NO. 10-35642

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, ET AL.,

Appellants,

v.

THURSTON COUNTY BOARD OF EQUALIZATION, ET AL.,

Appellees.

Appeal from the U.S. District Court for the Western District of Washington
Docket No. 3:08-cv-05562-BHS
U.S. District Judge Benjamin H. Settle

BRIEF OF *AMICUS CURIAE* INDIAN TRIBAL ENTERPRISES IN SUPPORT OF APPELLANTS CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION AND CTGW, LLC

Rob Roy Smith, WSBA #33798
ATER WYNNE LLP
601 Union Street, Suite 1501
Seattle, WA 98101-3981
Tel: (206) 623-4711
Fax: (206) 467-8406

COUNSEL OF RECORD FOR *AMICUS CURIAE*
MARINE VIEW VENTURES, INC., ISLAND ENTERPRISES, INC.,
AND PORT MADISON ENTERPRISES

TABLE OF CONTENTS

PAGE

INTRODUCTION **1**

STATEMENT OF *AMICUS CURIAE* INTEREST IN CASE **2**

ARGUMENT **4**

I. THURSTON COUNTY'S PROPERTY TAX IS INCOMPATIBLE WITH THE PARAMOUNT TRIBAL INTERESTS IN THE PROPERTY **5**

A. Tribal Involvement Must Be Measured Qualitatively 6

B. The District Court's *Bracker* Application Chills Significant Tribal Economic Development 8

CONCLUSION **12**

CERTIFICATE OF COMPLIANCE PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 32(A) AND CIRCUIT RULE 32-1 ..... **13**

TABLE OF AUTHORITIES

PAGE

Cases

Cabazon Band of Mission Indians v. Wilson,
37 F.3d 430 (9th Cir. 1994) 6, 7, 8
California v. Cabazon Band of Mission Indians,
480 U.S. 202 (1987) 4, 7
Gila River Indian Community v. Waddell,
967 F.2d 1404 (9th Cir. 1992) 8
New Mexico v. Mescalero Apache Tribe,
462 U.S. 324 (1983) 12
Salt River Pima-Maricopa Indian Community v. Arizona,
50 F.3d 734 (9th Cir. 1995) 6
White Mountain Apache Tribe v. Bracker,
448 U.S. 136 (1980) ..... passim
Yavapai-Prescott Indian Tribe v. Scott,
117 F.3d 1107 (9th Cir. 1997) 6, 7

Statutes

25 U.S.C. § 1451 12

Federal Regulations

25 C.F.R., pt. 103 9

INTRODUCTION

Amicus curiae Marine View Ventures, Inc., Island Enterprises, Inc., and Port Madison Enterprises (collectively "*Amici* Tribal Enterprises") submit this brief in support of Appellants Confederated Tribes of the Chehalis Reservation and CTGW, LLC.

Amici Tribal Enterprises believe that well-established principles of Federal Indian law preempt Thurston County, Washington, from imposing property taxes on (1) permanent improvements made to the Chehalis Tribe's on-reservation trust land (2) that are majority-owned by the Tribe through a limited liability company. *Amici* Tribal Enterprises therefore seek a reversal of the District Court's misapplication of the *White Mountain Apache Tribe v. Bracker* balancing inquiry and resulting judgment permitting the County to tax such permanent improvements. Excerpts of Record ("ER")[1] 13-27. Allowing the County to tax the Chehalis Tribe for the Tribe's permanent improvements to its own on-reservation trust land flies in the face of bedrock principles of tribal sovereignty, federal preemption, and long-standing Congressional policies promoting tribal self-determination and reservation economic development.

All parties consented to the filing of this brief.

[1] All "ER" citations are to the Excerpts of Record filed by Appellants on December 16, 2010.

STATEMENT OF *AMICUS CURIAE* INTEREST IN CASE

Amici Tribal Enterprises are wholly-owned and operated governmental business enterprises of federally-recognized sovereign Indian tribes located within the state of Washington. *Amici* Tribal Enterprises all share certain common attributes and interests affected by the outcome of this case.

