the Indian Reorganization Act of 1934 (25 U.S.C. 461 et seq.)] are immune from taxation." DktEntry: 23-1 at 37. If the Tribe and CTGW were correct, then no commercial structures on tribal trust land would ever be subject to state taxation -- even where a tribe leases out land and has no involvement in the ownership or operation of the commercial buildings on the land. The holding in *Mescalero* is not so broad.

In *Mescalero*, the Mescalero Apache Tribe leased land from the United States Forest Service and obtained federal government loans for equipment and construction of a ski resort on the leased land. 411 U.S. at 146. The tribe owned and operated the ski resort. *Id.* The State of New Mexico imposed "a use tax on certain personalty purchased out of State and used in connection with the resort." *Id*.

The Court applied 25 U.S.C. § 465 of the Indian Reorganization Act, which provides that lands or rights acquired by the United States in trust for a tribe or individual Indian "shall be exempt from State and local taxation." *Id*. at 155 (quoting 25 U.S.C. § 465). The Court considered the nature of the "bundle of privileges that make up property or ownership" and stated "a tax upon 'use' is

a tax upon the property itself." *Id.* at 158. In *Mescalero*, the tribe was the lessee, so it held the "bundle of privileges" that included possession and use of the Land. *See id.* at 146. The Court, therefore, held that the "personalty installed in the construction of the ski lifts," as part of the tribe's use of the land, was not subject to taxation. *Id*. at 158. As in *Rickert*, the Court in *Mescalero* considered the "personal property [to be] 'permanently attached to the realty'" and stated it "is so intimately connected to the use of the land" that immunity from taxation of the land must extend to the improvements. *Id*.

In contrast, here, the bundle of privileges that include use and possession of the Land and the Improvements is held by CTGW, not the Tribe. The *Mescalero* holding—that a tribe that uses and possesses property is entitled to use its property free from state taxation—is inapplicable where the lease to CTGW transfers the Tribe's rights of use and possession to a Delaware company.

Both *Rickert* and *Mescalero* are too factually distinct from the present case to support the Tribe and CTGW's contention that it is unlawful to tax the Improvements while they are owned in fee by CTGW. As such, the Improvements are subject to Washington State property tax, and CTGW is liable for the property tax.

The Tribe and CTGW provide a lengthy description of the Bureau of Indian Affairs' ("BIA") findings and approval to acquire the Land in trust, urging that the findings establish the import of the Lodge to the Tribe. DktEntry: 23-1 at 16-20. The BIA decision did not, however, address whether improvements owned by CTGW would be taxable. The BIA determination that the Land would not be subject to state tax, or that a joint venture would be beneficial to the Tribe, in no way presupposes CTGW's property would not be taxable.

III. CTGW'S PROPERTY SHOULD NOT BE PREEMPTED FROM STATE TAX BECAUSE THE STATE INTERESTS OUTWEIGH THE FEDERAL AND TRIBAL INTERESTS.

The Supreme Court has identified factors to consider when determining if a state tax borne by non-Indians on a reservation should be preempted. *Salt River Pima-Maricopa Indian Community v. Arizona*, 50 F.3d 734, 736 (9th Cir. 1995), *cert denied*, 516 U.S. 868 (1995) (citing *Bracker*, 448 U.S. at 145). Those factors include: "the degree of federal regulation involved, the respective governmental interests of the tribes and states (both regulatory and revenue raising), and the provision of tribal or state services to the party the state seeks to tax." *Id*. Further, a *Bracker* analysis requires 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." 448

U.S. at 145. When conducting a *Bracker* analysis, "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." *Id*. at 143 (citing *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172, 93 S. Ct. 1257 (1973)).

A. ***Yavapai-Prescott* Establishes the Framework in Which to Conduct a Bracker Analysis.**

The District Court conducted a *Bracker* analysis using *Yavapai-Prescott* as a framework because it is the most factually similar precedent. 117 F.3d 1108-09; ER 22 . In *Yavapai-Prescott*, this Court determined that an Arizona tax was not preempted under *Bracker*. 117 F.3d at 1112. The tribe entered into an agreement with Prescott Convention Center, Inc., ("PCC"), a non-Indian, Arizona corporation, to build and lease a 161-room hotel and convention center ("Hotel"). *Id.* at 1108. The tribe received a $1.12 million grant from the United States Department of Housing and Urban Development ("HUD") to construct the Hotel. *Id*. PCC built the Hotel, but the tribe held title to all buildings and improvements. *Id.* With approval from the Secretary of Interior, the tribe leased the Hotel to PCC. *Id*. The tribe loaned $1.1 million of its HUD grant money to PCC. *Id*. PCC paid rent to the tribe ($35,000 per year plus 1% of gross revenues) as well as 2% on the loan, plus 20% of the annual net cash flow of the Hotel. *Id.*

The tribe levied a 1% tax on gross revenues. *Id.* The tribe subleased space in the Hotel where it operated a casino. *Id.* at 1109.

In comparing *Yavapai-Prescott* to the present case, the District Court found that "on balance, the federal and tribal interests in this case are even weaker than the minimal federal and tribal interests outlined in *Yavapai-Prescott* and *Gila River*." ER 25-26. Here, as in *Yavapai-Prescott*, the land is held by the United States in trust for the tribe and the Secretary of Interior approved the lease. 117 F.3d at 1111; ER 1089; ER 1125. In both cases, state services include court and law enforcement jurisdiction. 117 F.3d at 1111-12; SUPP ER 66 at 14:18-15:21; SUPP ER 10 ¶ 3(a), (b). In *Yavapai-Prescott* the tribe owned the Hotel, but here CTGW owns the Improvements. 117 F.3d at 1111; ER 1101-1102 at Article 11. In *Yavapai-Prescott* the tribe operated a casino in the Hotel, but here the Tribe has no commercial activity at the Lodge. 117 F.3d at 1114. In *Yavapai-Prescott*, HUD funding was used for the Hotel, but here the majority of the funding for the Lodge was from non-tribal sources, and no funding came from federal sources. 117 F.3d at 1109; ER 554 at 36:9-11; ER 931 at 31:8-23.

