UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 12-CV-62140-Scola/Valle

SEMINOLE TRIBE OF FLORIDA,
a Federally recognized Indian Tribe,

Plaintiff,

v.

MARSHALL STRANBURG,
AS INTERIM EXECUTIVE DIRECTOR AND
DEPUTY EXECUTIVE DIRECTOR,

Defendant.
_____/

PLAINTIFF'S MOTION FOR FINAL SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

Plaintiff, SEMINOLE TRIBE OF FLORIDA (the "**Tribe**"), a Federally recognized Indian tribe, pursuant to Federal Rule of Civil Procedure 56 and Southern District of Florida Local Rule 56.1, files this Motion for Final Summary Judgment and Incorporated Memorandum of Law.[1] The Tribe's Statement of Undisputed Material Facts in support of this motion is being filed concurrently herewith.

SUMMARY OF CASE

The Defendant imposes and collects the Florida sales tax prescribed by Fla. Stat. §212.031 ("**Rental Tax**") on rentals that its tenants pay for their leasehold interests in property on the Tribe's reservation ("**Indian Land**"). The Defendant also imposes and collects the gross receipts tax prescribed by Fla. Stat. §203.01 ("**Utilities Tax**") on utility services, specifically

[1] This Court previously dismissed Defendant, State of Florida, Department of Revenue from this case on Eleventh Amendment immunity grounds. [Doc. 46]. The Tribe's motion for reconsideration of the dismissal order is pending. [Doc. 51].

electricity, that are delivered to the Tribe on Indian Land. The Tribe brought this action seeking declarations that the Rental Tax does not apply to rentals of Indian Land and that the Utilities Tax does not apply to utility services delivered to the Tribe on Indian Land. The Tribe also seeks to enjoin the future imposition, assessment, and collection of these taxes.

SUMMARY OF ARGUMENTS

State taxation of rentals of Indian Land is expressly prohibited by Federal law. Where State law conflicts with Federal Law, Federal law controls.[2]

State taxation of utility services delivered to the Tribe on Indian Land is categorically barred by the Indian Commerce Clause[3] because the legal incidence of the Utilities Tax rests with the Tribe as the retail consumer. Even if the legal incidence of the Utilities Tax were held to rest with the utility service provider, the Utilities Tax would be invalid to the extent that it is applied to utility services that are used in any on-reservation activity of the Tribe whose regulation is preempted by Federal law. The Tribe uses electricity in connection with many on-reservation activities whose regulation is preempted by Federal law, including (i) the provision of essential governmental services[4], which is regulated by the Indian Self-Determination and Educational Assistance Act, 25 U.S.C. § 450 *et seq.*; (ii) the leasing of Indian Land, which is regulated by the Indian Reorganization Act of 1934, 25 U.S.C. §461, *et seq.*, 25 U.S.C. §415, *et. seq.*, and the regulations promulgated thereunder at 25 C.F.R., Part 162; and (iii) Indian gaming,

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[2] The Supremacy Clause, U.S. Const., Art. VI, Clause 2, provides as follows: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

[3] U.S. Const., Art. I, Sec. 8, Clause 3.

[4] Essential governmental services include the same services that States provide off-reservation, including police and fire protection, emergency medical services, public schools, public transportation, garbage removal, business regulation, and road construction and maintenance.

which is regulated by the Indian Gaming Regulatory Act, 25 U.S.C. §2701, *et seq.* Any State tax that is incompatible with the Federal policies underlying the regulation of these activities is prohibited unless it is narrowly tailored to compensate the State for services it specifically provides in connection with the particular activity that is burdened by the tax. The Utilities Tax is not narrowly tailored to compensate the State for services it specifically provides in connection with any Federally regulated on-reservation activity. It is a tax of general application whose revenues are allocated to the State's general fund for use in providing services to the State's residents in general.[5]

MEMORANDUM OF LAW

I. Summary Judgment Standard.

Summary judgment shall be granted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). As established herein, the Tribe is entitled to entry of summary judgment in its favor on all claims.

