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AGUA CALIENTE BAND OF CAHUILLA INDIANS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

AGUA CALIENTE BAND OF CAHUILLA INDIANS,

Plaintiff,

v.

RIVERSIDE COUNTY, *et al.*,

Defendants,

DESERT WATER AGENCY,

Defendant-Intervenor.

Case No.: ED CV 14-00007-DMG (DTBx)

PLAINTIFF'S OPPOSITION TO DEFENDANTS' AND DEFENDANT-INTERVENOR'S MOTION FOR JUDGMENT ON THE PLEADINGS

Hearing Date: August 29, 2014
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OPPOSITION TO JUDGMENT ON PLEADINGS

Riverside County (the "County") and Desert Water Agency ("DWA") (collectively, "Defendants") seek to dismiss Plaintiff Agua Caliente Band of Cahuilla Indians' ("Tribe") claims against the County pursuant to Fed. R. Civ. P. 12(c) based on outdated case law and nearly half-century old facts. Dkt. No. 42-1 (July 28, 2014). The Court should deny Defendants' motion for three reasons: (1) res judicata is inapplicable to tax cases; (2) collateral estoppel does not apply when, as here, there has been an intervening change in the law; and (3) stare decisis is inapplicable. The Tribe's case should proceed against both the County and DWA.

I. BACKGROUND

The Tribe challenges the legality of a specific California state tax assessed by the County on possessory interests held by lessees of Indian trust lands within the Tribe's Reservation. Compl. ¶ 19 (Dkt. No. 1); Ca. Rev. & Tax Code § 107 *et seq.;* Bd. of Equalization Property Tax Rule 20. This possessory interest tax ("PIT"), which is a general revenue tax not directly tied to any services that the County provides to Indian landowners or their lessees, is preempted by federal law pursuant to a balancing of relevant federal, state, and tribal interests, and because it impermissibly interferes with the Tribe's sovereign interest in self-governance. Compl. ¶¶ 24, 29-31, 35-37.

DWA's intervention in the case placed at issue one additional tax and two charges: (1) a groundwater replenishment assessment charged directly by DWA to groundwater pumpers in DWA's service area; (2) a monthly water service charge charged directly to DWA based on water used by DWA customers; and (3) an *ad valorem* tax based on the value of property interests that a taxpayer holds within DWA's service area assessed and collected for DWA by the County. *See* Dkt. No. 17. The pending motion to dismiss does not address DWA's tax and charges.

To determine the validity of the PIT, the Court must engage in a balancing of federal, state, and tribal interests. *White Mountain Apache Tribe v. Bracker*, 448 U.S.

136, 144-45 (1980); *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433 (9th Cir. 1994). Factors relevant to this preemption balancing test include, *inter alia*, the comprehensiveness of federal regulation of the taxed activity or transaction, the entity that bears the legal and economic burden of the tax, the purpose of the tax, and the nexus between the tax and governmental functions or services provided by the taxing entity to the taxpayer. *See, e.g.*, *id.*; *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 843-45 (1982). This test is fact-intensive and specific, requiring "a particularized inquiry … designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Bracker*, 448 U.S. at 145. Relevant to this analysis are new federal leasing regulations that took effect on January 4, 2013. *See* 25 C.F.R. § 162.017(c) ("Subject only to applicable Federal law, the leasehold or possessory interest is not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State."); Compl. ¶¶ 25, 34-37.

II. STANDARD OF REVIEW

Under Rule 12(c) of the Federal Rules of Civil Procedure, "a party may move for judgment on the pleadings" after the pleadings are closed "but early enough not to delay trial." A Rule 12(c) motion is "functionally identical" to a Rule 12(b)(6) motion to dismiss for failure to state a claim, and therefore the same legal standard applies. *See Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 n. 4 (9th Cir. 2011). "A judgment on the pleadings is properly granted when, taking all the allegations in the pleadings as true, a party is entitled to judgment as a matter of law." *Lyon v. Chase Bank USA, N.A.*, 656 F.3d 877, 883 (9th Cir. 2011) (citations and quotations omitted.) "All allegations of fact by the party opposing the motion are accepted as true, and are construed in the light most favorable to that party." *Gen. Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church*, 887 F.2d 228, 230 (9th Cir.1989). Dismissal is improper except in extraordinary cases. *Corsican Prods. v. Pitchess*, 338 F.2d 441, 442 (9th Cir. 1964).

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III. ARGUMENT

The Court should deny Defendants' motion for three reasons: (1) res judicata is inapplicable to tax cases; (2) collateral estoppel does not apply when, as here, there has been an intervening change in the law; and (3) stare decisis is inapplicable, and even if the doctrine applied here, *Bracker* would be the controlling decision. Judgment is not possible based on solely the contents of the pleadings.

