No. 14-14524-D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SEMINOLE TRIBE OF FLORIDA,
a federally recognized Indian Tribe,

Plaintiff/Appellee,

v.

MARSHALL STRANBURG, in his
capacity as Executive Director of the
Florida Department of Revenue,

Defendant/Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

INITIAL BRIEF OF APPELLANT

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Seminole Tribe v. Stranburg
Eleventh Circuit Case No. 14-14524-D

AMENDED **CERTIFICATE OF INTERESTED PERSONS**

Pursuant to Federal Rule of Appellate Procedure 26.1 and the rules of this Court, Appellant Marshall Stranburg, in his capacity as Executive Director of the Florida Department of Revenue, furnishes the following *amended* list of those who have an interest in the outcome of this case and/or appeal:

1. Akerman LLP (f/k/a Akerman Senterfitt LLP or Akerman Senterfitt) (Counsel for Plaintiff/Appellee)
2. Fiore, Kristin M. (Counsel for Plaintiff/Appellee) *[new entry]*
3. Giddings, Katherine Eastmore (Counsel for Plaintiff/Appellee)
4. Gold, Andrew Paul (Counsel for Plaintiff/Appellee)
5. Glogau, Jonathan A., Special Counsel, Office of the Attorney General of Florida (Counsel for Defendant/Appellant)
6. Larson, Michael Joseph (Counsel for Plaintiff/Appellee)
7. Otazo-Reyes, Hon. Alicia M. (District Court Magistrate Judge)
8. Scola, Hon. Robert N. (District Court Judge)
9. Seminole Tribe of Florida, a federally-recognized Indian Tribe (Plaintiff/Appellee)
10. Snow, Hon. Lurana S. (District Court Magistrate Judge)

11. Spencer, William S. (Counsel for Plaintiff/Appellee)
12. Stankee, Glen Allen (Counsel for Plaintiff/Appellee)
13. State of Florida, Department of Revenue (Defendant, Dismissed 9.27.2013)
14. Stranburg, Marshall, as Executive Director (Defendant/Appellant)
15. Valle, Hon. Alicia O. (District Court Magistrate Judge)
16. Vazquez, Osvaldo, Deputy Solicitor General, Office of the Attorney General of Florida (Counsel for Defendant/Appellant)
17. Winsor, Allen, Solicitor General, Office of the Attorney General of Florida (Counsel for Defendant/Appellant)

STATEMENT REGARDING ORAL ARGUMENT

This appeal presents complex questions regarding the State of Florida's taxing authority and the scope of several federal statutes and regulations, among other issues. Accordingly, Appellant Marshall Stranburg, in his official capacity, respectfully requests oral argument.

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STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

This is an appeal from a final judgment of the District Court for the Southern District of Florida, entered on September 5, 2014. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1362 because this case is a civil action, brought by an Indian tribe, that raises questions under federal law. Defendant-Appellant filed a timely notice of appeal on October 6, 2014. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Florida may impose an excise tax on non-Indian parties leasing commercial property from Indian entities on Indian lands.

2. Whether Florida may impose a tax on receipts obtained by utility companies for services provided on Indian lands.

3. Whether the district court should have, under the comity doctrine, dismissed certain counts of the Complaint that raised issues identical to those raised in parallel state proceedings brought by the parties actually subject to the challenged taxes.

STATEMENT OF THE CASE

The State of Florida imposes two nondiscriminatory taxes, an excise tax on the privilege of engaging in the business of leasing real property and a tax on the privilege of collecting from consumers for utility services. Plaintiff, the Seminole Tribe of Florida ("the Tribe") sued to prevent imposition of these taxes on transactions involving certain entities with which it does business. The district court struck down both taxes, one of which was also at issue in a pending state court action brought by the parties actually subject to the tax.

In a broad opinion, the district court read one federal statute to prohibit *any* taxes related to leases on Indian lands, flatly contradicting holdings from the Supreme Court and several federal appeals courts, and improperly deferred to a recent federal regulation that, by its terms, does not apply in this situation. The district court also improperly read the utility receipts tax statute to impose the legal incidence of the tax on consumers in the face of clear statutory language and administrative practice to the contrary. Finally, the district court refused to dismiss part of the action, despite the fact that the lessees subject to the rental tax were themselves pursuing a parallel case in state court.

This Court should reverse.

A. Statement of the Facts

1. Florida's Rental and Gross Receipts Taxes

The State of Florida has for years imposed a tax on all tenants leasing commercial property within the state. Fla. Stat. § 212.031 (2014) ("the Rental Tax"). The Rental Tax statute provides that, with several exceptions, "every person is exercising a taxable privilege who engages in the business of renting, leasing, letting, or granting a license for the use of any real property." Fla. Stat. § 212.031(1)(a). The tax is a transactional tax on the payment of rent rather than an ad valorem tax on the underlying property. *See Fla. Revenue Comm'n v. Maas Bros., Inc.*, 226 So. 2d 849, 851-52 (Fla. Dist. Ct. App. 1969). The legal incidence of the tax is on the tenant and the rate is six percent of the total rent or license fee. *Id.* at 853; Fla. Stat. § 212.031(1)(c).

Florida also imposes a tax on utility companies for the privilege of receiving payments from utility customers. Fla. Stat. § 203.01 (2014) ("Gross Receipts Tax"). The Gross Receipts Tax is an item of cost to utility companies and, like ad valorem taxes and personal property taxes, is recovered through companies' rate

structure. DE 63-1:20-21 (Steffens Dep.)[1]; Fla. Admin Code r.12B-6.0015(3)(a) (2014).

The Gross Receipts Tax statute allows utility companies to separately state the tax in bills to consumers. Fla. Stat. § 203.01(4). As longtime Department employee and Manager of Field Audit Operations Peter Steffens explained, this provision was added after the Florida Legislature increased the tax rate. Companies sought to make it clear to customers that higher bills were due to legislative action rather than the utilities' decisions. DE 63-1:45-46 (Steffens Dep.); *see also* Fla. Admin Code r. 12B-6.0015(3)(a).

Proceeds from the Gross Receipts Tax are deposited directly into the Public Education Capital Outlay and Debt Service Trust Fund ("PECO Fund"). DE 40-1:23 (ECF pagination) (Annette Decl. Ex. 5). Florida's Commissioner of Education is required to allocate capital outlay funding to public schools, including eligible charter schools, each year. *See* Fla. Stat. § 1013.62 (2014). Money from the PECO

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[1] This Brief refers to the record as DE #:*, where # stands for the docket entry number and * for the page or paragraph number. The Rental Tax and Gross Receipts Tax statutes, along with federal regulations cited later, are reproduced in Addendum A.

Fund is also used to support public post-secondary education. *See, e.g.*, DE 40-1:21-24 (Annette Decl. Ex. 5).

2. The Tribe's Casino Operations and Its Leases with Non-Indian Tenants

The Tribe operates seven casinos throughout Florida. DE 64-1:11 (Geer Dep.). In 2013 alone, the Tribe's proceeds from gambling operations exceeded $2 billion. *Id.* at 13-14. Net profits totaled approximately $900 million. *Id.* In addition to using proceeds for Tribe operations, the Tribe distributes profits to its approximately 4000 members. *Id.* at 14.

The Tribe operates the Seminole Hard Rock Hotel & Casino Hollywood on its Hollywood reservation. The facility includes a seventeen-story hotel and 130,000 square feet in gaming space, along with numerous restaurants, bars, and retail shops. DE 1:10-11. The Tribe also operates the Seminole Hard Rock Hotel & Casino Tampa, located on its Tampa reservation. That facility includes 90,000 square feet of gaming space and also has a number of restaurants, bars, and retail shops. *Id.*

On May 2, 2005, the Tribe entered into two twenty-five year leases, one for each casino, with non-Indian entities based in Delaware. *See* DE 1-4:1; 1-5:1 (ECF pagination). Under the terms of the agreements, the lessees, Ark Hollywood LLC and Ark Tampa LLC, each agreed to "pay . . . to the applicable Federal, tribal

and/or Florida governmental authority, any and all sales, excise, property and other taxes levied, imposed or assessed with respect to . . . the occupancy by Tenant of space on Reservation Land." DE 1-4:10; DE 1-5:10. The Bureau of Indian Affairs, an entity within the federal Department of the Interior, approved each lease on August 4, 2005. DE 1-4:39 (ECF pagination); DE 1-5:39 (ECF pagination).

3. The Services Florida Provides to Seminole Tribe Members

Each year, Florida and local government entities provide millions of dollars in services and benefits to the Tribe and its members.