II. The Rental Tax As Applied To Indian Land Is Expressly Prohibited By Federal law.

The Secretary of the United States Department of the Interior promulgated regulations, 25 C.F.R. Part 162 ("**Federal Leasing Regulations**"), which prohibit any and all State taxation of leasehold interests in Indian Land.[6] Section 162.017(c) provides as follows:

> (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

[5] The only on-reservation services provided by the State are those provided pursuant to the gaming compact between the Tribe and the State for which the State is separately compensated outside its taxing system.

[6] The final regulations were published in the Federal Register on December 5, 2012, and became effective January 4, 2013. They are attached as Appendix 1.

> State or political subdivision of a State. Leasehold or possessory interests may be subject to taxation by the Indian tribe with jurisdiction. [Emphasis added].[7]

This exemption is not subject to any exceptions, exclusions, qualifications, conditions, restrictions, or limitations of any kind. It categorically bars all State taxation of leasehold or possessory interests in Indian Land under the assumption that the legal incidence of the State tax rests with the non-Indian tenant.[8] If the legal incidence of the Rental Tax rested with the Indian landlord, the tax would be categorically barred by the Indian Commerce Clause, in which case neither this exemption nor the statute it implements[9] would be necessary or serve any purpose. *See McClanahan v. Tax Comm'n of Ariz.*, 411 U.S. 164 (1973); *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995) ("If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization"); *Cnty. of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 258 (1992) ("'[A]bsent cession of jurisdiction or other Federal statutes

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[7] These regulations implement the exemption provided in 25 U.S.C. §465, which was enacted as part of the Indian Reorganization Act of 1934. It provides: "Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation." [Emphasis added]. These regulations also implement the Helping Expedite and Advance Responsible Tribal Homeownership Act (the "HEARTH Act") that was signed into law by President Obama on July 30, 2012. The HEARTH Act allows Federally recognized Indian tribes to assume greater control over the leasing of Indian Land.

[8] The legal incidence of every State tax that is prohibited by 25 C.F.R. §162.017 rests with the non-Indian lessee. For example, §162.017(a) exempts from State ad valorem tax all improvements on leased Indian Land "without regard to ownership of those improvements". The legal incidence of State ad valorem tax always rests with the owner of the improvements. The preamble specifically says the exemption applies to "lessee-owned improvements." Similarly, §162.017(b) exempts from State taxation all activities that are conducted by the non-Indian tenant under a lease of Indian Land. The preamble specifically says that the exemption applies to "activities conducted by the lessee." The Secretary determined that Congress intended to exempt leasehold interests in Indian Land after applying the balancing test in *White Mountain Apache Tribe v. Bracker*, 448 U.S, 136, 143 (1980). The *Bracker* balancing test only applies to State taxes whose legal incidence rests with non-Indians.

[9] 25 U.S.C. §465. *See* Note 5.

permitting it,' we have held a State is without power to tax reservation lands and reservation Indians." (internal citations omitted)); *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148 (1973) ("[I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan v. State Tax Commission of Arizona* lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent." (internal citations omitted)); *Mont. v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764-65 (1985) ("The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes. . . , and in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from State taxation within their own territory. An Indian tribe's exemption from State taxation is lifted 'only when Congress has made its intention to do so unmistakably clear.'"). Congress has not authorized State taxation of rentals of Indian Land.

The Federal Leasing Regulations expressly exempt leasehold interests in Indian Land from State taxation, but they did not create the exemption. All rights in Indian Land are exempt under 25 U.S.C. §465, which was enacted as part of the Indian Reorganization Act of 1934, but State taxation of interests in Indian Land has been prohibited since the inception of the United States. Until now, no State has ever attempted to tax rentals of Indian Land.