A. Res Judicata Is Inapplicable

"Res judicata, also known as claim preclusion, bars litigation in a subsequent action of any claims that were raised or could have been raised in the prior action." *Western Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1192 (9th Cir.1997). Res judicata does not apply here because this is a tax case and the Tribe's claims are clearly distinct in time, space, and origin from the 1966 litigation.

1. Res Judicata Does Not Apply to Tax Cases

Importantly, res judicata does not apply in tax cases, including this one. In *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948), the United States Supreme Court considered whether the intra-family assignment of a license contract disposed of the taxpayer's income tax liability. The Supreme Court held that "each year is the origin of a new liability and of a separate cause of action." *Id*. at 598. Courts have since interpreted this to mean that tax cases covering different years necessarily raise different claims, although the issues may be the same. *See*, *e.g.*, *Burlington Northern Santa Fe Railroad Co. v. Assiniboine and Sioux Tribes*, 323 F.3d 767, 771 (9th Cir. 2003) (holding that res judicata did not bar railroad's second challenge to the validity of a tribal ad valorem tax because "tax cases by their nature raise different claims concerning different tax years, although the *issues* may be precisely the same") (emphasis in original); *Parker v. Westover*, 221 F. 2d 603, 605 (9th Cir. 1955) (citing *Sunnen* and stating "Each year is the origin of a new liability and of a separate cause of action). As a result, the doctrine of res judicata cannot apply to tax cases generally.

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Defendants argue that *Sunnen* and *Burlington Northern* do not apply because "[t]his case is unlike a typical taxpayer liability case." Mem. at 10. This argument places form over substance and is not persuasive. The rationale of *Sunnen* applies with full force here, where the Tribe argues that an intervening change in law has rendered the County's assessment of its PIT – a "distinct annual event[ ]– invalid." *Burlington Northern*, 323 F.3d at 771 (applying *Sunnen* to Railroad's second challenge to the validity of a tribal ad valorem tax). The Tribe is harmed by the County's assessment and collection of the PIT each and every tax year, just as other taxpayers are harmed by any other imposition of tax liability. *See Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976) (explaining tribe's injury arose from the fact that the state's taxation scheme posed a threat to the tribe's interest in "tribal self-government," an interest that Congress has sought to protect); s*ee also Osage Nation v. Oklahoma ex rel. Okla. Tax Comm'n*, 597 F. Supp. 2d 1250, 1253-54 (N.D. Okla. 2009) (holding that the tribal plaintiff had standing because it "alleged [that the] Defendants' taxing activity within its reservation [was] an unlawful infringement on the Nation's sovereignty and right of self-government"); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Zeuske*, 145 F. Supp. 2d 969, 972 (W.D. Wis. 2000) (holding that the plaintiff tribe had standing to challenge state taxing activities because the tribe was "suing to protect general sovereignty interests … and to protect against the possibility that if it ever chooses to impose its own taxes … its tax base will be eroded by state taxation"). That the harm is to a sovereign interest does not change the rationale behind the rule in *Sunnen.* The legal grounds for a party's claim to invalidate a tax, or who is legally responsible for paying the tax, are not relevant to the rules that bar the application of res judicata to a tax case. Mem. at 11.

2. The Instant Claims Are Distinct from Those in 1966

Even if res judicata somehow could apply in this tax case, the Tribe's current challenge cannot and does not present the same claim as one brought nearly a half-

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century ago, as it relies on a different legal theory with different elements of proof to challenge a different assessment of taxes.

The Tribe's challenge to the PIT relies in part on the change in the Federal implementing regulations effective January 4, 2013, and, accordingly, seeks to preempt the PIT assessed after that change. Compl. ¶¶ 25, 28-30. 25 C.F.R. § 162.017(c) became effective no sooner than January 4, 2013. Under California law, possessory tax liability (which includes taxes on improvements) is fixed as of January 1 each year. *See* Ca. Rev. & Tax Code §§ 117 & 2192. By definition, there could have been no prior claim that the assessment of the PIT violated 25 C.F.R. § 162.017(c) or ran afoul of the federal interests expressed in that regulation.