The Tribe's casino operations benefit extensively from these government services. As the Tribe's Executive Director of Finance testified, individuals arrested on the Hollywood and Tampa reservations are taken to the county jail and prosecuted by the relevant State Attorney. DE 64-1:16 (Geer Dep.). None of the Tribe's reservations have a hospital, so members and casino visitors must be transported off-reservation for any issues the Tribe's clinics cannot address. *Id.* at17. Finally, the Tribe has agreements with local fire departments to assist in emergencies too large for the Tribe's personnel to handle alone. *Id.* at 16.

Florida also provides extensive educational benefits to Tribe members. The state has drawn from the PECO Fund, funded in part by the Gross Receipts Tax, to support the Pemayetv Emahakv Charter Middle School, located on the Brighton

Seminole Reservation and serving the Tribe's members. DE 40-1:25-37 (Annette Decl. Exs. 6-9). The school received a total of $1,770,272 from the state in fiscal years 2008-09, 2010-11, and 2011-12.[2] *See id.* Money from the PECO Fund goes to other public and charter schools serving Tribe members; a large percentage of students in each reservation attend public or charter schools in the surrounding counties. *Id.* at 38-41 (Annette Decl. Ex. 10). Moreover, the State spends millions from general revenue in GED and post-secondary educational programs that also benefit the Tribe's members. *Id.* at 54-56 (Annette Decl. Ex.14).

B. Course of Proceedings

Prior to the filing of this suit, the Tribe's tenants—Ark Hollywood and Ark Tampa—filed claims for refunds of the same Rental Tax at issue here. After the Department denied those claims, the Tribe filed this case in federal court, naming as defendants the Department and its Executive Director, Marshall Stranburg, in his official capacity.[3] DE 1. The very next day, Ark Hollywood and Ark Tampa

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[2] The amount of the Gross Receipts Tax for which the Tribe claimed refunds totaled $181,209.47 for the period from December 2008 to July 2011. DE 1: 24; DE 64-1:25 (Geer Dep.).

[3] At the time the Complaint was filed, Mr. Stranburg was Interim Executive

filed actions in Florida state courts, contesting the Department's denial of their refund claim and asserting that the taxes are prohibited by federal law. The cases remain pending.[4]

Defendants moved to dismiss, arguing among other things that the Eleventh Amendment barred all claims against the Department, that the Tribe lacked standing to challenge the Rental Tax, and that the court should abstain from exercising jurisdiction in light of the parallel state proceedings. DE 12. Ten months later, the district court granted the motion in part, dismissing all claims against the Department, but allowing all claims to proceed against Executive Director Stranburg.

Director and Deputy Executive Director. He was named permanent Executive Director on April 23, 2013.

[4] *See* Docket, *Ark Hollywood, LLC v. State of Fla. Dep't of Revenue*, Leon Cnty., 2nd Judicial Circuit, case no. 12-3609; Docket, *Ark Tampa, LLC v. State of Fla. Dep't of Revenue*, Hillsborough Cnty., 13th Judicial Circuit, case no. 12-17222. The Ark entities are represented by the same attorney representing the Tribe in this matter. *See id.* Both cases are at the summary judgment stage. On November 3, the court in the Hollywood litigation granted the Department's unopposed motion to stay the case in light of this case. *See* Ark Hollywood, LLC Docket.

The parties engaged in limited discovery. The Executive Director deposed the Tribe's Executive Director of Finance, Suresh Geer, while the Tribe deposed Mr. Steffens. The Tribe did not introduce any studies or reports detailing the impact of either tax on the Tribe's operations, nor did it introduce record evidence about the Ark leases, such as its marketing efforts, negotiations, or operations under the leases. The Tribe did not even introduce evidence about what entities or activities were allegedly affected by the Gross Receipts Tax. In moving for summary judgment, the Tribe relied on the two depositions and an affidavit filed by Mr. Geer. *See* DE 58.[5]

The district court granted plaintiff summary judgment on all counts. The court first held that the Rental Tax was directly prohibited by federal statute, citing 25 U.S.C. § 465, which grants the Secretary of the Interior authority to acquire land and states that such land is exempt from state and local taxation. DE 84:2-3. Separately, the Court held that the Rental Tax is preempted under federal law,

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[5] The Tribe had moved for summary judgment before the district court's ruling on the motion to dismiss and before either party had taken discovery. *See* DE 31, 41-2:3. After ruling on the motion to dismiss, the district court denied this motion without prejudice and authorized further discovery. DE 49.

citing regulations promulgated by the Interior Secretary at the end of 2012. *Id.* at 3-8. The district court rejected the Executive Director's arguments that the regulations were entitled to no deference, and concluded that the regulations, along with a federal statute governing leasing, "prohibit the imposition of the Rental Tax." *Id.* at 6 (citing 25 U.S.C. § 415, 25 C.F.R. § 162.017).

Next, the district court held that the Gross Receipts Tax is prohibited by federal law. The court concluded that the legal incidence of the Gross Receipts Tax falls on the Tribe and its members, rejecting the Executive Director's argument that the plain language of the statute showed that the Legislature had instead imposed the tax on utility companies. The court analogized the statutory language, which states that the tax is imposed for the privilege of conducting a utility business, to the language of Florida's sales tax statute, which places the legal incidence on the consumer. DE 84:13. Consequently, the court held, the tax was categorically banned by federal law. *Id.* at 8-15.

The Executive Director filed a timely notice of appeal. DE 86.

C. Standard of Review

This Court reviews summary judgment orders *de novo*. *See Curves, LLC v. Spalding Cnty.*, 685 F.3d 1284, 1289 (11th Cir. 2012). Its decision not to dismiss on comity grounds is reviewed for abuse of discretion. *Bowden v. Lincoln Cnty.*

Health Sys., No. 08-10855, 2009 WL 323082 (11th Cir. Feb. 10, 2009) (unpublished); *see also S. Ry. Co. v. State Bd. Of Equalization*, 715 F.2d 522, 530 (11th Cir. 1983).

SUMMARY OF ARGUMENT

Florida's Rental and Gross Receipts Taxes are valid, nondiscriminatory taxes that are not prohibited by federal law.

1. The district court erred in finding that 25 U.S.C. § 465 prohibits the Rental Tax. The court read this statute broadly to prohibit all taxes related to land, despite the fact that the Supreme Court and other courts have consistently read the statute to bar only taxes on the land itself or on permanent fixtures that are intimately connected to the land. The case on which the district court primarily relied acknowledged that the bar in Section 465 does *not* reach taxes on all income generated from land; indeed, the Court in that case expressly acknowledged that taxation of lessees of land is proper. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 157-58, 93 S. Ct. 1267, 1275 (1973).

Separately, the district court found that the Rental Tax was otherwise preempted based on the tribal and federal interests at stake. In this holding, the court relied on federal regulations issued recently by the Secretary of the Interior. In doing so, the district court gave the regulations a reading far broader than even

the Secretary has advocated, and made the regulations determinative of the preemption question. This outcome conflicts directly with the direction the Supreme Court recently provided in *Wyeth v. Levine*, 555 U.S. 555, 129 S. Ct. 1187 (2009). Under the particularized balancing inquiry the district court should have engaged in, the Rental Tax cannot be held preempted.

2. The Gross Receipts Tax statute unambiguously imposes the legal incidence of the tax on utility companies, and the district court erred in finding otherwise. The language of the statute provides that the tax is on the receipts received by a utility company and also provides that the tax is imposed on every "person for the privilege of conducting a utility business." Fla. Stat. § 203.01(1)(c)1, (5) (2014). Even if the district court did not find that this language expressly places the legal incidence of the tax on utility companies, the court should have found that a fair interpretation of the statute and its application shows that the tax is on utilities, not their customers. *See Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 461, 115 S. Ct. 2214, 2221 (1995). Courts and federal agencies construing similar statutes have consistently found the legal incidence of such taxes to be on the seller. As a tax on non-Indians, the Gross Receipts Tax is not categorically barred. Under the proper balancing inquiry, the tax is not preempted.

3. The district court should not have even reached the merits of the Rental Tax claims because the tenants, who were actually subject to the tax, challenged the tax in state court on the same grounds. The Supreme Court has directed lower federal courts, under the doctrine of comity, to dismiss challenges to state taxing statutes even where federal rights are implicated. *See Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 130 S. Ct. 2323 (2010). The Court has stressed that state taxation is a particularly sensitive area, and that federal courts should defer to state courts to determine whether a state taxing framework is constitutional and, if not, what the remedy should be. The district court should have dismissed the Rental Tax claims to allow the state courts to decide the merits of the state cases, brought by the affected tenants and involving the very issues raised here.

