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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

AGUA CALIENTE BAND OF CAHUILLA INDIANS,

Plaintiff,

vs.

RIVERSIDE COUNTY, LARRY W. WARD, in his official capacity as Riverside County Assessor, PAUL ANGULO, in his official capacity as Riverside County Auditor-Controller, and DON KENT, in his official capacity as Treasurer Tax Collector,

Defendants;
and

DESERT WATER AGENCY,

Defendant-Intervenor.

Case No. 5:14-CV-00007-DMG-DTB
Judge: Hon. Dolly M. Gee

NATIONAL INTERTRIBAL TAX ALLIANCE'S REQUEST FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Trial Date: June 16, 2015
Action filed: January 2, 2014

The National Intertribal Tax Alliance ("NITA") hereby requests leave of Court to file the brief attached hereto as Exhibit A as *amicus curiae*. NITA was

formed in 2001 for the purpose of enhancing and strengthening tribal governments through education on federal, state, and tribal tax issues affecting Indian tribal governments, tribal enterprises, and tribal members. NITA is a non-profit organization governed by a six-member volunteer Board of Directors with representation from Indian tribes and tax and legal professionals serving Indian tribes from various regions within the United States, including Oklahoma, Oregon, New York, and Washington. NITA is the foremost Native organization focusing on taxation issues affecting Indian country. Since the formal organization of NITA in 2001, NITA has organized and presented an important annual conference addressing these tax issues.

The Court has broad discretion regarding the appointment of *amici*. *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir.1982), *abrogated in part on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995); *In re Roxford Foods Litig.*, 790 F.Supp. 987, 997 (E.D.Cal.1991). "An amicus brief should normally be allowed" when, among other considerations, "the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Cmty. Ass'n for Restoration of Env't (CARE) v. DeRuyter Bros. Dairy*, 54 F.Supp.2d 974, 975 (E.D.Wash.1999) (*citing Miller-Wahl Co. v. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982)). While "[h]istorically, amicus curiae is an impartial individual who suggests the interpretation and status of the law, gives information concerning it, and advises the Court in order that justice may be done, rather than to advocate a point of view so that a cause may be won by one party or another," *Id.* at 975, the Ninth Circuit has said "there is no rule that amici must be totally disinterested." *Funbus Sys., Inc. v. State of Cal. Pub. Utils. Comm'n*, 801 F.2d 1120, 1125 (9th Cir.1986) (citation omitted); *Hoptowit*, 682 F.2d at 1260 (upholding district court's appointment of amicus curiae, even though amicus entirely supported only one party's arguments).

NITA has unique information and a unique perspective to offer the Court in this matter, a tax dispute between an Indian tribe and a California county in which it is located. NITA's very purpose is to provide education on tribal taxation issues across the United States. Therefore, NITA is uniquely positioned to inform the Court of the important developments in federal law since the Ninth Circuit issued its decisions in *Agua Caliente Band of Mission Indians v. Riverside County*, 442 F.2d 1184 (9th Cir. 1971) and *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253 (9th Cir. 1976), calling into doubt the continuing vitality of those decisions, as well as to inform the Court of the broad, nationwide policy concerns implicated by this case – developments and concerns that the parties may overlook as they are likely to be focused on their own interests related to this dispute.

NITA has conferred with the parties regarding its request. Plaintiff and the Defendant-Intervenor do not oppose, and Defendants take no position at this time. NITA respectfully requests that the Court grant it *amicus* status and leave to file Exhibit A.

DATED: October 8, 2014

DORSEY & WHITNEY LLP

By: */s/ Kent J. Schmidt*
KENT J. SCHMIDT
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ARGUMENT

Defendants devote a great deal of attention to arguing that the Tribe's claims are barred by res judicata and collateral estoppel, neither of which applies in this case as a matter of black letter law.[1] Because these doctrines do not apply, the Tribe's claims that California's possessory interest tax is preempted by federal law must proceed to a decision on their merits. The Tribe's claims are based on two principal grounds: (1) federal common law principles, specifically the balancing test established by *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), and (2) 25 U.S.C. § 465. In this brief, *amicus curiae* National Intertribal Tax Alliance ("NITA") will focus on the first principal ground for the Tribe's claims – federal common law principles – to argue that (1) *Bracker* represents a sea change in federal law in requiring that courts balance federal, tribal, and state interests in determining the validity of state taxation of non-Indians in Indian country, (2) the Ninth Circuit's decisions in *Agua Caliente Band of Mission Indians v. Riverside Cnty*, 442 F.2d 1184 (9th Cir. 1971), and *Fort Mojave Tribe v. San Bernardino Cnty*, 543 F.2d 1253 (9th Cir. 1976), are fundamentally at odds with *Bracker* and must be reexamined, and (3) *Bracker* balancing requires a developed factual record and cannot be conducted on the pleadings.