Indeed, the rationale underlying the doctrine of res judicata shows that it has no application here. Res judicata is intended to prevent calculated claim splitting and the relitigation of claims that a party litigated or could have fully litigated in a prior proceeding. *See, e.g.*, *Schaafsma v. Marriner*, 634 F. Supp. 812, 814-15 (D. Vt. 1986). Its application makes no sense where, as here, laws or legal doctrines that were not applicable or not even in existence at the time of the initial litigation allow a party to bring a new, distinct claim that, by definition, it has not had an opportunity to fully litigate. *See id.* It has been almost 50 years since the Tribe filed the case challenging the PIT under a different legal preemption standard and without the benefit of the new federal leasing regulations. *See, e.g., Pittston Co. v. U.S.*, 199 F.3d 694, 705 (4th Cir. 1999) (rejecting res judicata where new claim is "clearly distinct in time, space, and origin from the assessments [plaintiff] is now challenging."); *Spradling v. City of Tulsa*, 198 F.3d 1219, 1223 (10th Cir. 2000) (stating that res judicata is inapplicable in the face of an intervening change in the law or if a modification of significant facts creates new legal conditions); *Houston Professional Towing Ass'n v. City of Houston*, No. 4:12–CV–56, 2013 WL 4483380 at *5 (S.D. Tex. Mar. 30, 2013) (rejecting res judicata where "amendments to the ordinance constitute a change that provides a new factual basis for [plainitff's] claim.").

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In sum, res judicata does not apply here because the Tribe's current cause of action is fundamentally different from that of the 1966 litigation both factually and legally. The 2014 claims are not the same as those made in 1966, and the evidence required to support them is quite different. Mem. at 6-8; *Agua Caliente Band of Mission Indians v. Riverside County*, 442 F.2d 1184 (9th Cir. 1971).

B. Collateral Estoppel Does Not Apply Because the Cases are Not Identical and There Has Been A "Significant Change in the Legal Climate."

Defendants rely on both a 44-year old case and a 38-year old case from this Circuit to support their collateral estoppel argument. Mem. at 5, 8, 11-12 (citing *Agua Caliente*, 442 F.2d at 1237 and *Fort Mojave Tribe v. County of San Bernadino,* 543 F.2d 1253 (9th Cir. 1976)). These near half-century old cases involving the PIT do not forever determine tax liability arising from the PIT or even the PIT's legal validity. This is because the instant case and the 1970s actions are not identical and, even if they were, an exception to collateral estoppel applies because there have been two significant changes in the law since the 1970s cases were decided – namely: the 1980 U.S. Supreme Court in *Bracker* and the promulgation of 25 C.F.R. § 162.017 (2013). Because the "identical" prong and the significant change in the legal climate exception address the same question, the Tribe discusses them together below.

A federal court decision has preclusive effect where: (1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the first proceeding. *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000). There are several factors that guide a court's determination of whether an issue litigated in a prior case is identical to one raised in later proceedings. In *Kamilche Co. v. United States*, 53 F.3d 1059, 1062 (9th Cir.1995), the Ninth Circuit adopted four factors, articulated by the Restatement (Second) of Judgments, to be

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considered in determining whether the issue in a proceeding is identical to an issue previously litigated: (1) whether there is a substantial overlap between the evidence or argument to be advanced in the second proceeding and that advanced in the first; (2) whether the new evidence or argument involves the application of the same rule of law as that involved in the prior proceeding; (3) whether pretrial preparation and discovery related to the matter presented in the first action reasonably be expected to have embraced the matter sought to be presented in the second; and (4) the closeness of the relationship of the claims in the two proceedings.

In addition, and importantly, the collateral estoppel doctrine is not absolute. In *Sunnen*, the U.S. Supreme Court declined to apply collateral estoppel because there had been a "significant change in the legal climate." *Sunnen,* 333 U.S. at 606.[1] The Court held that "a change or development in the controlling legal principles" may make a prior judicial determination of a particular tax matter "obsolete or erroneous, at least for future purposes." *Id*. at 599. The reasoning for the "changed legal climate" rule, re-emphasized in *Montana v. United States*, 440 U.S. 147 (1979), is that "controlling legal principals" can render a previous determination inconsistent with prevailing doctrine, and "[collateral estoppel] is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers." *Montana*, 440 U.S. at 161 (1979) (applying collateral estoppel because "the Government's amended complaint in this action replicates in substance the legal argument advanced by the contractor's complaint" in the prior litigation which "suggests the absence of any major doctrinal shifts."); *see also Richey v. I.R.S.*, 9 F.3d 1407, 1410 (9th Cir.1993) (citing *Montana* and noting that that

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[1] Since *Sunnen* was decided, however, the Supreme Court has all but overturned the "separable facts" doctrine. *See Peck v. C.I.R.*, 904 F.2d 525, 527 (9th Cir. 1990) ("The Court's decision in *Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979), calls *Sunnen's* separable facts doctrine into question") (other citations omitted). The "changed legal climate" rule from *Sunnen* remains good law. *Peck*, 904 F.2d at 527 (9th Cir. 1990) *citing Montana*, 440 U.S. at 161.