In *Yavapai-Prescott* the Hotel employed no tribal members, compared to the Lodge employing three-to-eight tribal members at a time, which is 0.7 to 1.6% of the workforce. 117 F.3d at 1111; ER 933 at 37:7-23;ER 99; ER 956 at 68:14-21. In *Yavapai-Prescott* the tribe inspected the food service two or three

times a year, and here the Indian Health Service inspects once per year. 117 F.3d at 1111; ER 557 at 9-13; ER 767 at ¶ 49. In *Yavapai-Prescott*, the tribe received $35,000 per year plus 1% of gross revenues in rent, 2% on the loan, plus 20% of the annual net cash flow of the Hotel, but here the Tribe receives no gross revenues from the Lodge and is entitled to a 51% proportionate share of net profits, of which none were reported. 117 F.3d at 1108; SUPP ER 175 (see "Total revenues" and "Net loss applicable to members" rows); SUPP ER 30 at 138:20-24; ER 946 at 183:16-21.

Further, the Tribe has a very limited role in the operation and management of the Lodge. SUPP ER 199. On this point, the District Court's analysis is instructive:

> The Tribe's only relevant exercise of authority is the authority to approve the annual operating budget for the Lodge, which may not be unreasonably withheld and is subject to binding arbitration. Even if this were considered a more active role in the operation of the Lodge than was present in the operation of the hotel in *Yavapai-Prescott*, the Tribe is significantly removed from the day-to-day management of the Lodge that is performed by Great Lakes Services, LLC, under the provisions of a contract with CTGW in which the Tribe has an equitable interest and is not a managing member.
>
> Defendants counter that "the Tribe does not exercise a controlling interest in CTGW or the Great Wolf Lodge and that lack of control illustrates the weakness of the Tribe's interests." Dkt. 100 at 14. The Court agrees with Defendants to the extent that the relevant contracts limit the Tribe's control over the Lodge. For

> example, the LLC agreement states that Great Wolf is the Managing Member with "the power and authority to conduct the business and affairs of [CTGW]." The management agreement states that CTGW "will not interfere or involve itself in any way in the day-to-day operation of the Lodge." Therefore, even though the Tribe may receive 51% of the net profits of CTGW, the evidence in the record shows that the Tribe lacks control over the Lodge and business decisions regarding the Lodge.

ER 23-24. Here, as in *Yavapai-Prescott*, the federal and tribal interests are relatively insignificant. *See* 117 F.3d at 1112.

Yavapai-Prescott sets the proper framework for a *Bracker* analysis here because the facts are so similar to the present case. However, other federal, tribal, and state interests that were not considered in *Yavapai-Prescott* are present here that further emphasize the weak federal and tribal interests and strong state interests disfavoring preemption.

B. The Federal Interests Are Insufficient to Preempt the Property Tax.

The Tribe and CTGW base their argument regarding the strength of federal interests on the title to the Land held by the United States in trust for the Tribe; the federal regulation of the acquisition of the Land into trust status; the federal regulation and approval of the lease of the Land to CTGW; federal interests in tribal economic development and self sufficiency; and federal interest against alienation of Indian title. DktEntry: 23-1 at 47-49. These asserted federal interests are weak and insufficient to preempt state taxation.

See Yavapai-Prescott, 117 F.3d at 1112; *Gila River Indian Community v. Waddell*, 91 F.3d 1232, 1237 (9th Cir. 1996) ("*Gila River II*"). Notably, other than the general federal interest in tribal economic development and self-sufficiency, the asserted federal interests concern the Land, not the personal property owned by CTGW.

Like the tribe in *Yavapai-Prescott*, here, the Tribe "bolsters its case" with the opinion of its expert, Joseph Kalt. 117 F.3d at 1113; DktEntry: 23-1 at 49-51. In his expert report, Kalt contends that federal interests are paramount in the form of policy encouraging tribal self-determination, self-government, and economic self-sufficiency. DktEntry: 23-1 at 49-51 (citing ER 121-122). However, an expert's opinion must connote more than subjective belief or unsupported speculation. *See Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 590, 113 S. Ct. 2786 (1993). Kalt's report includes irrelevant facts that are inadmissible, extensive hearsay, and unsubstantiated. Kalt also offers legal opinions regarding subjects on which he is not competent to offer opinions.[3] Kalt's report is nothing more than unsupported speculation.

The Improvements and activities conducted at the Lodge are not subject to any specific federal regulations or laws. ER 412-415 at 207:19-210:2; ER

[3] In the cross motions for summary judgment, the County sought to strike Joseph Kalt's expert report based on Federal Rules of Evidence 403, 702 and 703. SUPP ER 119-120. Rather than rule on the objection, the District Court set forth the facts upon which its decision was based. ER 19-20.

421-422 at 216:14-217:18. No federal funds were involved with the development of the Improvements. ER 931 at 31:8-23; ER 762 ¶16.

1. Neither Federal Regulation of Acquisition and Leasing of Trust Lands, nor Other Federal Regulation, Presents a Comprehensive Scheme with Which the Property Tax Conflicts.

Federal interests are greatest when the government's regulation of a given sphere is "comprehensive and pervasive." *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1192 (9th Cir. 2008) (quoting *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 839, 102 S. Ct. 3394 (1982)). Here, no such sphere exists. Aside from the Department of Interior initially taking the Land into trust, approving the lease, and conducting a single health inspection, there is no apparent federal involvement in the operation of the Lodge.