Marine View Ventures, Inc. ("MVV") is a wholly-owned and operated corporation of the Puyallup Tribe of Indians, a federally-recognized sovereign Indian tribe, with tribal reservation lands in and near Tacoma, Washington. MVV's mission is to maximize the social and economic value of Puyallup Tribal assets by managing tribal assets in a manner that generates significant economic returns. MVV manages a variety of industrial and commercial properties on the Puyallup Reservation, some of which are leased to tenants for purposes ranging from construction and operation of an international shipping container terminal to port support services and a recreational marina under short and long-term ground leases. MVV also operates businesses on tribal lands, including a marina and four retail gasoline stations.

Island Enterprises, Inc. ("IEI") is the wholly-owned and operated economic development arm of the Squaxin Island Tribe, a federally-recognized sovereign Indian tribe with tribal reservation lands near Shelton, Washington. IEI manages and operates the following tribal business operations: Island Search Services, an

executive employment search service; Salish Seafoods, an oyster wholesale supplier; Kamilche Trading Post, a convenience store and retail fuel station; and Skookum Creek Tobacco, which manufactures and distributes cigarettes.

Port Madison Enterprises ("PME") is a chartered agency of the Suquamish Tribe, a federally-recognized sovereign Indian tribe with tribal reservation lands across Elliott Bay from Seattle, Washington. One of PME's purposes is to generate revenue for the tribal government to reduce dependence on external funding sources and to provide needed services to members of the tribal community. PME's business ventures include: Suquamish Clearwater Casino Resort, Kiana Lodge, White Horse Golf Course, a property management division, business park, three retail gasoline and convenience stations, and a wholly-owned subsidiary construction company.

The District Court's Order could, if affirmed, upset the business expectations of Indian tribes and their non-tribal business partners in this Circuit. *Amici* Tribal Enterprises submit this brief to provide the Court with context underscoring the harm that could be caused should the District Court's misapplication of the balancing inquiry in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), not be reversed. An undue narrowing of the entity formation devices and financing sources that can be employed by tribal business ventures could imperil tribal self-sufficiency by making it more difficult to engage

in significant economic development projects in Indian Country. Despite the success of some tribal projects, the obstacles that tribes face in developing reservation economies are real and substantial. *Amici* share a strong interest in ensuring that the Court reaffirms the appropriate scope of the *Bracker* "particularized inquiry" standard, and the broad federal policy in favor of tribal self-sufficiency and meaningful tribal economic development recognized in *Bracker*.

ARGUMENT

Tribal self-sufficiency is "not within reach if the Tribes cannot raise revenues and provide employment for their members." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 218 (1987). Tribal economic development efforts, which must often seek investment and participation from non-tribal sources, would be severely constrained if the District Court's cramped application of the *Bracker* balancing inquiry were to stand. ER 127-31. The realities of tribal business development, and doing business within Indian Country, are not reflected in the District Court's preemption analysis.

I. THURSTON COUNTY'S PROPERTY TAX IS INCOMPATIBLE WITH THE PARAMOUNT TRIBAL INTERESTS IN THE PROPERTY

Amici Tribal Enterprises' business development efforts seek to create markets for tribal goods, build infrastructure to support those markets, and to create jobs for tribal members, on their own tribal lands, using to the greatest extent possible their own tribal monies. Tribal economic development should be viewed on a continuum. Presently, tribal economic diversification depends, in part, on attracting investment and business operational expertise from outside the tribal community. While this might not always be the case, Indian tribes will not become economically self-sufficient without going through this pivotal maturation phase wherein joint development of significant tribal projects with non-tribal interests is the norm, not an exception.

Creative tribal economic diversification projects cannot be likened to ordinary private commercial activity. Tribal business ventures, such as CTGW, LLC, provide funds directly to the tribal government, which in turn use those revenues to support critical tribal services and programs for members. Proper application of *Bracker* balancing to preempt taxes that frustrate powerful tribal and federal polices is necessary to satisfy unmet governmental service and infrastructure needs.

A. Tribal Involvement Must Be Measured Qualitatively

To attract and retain investment, and encourage entrepreneurial activity, Indian tribes must demonstrate to potential business partners and lenders both certainty in business dealings and a stable business environment that fosters innovation and invites business participation. Despite correctly identifying *Bracker* and this Court's *Salt River Pima-Maricopa Indian Community v. Arizona*, 50 F.3d 734 (9th Cir. 1995) and *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997) decisions, the District Court nonetheless misapplied the *Bracker* "particularized inquiry" standard and proceeded to minimize the Chehalis Tribe's "active role" and "substantial investment" in the buildings that comprise the Great Wolf Lodge. ER 21-26; *Bracker*, 448 U.S. at 145.