I. *BRACKER* ABROGATED THE NINTH CIRCUIT'S EARLIER *AGUA CALIENTE* AND *FORT MOJAVE* DECISIONS.

A. The *Bracker* Balancing Test

Bracker and its progeny govern the "validity of state laws taxing transactions between Indians and non-Indians, on reservation land." *Confederated*

[1] Res judicata does not apply because in tax cases; each separate tax year presents a separate – and new – cause of action. *E.g., Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591, 598 (1948). Collateral estoppel does not apply, if for no other reason than that there have been substantial intervening changes in federal law since the Ninth Circuit's decision in *Agua Caliente* in 1971. *E.g., Sunnen*, 333 U.S. at 595, 606.

Tribes of the Chehalis Reservation v. Thurston Cnty. Bd. of Equalization, 724 F.3d 1153, 1158 (9th Cir. 2013). Where it applies, *Bracker* requires "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Bracker*, 448 U.S. at 145. Under *Bracker*, a state tax "is preempted . . . 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." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983).

Bracker marked a significant alteration of the legal framework governing state taxation of non-Indians doing business with Indians in Indian country. Earlier cases were generally analyzed first under the doctrine of intergovernmental tax immunity and later under the express preemption doctrine. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 173 (1989) (explaining that analysis of state taxation of on-reservation activity by non-Indians "has varied over the course of the past century" as a result of "the evolution of the doctrine of intergovernmental tax immunity"); *Cohen's Handbook of Federal Indian Law* § 8.03[1][d], at 707-08 (2012 ed.) ("[I]n the early part of the twentieth century, Indian taxation cases were analyzed under the now largely discredited intergovernmental immunities doctrine, which invalidated state taxes that imposed an indirect burden on the federal government.").

In the first several decades of the twentieth century, the "intergovernmental immunity doctrine . . . was consistently held to bar a state tax on the lessees of, or the product or income from, restricted lands of tribes or individual Indians." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 150 (1973). "The theory was that a federal instrumentality was involved [*i.e.*, tribal property] and that the tax would interfere with the Government's realizing the maximum return for its wards." *Id.* State taxation of non-Indian lessees of tribal property was thus barred as a matter

of constitutional implication. But this "approach did not survive," *id.*, and was overturned by *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342 (1949) (holding that Congress must expressly create an immunity from state taxation for federal instrumentalities). The Supreme Court succinctly summarized the doctrinal evolution in its 1989 *Cotton Petroleum* decision: "At one time," a state tax on non-Indian lessees "was held invalid unless expressly authorized by Congress; more recently, such taxes have been upheld unless expressly or impliedly prohibited by Congress." 490 U.S. at 173.

The analysis in *Oklahoma Tax Commission* rested squarely on recent Supreme Court decisions rejecting application of the intergovernmental immunity doctrine to federal contractors constructing dams, army facilities, and the like for the United States. 336 U.S. at 359 (citing, among others, *Alabama v. King & Boozer*, 314 U.S. 1 (1941); *Curry v. United States*, 314 U.S. 14 (1941); *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937)). In these cases, the Supreme Court held that, for preemption purposes, it is *irrelevant* that the economic burden of a state tax on federal contractors fell entirely on the United States. *Curry*, 314 U.S. 18; *Boozer*, 314 U.S. at 8-9; *Davo, 302 U.S. at 160*. By rejecting the intergovernmental immunity doctrine, this line of decisions held that only an express statutory prohibition would prevent the imposition of non-discriminatory state taxes on federal contractors or, it was later held, federal lessees. *See, e.g., Boozer*, 314 U.S. at 8 (noting that no federal legislation expressly prohibits the application of state taxes to federal contractors using cost-plus contracts); *United States v. City of Detroit*, 355 U.S. 466 (1958) (rejecting application of intergovernmental immunity doctrine to federal lessees).