The Tribe and CTGW argue that the federal regulation of acquisition and leasing of trust lands constitute comprehensive regulatory schemes. DktEntry: 23-1 at 47-48. However, preemption does not occur merely because a federal regulatory scheme exists. *Gila River II*, 91 F.3d at 1237. To preempt, courts must find that the federal scheme is so comprehensive that it leaves "no room" for the applicable state regulation, such that application of the state regulation would obstruct or conflict with the federal scheme. *See Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1392 (9th Cir. 1987).

For example, in *Bracker*, the Supreme Court found that comprehensive federal regulation of Indian timber harvesting preempted application of Arizona's motor vehicle license and use fuel taxes on the logging and hauling operations of a non-Indian company operating entirely on Indian lands. 448 U.S. at 148. The Court relied on federal law and detailed regulations granting the Secretary of Interior broad authority over reservation timber management, sales, and harvesting; and the overriding federal objective of guaranteeing tribes that they will receive the benefit of their profit. *Id*. at 146-49. In finding Arizona's taxes preempted, the Court stated "the federal regulatory scheme is so pervasive as to preclude the additional burdens sought to be imposed . . . There is *no room* for these taxes in the comprehensive federal regulatory scheme . . . [T]he assessment of state taxes would *obstruct* federal policies." *Id*. at 148 (emphasis added).

Similarly, in *Segundo*, a local city's land use ordinance applying rent control ordinances to Indian allotments held in trust by the United States was preempted because there was a conflict between the ordinance and the federal scheme. 813 F.2d at 1392-93. This Court determined that concurrent jurisdiction was not possible because of the direct conflict between the city ordinance and the federal regulatory scheme, specifically 25 C.F.R. § 1.4. *Id*. This Court stated, "the regulatory scheme surrounding leasing of Indian lands

leaves 'no room' for application of the ordinances at issue." *Id*. at 1393. Importantly, this Court also distinguished cases like *Segundo*, where conflicting state and tribal regulations of the use of land results in preemption of state rules, and some taxation cases "where the laws of both the State and Tribe may be enforced simultaneously." *Id*. In fact, the federal regulatory scheme governing leasing of trust land was determined to be insufficient to preempt state taxation. *Gila River II*, 91 F.3d at 1237.

Preemption is favored when concurrent jurisdiction between the state and federal government is not possible. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 338-39, 103 S. Ct. 2378 (1983). That is not the case here. No federal regulatory scheme conflicts with the state tax on the lessee's property.

2. Federal Interest in Tribal Economic Development and Self-Sufficiency, Without More, Is Insufficient to Preempt the Property Tax.

The federal government has long had an interest in tribal economic development and self-sufficiency. *Salt River*, 50 F.3d at 739; *Gila River II*, 91 F.3d at 1237. However, "that interest does not, *without more*, defeat a state tax on non-Indians." *Salt River,* 50 F.3d at 739 (emphasis added). The Tribe and CTGW fail to show the requisite "more" necessary to outweigh the state interests.

3. Any Federal Interest Against Alienation of Indian Title Does Not Apply to Property Owned by CTGW.

The asserted federal interest against alienation of Indian title does not apply here because CTGW, not the federal government or the Tribe, holds title to the Improvements so there is no "Indian title" at issue. *See* DktEntry: 23-1 at 47-48. For this reason, the speculation that collection of the property tax could involve selling a building and "would likely violate federal law" against alienation of Indian title is without merit. DktEntry: 23-1 at 47-48.

C. The Tribal Interests in the Present Case Are Insufficient to Preempt the Property Tax.

The Tribe and CTGW contend that the following establish significant tribal interests: the Tribe is the majority owner of CTGW and would bear 51% of any taxes imposed by the County; and "the Chehalis Tribe has an interest in its territorial authority and autonomy and regulates virtually every facet of the Lodge. DktEntry: 23-1 at 46-47. In addition, the Tribe argues it pays the County for services related to the Lodge. DktEntry: 23-1 at 52. As discussed, *infra* section III(D)(3), the asserted payments either are unrelated to the property tax, unrelated to the Lodge, or not made to the County.

The asserted tribal interests are overstated. The evidence shows that, even when combined with the federal interests, the tribal interests are insufficient to preempt the property tax.

1. TGW Is Not the Tribe, Is Not a Tribal Entity, and the Tribe Is Not the Majority Owner of CTGW.

The Tribe argues that it holds 51% interest in CTGW making the Tribe the "majority owner" of CTGW. DktEntry: 23-1 at 46. Under the LLC Agreement, the Tribe is entitled to a 51% "proportionate share" of CTGW's profits and losses and Great Wolf is entitled to a 49% "proportionate share" of CTGW's profits and losses. ER 1147 ¶ 13; ER 1089 at 11; ER 1056 ¶ 14; SUPP ER 256, 292 ¶ 6.4, 6.5.

The Tribe's actual contributions and share of debt show that the Tribe's interest in CTGW is far less than 51%. The Tribe guaranteed 51% of the $102 million loan Great Wolf and the Tribe obtained from Marshall Financing Group, and contributed the $3.64 million value of the leased land, $6.3 million in cash, and $8 million in preferred equity. DktEntry: 23-1 at 21-22; ER 762-763. The Tribe was also credited $10.95 million in non-payment of taxes that the Tribe calls "sovereign benefits." These "sovereign benefits" are the amount of unpaid state taxes which the state of Washington determined should be preempted. DktEntry: 23-1 at 21-22; *see* ER 1129-1138. Omitting these "sovereign benefits" results in the Tribe holding a far less than a majority equity interest in CTGW.