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exceptions to the doctrine of collateral estoppel apply where "controlling facts or legal principles have changed significantly since the prior judgment"); *Segal v. AT&T*, 606 F.2d 842, 845 (9th Cir.1979) (noting exception to collateral estoppel where "[t]he issue is one of law and ... a new determination is warranted in order to take account of an intervening change in the applicable legal context" and noting that "[i]ssue preclusion has never been applied to issues of law with the same rigor as to issues of fact") (citations and emphasis omitted). Here, collateral estoppel does not apply because the law has fundamentally changed since the 1970s.

1. *Agua Caliente* and *Fort Mojave* Are No Longer Good Law

On January 17, 1966, the Tribe and Palm Springs Properties filed suit against Riverside County seeking an injunction and reimbursement of PIT paid.[2] Ex. A to Smith Decl. (filed herewith).[3] The Tribe claimed that the County was constitutionally barred from imposing the PIT under a general theory of preclusion of taxation of tribal lands under Article I, Section 8, Clause 3 of the Constitution of the United States of America; Section 1 of the Fourteenth Amendment to the Constitution of the United States of America; and P.L. 83- 280, Aug. 15, 1953, 67 Stat. 589, 28 U.S.C. § 1360 and the amendments thereto. *Id; see also* Exs. B & C to Smith Decl. Rejecting these arguments, the district court noted that none of the cited constitutional provisions or

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[2] Several years later, the Fort Mohave Tribe challenged the PIT assessed by a neighboring county on similar grounds, leading to a similar result. *Fort Mojave*, 543 F.2d at 1256 (citing *Agua Caliente* and concluding that "we must carefully analyze the applicable federal statutes to determine whether state action has been pre-empted"). Fort Mojave argued that 25 U.S.C. § 476 precluded the PIT because Section 476 prohibited the "encumbrance of tribal lands." The Ninth Circuit concluded that the PIT did not constitute an encumbrance because ultimate liability for the PIT would not fall on the owner of the land. *Id*.

[3] Facts outside the pleadings susceptible to judicial notice do not convert the Rule 12(c) motion into a motion for summary judgment. *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir.1986) (finding that a court may look beyond the complaint to judicially noticed matters of public record in determining a motion to dismiss). The record in the 1966 litigation is subject to judicial notice.

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federal laws met the then-prevailing preemption test, as there was no clear expression of congressional intent to preempt the PIT as applied to leaseholders on the Tribe's land. Ex. C at p. 9 to Smith Decl.; *Agua Caliente, et al. v. Riverside County,* 306 F. Supp. 279, 283 (C.D. Cal. 1969).

The Ninth Circuit affirmed, also applying traditional "pre-emption" analysis to uphold the possessory interest tax as applied to lessees of Indian trust land on the Agua Caliente and Fort Mohave reservations. The court noted that although the County's imposition of the PIT increased the burden on the Tribe, the PIT would stand unless affirmatively forbidden by federal legislation. *Agua Caliente*, 442 F.2d. at 1187 (looking to the language of the General Allotment Act and citing *Oklahoma Tax Commission v. Texas Company*, 336 U.S. 342 (1949)). Stated in different terms, the Ninth Circuit reasoned in 1971 that the PIT was lawful "unless it can be said that the legislation dealing with Indians and Indian lands demonstrates a congressional purpose to forbid the imposition of it." *Id*. at 1186 (citing *United States v. City of Detroit*, 355 U.S. 466 (1958) and stating "there is no statute which expressly forbids the imposition of a state use tax").

Nine years later, the Supreme Court dramatically departed from the legal standard applied by *Agua Caliente* and *Fort Mojave*. In *White Mountain Apache v. Bracker*, 448 U.S. 136 (1980), the Supreme Court held that the standard pre-emption analysis applied in *Fort Mohave* and *Agua Caliente* was inapplicable to taxes of non-Indian activities occurring on Indian reservation land. Instead, the Court held that when a state asserts authority over the conduct of non-Indians engaging in activity on the reservation, it is necessary to engage in a "particularized inquiry into the nature of

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the state, federal and tribal interests at stake."[4] *Id*. at 145. Importantly, the only reference in *Bracker* to the *United States v. Detroit* standard that was used in *Agua Caliente* and *Fort Mojave* is found in Justice Stevens' **dissent** where he notes that:

> Under these circumstances I find the Court's reliance on the indirect financial burden imposed on the Indian Tribe by state taxation of its contractors disturbing. As a general rule, a tax is not invalid simply because a nonexempt taxpayer may be expected to pass all or part of the cost of the tax through to a person who is exempt from tax. *See United States v. Detroit*, 355 U. S. 466, 469;… I would require more explicit evidence of congressional intent than that relied on by the Court today.