The District Court's error was its choice to quantitatively measure the Chehalis Tribe's involvement by counting instances of tribal activity in the entire project, when it should have focused on the ***quality*** of the Tribe's majority investment in the property – the buildings – subject to the challenged tax. *Compare* ER 23-24 *with Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 434 (9th Cir. 1994) ("assessing the Bands' interests, we also must consider the nature of the taxed activity."). The measure of a tribe's "active role" in a project typically turns on such factors as who owns the land, facilities, and equipment; who owns and operates the business; and who provides the infrastructure and

governmental services to support the operations. *Yavapai*, 117 F.3d at 1111. This is not a quantitative measurement, but rather a ***qualitative*** one.

A proper understanding of how the *Bracker* standard is to be applied is especially important where, as here, the challenged tax is imposed on a particular thing (property) rather than an entire set of activities. In such a case, the scope of the "particularized inquiry" must be limited and the nature of the ownership interests should take precedence. Where tribal land, with facilities and equipment paid for by the tribe, is involved; the tribe is actively involved in the business; the taxed activity receives tribal governmental services; and revenues are used by the tribe to further economic self-sufficiency and tribal sovereignty, case law demonstrates that – even though interest balancing is fact-specific – taxes should be preempted. *E.g.*, *Cabazon*, 480 U.S. at 219-20; *Cabazon Band*, 37 F.3d at 434-35.

The permanent improvements the County desires to tax would not exist but for the tribal investment of money and oversight. *E.g.*, ER 569-73, 761-66, 773, 789-96, 1090-91. Such active tribal involvement ought to be sufficient to preempt the County's property tax.

B. The District Court's *Bracker* Application Chills Significant Tribal Economic Development

The District Court's reasoning appears driven by a misapprehension of the arrangements that often must be made to secure significant economic development within Indian Country. Distracted by CTGW, LLC's structure and the fact that some "funding for the Lodge was loaned . . . from non-tribal sources," the District Court discounted the myriad tribal contributions to the development. ER 23. However, there is often no avoiding "non-tribal" attributes in a project of this magnitude.

For non-tribal capital contributions, some cession of operational control to the non-tribal partner and the use of limited liability company entity-formation is often needed to provide security for the capital investment. Such an arrangement is not new; in fact, this Court has found that use of federal funds to develop a marina project weighs in favor of preemption. *Gila River Indian Community v. Waddell*, 967 F.2d 1404, 1406-07 (9th Cir. 1992). And, it has never been necessary that the "entire value of the on-reservation activity come from within the reservation's borders." *Cabazon Band*, 37 F.3d at 435. The existence of non-federal or non-tribal contributions should not be elevated over the quality of the tribal investment to the project in the context of the entire operation. *Id.* To hold otherwise deviates from precedent, and locks Indian tribes into antiquated economic development models that eschew private investment and could place the

goals of tribal self-sufficiency and stable, diversified tribal economies out-of-reach for many Indian tribes.

Allocating proportional shares of risk and responsibility through a limited liability company venture does not, without more, suggest insufficient tribal interests in a project to preempt state or local taxation. Just as it does for non-tribal transactions, the limited liability company structure provides well-known and well-understood criteria for the allocation of rights, responsibilities, shares and decision-making based on sound business principles. ER 97-100. Given that many Indian legal principles have been referred to by the courts as "crazy quilt" and "ill-defined," certainty is rare, yet fundamentally important to secure outside investment for projects on tribal land. Indian tribes should not be pigeon-holed into a limited, and ultimately unsatisfactory, set of choice of law or entity formation alternatives out of a concern that commonly available entity formation devices might foreclose preemption in close cases.