ARGUMENT

The district court's conclusion turned on a reading of Section 465 that is far broader than the Supreme Court has endorsed, a grant of deference to agency regulations that do not bear the weight the court attached to them, and a conception of the Gross Receipts Tax that is inconsistent with the statute. While the district court's ruling on the merits was incorrect, it should not even have reached many of these questions because it should have dismissed the Tribe's Rental Tax claims at the outset.

I. THE RENTAL TAX IS NOT BARRED OR PREEMPTED BY ANY FEDERAL LAW AND IS A VALID EXERCISE OF THE STATE'S TAXING AUTHORITY.

The district court held the Rental Tax invalid on two grounds, first concluding that 25 U.S.C. § 465 directly disallows the tax, and, separately, concluding that the tax is otherwise preempted based on the weight of federal and tribal interests affected, relying primarily on recent federal regulations. Neither ground is correct.

A. Federal Statutory Law Does Not Disallow the Rental Tax.

In Indian taxation law, the "'who' and the 'where' of the challenged tax have significant consequences." *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101, 126 S. Ct. 676, 681 (2005). Whether a state may impose a tax turns on who is taxed—the tribe (or its members) or a non-Indian—and where the tax is imposed—on-reservation or off. Under the Supreme Court's current doctrine, a state may impose a nondiscriminatory tax on private parties with whom Indian tribes do business, even if they conduct business on a reservation. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175, 109 S. Ct. 1698, 1707 (1989). Congress may grant such a party tax immunity, *see id.* at 176, but the Court has cautioned "against interpreting federal statutes as providing tax exemptions unless those exemptions are clearly expressed," *Chickasaw Nation v. United States*, 534 U.S. 84, 95, 122 S. Ct. 528, 535 (2001); *accord Fla. Dep't of Revenue v. Piccadilly*

Cafeterias, Inc., 554 U.S. 33, 50, 128 S. Ct. 2326, 2338 (2008). While a tax on non-Indians conducting business on-reservation may be preempted after balancing the relevant interests, *see infra* Part I.B, it is not statutorily barred unless Congress clearly says so.

The district court held that, in 25 U.S.C. § 465, Congress did clearly bar taxes such as the Rental Tax. DE 84:3. Section 465 provides in relevant part:

> The Secretary of the Interior is authorized, in his discretion, to acquire . . . any interest in lands, water rights, or surface rights to lands . . . for the purpose of providing land for Indians. . . . 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.

25 U.S.C. § 465 (2014). The Supreme Court looked at this very language in 1989 and concluded squarely that it did *not* express a "congressional intent to pre-empt state taxation" on lessees of Indian land. *Cotton Petroleum Corp.*, 490 U.S. at 183 n.14, 109 S. Ct. at 1711 n.14 (citing Indian Reorganization Act, 48 Stat. 984 (1934), of which Section 465 is a part). As the Ninth Circuit has repeatedly held, Section 465 bars state taxes directly on land or on permanent improvements to land, and *only* in those two areas. *See Confederated Tribes of Chehalis Reservation v. Thurston Cnty. Bd. of Equalization*, 724 F.3d 1153, 1158 & n.7 (9th Cir. 2013); *see also Fort Mojave Tribe v. Cnty. of San Bernardino*, 543

F.2d 1253, 1255 (9th Cir. 1976) (upholding state tax on leasehold interest).[6] The district court found otherwise based on a broad reading of an earlier case, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S. Ct. 1267 (1973).

In *Mescalero Apache Tribe*, the Court considered challenges to two state taxes imposed on a tribe-operated ski resort located on federal trust lands but off-reservation. The Court held that the state could tax the tribe's gross receipts from the resort, but struck down a use tax on the materials used to construct permanent improvements on the land. *Mescalero Apache Tribe*, 411 U.S. at 158, 93 S. Ct. at 1275. In discussing the use tax, the Court noted that "use is among the bundle of privileges that make up property or ownership of property and, in this sense, at least, a tax upon use is a tax upon the property itself." *Id.* The district court

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[6] To our knowledge, no court had ever held to the contrary prior to the district court's order below. Further, many courts have upheld taxes that would be barred under the district court's broad reading of Section 465. *See, e.g.*, *Cotton Petroleum Corp.*, 490 U.S. 163, 109 S. Ct. 1698; *Ute Mountain Ute Tribe v. Rodriguez*, 660 F.3d 1177, 1194-95 (10th Cir. 2011) (upholding tax on gas extraction under leases). Finally, the Interior Secretary's practice confirms the narrower understanding of Section 465. When the Secretary considers taking lands into trust, he or she must notify state and local governments and request information regarding the impact of such action on real property taxes but not on excise taxes like the Rental Tax or any other kind of tax. 25 C.F.R. §§ 151.10, 151.11(d).

expanded on this language, holding that it necessarily meant that *other* rights "making up the bundle of privileges," such as the "right to lease property to another for profit," are similarly exempt under Section 465. DE 84:3.

To the extent there is any conflict between *Mescalero Apache Tribe*'s reasoning and that of *Cotton Petroleum*, the later case controls and the district court must be reversed. *See, e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 744-47, 111 S. Ct. 2546, 2562-63 (1991). But there is no conflict, because *Mescalero Apache Tribe* itself recognizes that not all use taxes are so intimately connected to the land to be "deemed simple ad valorem property taxes," 411 U.S. at 158, 93 S. Ct. at 1275; only taxes on items "intimately connected with the use of the land itself," such as taxes on permanent improvements, are exempt, *see id.* Indeed, *Mescalero Apache Tribe* flatly states that "[l]essees of otherwise exempt Indian lands . . . are also subject to state taxation." 411 U.S. at 157, 93 S. Ct. at 1275 (citing *Okla. Tax Comm'n v. Tex. Co.*, 336 U.S. 342, 69 S. Ct. 561 (1949)).[7] Separately, the Court recognized that, in light of the principle that tax exemptions

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[7] *Oklahoma Tax Commission* upheld a state tax of 5% of the value of production under petroleum leases. *See* 336 U.S. at 345, 69 S. Ct. at 563-64.

are not granted by implication, it would not read Section 465 to exempt all income derived from the land, *see id.* at 155-56; *accord Confederated Tribes of Chehalis Reservation*, 724 F.3d at 1158 n.7, though the right to such income is arguably in the "bundle of privileges" of ownership, as the district court recognized here, *see* DE 84:3.

Under *Cotton Petroleum* and *Mescalero Apache Tribe*, Section 465 cannot be read to bar the Rental Tax.

B. The Rental Tax Is Not Preempted by Operation of Federal Regulations or Otherwise.

Separate from Section 465, a state tax imposed on a reservation may be preempted under federal law where the federal and tribal interests implicated by a tax outweigh the state's interest, or where the tax unduly interferes with Indian sovereignty. *See generally White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-45, 100 S. Ct. 2578, 2583-84 (1980); *see also infra* Part I.B.3.

The district court relied primarily on recently issued federal regulations to find the Rental Tax preempted, but those regulations do not purport to decide the preemption question and, to the extent they do, they are owed no deference. Rather than simply apply the regulations, the district court was required to engage in a fact-specific balancing of the interests involved. Under the *Bracker* balancing inquiry, the Rental Tax is not preempted.

1. The Secretary of the Interior Has Disclaimed that the Regulations Have Any Preemptive Effect.

In December 2012, the Secretary of the Interior promulgated extensive new regulations regarding Indian leasing. These regulations address taxation relating to leases on Indian lands, stating in relevant part:

> (b) Subject only to applicable Federal law, activities under a lease conducted on the 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 a State. Activities may be subject to taxation by the Indian tribe with jurisdiction.
>
> (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. Leasehold or possessory interests may be subject to taxation by the Indian tribe with jurisdiction.

25 C.F.R. § 162.017 (2014). Despite the seeming breadth of the language, courts and the Secretary have made clear that the regulations do not purport to decide the question of taxation for all Indian leases throughout the nation.

The Ninth Circuit has squarely held that the regulations merely "clarify[] and confirm[]" what federal law, including Section 465, already says and do not state new law. *Confederated Tribes of Chehalis Reservation*, 724 F.3d at 1157 n.6. Indeed, that court refused even to consider the regulations in determining whether a county property tax was permissible. *Id.* (citing *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 20-21, 127 S. Ct. 1559, 1572 (2007)).