As the Secretary explained in the preamble to these regulations, Congress intended to exempt rentals of Indian Land from State taxation because it "has the potential to increase project costs for the lessee and decrease the funds available to the lessee to make rental payments to the Indian landowner." This obstructs the policies underlying the Federal Leasing Regulations

including “maximiz[ing] income to Indian landowners and encourag[ing] all types of economic development on Indian lands”, which further the compelling Federal interests in tribal “self-determination, economic self-sufficiency, and self-government”. The Secretary explains how non-Indian investment on Indian Land is critical to the vitality of tribal economies and how a State tax burden on the non-Indian lessee interferes with the Indian tribes' ability to attract that investment. He also explains how State taxes have a "chilling effect" on an Indian tribe's ability to impose its own taxes that it needs to support its own infrastructure. With respect to §162.017 of the regulations, entitled "What taxes apply to leases approved under this part?", the Secretary explains the Federal government's position as follows:

> This section now addresses not only taxation of improvements on leased Indian land, but also taxation of the leasehold or possessory interest, and taxation of activities (e.g., excise or severance taxes) occurring or services performed on leased Indian land. . . . 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 interests are very strong. . . The Federal statutes and regulations governing leasing on Indian lands (as well as related statutes and regulations concerning business activities, including leases, by Indian traders) occupy and preempt the field of Indian leasing. The Federal statutory scheme for Indian leasing is comprehensive, and accordingly precludes State taxation. In addition, the Federal regulatory scheme is pervasive and leaves no room for State law. . . The purposes of residential, business, and WSR [wind and solar resource] leasing on Indian land are to promote Indian housing and to allow Indian landowners to use their land profitably for economic development, ultimately contributing to tribal well-being and self-government. The legislative history of [25 U.S.C.] section 415 demonstrates that Congress intended to maximize income to Indian landowners and encourage all types of economic development on Indian lands. *See* Sen. Rpt. No. 84-375 at 2 (May 24, 1955). Assessment of State and local taxes would obstruct Federal policies supporting tribal economic development, self-determination, and strong tribal governments. State and local taxation also threatens substantial tribal interests in effective tribal government, economic self-sufficiency, and territorial autonomy. The leasing of trust or restricted land is an instrumental tool in fulfilling "the traditional notions of sovereignty and the federal policy of encouraging tribal independence." *Bracker,*

448 U.S. at 145 (citing *McClanahan v. Arizona State Tax Comm 'n,* 411 U.S. 164, 174-75 (1973)). The leasing of trust or restricted lands facilitates the implementation of the policy objectives of tribal governments through vital residential, economic, and governmental services. Tribal sovereignty and self-government are substantially promoted by leasing under these regulations, which require significant deference, to the maximum extent possible, to tribal determinations that a lease provision or requirement is in its best interest. . . Another important aspect of tribal sovereignty and self-governance is taxation. Permanent improvements and activities on the leased premises and the leasehold interest itself may be subject to taxation by the Indian tribe with jurisdiction over the leased property. The Supreme Court has recognized that "[t]he power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 137 (1982). State and local taxation of lessee-owned improvements, activities conducted by the lessee, and the leasehold interest also has the potential to increase project costs for the lessee and decrease the funds available to the lessee to make rental payments to the Indian landowner. Increased project costs can impede a tribe's ability to attract non-Indian investment to Indian lands where such investment and participation are critical to the vitality of tribal economies. An increase in project costs is especially damaging to economic development on Indian lands given the difficulty Indian tribes and individuals face in securing access to capital. . . . [T]he very possibility of an additional State or local tax has a chilling effect on potential lessees as well as the tribe that as a result might refrain from exercising its own sovereign right to impose a tribal tax to support its infrastructure needs. Such dual taxation can make some projects less economically attractive, further discouraging development in Indian country. Economic development on Indian lands is critical to improving the dire economic conditions faced by American Indians. . . Subject only to applicable Federal law, the leasehold or possessory interest itself is not taxable by States or local governments. The ability of a tribe or individual Indian to convey an interest in trust or restricted land arises under Federal law, not State law; Federal legislation has left the State with no duties or responsibilities for such interests, even recordation (25 U.S.C. 5); and the leasehold interest is exhaustively regulated by this rule, as noted above. For example, a leasehold interest may not be conveyed, mortgaged, assigned, or subleased without Secretarial approval, with limited exceptions. Compelling Federal interests in self-determination, economic self-sufficiency, and self-government, as well as strong tribal interests in sovereignty and economic self-sufficiency, are undermined by State and local taxation of the leasehold interest.