Bracker, 448 U.S. at 159 (Stevens, J., dissenting).

Bracker effectively abrogated *Fort Mojave* and *Agua Caliente* by creating an entirely new preemption test. The *Bracker* balancing test alters the legal principles that govern whether states can tax non-Indian activity on Indian trust land. Accordingly, collateral estoppel does not apply. *See Burlington Northern*, 323 F.3d at 771 (holding collateral estoppel did preclude railroad from claiming that intervening change in the law impacted the validity of a tribal tax).

[4] *Bracker* is not the only means by which a state tax can be preempted. Indeed, before *Bracker* and only three years after *Agua Caliente*, the Supreme Court held that a state tax on the use of permanent improvements was prohibited by 25 U.S.C. § 465. In *Mescalero Apache v. Jones*, 411 U.S. 145 (1973), the Supreme Court held that Section 465 preempted a state tax on the use of permanent improvements on Indian land because "it has long been recognized that 'use' is among the 'bundle of privileges that make up property or ownership of the land . . ." *Id.* at 158. The PIT too is a tax on the use of land. At the time the Ninth Circuit considered the PIT in *Agua Caliente* and *Fort Mojave*, 25 U.S.C. § 465 had not been made applicable to all tribes; that only took place in 1983 when Congress enacted Public Law 97-45, 25 U.S.C. § 2202, which states: "The Provisions of 465 of this title shall apply to all tribes . . .." Thus, the Ninth Circuit has never considered whether the PIT is expressly preempted by 25 U.S.C. § 465. *Mescalero* and Section 465 are another intervening change in the law, applicable to the Court's consideration of both collateral estoppel and stare decisis.

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2. The New BIA Leasing Regulation Is Another Change in the Law

Second, the current lawsuit relies, in part, on the recently promulgated 25 C.F.R. § 162.017(c). Compl. ¶¶ 25, 34-37. The Secretary of Interior's wholesale revision of 25 C.F.R. Part 162 represents a shift in the legal principles controlling taxes against possessory interests arising from Indian lands. Thus, the substance of the legal argument advanced in the Tribe's complaint is inherently different than that advanced in the 1966 litigation.

Here, the Tribe argues that 25 C.F.R. § 162.017(c) provides evidence of the federal interest that must be considered as part of the *Bracker* balancing test. Compl. ¶¶ 25, 34-37; *see Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1192 (9th Cir. 2008) (recognizing that the strength of the federal interest at issue increases directly with the comprehensiveness and pervasiveness of federal regulation in the sphere that the state seeks to tax or otherwise regulate); *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1393-94 (9th Cir. 1987) (holding that the statutory and regulatory scheme involving the leasing of Indian land pre-empts local rent control ordinances). The Federal Register explanation accompanying the new leasing regulation declares that "[i]n the case of leasing on Indian lands, the Federal and tribal interests are very strong" and provides a litany of ways in which federal regulations "cover all aspects of leasing." *See* 77 Fed. Reg. 72440,72447-48 (Dec. 5, 2012). This question could not possibly have been litigated before because neither the *Bracker* balancing test nor 25 C.F.R. § 162.017(c) were in existence in 1966.

The Defendants, DWA in particular, must recognize that 25 C.F.R. § 162.017(c) fundamentally altered the landscape for assessing taxes imposed in Indian country. After all, the promulgation of the regulation drove DWA to sue the United States before this Court in *Desert Water Agency v. United States*, No. 5:13-cv-00606-DMG. In particular, in that litigation, DWA filed a Notice of Related Case discussing the instant action and describing the similarities as follows:

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> More specifically, the two cases raise the same issue of federal law based on substantially similar facts, namely whether federal law, and in particular a recent regulation adopted by the U.S. Bureau of Indian Affairs("BIA"), 25 C.F.R.§ 162.017, preempts state and local taxes as applied to lessees on the Tribe's reservation. In the pending case, DWA contends that federal law, including the BIA regulation, does not preempt DWA's ad valorem tax as applied to lessees on the Tribe's reservation. In the new case, the Tribe contends that federal law, including the BIA regulation, preempts Riverside County's possessory interest tax as applied to lessees on the Tribe's reservation. . . . DWA intends to argue that the Tribe's new action supports DWA's argument that its action is ripe for review.

Desert Water Agency, No. 5:13-cv-00606-DMG, DWA Notice of Related Case at 2, Doc. No. 26 (Jan. 8, 2014). For DWA to ignore the impact of the regulation which prompted it to file its own lawsuit, appeal its dismissal to the Ninth Circuit, and intervene in the Tribe's case, is disingenuous.