In litigation, the Secretary has echoed the Ninth Circuit's view, arguing that leases are not necessarily exempt from taxation simply due to the existence of the regulations. The reason for this position is that the regulations provide that they are subject to "applicable federal law." In *Desert Water Agency v. U.S. Department of the Interior*, No. 13-cv-00606 (C.D. Cal.), a state agency sued to challenge the regulations under the Administrative Procedures Act, 5 U.S.C. §§ 701-06 (2014). The agency, which imposes ad valorem property taxes and other fees on leases between the Agua Caliente Band of Cahuilla Indians and non-Indians, argued that the regulations were impermissible under federal law and violated due process. *See* Mem. in Supp. of U.S. Mot. to Dismiss, June 11, 2013, at 3, 5 (briefing from this case is reproduced in Addendum B). The Interior Secretary, and other defendants, argued that the challenge was not ripe because *every* lease had to be reviewed to see if the regulations applied. *See id.* at 1, 17 (noting that there were approximately 20,000 lease documents involving the tribe, and the Bureau of Indian Affairs had to review each to "determine whether they are consistent with the regulations, including section 162.017, tribal law and relevant Federal laws"); *see also* 25 C.F.R. § 162.008 (providing that leases approved by the Secretary before January 4, 2013 govern in any conflict with the new regulations). In their reply brief, defendants made the point even more clearly, asserting:

> Plaintiff misreads the Final Rule. *It does not preempt DWA's charges*. Instead, section 162.017 is a statement of the strong federal interest prong articulated in the test under [*Bracker*] and its progeny. *In other words, it does not change current law; it only clarifies current law within the surface leasing regulations*.
> . . .
> Section 162.017 expressly provides that state taxation of permanent improvements, activities, and possessory interests on Indian land leases are "subject only to applicable Federal law." The section incorporates the federal common test articulated in *Bracker* and its progeny.

Reply in Supp. of Mot. to Dismiss, Sep. 20, 2013, at 2-3 (emphasis added), *see also infra* Part I.B.3 (discussing *Bracker* balancing test).

2. If the Regulations Were Intended to Have Preemptive Effect, They Would Be Beyond the Secretary's Authority.

The regulations can do no more than express the Secretary's views about how the preemption analysis should be conducted, because they can have no force to prohibit state taxation on their own. As the Supreme Court has repeatedly emphasized, only Congress may grant tax exemptions, and they should not be implied. *See supra* at 12-14; *Chickasaw Nation*, 534 U.S. at 95. The Secretary of the Interior, however much authority she has been delegated, cannot create a tax exemption that does not appear in the text of the statute itself. *Cf. Alexander v. Sandoval*, 532 U.S. 275, 291, 121 S. Ct. 1511, 1522 (2001) (noting that a private right of action must appear in the statute and rejecting claim that regulation created such a right because "[a]gencies may play the sorcerer's apprentice but not the

sorcerer himself").[8]

Moreover, regulations generally cannot of their own accord preempt state laws, as the Supreme Court made clear in *Wyeth v. Levine*, 555 U.S. 555, 129 S. Ct. 1187 (2009). In *Wyeth*, a drug manufacturer argued that FDA labeling regulations preempted a state tort action, pointing to a preamble to recently issued FDA regulations, where the agency stated that approval of a label "preempts conflicting or contrary state law." *Id.* at 576. There, as here, Congress had delegated authority to the agency but had not expressly authorized the agency to preempt state law. The Court noted that in such cases it had not deferred to an agency's preemption conclusion, instead performing its own preemption analysis and giving the agency's views of the impact of state law some weight, depending on its "thoroughness, consistency, and persuasiveness." *Id.* at 577 (citing *United States v. Mead Corp.*, 533 U.S. 218, 121 S. Ct. 2164 (2001); *Skidmore v. Swift &*

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[8] The Tribe acknowledged in its summary judgment papers that only Congress can create a tax exemption, but argued that the regulations express Congress's intent. *See* DE 68:5. But even the Secretary has not made this argument. *See supra* at 19-21. Regardless, the question is whether Congress has *expressly* created a tax exemption, and that question is one the Supreme Court has already answered in the negative. *See supra* at 16.

Co., 323 U.S. 134, 65 S. Ct. 161 (1944)).

The Secretary's leasing regulations deserve minimal deference, if any.[9] First, Congress has not given the Secretary any authority to pre-empt state law directly. *See Wyeth*, 555 U.S. at 576 (citing 21 U.S.C. § 360k, which authorizes the FDA to determine the scope of a statutory preemption clause, as an example of such delegation). Second, as in *Wyeth*, the manner by which the Secretary promulgated the regulation weighs against deference—the notice of proposed rulemaking, like that in *Wyeth*, stated that the rule would not have federalism implications. *Compare id.* at 577 (quoting FDA notice), *with* Residential, Business, and Wind and Solar Resource Leases on Indian Land, 76 Fed. Reg. 73784, 73786 (proposed Nov. 29, 2011) (stating that the rule has no substantial effect on states or on the existing "distribution of power and responsibilities"). Also, as in *Wyeth*, the states were not provided notice or opportunity to comment on critical changes—the original NPRM reached only the taxation of permanent improvements on Indian

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[9] In fact, since the regulations merely "clarify and confirm" what federal statutes say, the deference question is academic; the only question is what those statutes provide. *Watters*, 550 U.S. at 20-21, 127 S. Ct. at 1572.

land, which were clearly exempt after *Mescalero Apache Tribe*, it was not until the final rule that the Secretary purported to exempt "activities under leases" or the leasehold interests themselves. *See* 76 Fed. Reg. at 73798, 73808 (NPRM, proposed §§ 162.415, 162.429); *see also* Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72440, 72447 (Dec. 5, 2012) (noting that, in response to comments, the Secretary created new section 162.017, which "now addresses not only taxation of improvements on leased Indian land, but also taxation of the leasehold or possessory interest, and taxation of activities . . . occurring or services performed on leased Indian land").

Aside from these procedural issues, the regulations merit no deference because they are substantively incorrect. *See Wyeth*, 555 U.S. at 579, 129 S. Ct. at 1201. This is so whether they purport to preempt state laws on their own or, as the Secretary has argued, whether they state only the agency's views as to how the *Bracker* test should be applied.

3. Even Though the Regulations Purport Only to State the Federal Government's Interest in the Context of the Bracker *Analysis, This Is Itself an Improper Exercise and No Deference Is Warranted.*

Under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S. Ct. 2578 (1980), courts considering preemption are to apply a flexible inquiry, "sensitive to the particular state, federal, and tribal interests involved." *Cotton*

Petroleum Corp., 490 U.S. at 184, 109 S. Ct. at 1711. If the state interests, including its regulatory interests and the services it provides, outweigh the federal and tribal interests, the tax should be upheld. *See id.* at 185-86.

The preamble to the leasing regulations sets forth four principal justifications for preemption of state taxation of Indian leases or related activities:

- Federal statutes and regulations occupy the field, leaving no space for state taxation. 77 Fed. Reg. at 72447.
- Congress intended to maximize income to tribes. *Id.* (citing legislative history of 25 U.S.C. § 415).
- State taxation undermines tribal self-governance. *Id.*
- State taxation increases project costs, creating a chilling effect on potential lessees. *Id.* at 72448.

A conclusion that these justifications preempt all state taxation is inconsistent with decades of decisions from the Supreme Court and a range of lower federal courts.