25 C.F.R. Part 162 (Emphasis added).[10] The Defendant might not agree with the Federal policies that underlie these regulations, or with the factual assumptions upon which they are based, but he cannot reasonably deny that Rental Tax, as applied to rentals of Indian Land, is expressly prohibited by Federal law.

III. The Utilities Tax On Utilities Provided To The Tribe On Indian Land Is Categorically Barred By The Indian Commerce Clause Because The Legal Incidence Of That Tax Rests With The Tribe.

Under Fla. Stat. §203.01(1)(a)1., the Utilities Tax "is imposed on the gross receipts from utility services that are delivered to a retail consumer in the state." Where, as here, the electricity is sold and delivered by the same distribution company (i.e., utility service provider), the tax is levied by subsection (1)(c)1., which provides as follows:

> The tax shall be levied against the total amount of gross receipts received by a distribution company for its sale of utility services if the utility service is delivered to the retail consumer by a distribution company and the retail consumer pays the distribution company a charge for utility service which includes a charge for both the electricity and the transportation of electricity to the retail consumer. The distribution company shall report and remit to the Department of Revenue by the 20th day of each month the taxes levied pursuant to this paragraph during the preceding month.

Like the Florida retail sales tax which is imposed on the seller for the privilege of "engag[ing] in the business of selling tangible personal property at retail in this state"[11], Fla. Stat. §212.05, or the Rental Tax, which is imposed on the landlord for the privilege engaging in the business of leasing property in the State, Fla. Stat. §212.031(1)(a), the Utilities Tax is imposed

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[10] In accord is *Gila River Indian Cmty. v. Waddell*, 967 F.2d 1404 (9th Cir. 1992), in which the court said that the Federal regulations governing leases of reservation property are of a scope and detail sufficient to preclude taxation by the State.

[11] Electrical services are also subject to Florida sales tax under §12.05(1)(e)1c, under the theory that electrical power is tangible personal property under §212.02(19) rather than a taxable service. The Defendant concedes that the legal incidence of the sales tax rests with the consumer and, accordingly, that the Department of Revenue ("the **Department**") has no right to impose its sales tax on electrical services delivered to the Tribe on the reservation.

on the utility service provider "for the privilege of conducting a utility . . . services business", Fla. Stat. §203.01(5).[12] Notwithstanding that the retail sales tax and Rental Tax are imposed on the seller and landlord, respectively, the legal incidence of each of those taxes rests with the consumer or tenant because those taxes are passed on and collected from the consumer or tenant. *Fla. Dep't of Revenue v. Naval Aviation Museum Found., Inc.*, 907 So. 2d 586, 587 (Fla. 1st DCA 2005) ("The legal incidence of the Florida sales tax falls upon the purchaser or consumer".) (citing §212.07(1), Fla. Stat.)).[13] This Court previously ruled that "there is no legal dispute that the legal incidence of the Rental Tax is borne by the tenants." [Doc. 46 at 4]. Like the Florida retail sales tax and Rental Tax, the Utility Tax is passed through and collected from the retail consumer pursuant to Fla. Stat. §203.01(4) which provides as follows:

> The tax imposed pursuant to this chapter relating to the provision of any utility services at the option of the person supplying the taxable services may be separately stated as Florida gross receipts tax on the total amount of any bill, invoice, or other tangible evidence of the provision of such taxable services and may be added as a component part of the total charge. Whenever a provider of taxable services elects to separately state such tax as a component of the charge for the provision of such taxable services, every person, including all governmental units, shall remit the tax to the person who provides such taxable services as a part of the total bill, and the tax is a component part of the debt of the purchaser to the person who provides such taxable services until paid and, if unpaid, is recoverable at law in the same manner as any other part of the charge for such taxable services. For a utility, the decision to separately state any increase in the rate of tax imposed by this chapter which is effective after December 31, 1989, and the ability to recover the increased charge from the customer shall not be subject to regulatory approval.