The *Bracker* decision in 1980 unequivocally rejected, with respect to Indian tribes, the application of the express preemption test used in *Oklahoma Tax Commission* and the federal contractor/lessee cases. *Bracker*, 448 U.S. at 144 (repudiating for federal Indian law purposes "the proposition that in order to find a

particular state law to have been preempted . . . , an express congressional statement to that effect is required"). In view of the unique nature of Indian tribes, Indian lands and federal oversight of Indian affairs, *Bracker* and its progeny recognized implied preemption.[2] Further, the nature of this implied preemption is unique, for the *Bracker* analysis is "not controlled by standards of pre-emption developed in other areas." *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 838 (1982). "Instead, the traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional Acts promoting tribal independence and economic development, inform the pre-emption analysis." *Id.* When applying the *Bracker* test, "ambiguities in federal law should be construed generously, and federal pre-emption is not limited to those situations where Congress has explicitly announced an intention to pre-empt state activity." *Id.*; *see also Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433 (9th Cir. 1994) ("In balancing the [] federal, tribal, and state interests, no specific congressional intent to preempt state activity is required; it is enough that state law conflicts with the purpose or operation of a federal statute, regulation, or policy.") (quotation marks and citation omitted), *cert. denied*, 524 U.S. 926 (1998); *Gila River Indian Community v. Waddell*, 967 F.2d 1404, 1408 (9th Cir. 1992) ("In a number of cases we have held that state authority over non-Indians acting on tribal reservations is preempted even though Congress has offered no explicit statement on the subject.").

The Supreme Court in 1999 emphasized the sharp distinction between the express preemption standard applicable to federal contractors/lessees and *Bracker*'s implied preemption standard applicable to Indian tribal

[2] In other words, *Bracker* added the "or impliedly" to the doctrine as summarized in *Cotton Petroleum*: *i.e.*, state taxes on non-Indian lessees are "upheld unless expressly or impliedly prohibited by Congress." 490 U.S. at 173.

contractors/lessees. *See Arizona Dep't. of Revenue v. Blaze Constr. Co.*, 526 U.S. 32 (1999). In *Blaze*, the petitioner sought exemption under *Bracker* from state taxes imposed on proceeds from a federal contract to improve roads on Indian reservations. *See id.* at 34. The Court explained that *Bracker*'s "particularized examination" of competing state, federal, and tribal interests applied "where the legal incidence of the tax fell on a nontribal entity engaged in a transaction with tribes or tribal members." *Id.* at 37. But Blaze Construction's contract was with the federal government – not a tribe or tribal member – and as a result it was subject only to the "narrow approach" of the modern intergovernmental immunity doctrine. *Id.* at 35. That doctrine, unlike *Bracker*, only establishes immunity where Congress has "expressly exempted the contractors' activities from taxation." *Id.* at 36.

Bracker did not establish bright-line rules governing the weighing of competing federal, tribal, and state interests. *Bracker* and cases following it have generally held, however, that a state tax on non-Indian activity in Indian country is preempted where, as in the present case, (1) the activity in question is subject to comprehensive and pervasive federal regulation; and (2) the tax imposes an economic burden on an Indian tribe or tribal member. *See Bracker*, 448 U.S. at 148-51; *Ramah*, 458 U.S. at 839-42; *Cabazon*, 37 F.3d at 433-34; *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 659-60 (9th Cir. 1989), *cert. denied*, 494 U.S. 1055 (1990).

B. The Pre-*Bracker* Decisions in *Agua Caliente* and *Fort Mojave* Are Inconsistent with *Bracker* and Do Not Control.

Defendants rely on the Ninth Circuit's 1971 decision in *Agua Caliente* and its 1976 decision in *Fort Mojave* to support their argument that the dispute now before the Court must be decided in favor of the state's taxation authority. Defendants are mistaken. *Bracker*, decided after those two cases, fundamentally changed the legal landscape, and it controls here. Contrary to Defendants' claims

(Def. Supp. Br.[3] at 9) – and as Defendants later admit (Def. Supp. Br. at 14) – *Agua Caliente* and *Fort Mojave* did not attempt to balance the federal, state, and tribal interests at all, but rather rested on the absence of "clear statutory guidance" indicating an exemption. The approach of the older cases is incompatible with *Bracker*, thus the Court should apply the *Bracker* test without reference to these cases.

In *Agua Caliente*, the Tribe sought to enjoin assessment of California's possessory interest tax on lessees of its land. *See* 442 F.2d at 1184. A panel of the Ninth Circuit held (over a dissent) that the tax was not preempted. *Id.* at 1186. In doing so, the panel majority heavily relied on *City of Detroit*, in which the Supreme Court applied to federal lessees the express preemption doctrine previously applied to federal contractors. *Id.* at 1186-87. The majority reasoned that, in light of *City of Detroit*, "[i]f the Indian as a beneficial owner of the land, the legal title to which is in the United States, is entitled to no more protection than the United States itself would enjoy, absent a congressional action forbidding the tax, then it is clear the tax here imposed is valid." *Id.* at 1186. Because there was "no statute which *expressly forbids* the imposition of a state use tax," the panel majority held the tax was permissible. *Id.* (emphasis added). It went on to cite *Oklahoma Tax Commission* in holding that the economic burden of the state tax on the tribe is legally irrelevant. *See id.* at 1187.