The Chehalis Tribe's arrangement is not unique. ER 101. *Amici* Tribal Enterprises engage in sophisticated business ventures to provide funds for essential tribal services, some of which require agreeing to Washington State choice of law and making other cessions to non-tribal business partners to secure financing or participation in a project. *See, e.g.*, 25 C.F.R. pt. 103 (Federal loan guarantee program); *id.* § 103.7 (loan guarantee only provided if tribe retains at least twenty

percent equity in the business being financed). Whether this be through a multi-phase master land lease project to develop an international port facility on trust lands or operating wholesale and retail businesses, *Amici* Tribal Enterprises must deal with skepticism about tribal laws and financing limitations in entrepreneurial ways.

Great risk is attributed to projects within Indian Country irrespective of the Indian tribe's experience. Both potential business partners and lenders force concessions such as agreeing to application of state uniform commercial codes and standard arbitration processes, or operational roles such as seats on boards or committees, in order to make the deal structure more familiar to them. This places tribes in an untenable situation: refuse to agree and lose financing; do nothing until the tribe can fund the project on its own from existing, smaller economic development efforts; or throw away the tax advantages that could help it diversify and stabilize its governmental revenues. The District Court's analysis cuts tribal economic growth and entrepreneurship off at the knees by misdirecting focus on form over function, and quantity over quality.

Neither the Chehalis Tribe nor other Indian tribes should be foreclosed from the benefits of preemption because they chose, after active negotiation, to avail themselves of the widely recognized economic and business advantages of partnering with non-tribal businesses to secure expertise and financing. The Indian tribe gains expertise and the non-tribal entity gains access to a largely untapped

segment of the economy within Indian Country. ER 96-97. The District Court's reasoning, making such strategies unavailable within Indian Country, places tribes at a further competitive disadvantage.

The specter that scores of contemplated and realized arrangements between non-tribal businesses and Indian tribes might not be deemed to have sufficient tribal active involvement for preemption purposes because of, or relating to, financing and common entity structure could have a chilling effect on tribal economic development decisions. The last thing tribal economies need is the removal of incentives for non-tribal businesses to come to tribal lands to engage in sophisticated economic development with their tribal partners.

The District Court's decision may frustrate tribal economic development plans by limiting the ability of Indian tribes to venture with or otherwise engage non-tribal partners. Congressionally supported goals of tribal self-sufficiency would be undermined if tribes must self-fund all economic development projects or are limited to specific deal structures that overly restrict the role of non-tribal investors.[2] This would leave tribes mired in a world where tribal governmental

[2] The U.S. Department of the Interior operates the Office of Indian Energy and Economic Development to help tribes and tribal entrepreneurs obtain capital for job creation, implement infrastructure reforms conducive to economic progress, and develop resources prudently and in a manner beneficial to tribes. The Office specifically assists tribes in "fostering business growth and ***outside investment***." http://www.bia.gov/WhoWeAre/AS-IA/IEED/DED/NB/index.htm (emphasis added).

revenues must come from smokeshops, fireworks stands, and casinos, rather than resort/ tourism, manufacturing, and energy projects. In turn, this would limit capacity to develop qualified tribal members to run tribal businesses.

There are enough barriers to tribal self-sufficiency already; the new obstacle erected by the District Court might make that goal an impossibility in the foreseeable future. This is not what Congress intended when it sought to encourage capital development on Indian reservations. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 (1983) (citing statutes); *see, e.g.*, Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq*.

CONCLUSION

For the foregoing reasons, *Amici* Tribal Enterprises respectfully request that the Court rule in favor of Confederated Tribes of the Chehalis Reservation and CTGW, LLC and reverse and vacate the judgment.

DATED this 22nd day of December, 2010.

Respectfully submitted,

ATER WYNNE LLP

By */s Rob Roy Smith*

Rob Roy Smith, WSBA #33798
601 Union Street, Suite 1501
Seattle, WA 98101-3981
Tel: (206) 623-4711
Fax: (206) 467-8406
Email: rrs@aterwynne.com

Counsel of Record for *Amicus Curiae*

CERTIFICATE OF COMPLIANCE PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 32(A) AND CIRCUIT RULE 32-1

Pursuant to Fed. R. App. P. 29(d) and 32(a), and Ninth Circuit R. 32-1, the attached *amicus curiae* brief is proportionately spaced, has a type face of 14 points, and contains 2438 words.

December 22, 2010 — Date

/s Rob Roy Smith — Rob Roy Smith

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of December, 2010, 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.

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

/s Rob Roy Smith
Rob Roy Smith