While the pass-through of the Utilities Tax is ostensibly "optional" for the utility service provider, the option is invariably exercised because there are no circumstances in which it would

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[12] Or for "the privilege of selling electricity that is delivered to a retail consumer in the State", Rule 12B-6.0015(2)(a), F.A.C.

[13] The court held that §212.07(1) places the legal incidence of the general sales tax on the purchaser because the seller is required to collect the tax from the purchaser and the purchaser, therefore, is ultimately responsible for its payment.

ever be in the utility service provider's best interest not to exercise it. This "option" is exercisable in the sole discretion of the utility service provider by simply adding the Utilities Tax to its bill for utility services. Failure to do so would result in the utilities service provider having to pay the Utilities Tax from its own pocket.[14] The Defendant is unable to cite a single incidence in which a utility service provider ever failed to exercise this "option".[15] As the Defendant himself explains, the Utilities Tax is "ultimately passed through to the purchaser of the utility service who is responsible under their contract with the utility distribution company for the payment of the utilities service." [Doc. 12 at 5].

While the taxing statute, Fla. Stat. §203.01, does not mention "legal incidence", the Defendant contends that the legal incidence of the Utilities Tax rests with the utility service provider based on the facts that (i) Fla. Stat. §203.01(1)(a) imposes the tax on the gross receipts received by the utilities service provider; (ii) Fla. Stat. §203.01(1)(c) imposes upon the utilities service provider the obligation to report and remit the Utilities Tax to the State; (iii) Fla. Stat. §203.01(5) provides that the tax is imposed "for the privilege of conducting a utility . . . services business"; and (iv) Fla. Stat. §203.01(5) provides that the utility service provider "remains fully and completely liable is liable for the tax, even if the tax is separately stated as a line item or component of the total bill." These, of course, are also characteristics of the retail sales tax and Rental Tax. The legal incidence of those taxes undeniably rests with the consumer or tenant

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[14] At his deposition on November 13, 2013, Defendant's only witness, Peter Steffens, testified that it is the Defendant's position that there is no legal significance to separately stating the Utilities Tax as a component of the charges for utility services. The Steffens deposition transcript is not yet final, but the Tribe will file transcript excerpts with this Court when it is finalized. Notwithstanding Fla. Stat. §203.01(4), it is the Defendant's position that the utility service provider would have the right to collect the Utilities Tax from the consumer even if it were not separately stated.

[15] Mr. Steffens testified that the utilities service provider invariably collects the Utilities Tax from the consumer. In 37 years of employment with the Department, he was unaware of a single incident in which a utilities service provider did not collect the Utilities Tax from the consumer.

These other factors upon which the Defendant relies are immaterial to the issue of legal incidence. Where the tax is collected by one party from the other, the legal incidence of a tax rests with the party from whom the tax is collected. In this case, whether the legal incidence rests with the utilities service provider or consumer is largely academic because the utilities service providers assigned their rights to a refund to the Tribe. The Tribe stands in the place of the utility service providers by virtue of those assignments *Sierra Equity Group, Inc. v. While Oak Equity Partners, LLC*, 650 F. Supp. 2d 1213, 1227 (S.D. Fla. 2009).

However, even without the assignments, the legal incidence of the Utilities Tax rests with the consumer because it is invariably paid from the consumer's pocket. The legal incidence of a tax is not synonymous with legal liability for remitting the tax as the Defendant contends.[16] "[W]e squarely rejected the proposition that the legal incidence of a tax falls always upon the person legally liable for its payment." *U.S. v. Mississippi*, 421 U.S. 599, 607-08 (1975) (citing *First Agricultural Nat. Bank v. Tax Comm'n*, 392 U.S. 339, 347-48 (1968)). In *Mississippi*, the Court overturned the decision of the district court, which defined "legal incidence" as "'the legally enforceable, unavoidable liability for nonpayment of the tax". 421 U.S. at 607. In that case, the out-of-state liquor distributor had the legal liability for remitting the tax, but it collected it from the in-state purchaser. The Court held the legal incidence of the tax rested with the purchaser because the tax was passed on and collected from the purchaser.