The *Agua Caliente* court thus relied squarely on the express preemption doctrine for federal contractors/lessees which the Supreme Court since *Bracker* has held to be inapplicable to parties dealing with Indians in Indian country. *Blaze*, 526 U.S. at 36-37. Indeed, the conflict between *Agua Caliente* and *Bracker* is fundamental, direct, and unavoidable: *Agua Caliente* found the tax at issue was

[3] Citations to "Def. Supp. Br" are to Defendants' Supplemental Brief Pursuant to Court Order of August 27, 2014.

not preempted because no federal statute "*expressly*" forbade it. *Agua Caliente*, 442 F.2d at 1186 (emphasis added). But *Bracker* and subsequent cases reject that rule in no uncertain terms, holding that "no express congressional statement of preemptive intent is required; it is enough that the state law conflicts with the *purpose* or *operation* of a federal statute, regulation, or policy." *Crow Tribe of Indians v. Montana*, 819 F.2d 895, 898 (9th Cir. 1987) (quotation marks and citation omitted), *aff'd*, 484 U.S. 997 (1988).

Looking for express preemption and finding none, the *Agua Caliente* majority naturally did not undertake the "particularized examination of the relevant state, federal, and tribal interests" that *Bracker* would command nearly a decade later. *Ramah*, 458 U.S. at 838. It did not consider whether the state tax would frustrate federal regulations or policy. *Cf. id.* at 839 (finding state tax preempted in light of "pervasive" federal regulation of the relevant activity).[4] Nor did the panel majority ascribe significance to the fact that the tax in question had "an adverse economic effect upon" the Indians, *Agua Caliente*, 442 F.2d at 1186 – an analytic omission in deep tension with *Bracker* and subsequent cases. *Cf. Ramah*, 458 U.S. at 842; *Cabazon*, 37 F.3d at 434.

In short, if presented with the same case today, the Ninth Circuit would be bound by controlling Supreme Court precedent to apply a fundamentally different

[4] Tellingly, the dissenting judge in *Agua Caliente* did emphasize the significance of federal interests, foreshadowing the approach the Supreme Court would later embrace. *See Agua Caliente*, 442 F.2d at 1188 (Ely, J., dissenting) ("If . . . an important federal policy conflicts with the goal of effective implementation of the state taxing power, I should think the Supremacy Clause demands that the extent to which a state tax burdens the federal policy be an important factor in determining the validity of the tax. There was no such conflict in [*City of Detroit*]. Here, I submit, the conflict is unmistakable, and the burden onerous."). This only highlights that the analysis of the panel majority in *Agua Caliente* was inconsistent with now-governing law.

analysis than the *Agua Caliente* majority applied in 1971, and it would reach a different outcome.

Fort Mojave, decided in 1976, has been similarly vitiated by *Bracker* and its progeny. Like *Agua Caliente*, *Fort Mojave* upheld the imposition of a state possessory interest tax on non-Indian lessees of tribal property. *Fort Mojave Tribe*, 543 F.2d at 1259. Indeed, the district court in *Fort Mojave* "found *Agua Caliente* to be controlling," and on appeal the Ninth Circuit "continue[d] to support the holding of that case." *Id.* at 1255. It reached that conclusion through a somewhat different analysis than that applied in *Agua Caliente*, because the Supreme Court's intervening decision in *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973), had introduced certain new principles. Ultimately, however, the reasoning in *Fort Mojave* is incompatible with *Bracker*.

In *McClanahan*, the Supreme Court held that a state income tax imposed on "reservation Indians with income derived wholly from reservation sources" impermissibly "interfered with matters which the relevant treaty and statutes leave to the exclusive province of the Federal Government and the Indians themselves," and was accordingly preempted. *Id.* at 165. *McClanahan* thus furthered the doctrinal shift "toward reliance on federal preemption" (and away from notions of inviolable sovereignty) in analysis of state taxing authority in Indian country. *Id.* at 172. It did not, however, employ the fact-intensive balancing approach *Bracker* would later mandate in cases involving state taxation of non-Indians dealing with Indians.