If the Tribe was bound by the 43-year old Ninth Circuit decision holding that the PIT applies to its Reservation lands, it would be accorded a tax treatment different from other tribes that could benefit from the new regulation or the fact specific analysis applied for the first time in *Bracker*, some 14 years after the Tribe filed its 1966 case. This would result in inequality in the administration of tax laws – a situation the law seeks to avoid. *See Carter v. United States,* 973 F.2d 1479, 1483 n. 1 (9th Cir.1992) (collateral estoppel must be applied in such a manner as "to avoid endowing taxpayers with perpetual, vested rights in a certain tax treatment, based on 'decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers.'" (quoting *Sunnen,* 333 U.S. at 599)). In fact, not allowing the Tribe to take advantage of the new federal regulations, thereby treating the Tribe differently from all other tribes, may be prohibited by federal law. 25 U.S.C. §§ 476(f) & (g) (ensuring that all Indian tribes are treated the same by federal agencies in the implementation of statutes and the promulgation of regulations).

Accordingly, the Tribe is not barred from litigating the issue of whether the PIT applies to non-Indian activity on its Reservation because of both the intervening

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developments in federal law set forth in *Bracker* and the clear statement of the federal interest contained in the new Federal leasing regulations at 25 C.F.R. § 162.017 present new issues not capable of being litigated before. *Eureka Fed. Sav. & Loan Ass'n v. American Casualty Co. of Reading, Penn.*, 873 F.2d 229, 233 (9th Cir. 1989) ("Collateral estoppel is inappropriate if there is any doubt as to whether an issue was actually litigated in a prior proceeding.") Collateral estoppel does not apply.

C. Stare Decisis Does Not Bind this Court to Nearly Half-Century Old Federal Cases, a 43-Year Old State Case, or Dicta from a 2013 Court Case

Lastly, Defendants invoke the slender reed of stare decisis in an effort to stop the current litigation. Mem. at 13-20. The arguments for this Court to follow the 1971 *Agua Caliente* decision, 1976 *Fort Mojave* decision, 2013 *Chehalis* decision, and 1971 State Court *Palm Springs Spa* decision are unavailing.

1. *Agua Caliente* and *Fort Mojave* Are No Longer Good Law

Stare decisis is a principle of policy and not a mechanical formula of adherence to prior cases. *Bates v. Jones*, 904 F. Supp. 1080, 1088 fn. 1 (N.D. Cal. 1995). This Circuit has recognized that it is "bound by decisions of prior panels unless an en banc decision, Supreme Court decision, or subsequent legislation undermines those decisions." *Baker v. Delta Air Lines, Inc.*, 6 F.3d 632, 637 (9th Cir. 1993) (citations and internal quotation marks omitted). This exception to the rule of stare decisis applies as to *Agua Caliente* and *Fort Mojave.*

As discussed above, the 1960-70s litigation before the District Court and Ninth Circuit required those courts to consider the legal question of whether a congressional action expressly forbade the PIT as applied on Indian lands. *Agua Caliente*, 442 F.2d at 1186-87 (citing *United States v. City of Detroit*, 355 U.S. 466 (1958) and stating "there is no statute which expressly forbids the imposition of a state use tax"); *Fort Mojave*, 543 F. 2d at 1256 (citing *Agua Caliente* and concluding that "we must carefully analyze the applicable federal statutes to determine whether state action has

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been pre-empted"). That test, focusing on clear Congressional preemption, was soundly rejected nine years later in 1980 by the U.S. Supreme Court in *Bracker*. *Bracker*, 448 U.S. at 145 (finding that this analysis "calls for a particularized inquiry into the nature of the state, federal, and tribal interests at stake … to determine whether, in the specific context, the exercise of state authority would violate federal law."). What Defendants fail to acknowledge is that the *Bracker* case – more recent in time than the 1970s Ninth Circuit cases upon which they rely and from a higher court – is also entitled to stare decisis effect and represents a subsequent Supreme Court decision that undermines *Agua Caliente* and *Fort Mojave*. This Court is required to apply the *Bracker* test that the U.S. Supreme Court articulated to the facts presented in this case in place of the one used by this Circuit prior to 1980.

Moreover, where, as here, there is a new legal landscape, stare decisis is no longer an appropriate basis for a decision. *Oregon Natural Desert Ass'n v. US Forest Service*, 550 F. 3d 778, 786 (9th Cir. 2008); *American Trucking Ass'n, Inc. v. Scheiner*, 483 U.S. 266, 302 (1987) (finding that a court may depart from precedent where "[s]ignificantly changed circumstances ... make an older rule, defensible when formulated, inappropriate."). As discussed in the collateral estoppel context, the Secretary of Interior's wholesale revision of 25 C.F.R. Part 162 represents a shift in the legal principals controlling state taxes against possessory interests arising from Indian lands. The Ninth Circuit in the 1970s had neither specific regulatory guidance as to the PIT to follow nor the *Bracker* balancing test to apply. Simply put, *Agua Caliente* and *Fort Mojave* did not actually analyze the issue this Court must now decide. As such, the cases cited by Defendants are not entitled to stare decisis effect.