CTGW, as a limited liability company created under Delaware law, is a distinct legal entity separate from its members, the Tribe and Great Wolf. Both

Delaware and Washington law provide: "A limited liability company formed under this chapter shall be a separate legal entity." 6 Del. C. Section 18-201; RCW 25.15.070(2)(c). "State chartered corporations, being fictional persons created by the states, should be treated as non-Indians even if owned by Indians." F. Cohen, Handbook on Federal Indian Law (1982 ed.) at pages 355-56; *see Moline Properties, Inc. v. Comm'r of Internal Revenue*, 319 U.S. 436, 440, 63 S. Ct. 1132 (1943); *Myrick v. Devils Lake Sioux Mfg. Corp.*, 718 F.Supp. 753, 755 (D.N.D. 1989); *Airvator, Inc. v. Turtle Mountain Mfg. Co.*, 329 N.W.2d 596, 602 (N.D. 1983); Steven L. Pevar, in *The Rights of Indians and Tribes* 179 (3d Ed. 2002). State-chartered entities, either corporations or limited liability companies, are separate and distinct from their members or shareholders. CTGW is a separate entity from its members, and thus it is a non-Indian entity, regardless of the Tribe's proportionate share in CTGW's profits and losses.

The Tribe and CTGW assert, "Defendants admit that 'Great Wolf owns 49% of the Great Wolf Lodge and the Tribe owns 51%.'" DktEntry: 23-1 at 13. This quote, taken from Thurston County Assessor's Response to Plaintiffs' Motion for Preliminary Injunction, dated September 29, 2008, was not an admission, but a misstatement in a memorandum made just days after the complaint was filed and prior to having an opportunity to conduct any

discovery. ER 1076. In reality, CTGW owns 100% of the Improvements in fee as alleged in the complaint and admitted in the answer. ER 1152; ER 1072.

The amici accuse the District Court of minimizing the Tribe's role and investment in the Lodge. DktEntry: 26 at 9. The amici also state that this Court should focus on the "quality of the Tribe's investment in the property[.]" *Id*. The amici are incorrect in their statements regarding the Tribe's role.

The District Court's determination was not just based on "financing and common equity structure" or the funding structure of CTGW as amici contend. DktEntry: 26 at 14. The amici downplay Great Wolf's role in the Lodge. Great Wolf provided greater financing of the Lodge than did the Tribe, and Great Wolf operates and manages the Lodge to the exclusion of the Tribe. ER 762-763; SUPP ER 199.

2. The Property Tax Does Not Burden the Tribe.

The argument that the Tribe will bear 51% of the property tax is unavailing. The entity liable for the taxes is CTGW, not the Tribe.

The Lease states that CTGW is responsible for payment of all taxes and liens resulting therefrom. ER 1110. The District Court determined that

> CTGW is contractually bound to "protect and hold harmless the Lessor, the United States and the leased premises and all interest therein and improvements thereon from any and all claims, taxes, assessments and like charges and from any lien there from [sic] or sale or other

> proceedings to enforce payment thereof, and all costs in connection therewith."

ER 41 (quoting Lease, Article 26). No evidence in the record establishes the Tribe would "bear" any burden as a result of taxation.

In *Yavapai-Prescott*, the Tribe owned the buildings, provided construction loans, levied taxes on the Hotel operations, was entitled to 20% of net revenue, and operated a casino in the Hotel, yet the taxes were deemed to fall upon the corporation, not the tribe. 117 F.3d at 1113. Despite the tribe's entitlement to net revenues from the Hotel in *Yavapai-Prescott*, or the Lodge here, the tribe is the landlord, not the entity liable for the taxes, and the legal lines between the state-chartered entity and the tribe should not be disregarded. *See id.* Just as in *Yavapai-Prescott*, the argument about "ownership position" with regard to which entity will bear the tax is unavailing. *Id.*

Even if the property tax affected the overall profitability of the Lodge, "[t]his alone, however, does not bar the imposition of a tax on non-Indians." *see Cotton Petroleum*, 490 U.S. at 175 (A state may tax private parties with whom a tribe does business, even though the financial burden of the tax may fall on the tribe.); *Barona*, 528 F.3d at 1191; *Salt River*, 50 F.3d at 737 (quoting *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 800 F.2d 1446, 1449 (9th Cir. 1986), *cert. denied,* 481 U.S. 1051 (1986)) ("[T]he Ninth

Circuit and the Supreme Court have repeatedly held that 'reduction of tribal revenues does not invalidate a state tax.'"); *Crow Tribe of Indians v. Montana*, 650 F.2d 1104, 1116 (9th Cir.1981) ("*Crow I*") ("It is clear that a state tax is not invalid merely because it erodes a tribe's revenues, even when the tax substantially impairs the tribal government's ability to sustain itself and its programs."). Moreover, here, as in *Gila River II*, there is "no evidence in the record to indicate that the profits from these facilities are the Tribe's sole source of income." 91 F.3d at 1238. The Tribe has several other business enterprises, including a casino, hotel, and construction company. ER 761 and ER 764. The Tribe has "failed to demonstrate that without the tax exemption, it would be unable to provide essential tribal services." *Chemehuevi*, 800 F.2d at 1449.

CTGW's expenses include fees paid to Great Lakes from its gross revenue; the property tax is simply another expense for the company. SUPP ER 209, 231, 277, 331, 346-347, 399; SUPP ER 37 at 82:4-14; SUPP ER 26 at 88:20-89:14; SUPP ER 27 at 92:9-93:1. Additionally, CTGW receives a 7% hospitality fee on room rentals and retains those proceeds for company purposes. SUPP ER 319; ER 766-767. The property tax has no impact on the Tribe because CTGW continues collecting the hospitality fee, and applying it to the company expenses in whatever manner it sees fit, which may include paying the

property tax. Because the property tax is not shown to impact the Tribe, the tribal interest, for the sake of a *Bracker* analysis, is weak.

The amici exaggerate the impact of taxing CTGW's property, stating that the District Court decision would narrow the "formation devices and financing sources" available to tribes. DktEntry: 26 at 6. The amici suggest that taxing CTGW's property would make partnering with a non-tribal corporation and forming a state-chartered LLC unavailable to tribes. DktEntry: 26 at 14. However, the determination against preempting the property taxes does not limit any tribe's ability to form a legal entity or finance a business venture. In fact, there is no evidence that Great Wolf would have decided against participating in CTGW had it known the property would be subject to state taxation.