The Ninth Circuit in *Fort Mojave* recognized that *McClanahan* required it to "carefully analyze the applicable federal statutes to determine whether state action has been pre-empted." *Fort Mojave*, 543 F.2d at 1256. The *Fort Mojave* court's preemption analysis of the "applicable statutes," however, did not even address, much less analyze, the Long Term Leasing Act, 25 U.S.C. § 415, or the detailed

federal regulations issued thereunder, which directly applied to the leases at issue.[5] In contrast, the Supreme Court in *Bracker* and later balancing cases has attached heavy weight to the federal interest where this type of comprehensive federal regulatory scheme existed and frequently struck down a state tax affecting such scheme. *See Bracker*, 448 U.S. at 148-51; *Central Machinery v. Arizona State Tax Comm'n*, 448 U.S. 160, 165-66 (1980); *Ramah*, 458 U.S. at 839-42. Moreover, with respect to the two federal statutes analyzed in *Fort Mojave* for preemption purposes, the Indian Reorganization Act and Public Law 280, the court obviously went looking only for *express* preemption; it did not acknowledge the possibility of the implied preemption *Bracker* would later embrace. Synthesizing the case law to date, the court concluded that "specific authorization" is required to preempt "state legislation primarily directed at non-Indian lessees of Indian land . . . ." 543 F.2d at 1257. The court found no such "specific authorization" in the two statutes it examined, and concluded that "[t]o permit [the tax immunity the Fort Mojave Tribe advocated] requires, we believe, *a stronger Congressional signal than a statute which neither precludes nor authorizes the taxation in question*." *Id.* (emphasis added) (referring to Pub. L. No. 280).

Finally, the *Fort Mojave* court effectively treated the economic burden of the state taxes on the tribe as legally irrelevant. Though the *Fort Mojave* court mentioned this economic burden several times, it effectively ignored it by repeatedly emphasizing that the burden was "uncertain," *id.* at 1255 n.2, 1257 n.4, 1258 (twice), and in any case "indirect," *id.* at 1256, 1257, 1258 (twice), without offering any concrete evidence that it was either of these things. In short, the *Fort Mojave* court failed entirely to assess an aspect of the tribal interest (economic

[5] The *Fort Mojave* court mentioned 25 U.S.C. § 415 only for the purpose of showing that enforcement of the possessory interest tax at issue would be unlikely to harm the tribe's reversionary interest. 543 F.2d at 1259.

burden) that must be addressed under the *Bracker* test. *Fort Mojave*'s analysis and its holding, like *Agua Caliente*, were inconsistent with the *Bracker* test.

Because *Agua Caliente* and *Fort Mojave* are inconsistent with the principles established by *Bracker* – and, indeed, for the simpler reason that they simply did not apply the test it requires – they cannot guide the Court here. The Court should therefore take a fresh look at the possessory interest tax at issue, applying *Bracker* in accordance with the many Ninth Circuit cases that have since articulated and developed its principles.

Contrary to Defendants' contention, the above conclusions are in no way undermined by *Chehalis*. *Chehalis* concerned "whether the exemption of [tribal] trust lands from state and local taxation under [25 U.S.C.] § 465 extends to permanent improvements on such lands," 724 F.3d at 1155, not whether state taxation was preempted as a matter of federal common law. Applying the statute and the controlling decision in *Mescalero Apache Tribe v. Jones*, the Ninth Circuit concluded that state taxation of such permanent improvements is preempted. *See id.* at 1159. It expressly declined to "consider *Bracker* or any other theory of preemption." *Id.* In the course of explaining why *Bracker* did not apply, the court referred in dicta to *Fort Mojave* and *Agua Caliente*, noting that they involved a "similar mode of analysis" to *Bracker*. *Id.* at 1158. It did not examine those cases more deeply, however, nor did it reach any conclusion about their continued vitality. It simply noted that "[n]one of these cases involved property taxes, . . . so they do not implicate § 465." *Id.* *Agua Caliente* and *Fort Mojave* were simply not relevant to the issue before the court in *Chehalis*; *Chehalis* thus does not confirm their continued validity and certainly does not require their application here.

II. UNDER THE *BRACKER* TEST, STRONG FEDERAL INTERESTS ARE EMBODIED IN THE COMPREHENSIVE FEDERAL REGULATION OF LEASING OF TRIBAL AND TRIBAL MEMBER LANDS AND SUPPORT PREEMPTION.

A vital component of the *Bracker* analysis is whether the state tax targets an on-reservation activity of substantial federal interest as reflected in a comprehensive regulatory scheme. In *Bracker*, for example, federal regulations governing the harvesting of Indian timber preempted the state tax. 448 U.S. at 148-49. In *Ramah*, "pervasive" regulation of "construction and financing of Indian educational institutions" left no room for state taxation. 458 U.S. at 839. The Ninth Circuit has followed suit. In *Cabazon*, the Ninth Circuit held that the comprehensive scheme of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, when combined with the tribe's interests, preempted state licensing fees imposed on a non-Indian organization that broadcasted live horse races and handled wagering at tribal off-track facilities. 37 F.3d at 433-34; *see also Hoopa Valley*, 881 F.2d at 659-61 (strong federal interests embodied in comprehensive federal regulatory scheme over timber harvesting; state tax preempted).