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[16] Through Mr. Steffens, the Defendant contends that the "legal incidence" of a tax necessarily rests with the party from whom the Defendant can enforce collection. This rationale led the Defendant to conclude that the "legal incidence" of the Florida sales tax rests with both the buyer and the seller of goods because the Defendant has the right to enforce collection from either party. According to the Defendant, the legal incidence of the Utilities Tax necessarily rests with the utility service provider because the Defendant cannot enforce collection from the consumer. However, as discussed below, the Defendant's right to enforce collection from the utility service provider is limited to the Utilities Taxes that the utility service provider had already collected from the consumer but failed to remit.

Fla. Stat. §203.01(4) contains explicit pass-through language for the Utilities Tax. It differs from the Florida retail sales tax and Rental Tax statute in that the pass-through is ostensibly[17] optional rather than mandatory. Where the pass-through is mandatory, the legal incidence rests with the consumer as a matter of law. *See Mississippi*, 421 U.S. at 608-10 ("It would appear to be indisputable that a sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser. . . [W]here a State requires that its sales tax be passed on to the purchaser and be collected by the vendor from him, this establishes as a matter of law that the legal incidence of the tax falls upon the purchaser. . . [B]y requiring the passing on of the tax and its collection from the purchaser, [the taxing statute] placed the legal incidence of the tax on the purchaser".) (citing *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954); *Alabama v. King & Boozer*, 314 U.S. 1 (1941)).

However, the absence of mandatory pass-through language does not mean that the legal incidence of the tax rests with the vendor. Even in the absence of any "pass-through" language, the legal incidence rests with the consumer if a fair interpretation of the entire tax scheme indicates that the State Legislature intended that the tax be passed on and collected from the consumer. In *California Board of Equalization* v. *Chemehuevi Tribe*, 474 U.S. 9, 11-12 (1985), the Court recognized: "None of our cases has suggested that an express statement that the tax is to be passed on to the ultimate purchaser is necessary. . . Nor do our cases suggest that the only test for whether the legal incidence of such a tax falls on purchasers is whether the taxing statute contains an express 'pass on and collect' provision." *See also Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980); *Moe v. Confederated Salish and Kootenai*

[17] In reality, no utility service provider would ever, or has ever, elected not to pass the Utilities Tax through to the consumer.

Tribes, 425 U.S. 463 (1976) (where the legal incidence of state cigarette taxes was held to rest with the consumer despite the absence of "pass-through" language.)[18]

It is obvious from Fla. Stat. §203.01(4) that the Florida Legislature intended that the Utilities Tax be passed on and collected from the consumer. The tax scheme is designed for the administrative convenience of the State. There are only a few utility service providers in the State, but there are millions of retail consumers. The tax scheme puts the administrative burden of collecting the tax from these retail consumers on the utility service providers for the privilege of engaging in the utilities business in the State. The Utilities Tax is imposed at the rate of 2.5%. Based on a typical retail consumer's monthly residential utility bill of $300, the amount of Utilities Tax is just $7.50. There are no cost effective means by which the State could ever enforce collection of the Utilities Tax from a retail consumer. It is the threat of losing his electrical service that motivates the consumer to pay. Only the utility service provider wields that sword. Because the Utilities Tax is inextricably tied to the charges for the utility services,[19] the utility service provider necessarily enforces payment of the Utilities Tax whenever it enforces payment for the utility services.

While Fla. Stat. §203.01(5) provides that the utility service provider remains fully and completely liable for the Utilities Tax it has passed through to the consumer, this does not result in the legal incidence resting with the utilities service provider. The Utilities Tax is imposed only on the "gross receipts", which includes the Utilities Tax, that the utility service provider has

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[18] In *Colville*, the Court adopted the district court's reasoning that the legal incidence of the tax rests with the purchaser in the first taxable event. Where the taxable event is the retail sale, the legal incidence rests with the retail consumer.