3. The Tribe Has Compromised Its Territorial Authority and Autonomy.

While a tribe has a right to autonomy within its territory, in the present case, the Tribe's territorial autonomy has been significantly compromised by the Tribe's agreements with Great Wolf to operate a business on its Land. The Tribe and Great Wolf contracted to form CTGW and create the Lodge on the Land. Rather than own and operate the business itself, the Tribe, through the LLC Agreement, relinquished control and management of the Lodge to Great Wolf giving Great Wolf "the power and authority to conduct the business and affairs of [CTGW]." ER 24; SUPP ER 272-273 at Article IV. The Management

Agreement prohibits the Tribe, through CTGW, from interfering or involving itself in any way with the operations at the Lodge. SUPP ER 199. The Tribe has compromised its territorial autonomy by leasing its land to CTGW to conduct a commercial operation on the Land.

Additionally, the property tax does not interfere with the Tribe's ability to exercise its sovereign authority by levying tribal taxes at the Lodge. DktEntry: 23-1 at 50. The Tribe imposes a 3% sales tax and a 3% room tax. SUPP ER 319. The sales and room taxes, adopted by tribal resolution, apply to all sales of goods, food and beverages, and hotel rooms on tribal trust land. SUPP ER 168. The Tribe, as a sovereign government, can determine the tax rate and can raise or lower the sales and room taxes at will. Thus, the property tax levied against CTGW does not affect or interfere with the Tribe's right to tax the activities at the Lodge, whether or not the property tax is preempted.

4. Tribal Regulation Is Not Comprehensive Allowing Concurrent State Taxation Authority.

The Tribe and CTGW argue that the "Tribe regulates virtually every facet of Great Wolf Lodge[.]" DktEntry: 23-1 at 46. However, in *Yavapai-Prescott*, *Gila River II*, and *Salt River*, the tribes imposed similar regulations and none were sufficient for this Court to preempt state taxes. *Yavapai-Prescott*, 117 F.3d at 1111; *Gila River II*, 91 F.3d at 1238; *Salt River* 50 F.3d at 735.

Taxation differs from regulatory jurisdiction. State regulations may effectively nullify a tribe's authority to enforce its own regulations requiring preemption of the state regulation, yet in "the field of taxation," the laws of both the State and the Tribe may be enforced simultaneously. *Segundo*, 813 F.2d at 1393 (citing *Colville*, 447 U.S. at 158). Even if, as is argued, "[u]nder Tribal law, Chehalis property (such as the buildings at issue here) is not taxable," under state law, the property may be subject to state property tax because the tax does not nullify the Tribe's authority. DktEntry: 23-1 at 46.

The Tribe regulates the Land and the Improvements through building, zoning, taxation, and other ordinances; however, those regulations and the Tribe's services are not comprehensive. The Tribe does not provide the myriad of services and infrastructure required for the thousands of Lodge customers and employees, such as roads, law enforcement, emergency services, and schools. ER 950 at 13:5-13; ER 941-942 at 132:20-133:22.

5. The Property Tax Does Not Affect the Tribe's Economic or Enterprise Interests.

Through Joseph Kalt's opinion, the Tribe and CTGW state that "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-taking and business development by the Chehalis Tribe." DktEntry: 23-1 at 50-51. Likewise, the amici argue the outcome of this

litigation could "upset the business expectations" of Indian tribes. *See* DktEntry: 26 at 6. This argument was rejected by *Gila River II*, because, as here, "[t]he Tribe's assertions regarding ultimate economic harm are too speculative to merit much weight." 91 F.3d at 1239. Further, neither the amici nor the Tribe identify any specific business venture, existing or contemplated, that would be impacted by taxation of CTGW. There is no indication that the property tax would prevent any business venture because none has been identified. Thus, the amici fail to identify any real interest in the outcome of this litigation. Rather than upsetting business expectations, a court decision will clarify business arrangements subject to state taxation, providing certainty for the amici.

Furthermore, the amici fail to identify any tribal "unmet government services and infrastructure needs." DktEntry: 26 at 8. There is no evidence that the Tribe's revenue from CTGW, through fees or taxes, has resulted in any new programs for tribal services. SUPP ER 28-29 at 129:2-130:2. Further, there is no evidence that any tribal service would not be funded as a result of the tax on CTGW's property. Finally, as discussed in section III(C)(2), *supra*, the tax is another expense of CTGW and there is no evidence it would burden the Tribe. Simply put, there is no evidence that the property tax would affect the Tribe's enterprise interest.

D. Strong State and Local Government Interests Weigh Heavily Against Preemption.

State taxing jurisdiction is not preempted if the state interests at stake "are sufficient to justify the assertion of state authority." *Mescalero Apache Tribe*, 462 U.S. at 334. In balancing the interests, the Court must consider the state and local government interests and the provision of services to the party the state seeks to tax. *Salt River*, 50 F.3d at 736. The state interests include the interests of the state and local governments in funding the services provided to CTGW. *Id*. (recognizing the governmental regulatory and revenue raising interests and the interests shown in the provision of state services to the party the state seeks to tax). The cost to the state of the services it provides need not be proportional to the tax. *Gila River II*, 91 F.3d at 1239 (citing *Cotton Petroleum*, 490 U.S. at 185, n.15).

1. State and Local Government Services Provided to CTGW and the Lodge Establish Significant State Interests.

The state interests in taxing CTGW's property are strong because, as the District Court determined, state and local services are clearly used by the Tribe and CTGW and are "directly correlated to the taxes imposed." ER 26. Significant services include law enforcement, emergency fire and medical, county roads and the court system. ER 25. While the Tribe and CTGW continue to argue that the state and local services provided to CTGW and its

employees and customers are "*de minimis,*" the evidence clearly establishes extensive services funded directly by the property tax are relied upon by CTGW. ER 26.