In this case, likewise, strong federal interests are present, including the long-term leasing regulations generally and 25 C.F.R. § 162.017(c) specifically. Section 162.017(c) is part of a larger scheme of federal regulation of leases on Indian lands. The federal government regulates leasing of leases for agricultural purposes, 25 C.F.R. Part 162, Subpart B, residential purposes, 25 C.F.R. Part 162, Subpart C, business purposes, 25 C.F.R. Part 162, Subpart D, and mining purposes, 25 C.F.R. Parts 211, 212, among other things. *See generally* 25 U.S.C. § 415. Section 162.017(c) provides that "[s]ubject 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." 25 C.F.R. § 162.017(c).

In promulgating this regulation, the BIA specifically weighed several policy considerations. The BIA found that "[a]ssessment 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." 77 Fed. Reg. at 72,447. The BIA went on to say "[t]ribal sovereignty and self-government are substantially promoted by leasing under these regulations . . . ." *Id.* The BIA specifically noted effects that state and local taxation have on stunting economic development in Indian country:

> State and local taxation of the . . . leasehold interest [] 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.

Id. at 72,448. The BIA further noted that such a lack of access to capital was a "key barrier to economic advancement" and that the "very possibility of an additional State or local taxation 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." *Id.*

The BIA concluded that "[c]ompelling 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." *Id.* In short, the comprehensive regulatory scheme and policy considerations of the BIA support a finding of a strong federal interest in the preemption of state taxation under the *Bracker* test.

Defendants make much of the clause "Subject only to applicable Federal law," arguing that "Federal law" should include the *Agua Caliente* and *Fort Mojave* decisions. However, as discussed above, those decisions were effectively overruled by the Supreme Court's decision in *Bracker*. In fact, in promulgating Section 162.017, the BIA specifically referred to *Bracker* as the controlling preemption test. 77 Fed. Reg. at 72,447 (citing *Bracker*). The BIA then analyzed its own interests and tribal interests in the leasing of Indian land to conclude that state and local taxation is preempted. In light of this history, the phrase "Subject only to applicable Federal law," is not an affirmation of outdated Ninth Circuit precedent, but instead is an acknowledgement of the Supreme Court's controlling decision in *Bracker*.

III. THE BIA HAD AUTHORITY TO ISSUE THE LEASING REGULATIONS.

The Court specifically invited the parties to brief the issue of the authority of the BIA to issue the leasing regulations, and NITA wishes to comment on that issue as well. NITA believes that the BIA, indeed, had such authority.

Congress specifically empowered the BIA to promulgate leasing regulations in the Long Term Leasing Act. 25 U.S.C. § 415 ("all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior."). Therefore, if the BIA lacked authority to promulgate the leasing regulations it is not because it lacked Congressional delegation to do so.

Defendants argue that the BIA lacked authority to promulgate Section 162.017(c) because, in its view, an agency does not have authority "to adopt a regulation that is contrary to federal law as interpreted by federal appellate authority . . . ." Def. Supp. Br. at 5. However, that appellate level authority – *Agua Caliente* and *Fort Mojave* – is no longer good law. *Bracker* balancing displaced the intergovernmental immunity and express preemption analysis used

by the Ninth Circuit in the 1970s. The BIA's regulations are consistent with, and in fact expressly reference, the controlling federal appellate authority – *Bracker*.

Furthermore, Defendants are incorrect in their assertion that federal agencies have no authority to promulgate regulations contrary to existing appellate authority – in fact, the opposite is true. In 2005, the U.S. Supreme Court considered the interplay between agency action and *stare decisis* in *National Cable & Telecommunications Ass'n v. Brand X Internet Services ("Brand X")*, 545 U.S. 967 (2005). In *Brand X*, the Federal Communications Commission ("FCC") issued a declaratory ruling that was directly at odds with existing Ninth Circuit precedent. *Id.* at 977-79. The Ninth Circuit applied *stare decisis* and overrode the FCC's ruling but the Supreme Court reversed, holding that normal administrative law principles should apply unless prior precedent has held that a statute is unambiguous (and therefore no room exists for agency action). *Id.* at 979-86. The Court reasoned that "precluding agencies from revising unwise judicial construction of ambiguous statutes" would lead to the "ossification" of statutory law. *Id.* at 983. With respect to the leasing regulations, *stare decisis* cannot trump the BIA's regulations because the 1970s cases did not hold that the statutes at issue unambiguously allowed local taxation. *See Fort Mojave*, 543 F.2d at 1257-59; *Agua Caliente*, 442 F.2d at 1186-87. In fact, *Fort Mojave* held exactly the opposite – ruling that one of the statutes considered (Public Law 280) could not be said to "directly authorize[] such taxation." 543 F.2d at 1257. Therefore, the holdings in both *Agua Caliente* and *Fort Mojave*, in addition to being abrogated by *Bracker*, should be revisited in light of the BIA's new regulations. Under *Brand X*, the Court should apply normal administrative law principles in revisiting them.