[19] Neither the consumer nor the utility service provider has any discretion with respect to the manner in which the consumer's payment is applied. 2.5% of every payment that a utilities service provider receives from a consumer is deemed to constitute payment of the Utilities Tax. Consequently, every payment for utility services will necessarily include a payment of the Utility Tax that is attributable to the utility services for which the remainder of the payment relates.

actually collected from the consumer. Fla. Stat. §203.01(1)(c)1; Rule 12B-6.001(2)(f), F.A.C. Until the consumer pays the Utilities Tax, it is not included in the utility service provider's "gross receipts" and the utilities service provider has no liability for its payment. The utility service provider is never required to go "out-of-pocket" with respect to the payment of any Utility Tax. It is for this reason that any refund of overpaid Utilities Tax is made to the consumer and not the utility service provider. Fla. Stat. §203.01(1)(d).

The Defendant's reliance on Fla. Stat. §203.01(5) as support for his argument that the legal incidence of the Utilities Tax rests with the utilities service provider is misplaced. That subsection provides that the utilities service provider remains liable for the Utilities Tax even if it is separately stated on the bill as a component of the charges for utility services. However, it applies only to Utility Taxes that the utility service provider had already collected from the consumer. It can never apply to Utilities Taxes that the consumer has not paid. This subsection of the statute is what gives the Defendant the right to enforce collection of the Utility Taxes that the utility service provider collected from the consumer but failed to remit. Payment of the Utilities Tax is invariably made from the consumer's pocket. Like the seller of tangible personal property or landlord, the utility service provider merely serves as the agent of the State in collecting the Utilities Tax. This is the price the utilities service provider pays for the privilege of engaging in the utilities service business. The legal incidence of the Utilities Tax clearly rests with the consumer because the consumer pays it.

In this case, the consumer is a Federally recognized Indian tribe. Where the legal incidence of a State tax on any on-reservation activity rests with an Indian tribe, the tax is categorically barred by the Indian Commerce Clause. *See McClanahan v. Tax Comm'n of Ariz.*, 411 U.S. 164 (1973); *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995) ("If the

legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization"); *Cnty. of Yakima v. Confederated Tribes and Bands of Yakima Nation,* 502 U.S. 251, 258 (1992) ("'[A]bsent cession of jurisdiction or other Federal statutes permitting it,' we have held a State is without power to tax reservation lands and reservation Indians." (internal citations omitted)); *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148 (1973) ("[I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan v. State Tax Commission of Arizona* lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent." (internal citations omitted)); *Mont. v. Blackfeet Tribe of Indians,* 471 U.S. 759, 764-765 (1985) ("The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes. . . , and in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from State taxation within their own territory. An Indian tribe's exemption from State taxation is lifted 'only when Congress has made its intention to do so unmistakably clear.'"). Since Congress has not lifted the Tribe's exemption from State taxation of utility services, the Utilities Tax, as applied to utility services delivered to the Tribe on Indian Land, is categorically barred.

IV. Even If The Legal Incidence Of The Utilities Tax Were Held To Rest With The Utility Service Provider, The Utilities Tax Is Prohibited To The Extent It Is Applied To Utility Services Used In An Activity On Indian Land Whose Regulation Is Preempted By Federal Law.

Even if the Court determined that the legal incidence of the Utilities Tax rests with the utilities service provider, rather than the consumer, the Tribe stands in the place of the utility

service provider by virtue of their assignments of their rights to the refund to the Tribe. *Sierra Equity Group, Inc. v. While Oak Equity Partners, LLC,* 650 F. Supp. 2d 1213, 1227 (S.D. Fla. 2009). However, even in the absence of an assignment, the Utilities Tax would violate the Indian Commerce Clause under the balancing test prescribed by *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), because it burdens activities that are conducted by the Tribe on Indian Land whose regulation is preempted by Federal law.