The Lodge draws in excess of 400,000 customers per year and employs more than 500 employees, requiring numerous services to address the needs of the activities at the Lodge. SUPP ER 4; ER 99; ER 955 at 50:23-51:3. The County provides law enforcement services and prosecution of crimes committed at the Lodge. ER 544 at ¶132; SUPP ER 10-11 ¶ 3(a), (b), ¶ 4. The County Sheriff has authority over the overwhelming majority of crimes at the Lodge since the tribal police do not have law enforcement authority over the vast majority of customers and employees of the Lodge who are non-Indian. DktEntry: 23-1 at 52. Each criminal prosecution involves services of the Courts, the Court Clerk, the Prosecuting Attorney, the Office of Assigned Counsel, and the Sheriff.

Other services relied upon by the Lodge include Thurston County's roads, emergency management, Medic One, Fire District 1, the Rochester School District, and statewide schools. All of these services establish significant state interests.

As the Tribe and CTGW assert, *Gila River II* illustrates the nexus required between a tax and services provided in order to uphold a tax. DktEntry: 23-1 at

54. In *Gila River II*, this Court determined that the state law enforcement services, highways, and the state court forum for civil and criminal litigation arising out of the property justified state taxation of the beneficiaries of the services. 91 F.3d at 1238-1239. Just as in *Gila River II*, here, road access and maintenance, law enforcement, courts and prosecution are services funded by the property tax that are used by CTGW and its Lodge. SUPP ER 7-8 at 2:22-3:3; SUPP ER 10-11; SUPP ER 67 at 32:2-13.

Likewise, in *Yavapai-Prescott*, this Court determined state services that included state criminal jurisdiction, the law governing liens and security interests, and the law governing employment at the hotel weighed in favor of taxation. 117 F.3d at 1111-12. Consistent with the decisions in *Gila River II* and *Yavapai-Prescott*, the provision of services funded by the property tax to the Tribe and CTGW establishes significant state interests that favor the exercise of state taxation.

Just like in *Gila River II* and *Yavapai-Prescott,* here, state services provide a direct benefit to CTGW. For example, the Thurston County Superior Court's orders that prohibit a criminal defendant's contact with the Lodge and order restitution directly benefit the Lodge and CTGW. SUPP ER 10 ¶ 3(a), (b). When the Rochester or Oakville School District educates its students in math, reading and the skills needed to be gainfully employed, the Lodge benefits

directly from having a workforce available in the community.[4] SUPP ER 77 at 13:16-18; SUPP ER 79 at 19:8-25; ER 941-942 at 132:20-133:3. When the Thurston County Roads department maintains county roads used to access the Lodge, the Lodge and CTGW benefit directly from the roads that enable their employees to travel to work and their thousands of customers to arrive to stay at the Lodge. SUPP ER 48 at 14:24-15:18; SUPP ER 49 at 29:7-25, 30:1-2. These are direct services to the Lodge and are exactly the types of services this Court has found compelling in previous decisions. *Yavapai-Prescott*, 117 F.3d at 1111-1112; *Gila River II*, 91 F.3d at 1238-1239.

This is not a case like *Bracker*, *Ramah*, or *Hoopa Valley v. Nevins* where state services were provided to tribal members but were unrelated to the activity being taxed. Here, 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. *Cf. Ramah*, 458 U.S. at 843 (finding a lack of state interests in taxing on-reservation school construction where the state declined to take responsibility for the education of the tribe's children). Here, the roads to access the Lodge are built, maintained and policed by Thurston County. *Cf. Bracker*, 448 U.S. at 150 (The roads were built, maintained and policed

[4] As explained by the Great Wolf Lodge General Manager, who is in charge of hiring, the Great Wolf Lodge needs employees "pretty much all the time" and is always looking for good employees. SUPP ER 153 at 6:14-22; ER 957 at 69:22-24.

exclusively by the federal and tribal governments and their contractors.). Here, there is a direct connection between the tax revenues at issue, and the services provided to CTGW and the Lodge. *Cf. Hoopa Valley Tribe*, 881 F.2d 657, 661 (9th Cir. 1989) ("California admits there is no direct connection between revenues from the timber yield tax and the provision of services to tribal members or area residents generally.").

The Tribe and CTGW argue that law enforcement and traffic control services like those that this Court found important in *Gila River II* are not provided by the County to the Lodge, citing to the deposition transcript of the County's Engineering Services Manager, Brent Payton. DktEntry: 23-1 at 54 (citing to ER 738-741). The evidence they point to fails to support their argument. When asked, "Do you provide services to CTGW?" Mr. Payton responded, "Not that I'm aware of." ER 740-741 at 38:25-39:1. When pressed further and asked whether the public works department provides services to CTGW, Mr. Payton stated, "I don't know that for sure." ER 741 at 39:8-11. The fact that the Engineering Services Manager was not aware of services provided to the CTGW proves nothing. To the contrary, the evidence in the record confirms that law enforcement, courts, emergency response, roads, schools, and other services funded by the property tax are provided to and relied upon by the Tribe and CTGW.

2. The Tribe and CTGW Misread *Hoopa Valley* in Asserting That Services Provided County-Wide Cannot Justify the Taxation, Even if the Services are Used by and Relied Upon by the Tribe and CTGW.

The Tribe and CTGW assert that this case is like *Hoopa Valley,* arguing that the state services are insufficient to establish strong state interests because the services are "made available for all in the county." DktEntry: 23-1 at 53. The evidence here is that important services are used by and provided directly to the Tribe and CTGW.

In *Hoopa Valley*, the court determined that state services were not provided to the entity being taxed. 881 F.2d at 661 (finding no relation between the services provided by the state and the timber harvesting affected by the tax). Here, to the contrary, CTGW uses and relies on emergency management, law enforcement, courts, prosecution, the public defender, County roads, and schools for its commercial operation at the Lodge.