2. The 2013 *Chehalis* Decision Does Not Apply Here

The third case relied upon by Defendants is the Ninth Circuit's recent decision in *Confederated Tribes of the Chehalis Reservation v. Thurston County Bd. of Equalization*, 724 F.3d 1153 (9th Cir. 2013). Defendants claim that this decision

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affirms that *Agua Caliente and Fort Mojave* are good law, and that federal law does not provide preemption. Mem. at 16-18. Defendants misconstrue *Chehalis.*

Chehalis involved a tribal challenge to a Washington State county's ability to impose a property tax on permanent improvements located on the Tribe's trust land. Significantly, unlike the PIT, *Chehalis* dealt with a tax imposed directly on a tribal business entity rather than non-Indian third parties in possession. *Chehalis,* 724 F.3d at 1155. Under these facts, the Ninth Circuit reversed the district court, holding that it is bound by Supreme Court precedent, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) providing that 25 U.S.C. § 465 exempts permanent improvements on tribal trust land from direct state and local taxation. *Id*. at 1157. Section 465 authorizes the Secretary of the Interior to acquire land in trust for tribes and provides that "such lands or rights shall be exempt from State and local taxation." 25 U.S.C. § 465.

By relying on Section 465 and *Mescalaro Apache*, the Ninth Circuit resolved the tax dispute in the Chehalis Tribe's favor without engaging in a *Bracker* balancing analysis. This is because *Bracker* applies where the tax affects tribal interests but the legal incidence of the tax actually falls on a non-tribal entity, as is the case here. *See* Mem. & Order at p. 12 n. 8, *Desert Water Agency v. United States,* No. 5:13-cv-00606-DMG, Dkt. No. 28 (Jan. 18, 2014) (stating "In *Bracker*, the Supreme Court adopted a balancing test for those "difficult questions . . . where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation."); *Chehalis,* 724 F.3d at 1156 (noting that the form of tax in *Mescalero* "was equivalent to a tax on land, and therefore barred by § 465."). The Ninth Circuit opinion should, thus, be read as a reaffirmation that Federal statutes can and do preempt state taxation in Indian County. It is a narrow holding that permanent improvements on Indian trust land are not subject to state and local taxation as assessed against a tribal entity, which provides no guidance to this Court on the different factual and legal question presented under an entirely different tax scheme.

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Moreover, Defendants make too much out of the *Chehalis* court's passing discussion of the new Federal leasing regulation and *Bracker*. In a footnote, the court cities the language of 25 C.F.R. § 162.017(a) and finds that "Because this regulation 'merely clarifies and confirms' what § 465 'already conveys, we need not reach the applicability of this regulation or the level of deference owed to the Bureau of Indian Affairs in this context." *Chehalis,* 724 F.3d at 1157 n. 6. In other words, the Ninth Circuit makes clear that it is not making any decision about either the applicability of or deference owed to the regulations given its larger holding that the taxes were preempted based on 25 U.S.C. § 465 and *Mescalero*; yet, at the same time, the Circuit seems to be placing its thumb on the scale in favor of the Tribe's argument that the new regulations confirm that the County's tax is unlawful due to the strong federal interests in surface leasing. Compl. ¶¶ 25, 34-35; *see also* United States' Reply Memorandum In Support Of Its Motion To Dismiss at 2-3, filed in *Desert Water Agency v. United States,* No. 5:13-cv-00606-DMG, Dkt. No. 20 (Sept. 20, 2013) (stating that the new regulation explains that "the Federal interests are so compelling in the Indian surface leasing area as to weigh heavily in favor of taxation preemption under the *Bracker* analysis.").

Not necessary to its decision, the Ninth Circuit briefly discusses *Bracker* and *Agua Caliente* as follows:

> We have applied the *Bracker* balancing test in a variety of circumstances involving the imposition of state or local taxes on non-Indians. … Even prior to *Bracker*, we applied a similar mode of analysis in holding that possessory interest taxes on "non-Indian lessees of property held in trust by the United States Government for reservation Indians" are not per se preempted. *See Fort Mojave Tribe v. Cnty. of San Bernardino*, 543 F.2d 1253, 1255 (9th Cir. 1976); *see also Agua Caliente Band of Mission Indians v. Cnty. of Riverside*, 442 F.2d 1184, 1186-87 (9th Cir. 1971).