Under normal administrative law principles, the BIA regulations are subject to significant weight. The BIA has unique expertise in the area of Indian law – it was first established nearly two hundred years ago in 1824, *Cohen's Handbook of Federal Indian Law* § 5.03[1], at 396 (2012 ed.) (citing H.R. Doc. No. 19-146

(1824)), and has "management of all Indian Affairs and all matters arising out of Indian relations," 25 U.S.C. § 2. Moreover, the BIA's preemption analysis, including its assessment of its own interests, was thorough and supported by national policies in favor of Indian self-determination and economic development.[6] 77 Fed. Reg. at 72,447-48. In fact, precisely because the preemption analysis here turns on policy objectives, rather than interpretation of an unambiguous statute, the BIA's preemption conclusion is entitled to weight as agencies are better positioned than courts to make policy determinations. *Cf. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984) ("Judges . . . are not part of either political branch . . . . In contrast, . . . the Chief Executive is [accountable directly to the people], and it is entirely appropriate for this political branch . . . to make . . . policy choices . . . .")

In light of the BIA's thorough analysis, *Wyeth v. Levine*, 555 U.S. 555 (2009), relied on by Defendants, is distinguishable. Notably, *Wyeth* did *not* suggest, in derogation of the holding of *Brand X*, that an agency cannot override federal appellate-level authority. *Wyeth* merely applied normal administrative law principles to hold that the Food and Drug Administration's ("FDA") bare conclusion that its regulations preempted state law was not entitled to deference. 555 U.S. at 577-78. The Court held in *Wyeth* that the FDA's conclusion was not entitled to deference because it was adopted with procedural irregularity, was at odds with Congressional purpose, and reversed the FDA's own longstanding position without providing a reasoned explanation. *Id.* No such problems exist with the BIA's regulations. The BIA's regulations were passed following formal

[6] *Agua Caliente* and *Fort Mojave* briefly discussed the economic development implications of double taxation. However, neither weighed the tribal interests in economic development against state interests in taxation and, most significantly, neither even considered the *federal* interest in economic development in Indian country (much less the federal interest in leasing of Indian land).

notice and comment procedures. The BIA's regulations are fully consistent with Congress' purpose in the Long-Term Leasing Act to promote the greatest economic return possible for Indian landowners. 77 Fed. Reg. at 72,447 ("The legislative history of section 415 demonstrates that Congress intended to maximize income to Indian landowners and encourage all types of economic development on Indian lands.") (*citing* Sen. Rprt. No. 84-375 at 2 (May 24, 1955)); *see also Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1393 (9th Cir. 1987) ("The overriding federal interest is to obtain the "highest economic return to the owner consistent with prudent management and conservation practices.'") (citation omitted). Finally, the BIA's regulations do not reverse any longstanding policy – instead the regulations were intended as "clarification" – and the BIA provided a thorough explanation for its clarification. 77 Fed. Reg. at 72,477.

Indeed, another federal district court recently remarked in holding a rental tax on Indian property leased to non-Indians preempted, "The Court must give some weight and deference to the new regulations." *Seminole Tribe of Fla. v. State of Florida*, __ F. Supp. 2d __, 2014 WL 4388143, at *4 (S.D. Fla. Sept. 5, 2014). "In the area of Indian affairs, the [President] has long been empowered to promulgate rules and policies, and the power has been given explicitly to the Secretary [of the Interior] and his delegates at the [Bureau of Indian Affairs]." *Id.* at *3 (*citing Morton v. Ruiz*, 415 U.S. 199, 231 & nn.25 & 26 (1974)). In fact, the *Seminole* court cited *Wyeth* in support of its deference to the BIA's regulations on account of *Wyeth*'s statement that agencies "have a unique understanding of the statutes they administer and an attendant ability to make informed determination about how state requirements may pose an obstacle to the accomplishment and execution of the full purposes of objectives of Congress." *Id.* at *4 (citing *Wyeth*, 555 U.S. at 576-77). The court eventually concluded that the "Secretary of the Interior's new regulations have changed the landscape of this area of the law,

specifically regarding the issue of preemption. To ignore these regulations would be contrary to well-established precedent." *Id.* at *7.