The court in *Gila River I* explained the *Hoopa Valley* decision as follows:

> Indeed, in *Hoopa Valley Tribe v. Nevins,* we rejected the State of California's argument that its timber tax was justified by services including law enforcement which it provided to those affected by the tax, noting that the services pointed to by the State were typically available to all of its citizens and that it had thus failed to establish a "direct connection between revenues from the timber yield tax and the provision of services to tribal members or area residents generally." Although the State may at a later stage of the litigation seek to prove a direct connection between its tax and the law enforcement services it provides for the Firebird Lake performances, the record currently is devoid of any such proof.

Gila River Indian Community v. Waddell, 967 F.2d 1404, 1412 (9th Cir. Ariz. 1992) (*Gila River I*) (internal citations omitted). Indeed, in *Gila River II*, that direct connection between the tax and the state services was shown and the court determined:

> The State provides a number of governmental functions critical to the success of the Compton Terrace and Firebird events. Law enforcement services are provided at state expense. This police protection is essential to the maintenance of order at events drawing such large groups of non-Indians since the Tribe and federal government lack the criminal jurisdiction over crimes between non-Indians.

91 F.3d at 1238-1239. Just as in *Gila River II*, the critical state services provided to CTGW and the Lodge justifies the state taxation.

3. The Property Tax-Funded Services Provided to CTGW and the Lodge Are Not Paid for by the Tribe or CTGW, Other Than the Tribe's Payment for Fire District 1 Service to All of the Tribe's Properties.

The Tribe and CTGW assert, "The Chehalis Tribe already pays the County for the services provided relating to the Lodge," referring to the $50,000 annual payment under the Tribe's gaming compact. DktEntry: 23-1 at 52. The payment is made in accordance with the Tribe's Tribal-State Compact for Class III gaming to pay for law enforcement and other services impacted by the Tribe's Lucky Eagle Casino. SUPP ER 156-158. The $50,000 payment is

unrelated to the Lodge or CTGW and is irrelevant to consideration of the facts of this case.

Likewise, the water and sewer utility services Thurston County provides to the Lodge are irrelevant to the Court's analysis. DktEntry: 23-1 at 47. Even though Thurston County is compensated for providing these services, the utilities are not funded by the property tax and do not impact state or tribal interests in the taxation. SUPP ER 8 at 3:4-5.

In asserting that the Tribe pays the County for the services provided relating to the Lodge, no evidence is provided other than the $50,000 payment under the gaming compact for the impacts of the Tribe's casino. DktEntry: 23-1 at 52. The Tribe and CTGW also refer to payment under a contract between Fire District 1 and the Tribe to provide services to all of the Tribe's property. DktEntry: 23-1 at 52; *see* ER 910. No evidence of any payment to the County for property-tax-funded services to the Lodge is given, because the Tribe does not pay for the County's services. Thus, the operation of the Lodge directly impacts numerous services funded by the property tax without any corresponding compensation.

As the Supreme Court stated in *Cotton Petroleum*, taxation is not premised on a strict quid pro quo relationship between the taxpayer and the tax collector. 490 U.S. at 185 n.15. "The intangible value of citizenship in an

organized society is not easily measured in dollars and cents." *Id.* at 189. However, the fact that the Sheriff was dispatched to the Lodge approximately 30 times each year and Medic One was dispatched approximately 11 times each year establishes these services are both provided to and used by the Lodge. SUPP ER 65-66 at 13:10-14:5; SUPP ER 43 at 28:2-17. The number of times these entities were dispatched should not, however, be used to examine the value of the services in relation to the amount of tax. The fact that these and all the other state and local services are both provided and used establishes strong state interests.

IV. STATE TAXATION OF CTGW'S PROPERTY DOES NOT INFRINGE ON THE TRIBE'S SOVEREIGNTY.

Whether state taxes infringe on tribal sovereignty depends on the degree to which tribal self-government is adversely affected. *See Crow II*, 819 F.2d at 902. The term tribal sovereignty denotes "the right of reservation Indians to make their own laws and be ruled by them." *Colville*, 447 U.S. at 156; *Williams v. Lee*, 358 U.S. 217, 220, 79 S. Ct. 269 (1959). Thus, tribal sovereignty is infringed upon when the imposition of state law conflicts with tribal law, such that it renders the tribal law null and void. *See Mescalero Apache Tribe*, 462 U.S. at 338-39; *Colville,* 447 U.S. at 158. However, if the state law and tribal law can be imposed and enforced concurrently without rending the other null and void, tribal sovereignty is not affected. *See Colville,* 447 U.S. at 158. The

fact that a tribal law exists is not enough to preempt state regulation. Rather, the state regulation must "nullify," "oust," "preclude," or "supplant" tribal law to interfere with tribal sovereignty. *Mescalero Apache Tribe*, 462 U.S. at 338; *see Colville,* 447 U.S. at 158; *Segundo*, 813 F.2d at 1393.

The Tribe and CTGW allege that the state tax impermissibly infringes on the Tribe's sovereignty because the tax conflicts with Chehalis tribal law which provides that the property is not taxable, and because the tax is imposed on "essentially a part of the lands." DktEntry: 23-1 at 59. To the contrary, the state tax neither conflicts with tribal law nor prevents the Tribe from concurrently enforcing its laws. Further, the property tax is imposed on CTGW's property, not the Land, resulting in no infringement of tribal sovereignty.

The Tribe and CTGW do not to cite any specific tribal law which states that property on the Chehalis Reservation is not taxed. DktEntry: 23-1 at 59. They merely reference Chairman Burnett's declaration stating, "The Tribe does not assess taxes on real or personal property as a matter of tribal law." DktEntry: 23-1 at 59 (citing ER 767, ¶ 47). Chairman Burnett's declaration is not "law" and no evidence of any tribal code, ordinance, regulation, or law is provided. In addition, Chairman Burnett's statement indicates only that "the Tribe" will not assess property taxes; it does not contend the Tribe's laws

prohibit state taxation. Thus, without the existence of a tribal law, there can be no conflict with state law and, therefore, no interference with tribal sovereignty.

