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.

APPELLEES' RESPONSE TO APPELLANTS' MOTION TO TAKE JUDICIAL NOTICE

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ATTORNEYS FOR THURSTON COUNTY, THURSTON COUNTY ASSESSOR, AND THURSTON COUNTY TREASURER

February 14, 2013

Defendants-Appellees, Thurston County, Thurston County Assessor, and Thurston County Treasurer, do not object to this Court taking judicial notice of the U.S. Department of Interior, Bureau of Indian Affairs (BIA) rulemaking, Federal Register Volume 77, No. 234, published at 77 Fed. Reg. 72440 on December 5, 2012, and effective January 4, 2013. However, Defendants-Appellees urge this Court to consider the full text of the regulations and the preamble to this rule, and particularly Section 162.017(a) which states, in relevant part:

> *Subject only to applicable Federal law,* permanent improvements on the leased land, without regard to ownership of those improvements, are not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a state.

25 C.F.R. § 162.017(a) (emphasis added).

The preamble to the rule explains that Federal law includes Supreme Court decisions:

> Tribes have inherent plenary and exclusive power over their citizens and territory, which has been subject to limitations imposed by *Federal law, including, but not limited to Supreme Court decisions*[.]

77 Fed. Reg. 72447 (emphasis added). In particular, when considering taxation of a non-Indian entity, such as CTGW, LLC in the present case, Federal courts apply the balancing test set out in *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980). The preamble to the rule further explains:

> With a backdrop of "traditional notions of Indian self-government," Federal courts apply a balancing test to determine whether State taxation of non-Indians engaging in activity or owning property on the

> reservation is preempted. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). The *Bracker* balancing test requires a particularized examination of the relevant State, Federal, and tribal interests. In the case of leasing on Indian lands, the Federal and tribal interest are very strong.

77 Fed. Reg. 72447. Thus, the regulations make clear that permanent improvements may be taxable if the inquiry established in *Bracker* is applied and the balance of federal, tribal, and state interests favors taxation rather than preemption.

This reading of the rule was explained by the BIA in a tribal consultation session on the proposed rule held January 12, 2012 in Palm Springs, California. *See* "Consultation with Indian Tribes," 77 Fed. Reg. 72464. Bryan Newland, Senior Policy Advisor to the Assistant Secretary of Indian Affairs, and Stephen Simpson, Senior Attorney, Division of Indian Affairs, Office of the Solicitor, Department of the Interior, responded to a question about the proposed regulation stating that permanent improvements on leased land are free of state and local taxes, with the following exchange:

> MR. NEWLAND: You know, this is something that we're trying to sharpen. I can't answer your question definitely. I do know that, you know, with the balancing tests that the courts apply for taxation on Indian lands, this is our expression of the federal interests. You know, there's the tribal interests, the state interests and the federal interests. And the best way that we can articulate federal interest is to put it in regulations. But -- yeah, go ahead.

. . .

MR. SIMPSON: We don't know who will be the test case for this. The provision -- unfortunately, now they have left. The provision was suggested or requested by the Chehalis Tribe in Washington State, who is currently involved in litigation on this very issue. And they have lost at both trial court and the appellate level or at least at the appellate level. They suggested this provision to help out other tribes. As Bryan [Newland] may have noted, the intent here is to sort of on the White Mountain v Bracker Balancing Test to sort of put our thumb down on the federal side.

MR. NEWLAND: In favor of tribes.

MR. SIMPSON: In favor of tribes. Do we know that this provision will be upheld? No, we don't. But this is our attempt to do that. And if it can be sharpened, as Bryan noted it can be sharpened, we are more than happy to have comments from tribes on how we could do that.

FEMALE: (Inaudible.)

MR. NEWLAND: We have no doubt that there will be a test case at some point about this provision; and, you know, we want to button it up as tightly as we can. So ideas are welcome.

Tribal Leasing Consultation Session 111:20-113:7, attached hereto. (Full transcript available at http://www.bia.gov/cs/groups/public/documents/text/idc016192.pdf, last visited Feb. 13, 2013.)

The regulations are not meant to replace the courts' analysis under *Bracker*, nor do they mandate that permanent improvements on tribal leased property are

never subject to state and local taxes. Rather, Section 162.017(a) and its preamble convey the BIA's perspective that when analyzing leasing on Indian lands under *Bracker*, courts should consider "the Federal and tribal interests [to be] very strong." 77 Fed. Reg. 72447.

The applicability of federal case law, including the *Bracker* balancing test, is further supported by the Federalism finding set forth in the rule that

> this rule has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. . . . This land is subject to tribal law and Federal law, only, except in limited circumstances and areas where Congress or a Federal court has made State law applicable.