First, despite the presence of extensive federal regulation of the process of Indian leasing, the Supreme Court has never held that such regulation is exclusive; indeed, it has found to the contrary. In *Cotton Petroleum*, the Court noted that federal regulation of the activities of oil lessees was comprehensive, but not exclusive. *Cotton Petroleum*, 490 U.S. at 186-87, 109 S. Ct. at 1712-13; *see also*

Ute Mountain Ute Tribe v. Rodriguez, 660 F.3d 1177, 1194-95 (10th Cir. 2011). While the lessees in *Cotton Petroleum* were subject to the very same range of regulations over the leases that the preamble cites—governing issues such as how to obtain a lease, what laws apply, and how long they should last, *see* 77 Fed. Reg. at 72447—the Court found taxation proper because of other aspects of state regulation. The district court's reading of the Secretary's position to mean that *all* Indian leases are comprehensively and exclusively regulated to the exclusion of state law cannot be reconciled with *Cotton Petroleum*.[10]

Second, courts have acknowledged Congress's desire to promote Indian

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[10] That *Cotton Petroleum* addressed oil drilling leases is immaterial. In *Gila River Indian Community v. Waddell*, 91 F.3d 1232 (9th Cir. 1996), the Ninth Circuit reached the very same conclusion with regard to taxation of gross receipts from entertainment events occurring on-reservation. *See id.* at 1237 (rejecting argument that "the federal statutes authorizing the leasing of trust lands and the regulations governing such leasing constitute a comprehensive regulatory scheme with preemptive effect on state laws"). Earlier, the same court had held that states could tax non-Indians' leasehold interests. *Fort Mojave Tribe v. Cnty. of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976); *Agua Caliente Band of Mission Indians v. Cnty. of Riverside*, 442 F.2d 1184 (9th Cir. 1971). In *Chehalis*, the court recently confirmed that those cases are still good law and that a tax on a lessee's possessory interest in land is entirely proper. 724 F.3d at 1158 n.7; *see also supra* at 15-16.

economic development by increasing tribal income, but held that this does not automatically preempt all state taxes. The Ninth Circuit made this point explicitly in rejecting an identical argument: "The promotion of tribal economic development has long been recognized as an important federal interest. However, as noted by the State, the Supreme Court has rejected it as an overriding force preempting an otherwise valid state tax on non-Indians." *Gila River Indian Cmty.*, 91 F.3d at 1237 (citing *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 155, 100 S. Ct. 2069, 2082 (1980)); *see also Cotton Petroleum Corp.*, 490 U.S. at 178-80, 109 S. Ct. at 1708-09 (noting that purpose of Indian mineral leasing act was to provide tribes with "badly needed revenue," but finding "no evidence for the further supposition that Congress intended to remove all barriers to profit maximization").

Third, the Supreme Court and others have consistently held that tribal self-governance is not undermined by the presence of an otherwise legitimate state tax, because the two entities can exercise *joint* taxing authority. In *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 126 S. Ct. 676 (2005), the Court rejected an argument that a state fuel tax interfered with a tribe's self-governance because it undermined the tribe's own ability to tax fuel. The Court noted that both entities could tax; the tribe merely sought to increase its share but it could not "invalidate

the [state] tax by complaining about a decrease in revenue." 546 U.S. at 114, 126 S. Ct. at 688; *see also id.* at 115 n.6 (rejecting for the same reason tribe's argument that state tax "interferes with the [tribe's] right to self-government"); *Colville Indian Reservation*, 447 U.S. at 184 n.9, 100 S. Ct. at 2069 n.9 (Rehnquist, J., concurring in part and dissenting in part) ("When two sovereigns have legitimate authority to tax the same transaction, exercise of that authority by one sovereign does not oust the jurisdiction of the other. If it were otherwise, we would not be obligated to pay federal as well as state taxes on our income or gasoline purchases.") (quoted in *Wagnon*, 546 U.S. at 114, 126 S. Ct. at 689).

Fourth, the fact that state taxation may increase project costs has never been held to justify preemption. In *Cotton Petroleum*, the Court rejected a rule that would hold that "any adverse effect on the Tribe's finances caused by the taxation of a private party contracting with the Tribe would be ground to strike the state tax." *Cotton Petroleum Corp.*, 490 U.S. at 187, 109 S. Ct. at 1713; *see also Colville Indian Reservation*, 447 U.S. at 151, 110 S. Ct. at 2080 (noting that a tax on non-Indian customers of on-reservation businesses may be valid "even if it seriously disadvantages or eliminates the Indian retailer's business"). Indeed, anything but a nominal tax will increase project costs and deter the attractiveness of investments in Indian lands. Nevertheless, the Supreme Court and other courts

have upheld state taxes in the face of such arguments. Indeed, the Ninth Circuit has squarely and repeatedly held that leases with non-Indian tenants may be subject to taxes similar to that challenged here. *See supra* at16.

Courts have rejected the Secretary's four factors, either alone or in combination, but the regulations have an even more fundamental flaw because they ignore how balancing under *Bracker* must be conducted. Courts have consistently noted that *Bracker* calls for a fact-bound inquiry into the specific tribal, state, and federal interests at issue with regard to a specific tax. *See supra* at 24*; see also, e.g.*, *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105, 113 (2d Cir. 2014) ("That delicate balance [required under *Bracker*] results in an idiosyncratic doctrinal regime, one that . . . requires 'careful attention to the factual setting' of state regulation of tribal activity.") (quoting *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1190 (9th Cir. 2008)). Indeed, in *Bracker* itself, the Court rejected "mechanical or absolute conceptions of state or tribal sovereignty," and required a "particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Bracker*, 448 U.S. at 145, 100 S. Ct. at 2584. Under this approach, the Secretary's four justifications, even if accepted, might be outweighed by sufficiently strong state interests. The district court's interpretation of the preamble to mean that generalized federal and tribal interests outweigh *every*

state tax in *every* context gives the regulations a reading that flies in the face of *Bracker*'s directive.

4. The District Court Gave the Leasing Regulations Too Much Deference and Treated Them as Determinative of the Preemption Question.

While acknowledging that the leasing regulations could not, of their own force, preempt state law, the district court nevertheless gave them the "full deference the law allows," DE 84:5, and essentially treated them as conclusive of the preemption question. This was error.

The district court concluded that full *Mead* deference was appropriate, finding that the Secretary had engaged in in-depth analysis and had extensive practical experience with Indian tribes. DE 84:5. But the Court was still required to engage in its own balancing even if it did defer. *See Wyeth*, 555 U.S. at 577. Moreover, the court did not address the conflict between the Secretary's conclusions and existing case law, *see supra* Part I.B.3, let alone determine which source should control.[11] The court also gave too much weight to the Secretary's

[11] The district court did, however, reject the Executive Director's reliance on *Cotton Petroleum Co.*, finding the case distinguishable. DE 84:7-8. First, the court

day-to-day experience, *see* DE 84:5, given the fact that similar arguments have been made by others (and rejected by courts) in the past. Finally, the court erred in failing to recognize that whatever experience the Secretary possessed in general is beside the point, since the "particularized inquiry" required under *Bracker* requires an inquiry into the specific facts and interests surrounding the leases.

The Secretary *did* perform a balancing inquiry into the specific leases, when it approved both leases in May 2005. *See Red Mountain Mach. Co. v. Grace Inv. Co.*, 29 F.3d 1408, 1410-11 (9th Cir. 1994) (declining to engage in balancing where Secretary had "already engaged in such an analysis" by approving lease). In fact, the regulations themselves recognize that the specific terms of an approved

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downplayed the fact that the *Cotton Petroleum* Court refused to defer to the Secretary's position regarding state taxation, concluding that the current leasing regulations are more formal, *id.* at 7, but the regulations are problematic for a host of additional reasons, *see supra* Part I.B.3. More importantly, the district court noted that *Cotton Petroleum* involved a "legislative background" under which Congress had previously upheld state taxation. DE 84:7-8. But this legislative background had nothing to do with the Court's application of *Bracker* and its progeny. The Court, like the district court here, addressed the statutory prohibition question separately from that of balancing, and made no mention of the legislative background in resolving the latter issue. *See Cotton Petroleum Corp.*, 490 U.S. at 182-83, 183-87, 109 S. Ct. at 1710-11, 1711-13.

lease trump the general preemption principles when the two conflict. Section 162.008 of the regulations provides that, for leases approved prior to January 4, 2013, the provisions of the lease trump the regulations in terms of conflict. 25 C.F.R. § 162.008(a). The district court found Section 162.008 irrelevant, concluding that the leases did not specifically refer to the Rental Tax and that there was no conflict because they only refer to *lawful* taxes. DE 84:6-7. This conclusion is circular—the taxes are only unlawful under the court's analysis if Section 162.008 does not apply and the regulations preempt the tax—and it ignores the fact that under the regulations, *any* state tax on "activities occurring under the lease" would be preempted. The lease terms presume the payment of some state taxes, a clear conflict with what the regulations purport to establish.[12]

In light of the issues with the regulations, the district court should have given them no deference, *see also supra* n.9, but the court instead treated them as

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[12] The district court also accepted the Tribe's argument that the language of the lease agreements did not create any third-party rights in the Department, DE 84:7, but this is a red herring. The Department did not attempt to recover on a contract claim against anyone; it argued only that the terms of the contract demonstrate that the regulations by their own terms do not apply.

independently binding. For example, the district court held that, along with 25 U.S.C. § 415 (which does not address taxation), the regulations prohibited the tax of their own accord. DE 84:6. Where it was not as explicit, the court still relied exclusively on the regulations to reach its preemption finding. For example, in rejecting the Executive Director's argument that the Rental Tax is an excise tax on the privilege of renting property rather than on the property itself, the court cited only the regulations' provision that a state may not tax activities under a lease. *Id.* The district court did not rely on any caselaw holding that the Rental Tax is improper under *Bracker*. In fact, that authority supports upholding the tax.