IV. *BRACKER* BALANCING REQUIRES A DEVELOPED FACTUAL RECORD AND CANNOT BE CONDUCTED ON THE PLEADINGS.

Bracker commands an analysis that is "sensitive to the particular facts and legislation involved," *Cotton Petroleum*, 490 U.S. at 176 – a "*particularized* inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the *specific context*, the exercise of state authority would violate federal law." *Bracker*, 448 U.S. at 145 (emphasis added). Because the *Bracker* "test calls for careful attention to the factual setting," *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1190 (9th Cir. 2008), it is generally impossible to apply in the absence of a complete factual record. Consequently, in a case subject to *Bracker*, judgment on the pleadings is rarely, if ever, appropriate.

Fact questions arise at each step of the tripartite *Bracker* analysis. First, to properly weigh the federal interests at issue, "[r]elevant federal statutes and treaties must be examined in light of the 'broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence.'" *Ramah*, 458 U.S. at 838 (quoting *Bracker*, 448 U.S. at 144-45). In a case such as this involving comprehensive agency regulations, the court must accordingly look beyond the face of the regulations to understand the functional aspects of the federal regulatory scheme, its objectives, and its particular challenges. *See Hoopa Valley*, 881 F.2d at 659 ("If the state law interferes with the *purpose* or *operation* of a federal policy regarding tribal interests, it is preempted.") (emphasis added).

Second, analysis of the tribal interests at stake requires assessment, among other things, of both the economic burden of the state tax and the "nature of the taxed activity." *Cabazon*, 37 F.3d at 434. Weighing these factors requires the court to understand the economics of on-reservation activities at issue, the relevant

investments of the tribe, and the effect of the state tax on both. For example, "[t]hat a tribe plays an active role in generative activities of value on its reservation gives it a strong interest in maintaining those activities free from state interference . . . ." *Gila River*, 967 F.2d at 1410. These are questions of fact.

Finally, the weight of the state's interests similarly turns on factual issues, particularly the relationship between the state tax and the "provision of tribal or state services to the party the state seeks to tax." *Barona Band*, 528 F.3d at 1190. A state's mere "general desire to raise revenue" is insufficient to justify taxation. *Bracker*, 448 U.S. at 150. Instead, the state must show a more direct connection between the tax and the on-reservation activity at issue. *See Hoopa Valley*, 881 F.2d at 661 (holding state timber tax preempted where it did "not fund services that directly relate to the harvesting of tribal timber and [was] otherwise unconnected with tribal timber activities"). This too requires a factual record illuminating how the state spends the revenue generated by the tax.

In sum, "[f]actual questions . . . pervade every step of the analysis required by . . . *Bracker* . . . . [E]ven if a court knows enough to trigger a weighing of competing interests, a court must still know what the nature of those interests are." *Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin. Servs.*, __ F.3d __, 2014 WL 4900363, at *7 (2d Cir. Oct. 1, 2014). As a result, cases subject to *Bracker* can rarely, if ever, be resolved before summary judgment. The Ninth Circuit has recognized this. In *Gila River*, the district court dismissed under Rule 12 a tribe's complaint challenging a state tax on on-reservation sporting and cultural events. *See Gila River*, 967 F.2d at 1406. The Ninth Circuit reversed, holding the district court erred in lending "dispositive weight" to the state's mere assertions about its relevant interests. "Although the State may at a later stage of the litigation seek to prove a direct connection between its tax and the . . . services it provides [in connection with the taxed activity], the record currently is devoid of any such proof." *Id*.

The present case is no different. *Bracker* governs, and the Court cannot carry out the analysis *Bracker* requires before developing a complete factual record that illuminates all of the relevant factors.

DATED:

DORSEY & WHITNEY LLP

By: _____
KENT J. SCHMIDT
Attorneys for *amicus curiae* National Intertribal Tax Alliance

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/s/ Kent J. Schmidt
Kent J. Schmidt

Requests

5:14-cv-00007-DMG-DTB Agua Caliente Band of Cahuilla Indians v. Riverside County et al

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Filer: National Intertribal Tax Alliance
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REQUEST for Leave to File Brief as Amicus Curiae filed by Amicus Curiae National Intertribal Tax Alliance. (Attorney Kent J Schmidt added to party National Intertribal Tax Alliance(pty:am))(Schmidt, Kent)

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