Generally, in cases dealing with state regulation of zoning and hunting and fishing on tribal lands, courts have not permitted concurrent state regulation where imposition of state regulation would effectively nullify tribal law. *Mescalero Apache Tribe*, 462 U.S. at 343-344 (preempting state hunting and fishing laws because the exercise of state jurisdiction would effectively nullify the Tribe's authority to regulate its resources). Similarly, this Court has found that a rent-control ordinance infringes on tribal sovereignty because it hinders a tribe's ability "to make its own laws . . . and to be governed by them." *Segundo*, 813 F.2d at 1393 (holding that imposition of "the cities' rent control ordinances would necessarily preclude enforcement of a conflicting ordinance enacted by the Tribe, and would 'effectively nullify' the Tribe's authority to regulate the use of its lands").

In contrast, in the area of taxation, courts have almost uniformly found that concurrent state jurisdiction does not interfere with tribal sovereignty. *See Wagnon v. Kansas Department of Revenue*, 546 U.S. 95, 114-115, 126 S. Ct. 676 (2005); *Cotton Petroleum*, 490 U.S. at 189; *Colville*, 447 U.S. at 158; *Gila River II*, 91 F.3d at 1239; *Segundo*, 813 F.2d at 1393; *Chemehuevi*, 800 F.2d at 1449; *Fort Mojave Tribe v. City & County of San Bernardino*, 543 F.2d 1253,

1258 (9th Cir. 1976) *cert. denied* 430 U.S. 983 (1977). This is because "[t]here is *no direct conflict* between the state and tribal schemes, since each government is free to impose its taxes without ousting the other." *Colville*, 447 U.S. at 158 (emphasis added); *see also Crow I*, 650 F.2d at 1115 ("Each taxing body is free to impose its tax, since neither tax by its terms precludes the other."). In other words, with concurrent taxation, unlike concurrent zoning or hunting and fishing regulations, the state can impose its tax without nullifying the Tribe's right to tax, or not tax, that same entity.

Here, the Tribe claims that the property tax on the Improvements infringes "on the right of reservation Indians to make their own laws and be ruled by them." DktEntry: 23-1 at 59 (citing *Crow II*, 819 F.2d at 902), *accord, Williams v. Lee,* 358 U.S. at 220. Specifically, the Tribe alleges that under Chehalis tribal law, all property on the Chehalis Reservation is not taxable and that "[a]llowing the County to tax those buildings would frustrate Chehalis Tribal law." DktEntry: 23-1 at 59. In other words, the Tribe claims that state taxation nullifies its tribal law because the Tribe does not tax the Lodge property. However, concurrent taxation permits the County to tax the Lodge regardless of whether the Tribe chooses to.

Pursuant to *Crow II*, the Tribe also argues that the tax interferes with its sovereignty because the property being taxed is "essentially part of the lands."

DktEntry: 23-1 at 59. The Tribe and CTGW's attempt to analogize *Crow II* with the facts of this case is misplaced. *Crow II* is the only Ninth Circuit case denying concurrent tax jurisdiction and its fact-specific holding does not apply to the present case.

In *Crow II*, this Court held that a state tax on coal mined from tribal land infringed on the Tribe's sovereignty because the subject of the tax—the coal removed from the Tribe's land—was a "component of the reservation land itself." 819 F.2d at 902. As explained in *Crow I,* "the revenues sought to be taxed by Montana may ultimately be traced to the Tribe's mineral resources, *a component of the reservation land itself*. . . Any substantial incursion into the revenues obtained from the sale of the Indians' land-based wealth cuts to the heart of the Tribe's ability to sustain itself. . . . [T]he state's interest . . . is weak in comparison with the Tribe's right to the bounty from its own land." 650 F.2d at 1117. Thus, when a state taxes a tribe's "natural resources," the tax interferes with the tribe's sovereignty. *Crow II*, 819 F.2d at 902-03 (emphasis added).

In contrast, in *Chemehuevi,* the Tribe argued that imposition of a state tax on cigarettes sold on the reservation infringed on the Tribe's sovereignty. *Id.* at 1448. This Court determined that the state cigarette tax did not "impermissibly interfere with the Chemehuevis' ability to govern themselves." *Id*. at 1450. In doing so, the Court found the facts "materially different from cases where states attempt to tax the value of *natural resources* on an Indian reservation." *Id*. at

1449 (citing *Crow I*, 650 F.2d at 1117) (emphasis added). This case, too, is distinguishable because the property tax is on buildings, furniture, and fixtures, not natural resources, and the property is owned by CTGW, not the Tribe.

The Tribe and CTGW's argument that the buildings and improvements located at the Lodge are "components of the reservation land itself" merely because they are located on tribal trust land, is wholly unsupported by case law. If 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." In all three cases this Court decided against preemption because a hotel and conference center, entertainment venue, and a shopping mall are clearly not components of the reservation. *Yavapai-Prescott*, 117 F.3d at 1107; *Gila River II*, 91 F.3d at 1232; *Salt River*, 50 F.3d at 734. Likewise, the argument that the Lodge is a component of the Chehalis Reservation must also be rejected, because the holding of *Crow II* does not extend to preempting state taxation of property owned by CTGW.

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CONCLUSION

For the foregoing reasons, the County respectfully requests the Court affirm the judgment of the District Court.

Dated this 1st day of February, 2011.

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PROSECUTING ATTORNEY

/s/

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STATEMENT OF RELATED CASES

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

Dated: February 1 , 2011.

/s/

Jane Futterman

CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Brief of Appellees is proportionately spaced, has a typeface of 14 points and contains 13,838 words.

Dated: February 1 , 2011.

/s/

Jane Futterman

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 1, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: February 1 , 2011.

/s/

Linda L. Olsen