The *Bracker* balancing test makes presumptions of Congressional intent with respect to State taxation of activities of non-Indians on Indian Land in particular circumstances in which that intent has not been expressed in Federal law. It determines the validity of a State tax whose legal incidence rests with a non-Indian. *Bracker* instructs courts to examine relevant statutory language "in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence." 448 U.S. at 145. It further requires 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." *Id.*

There are "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. Second, it may unlawfully infringe on the right of reservation Indians to make their own laws and be ruled by them." *Id. at* 143 (citations and internal quotation marks omitted). "The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members." *Id.*

If the federal regulatory scheme is "so pervasive as to preclude the additional burdens sought to be imposed", *id.* at 148, the state tax "is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law unless the State interests at stake are sufficient to justify the assertion of State authority." *N.M. v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983) (citing *Bracker*, 448 U.S. at 145). However, the state's "generalized interest in raising revenues in this context is insufficient to permit its proposed intrusion into the federal regulatory scheme." *Bracker*, 448 U.S. at 150; *see also Mescalero*, 462 U.S. at 343. Only state taxes that are "narrowly tailored" to compensate the State for services it specifically provides in connection with that particular federally regulated activity are valid. *See, e.g., Crow Tribe of Indians v. Mont.*, 650 F.2d 1104, 1114 (9th Cir. 1981), *amended*, 665 F.2d 1390 (1982) (holding state taxes on coal miners were justified only if "narrowly tailored" to fund additional government services required by coal miners or to treat pollution and solid waste that attend coal production); *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989) (holding a State tax fails the "narrowly tailored" requirement where revenues from the tax are allocated to the state's general fund, or are used to fund services, such as law enforcement, the state provides to its residents in general).

In *Bracker*, State taxation of fuel that was used by a non-Indian trucking company to haul timber on the tribe's reservation was held to be preempted by the Federal regulation of Indian timber harvesting because it was incompatible with the policies underlying that Federal regulation.

The Tribe uses electricity in connection with various activities whose regulation is preempted by Federal law, including (i) the provision of essential governmental services, which is regulated by the Indian Self-Determination and Educational Assistance Act, 25 U.S.C. § 450 *et*

seq.; (ii) the leasing of Indian Land, which is regulated by the Indian Reorganization Act of 1934, 25 U.S.C. §461, *et seq*., 25 U.S.C. §415, *et. seq.*, and the regulations promulgated thereunder at 25 C.F.R., Part 162; and (iii) Indian gaming, which is regulated by the Indian Gaming Regulatory Act, 25 U.S.C. §2701, *et seq.* The policies underlying these Federal statutes and regulations include promoting economic development, self-determination, and strong tribal governments. Any State tax that in inconsistent with those policies is invalid. The Utilities Tax in this case is indistinguishable from the fuel tax that was invalidated in *Bracker*.

It is clearly Congress's intent that utility services used on Indian Land be exempt from State taxation. Section 162.017(b) of the Federal Leasing Regulations provides as follows:

> Subject only to applicable Federal law, activities under a lease conducted on leased premises are not subject to any fee, tax, assessment, levy or other charge (e.g., business use, privilege, public utility, excise, gross revenue taxes) imposed by any State or political subdivision of any State. Activities may be subject to taxation by the Indian tribe with jurisdiction.

(Emphasis added).

While this exemption from Utilities Tax expressly applies to activities conducted by the tenants of Indian Land, their exemption is derived from the Indian tribe's exemption. The tenant's exemption could never be broader than the exemption from which it is derived. Section 162.017(b) merely extends to tenants of Indian Land the exemption from Utilities Tax that applies to Indian tribes. If the tenants' utilities services are exempt, the Tribe's utilities services are exempt. Furthermore, the Tribe provides utility services to its tenants. Some of the utility services for which the Defendant has imposed the Utilities Tax are expressly exempt under §162.017(b).

CONCLUSION

Based on the foregoing, there are no genuine issues of material fact in this case and the Tribe is entitled to judgment as a matter of law on all of its claims. Thus, the Tribe respectfully requests this Court grant final summary judgment in the Tribe's favor on all claims and such other relief as this Court deems appropriate.

DATED this 2nd day of December 2013.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 2, 2013, a true and correct copy of the foregoing was electronically uploaded and filed with the Court through the CM/ECF system, which will send a notice of electronic filing to counsel of record who have entered an appearance.

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