5. Under an Appropriate Application of Bracker, *the Rental Tax Should Not Be Held Preempted.*

The district court should have conducted the factbound *Bracker* inquiry and conducted its own preemption analysis. Critically, the burden of proof for this "particularized balancing" inquiry was on the Tribe, which had to put forth facts showing that federal and tribal interests outweighed the state's interest. *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107, 1112 (9th Cir. 1997).

The Tribe failed to meet its burden of proving that the Rental Tax is preempted. The Tribe introduced no record evidence whatsoever of the impact of the Rental Tax on the Tribe's business operations or its sovereignty. The Tribe put forth no studies or other evidence showing that it was less able to lease the

property, had to engage in unique marketing efforts, or had to reduce the rent to accommodate the tax. The Tribe's witness acknowledged that the Tribe's only basis for claiming harm was the economic principle that paying a tax meant there would be less money available for other uses. DE 64-1:19-21 (Geer Dep.). The district court accepted this "law of scarcity" argument, DE 84:8, but the Supreme Court has squarely rejected it as a basis for finding preemption, *Cotton Petroleum Corp.*, 490 U.S. at 187, 109 S. Ct. at 1713. In any case, the Tribe earns over $900 million annually from gaming operations, *see supra* at 5; the impact of the Rental Tax, paid by the tenants, is likely minimal. The Tribe introduced no other evidence specific to the leasing activities to support its balancing claims.

By contrast, the Executive Director introduced evidence regarding the services that state and local entities provide to the Tampa and Hollywood casinos. Non-Tribe sources provide law enforcement, prosecution of crimes, and health services. *See supra* at 6. The Ninth Circuit has held that the state's provision of services such as law enforcement and dispute resolution were "critical to the success of" a tribe's entertainment operations, justifying state taxation. *Gila River Indian Cmty.*, 91 F.3d at 1238-39. This showing does not even account for the intangible off-reservation benefits that the state provides, such as infrastructure and transportation services, *see* DE 64-1:15-17 (Geer Dep.), which also are critical to

the casinos' success. *Cf. Ute Mountain Ute Tribe*, 660 F.3d at 1199-1200 (finding that off-reservation transportation and pipeline services were important to success of oil extraction activities and justified taxation).

Given the Tribe's failure to develop its preemption argument—a showing for which it had the burden of proof—the lack of record evidence on the Tribe's side of the ledger leads to only one conclusion: the Rental Tax is not preempted. This Court should remand with instructions to enter summary judgment for the Executive Director.

II. THE GROSS RECEIPTS TAX IS NOT A TAX ON THE TRIBE OR ITS MEMBERS AND IS VALID.

The district court struck down the Gross Receipts Tax after finding that the legal incidence of the tax is on the Tribe. The district court should have instead followed the terms of the statute and concluded that the legal incidence is on utility companies, and that the tax is not categorically barred. Under *Bracker*, which the district court did not apply, the tax is permissible.

A. Under a Fair Reading of the Gross Receipts Tax Statute, the Legal Incidence of the Tax is On Utility Companies.

In Indian tax cases, the initial and frequently dispositive question is "who bears the legal incidence of a tax." *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458, 115 S. Ct. 2214, 2220 (1995); *see also supra* at 14. 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. *Chickasaw Nation*, 515 U.S. at 458, 115 S. Ct. at 2220. But if the legal incidence of the tax is on non-Indians, there is no categorical bar. *Id.*

The legal incidence of a tax refers to the party upon whom a tax is imposed. Legal incidence is closely related to the identity of the party with legal liability for the tax. *See Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 103, 126 S. Ct. 676, 682 (2005) (finding that the legal incidence of a tax was on a distributor, because state law "makes clear that it is the distributor, rather than the retailer, that is liable to pay"). An exception exists where a party is liable to the state for the tax but required by statute to collect it from others. *United States v. State Tax Comm'n of Miss.*, 421 U.S. 599, 607, 95 S. Ct. 1872, 1877-78 (1975); *see also Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 10-11, 106 S. Ct. 289, 289-90 (1985) (per curiam) (requirement need not be expressly stated).

Where the statute expressly states who bears the legal incidence, the conclusion is binding. Here, although the statute does not use the term "legal incidence," it precisely places the tax on utility companies, providing that the tax is levied "against the total amount of gross receipts received by a distribution company for its sale of utility services." Fla. Stat. § 203.01(1)(c)1. There is only one entity that receives the funds taxed: the utility. Even if the statute were not

explicit, however, the court would have to make a "fair interpretation of the taxing statute as written and applied." *Chickasaw Nation*, 515 U.S. at 461, 115 S. Ct. at 2221 (quoting *Chemehuevi Indian Tribe*, 474 U.S. at 11, 106 S. Ct. at 290). Under this approach, this Court should still find that the statute places the legal incidence of the Gross Receipts Tax on utility companies.

1. The Language of the Gross Receipts Tax Statute Makes Clear That the Legal Incidence of the Tax Is on Utilities.

A correct understanding of what the Gross Receipts Tax accomplishes is important in determining who bears the legal incidence. The district court essentially construed the tax as a sales tax, rather than a gross receipts tax. But the two types of taxes are distinct—"gross receipts taxes are on the gross receipts from sales payable by the seller, in contrast to sales taxes, which are also levied on the gross receipts from sales but are payable by the buyer (although they are collected by the seller and remitted to the taxing entity)." *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 n.3, 115 S. Ct. 1331, 1335 n.3 (1995). In fact, Florida has a separate sales tax on utilities services. Fla. Stat. § 212.05(1)(e)1c.

The plain language of the statute imposes the legal liability on utility companies. Not only does the statute provide that it is "levied against the total amount of gross receipts received" by the utility, *see supra* at 35, but it states that the tax is "imposed upon every person for the privilege of conducting a utility . . .

business." Fla. Stat. § 203.01(5), (1)(c)(1). While a utility may separately state the amount of the tax on the bill, "*each provider of the taxable services remains fully and completely liable for the tax*, even if the tax is separately stated as a line item or component of the total bill." Fla. Stat. § 203.01(5) (emphasis added). The Department, through rulemaking, has likewise provided that the tax "is imposed on the privilege of doing business, and it is an item of cost to the distribution company." Fla. Admin. Code r. 12B-6.0015(3)(a) (2014).

Courts have found nearly identical language to place the legal incidence on the seller of a service. In *BellSouth Telecommunications, Inc. v. Farris*, 542 F.3d 499, 503 (6th Cir. 2008), for example, the Sixth Circuit found that a telecommunications tax statute contained "ample, indeed undeniable, evidence" that the legal incidence was on service providers where the text stated that the tax was "imposed on the gross revenues received by all providers." *See also James v. Dravo Contracting Co.*, 302 U.S. 134, 160-61, 58 S. Ct. 208, 221 (1937) (holding that gross receipts tax was imposed on federal contractor, not on federal government itself). In *Wagnon*, a tax allowed fuel distributors "to pass along the cost of the tax to downstream purchasers, [but] they [were] not required to do so." *Wagnon*, 546 U.S. at 103, 126 S. Ct. at 682. Here, the tax is imposed on "the total amount of gross receipts received by a distribution company," and the statute

allows utilities to state the amount of the tax and to pass on its cost, though they are not required to do so.[13] Even when they do, however, the statute is clear that providers are liable.

2. The Manner by Which the Gross Receipts Tax Statute Has Been Applied Shows Its Legal Incidence Is on Utilities.

The Department's witness, Head of Audit Programs Peter Steffens, testified about his experience with the application of the Gross Receipts Tax. As Mr. Steffens explained, the Legislature added the provision allowing utilities to state the amount of the tax after it raised the tax rate. Utilities were concerned that customers would blame them for the increasing prices and wanted to make it clear

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[13] Whether or not the utilities in fact pass on the cost, making the consumers bear the *economic* incidence of the tax, is immaterial. In *Chickasaw Nation*, the Court rejected an "economic reality" approach, favoring instead a bright-line test that looks solely to the legal incidence of the tax. 515 U.S. 459-60. The district court focused on this factor, concluding that utilities always pass on the cost of the tax, DE 84:12, whether or not the tax is separately stated. But the question of legal incidence is about which party the legislature requires bear the tax—whether it is the directly taxed entity, or whether the legislature *mandates* that that entity collect the tax from someone else. Under the district court's view, by contrast, the legislature's intent is immaterial and the legal incidence of a gross receipts tax will always be on the ultimate customer because the tax is part of what the customer pays. This is the opposite of the common understanding of such taxes. *See Jefferson Lines, Inc.*, 514 U.S. at 179 n.3.

that the increase was due to an increase in taxes. *See supra* at 4. Mr. Steffens also made it clear that the Department has no authority whatsoever to pursue individual consumers for the amount of the taxes. DE 63-1:35-37. Rather, the Department pursues the utilities if they do not pay the required tax.[14] *Id.; see also* Fla. Admin. Code. r. 12B-6.0015(3) ("The distribution company remains fully and completely liable for the payment of the tax . . .").