Chehalis, 724 F.3d at 1158. In other words, contrary to Defendants' interpretation, the *Chehalis* court recognizes what the Tribe argues here, that before *Bracker*, the preemption analysis was different, while also noting that *Agua Caliente* and *Fort*

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Mojave are of no relevance to *Chehalis* because of the different facts and argument presented. To illustrate this point, the court adds a footnote, stating: "In *Agua Caliente*, for example, we stressed that "[t]he California tax on possessory interests does not purport to tax the land as such," which would be barred by § 465, "but rather taxes the 'full cash value' of the lessee's interest in it," which is not covered by § 465. 442 F.2d at 1186." *Id.* at 1158 n. 7. In other words, the court referred to *Agua Caliente* and *Fort Mojave* not to affirm their continuing relevance, but to make clear the scope of Federal tax preemption under Section 465 at issue in *Chehalis*. The *Chehalis* Court was not presented with the question of whether Section 465 precludes the PIT. Whether fully analyzed or not, the Ninth Circuit found a "critical" distinction between California's PIT and the Washington State property tax on permanent improvements on the facts. *Id.*

Not only is the Ninth Circuit's footnote discussion as to *Agua Caliente* and *Fort Mojave* dicta that does not constitute binding legal precedent, the Ninth Circuit did not engage in a substantive discussion of either the new Federal leasing regulations or *Bracker* balancing, both of which are at the heart of the Tribe's case. Thus, stare decisis is not applicable. *See, e.g., Alcoa, Inc. v. Bonneville Power Admin.*, 698 F.3d 774, 805 (9th Cir. 2012) ("A hypothetical that is unnecessary in any sense to the resolution of the case, and is determined only tentatively . . . does not make precedential law. Accordingly, it is not binding."); *Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993) (holding that stare decisis is not applicable unless the issue was "squarely addressed" in a prior decision). There is nothing in *Chehalis* that forecloses the Tribe's instant case.

3. The State Court Case Has No Stare Decisis Effect

Lastly, Defendants ague that this Court is bound by the 1971 decision of the California Court of Appeals in *Palm Springs Spa v. County of Riverside*, 18 Cal. App. 3d. 372 (1971). Mem. at 18-19. Defendants' argument makes little sense.

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First, this 1971 State appellate court decision relies on legal principles rejected by the U.S. Supreme Court nine years later in *Bracker* and without reference to the new 25 C.F.R . § 162.017(c).[5] Moreover, contrary to Defendants' claim, *Palm Springs Spa* did not engage in a balancing test foreshadowing *Bracker*; rather, the State court cited to and relied upon the same *United States v. Detroit* standard applied by *Agua Caliente* and rejected by *Bracker*. *Palm Springs Spa*, 18 Cal. App. 3d at 379. The phrase "particularized inquiry" appears nowhere in the State court decision. The only "balancing" that took place considered the argument of whether the tax violated the Indian Commerce Clause, a claim not made in the instant case. *Id*. at 377-78.

Second, and most importantly, while this 43-year old decision of the California Court of Appeals may bind some lower California courts,[6] it can have absolutely no stare decisis effect as to this Federal court's thinking about an issue of Federal law. *See Chemstar, Inc. v. Liberty Mut. Ins. Co.*, 41 F.3d 429, 432 (9th Cir.1994) (Ninth Circuit not bound by California appellate court decisions if it believes that the California Supreme Court would decide otherwise); *Miller v. County of Santa Cruz*, 39 F.3d 1030, 1036 n. 5 (9th Cir.1994) (appellate court decision is "datum for ascertaining state law").

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[5] *Palm Springs* relies on outdated Federal regulations, noting that "the regulations embodied in 22 C.F.R. 10670-10674 . . .do not purport to establish a comprehensive scheme of regulation governing all commercial transactions between Indians and non-Indians." *Palm Springs Spa*, 18 Cal. App. 3d at 379. Quite the contrary, the new Federal leasing "cover all aspects of leasing." 77 Fed. Reg. 72440, 72447-48 (Dec. 5, 2012).

[6] A decision of a California Court of Appeal is only binding on every lower court in the state, until any Court of Appeal or the California Supreme Court contradicts it. *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal.2d 450, 455 (1962) ("all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction".).

In sum, Defendants' stare decisis argument fails to preempt this litigation which turns on a different legal standard and involves new Federal regulations that were not squarely at issue in any of the cited cases.

IV. CONCLUSION

For the foregoing reasons, the Tribe respectfully requests that the Court enter Plaintiff's [Proposed] Order filed herewith and deny Defendants' motion for judgment on the pleadings.

DATED: August 7, 2014

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