77 Fed. Reg. 72464. Had the finding regarding federalism failed to acknowledge the applicability of state law or applied a blanket exemption from state and local taxation without regard to a *Bracker* analysis or other federal case law, the rule would have a substantial direct effect on the States and consultation with the States would have been mandated under Executive Order 13132. Exec. Order No. 13132, 64 Fed. Reg. 43255-43259 (August 10, 1999).

In taking judicial notice, this Court should look to the full text of the new rule. As the explanatory language in the rule makes clear, the Court should consider the *Bracker* balancing of federal, tribal, and state interests. In doing so, the Court should give appropriate weight to the Secretary of the Interior's

expression of the Department of Interior's federal interest in non-Indian owned permanent improvements on tribal trust land.

Dated this 14th day of February, 2013.

JON TUNHEIM
PROSECUTING ATTORNEY

/s/

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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 14, 2013.

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 14 , 2013.

/s/

Linda L. Olsen

REPORTER'S TRANSCRIPT OF MEETING RE:

DEPARTMENT OF THE INTERIOR

BUREAU OF INDIAN AFFAIRS

PROPOSED RULE: 25 CFR 162

(LEASES & PERMITS)

DATE: Thursday, January 12, 2012

TIME: 8:30 a.m. to 12:41 p.m.

PLACE: Palm Springs Convention Center
277 North Avenida Caballeros
Palm Springs, California

REPORTED BY: Rhonda K. Goodman
CSR No. 8857

Attachment to
Response to Judicial Notice - 7

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PRESENT:

FROM THE DEPARTMENT OF THE INTERIOR:

BRYAN NEWLAND

STEPHEN L. SIMPSON

ELIZABETH K. APPEL

INTRODUCED:

MR. KEVIN BEARQUIVER

MS. GLORIA KOEHNI

MS. CARMEN FOSIO

MR. JIM JAMES

MS. OLLIE BEYAL

MR. MATTHEW KIRKLAND

MS. THERESA GLINSKI

MS. BELINDA RAY

MS. CYNTHIA MORALES

FROM THE AUDIENCE:

See seven pages of attached Sign-in Sheets

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MS. VITOLS: Good afternoon. My name is Diane Vitols. I'm in-house counsel at Agua Caliente. I have a question about the tax provision, and you highlighted it in the power point that the tax provision was new and perhaps might be controversial. It is at Section 162. 415 C. And it says permanent improvements on lease land are free of fees, taxes, charges imposed by the state for the agency of the state.

So as an example, where a tribe was to build, say, a restaurant building and lease the land and the building to someone to come in and operate, we'll say, a Friday's Restaurant. When the state or local municipality comes along and wants to impose a possessory interest tax, they want to tax that restaurant on the value of the leasehold interest, will this section help us, or are we still having to advise the restaurant operator that possessory interest tax will be collected?

Thank you.

MR. NEWLAND: Thank you for that.

You know, this is something that we're trying to sharpen. I can't answer your question definitely. I do know that, you know, with the balancing tests that the courts apply for taxation on Indian lands, this is our expression of the federal interests. You know, there's the tribal interests, the state interests and the federal

interests. And the best way that we can articulate federal interest is to put it in regulations. But -- yeah, go ahead.

MS. VITOLS: Let me ask the same question a different way.

MR. NEWLAND: Okay.

MS. VITOLS: Are you planning that we will be the test case for this?

MR. NEWLAND: Agua Caliente? No.

MR. SIMPSON: We don't know who will be the test case for this. The provision -- unfortunately, now they have left. The provision was suggested or requested by the Chehalis Tribe in Washington State, who is currently involved in litigation on this very issue. And they have lost at both trial court and the appellate level or at least at the appellate level. They suggested this provision to help out other tribes. As Bryan may have noted, the intent here is to sort of on the White Mountain v Bracker Balancing Test to sort of put our thumb down on the federal side.

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FEMALE: (Inaudible.)

MR. NEWLAND: We have no doubt that there will be a test case at some point about this provision; and, you know, we want to button it up as tightly as we can. So ideas are welcome.

MR. PARKER: Got a question. I don't know the answer. Maybe I'll find out. On the -- it was mentioned 400-plus homeowners that don't have deeds; and this other thing, it doesn't stipulate anything about getting deeds either. But the tribe has in the past, and I've asked them, that people have gotten the 51 percent, but on the 100 percent. So you are saying you'll okay all the homesites that they have in the past got the 51 percent of the land or the interest?

MR. NEWLAND: We're going to do our best to make sure that the folks at Salt River and elsewhere, who are in a similar situation, can continue to keep their houses.

MR. PARKER: There's two parts here. The section of 400-plus people that don't have deeds that went through this process before and got the 51 percent had a house built, but they have no documentation to that, plat that. Yeah, that's their land, and that's