As is the case with the statutory language, courts have concluded that the economic incidence is on the upstream provider in similar circumstances. In *Wagnon*, for example, the Supreme Court emphasized that the fact that the upstream distributor retained liability for a tax demonstrated that it bore the legal incidence. *Wagnon*, 546 U.S. at 103, 126 S. Ct. at 682. In *BellSouth Telecommunications*, the Sixth Circuit distinguished between a provision that forbade service providers from passing on the legal incidence of a tax—that is, to

[14] The district court looked to a separate part of the statute, dealing with the sale of *natural gas*, which expressly provides that the Department can pursue some consumers for improperly issued refunds. DE 84:11 (citing Fla. Stat. § 203.01(3)(d)). This section sheds no light on the legal incidence of the tax on electricity services and does not undermine Mr. Steffens's unambiguous testimony on this point.

make their customers liable—and a provision that barred them from informing customers of the charge on their bill. *BellSouth Telecomms., Inc.*, 542 F.3d at 500-01; *see also id.* at 503 ("Had the taxpayers sought to use their invoices to switch the legal incidence of taxation—saying to customers, 'This is your legal responsibility, not ours'—that might be another matter."). Finally, in *Gurley v. Rhoden*, 421 U.S. 200, 205-06, 95 S. Ct. 1605, 1609-10 (1975), the Supreme Court held that the legal incidence of a tax was on fuel producers, not on their vendees, where the government could pursue only the producers for nonpayment.

The federal government has, in analogous circumstances, concluded that similar legislation did not impose the legal incidence of a tax on downstream users. In 1982, Veterans Administrations hospitals in Alabama objected to paying portions of their utility bills, arguing that they were improper state taxes on federal entities. The Department of Justice's Office of Legal Counsel ("OLC") issued a binding opinion concluding that, despite the fact that the bills separately stated an amount for recovery of a state tax, the legal incidence of the tax was not on the federal entities. *Immunity of Veterans Admin. Med. Facilities From Ala. State Util. License Tax*, 6 U.S. Op. Off. Legal Counsel 273, 1982 WL 170698 (1982). The OLC opinion noted that the tax was "imposed on the privilege of selling electricity by . . . utilities to retail customers," *id.* at 289, and noted that a state agency had

described the tax as a cost of doing business for the utilities, *id.* at 288. The legislation did not include a provision to allow the state to collect directly from customers. *Id.* at 289. In light of these factors, OLC concluded that the tax was on the utilities, notwithstanding the fact that utilities were required by the state to increase their bills to account for the tax. *See id.* at 275. More recently, the Comptroller General concluded that the legal incidence of taxes for 911 services are on the communications provider, rather than a federal entity, where the providers remained liable for the tax and the state did not pursue customers for payment, even if the law allowed providers to pass the economic burden of the tax on to customers. *See* Op. of Comptroller Gen. B-302230, 2003 WL 23145772, at *10-11 (Dec. 30, 2003) (citing Op. of Comptroller Gen. B-238410, Sept. 7, 1990).

3. The District Court's Reasoning Was Incorrect.

The district court found that the Gross Receipts Tax statute places the legal incidence of the tax on utilities consumers based on a misreading of the statute. The court, citing *Wagnon*, reasoned that the utilities merely collected the tax from consumers because they would never go "out of pocket," by paying taxes before having collected the amount. DE 84:12 (citing *Wagnon*, 546 U.S. at 108-09, 109 n.4). But this analysis misconstrues the nature of the taxing event. In *Wagnon*, the question was whether the tax was on the receipt of fuel by a distributor or on its

eventual sale—the Court rejected the tribe's argument because the tax was imposed even if there was never a sale. This analysis fails in the very different context of a gross receipts tax, where the tax does not even arise until the utility has *received* the money.

The district court primarily focused on the language of the statute providing that consumers "shall remit the tax" to a utility if a charge is separately stated. *See* Fla. Stat. § 203.01(4); *see also* DE 84:12. But this language is directly followed by language that makes it clear that the utility "remains fully and completely liable for the tax" even if the tax is separately stated. Fla. Stat. § 203.01(5). The court also relied on the fact that exemptions in another part of the statute, dealing with another tax, turn on the identity of certain consumers. DE 84:11. But this sheds no light on the actual tax at issue and, even if it were relevant, the fact that the Department takes into account activities by certain consumers does not mean that the legal incidence of the tax must be on consumers.

Finally, the district court analogized the Gross Receipts Tax to the state's general sales tax, noting that both statutes state that the tax is for the privilege of doing business, and the legal incidence of the latter is on customers. DE 84:13 (citing *Fla. Dep't of Revenue v. Naval Aviation Museum Found., Inc.*, 907 So. 2d 586 (Fla. Dist. Ct. App. 2005). But this is where the similarities end, because the

sales tax also provides that the tax "shall be collected by the dealers *from* the purchaser or consumer," Fla. Stat. § 212.07(1)(a) (cited in *Naval Aviation Museum Found.*, 907 So. 2d at 587), and that a dealer may not absorb the tax or "relieve the purchaser of the payment of all or any part of the tax." Fla. Stat. § 212.07(4). The sales tax is therefore a tax that expressly requires the seller to pass on the tax. *See generally State Tax Comm'n of Miss.*, 421 U.S. at 607, 95 S. Ct. at 1877. No such language appears in the Gross Receipts Tax statute.[15] By contrast, that statute merely permits the utility to separately state the tax without shifting the liability of the tax.

B. The District Court Should Have At Minimum Applied a Proper Balancing Test, Under Which the Tax Is Not Barred.

Because the legal incidence of the Gross Receipts Tax is not on the Tribe or its members, the tax is not categorically barred. The only remaining question is

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[15] The district court made this analogy in rejecting the Executive Director's argument that the language of 203.01(5), which states that the tax is "imposed upon every person for the privilege of conducting a utility . . . business" clearly imposes the tax on utility providers. *See* DE 84:13. . Critically, the court omitted key language—the tax is imposed upon "*every person* for the privilege of *conducting*" a utility. Moreover, the court did not address the material differences in the language of the two statutes.

where the tax is imposed. If the tax is imposed off the reservation, the tax is valid;[16] for an on-reservation tax, the court would have to engage in the balancing required under *Bracker*. *See Wagnon*, 546 U.S. at 110-12, 126 S. Ct. 686-87. The Executive Director argued unsuccessfully in the district court that the Gross Receipts Tax is imposed off-reservation, and this is the correct reading.[17] This Court need not reach the issue, however, because even if the tax is imposed on-reservation, it is valid under *Bracker*.

The state interests underlying the Gross Receipts Tax satisfy the *Bracker* balancing test. As with the Rental Tax, the Tribe failed to introduce sufficient evidence to show that federal and tribal interests outweighed those of the state.

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[16] The Tribe argued in the district court that the Gross Receipts Tax was preempted even if the legal incidence were on the utilities, and even if it were imposed off-reservation, because the Tribe used utilities to engage in federally preempted activities. DE 68:20. However, the Tribe, which bore the burden of proof, introduced no evidence at all to support this argument.

[17] The Executive Director argued that the tax is imposed where the revenues are collected. The district court held that the Executive Director forfeited this point by failing to support it with caselaw citations, *see* DE 84:14, but the point logically follows from the operation of the statute, which imposes a tax on the receipt of funds. Moreover, the Executive Director had elaborated on that point in earlier briefing. *See* DE 38:12.

Indeed, there was no record of the effect of the tax on the Tribe's economic position or its ability to impose its own taxes and regulations.

The Executive Director, by contrast, introduced ample evidence of the state's interests in collecting sufficient amounts through the Gross Receipts Tax to fund school construction through the PECO Fund and to perform other essential services. *See supra* at 4-5. Indeed, a substantial portion of the state's expenditures were made to the Tribe's own charter school and to other services benefitting the Tribe's members. *Id.*

In light of the substantial state interests and the corresponding lack of evidence of any tribal interests at stake, the district court should have concluded that the Gross Receipts Tax is not pre-empted. It did not reach the question, however, based on its erroneous conclusion that the statute places the legal incidence of the tax on the Tribe and its members. As with the Rental Tax, because of the Tribe's failure to develop any record and because of the Executive Director's showing, this Court should remand with instructions to enter summary judgment on behalf of the Executive Director.

III. THE DISTRICT COURT SHOULD HAVE DISMISSED THE RENTAL TAX CLAIMS IN LIGHT OF THE PARALLEL STATE PROCEEDINGS CHALLENGING THE SAME TAX ON THE SAME GROUNDS.

While this Court should find for the Executive Director on the merits and

hold that the district court erred, the district court should not have even reached the Rental Tax issue. The fact that one of taxes at issue here is the subject of parallel, pending actions in state court should have led the district court to dismiss or stay the Rental Tax claims. The Ark entities, who are the parties actually liable for the tax, are statutorily barred by the Tax Injunction Act, 28 U.S.C. § 1341 (2012) ("TIA"), from bringing an action in federal court to enjoin the tax. The Tribe, which generally is not subject to this restriction when challenging taxes imposed on-reservation,[18] should not be able to create an end-run around this limitation because principles of comity weigh against allowing the Rental Tax claims to proceed.

The Tribe's Rental Tax claims directly implicate notions of comity, a doctrine that underlies the TIA but is "more embracive" than the statute. *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 417, 130 S. Ct. 2323, 2328 (2010). In *Levin*, the Supreme Court held that a court should have dismissed an action

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[18] *See Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 473-75, 96 S. Ct. 1634, 1641-42 (1976); *but see FDIC v. New York*, 928 F.2d 56 (2d Cir. 1991) (holding that federal entity, which was not subject to the TIA, was nevertheless barred from bringing claims on behalf of private party).

alleging unequal state taxation of other entities, even if the claims were not directly barred by the TIA. The Court surveyed the history of the comity doctrine, noting that it reflects a "'proper respect for state functions,'" and emphasizing that it has "particular force when lower federal courts are asked to pass on the constitutionality of state taxation of commercial activity." *Levin*, 560 U.S. at 421, 130 S. Ct. at 2330 (quoting *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 112, 102 S. Ct. 177, 184 (1981)). Indeed, the Court cited cases spanning over a century in which it had shown a deep reluctance to weigh such claims. *See id.*

The concerns animating comity doctrine should have led the district court to dismiss the Rental Tax claims. As *Levin* emphasized, states' exercise of their taxing power is a sensitive area, where federal courts should tread lightly. The comity doctrine directs a federal court to defer to a parallel case, raising identical issues, proceeding in the state's own courts. *See Levin*, 560 U.S. at 429, 130 S. ct. at 2335 ("[I]f the Ohio scheme is indeed unconstitutional, surely the Ohio courts are better positioned to determine . . . how to comply with the mandate of equal

treatment.").[19] If this Court does not direct entry of judgment on the merits, the Court should vacate this portion of the district court's judgment to allow the Ark Entities' state actions to proceed so that Florida courts can determine if, and how, Florida's tax collection regime must be restructured.[20] Such an approach would not prejudice the Tribe's rights and would recognize the "necessity of federal-court respect for state taxing schemes" that the Court has stressed. *Fair Assessment in Real Estate Ass'n*, 454 U.S. at 111, 102 S. Ct. at 183.

CONCLUSION

This Court should remand the entire judgment with instructions to enter summary judgment in favor of the Executive Director on all counts of the

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[19] The Supreme Court has not addressed, after *Levin*, what effect the case may have on its earlier holding in *Moe*. To our knowledge, the only case that has addressed this question is *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2d Cir. 2013), where the Second Circuit rejected a comity argument. Unlike here, the state court proceedings in that case were filed, by the federal defendants, two years *after* the federal action began. *See* 722 F.3d at 462, 466 n.6.

[20] This Court may reach the merits despite the fact that appellant has raised a comity argument. *See I.L. v. Alabama*, 739 F.3d 1273, 1285 (11th Cir. 2014). This Court's directing entry of judgment for the Executive Director would, unlike the district courts' order, avoid the concerns underlying the comity doctrine and comport with *Levin*. *See* 560 U.S. at 429, 130 S. Ct. at 2335.

Complaint. In the alternative, this Court should vacate the district court's judgment as to Counts One and Two of the Complaint, remand with instructions to dismiss those counts, and remand the remainder of the district court's judgment with instructions to enter summary judgment in favor of the Executive Director.

Dated: December 29, 2014

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the applicable type-volume limitation under Rule 32(a)(7) of the Federal Rules of Appellate Procedure and 11th Circuit Rule 32-4. According to the word-processing software's word count, there are 11,667 words in the applicable sections of this brief. I also certify that this brief complies with the applicable type-style requirements limitation under Rule 32(a)(5) and (6). The brief was prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point, Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2014, the foregoing brief was filed with the Clerk of Court via the CM/ECF system, causing it to be served on the following counsel of record.

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Addendum A

Statutory and Regulatory Addendum

Fla. Stat. § 212.031

Tax on rental or license fee for use of real property.

(1)(a) It is declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of renting, leasing, letting, or granting a license for the use of any real property unless such property is:

1. Assessed as agricultural property under s. 193.461.

2. Used exclusively as dwelling units.

3. Property subject to tax on parking, docking, or storage spaces under s. 212.03(6).

4. Recreational property or the common elements of a condominium when subject to a lease between the developer or owner thereof and the condominium association in its own right or as agent for the owners of individual condominium units or the owners of individual condominium units. However, only the lease payments on such property shall be exempt from the tax imposed by this chapter, and any other use made by the owner or the condominium association shall be fully taxable under this chapter.

5. A public or private street or right-of-way and poles, conduits, fixtures, and similar improvements located on such streets or rights-of-way, occupied or used by a utility or provider of communications services, as defined by s. 202.11, for utility or communications or television purposes. For purposes of this subparagraph, the term "utility" means any person providing utility services as defined in s. 203.012. This exception also applies to property, wherever located, on which the following are placed: towers, antennas, cables, accessory structures, or equipment, not including switching equipment, used in the provision of mobile communications services as defined in s. 202.11. For purposes of this chapter, towers used in the provision of mobile communications services, as defined in s. 202.11, are considered to be fixtures.

6. A public street or road which is used for transportation purposes.

7. Property used at an airport exclusively for the purpose of aircraft landing or aircraft taxiing or property used by an airline for the purpose of loading or unloading passengers or property onto or from aircraft or for fueling aircraft.

8.a. Property used at a port authority, as defined in s. 315.02(2), exclusively for the purpose of oceangoing vessels or tugs docking, or such vessels

mooring on property used by a port authority for the purpose of loading or unloading passengers or cargo onto or from such a vessel, or property used at a port authority for fueling such vessels, or to the extent that the amount paid for the use of any property at the port is based on the charge for the amount of tonnage actually imported or exported through the port by a tenant.

b. The amount charged for the use of any property at the port in excess of the amount charged for tonnage actually imported or exported shall remain subject to tax except as provided in sub-subparagraph a.

9. Property used as an integral part of the performance of qualified production services. As used in this subparagraph, the term "qualified production services" means any activity or service performed directly in connection with the production of a qualified motion picture, as defined in s. 212.06(1)(b), and includes:

a. Photography, sound and recording, casting, location managing and scouting, shooting, creation of special and optical effects, animation, adaptation (language, media, electronic, or otherwise), technological modifications, computer graphics, set and stage support (such as electricians, lighting designers and operators, greensmen, prop managers and assistants, and grips), wardrobe (design, preparation, and management), hair and makeup (design, production, and application), performing (such as acting, dancing, and playing), designing and executing stunts, coaching, consulting, writing, scoring, composing, choreographing, script supervising, directing, producing, transmitting dailies, dubbing, mixing, editing, cutting, looping, printing, processing, duplicating, storing, and distributing;

b. The design, planning, engineering, construction, alteration, repair, and maintenance of real or personal property including stages, sets, props, models, paintings, and facilities principally required for the performance of those services listed in sub-subparagraph a.; and

c. Property management services directly related to property used in connection with the services described in sub-subparagraphs a. and b.

This exemption will inure to the taxpayer upon presentation of the certificate of exemption issued to the taxpayer under the provisions of s. 288.1258.

10. Leased, subleased, licensed, or rented to a person providing food and drink concessionaire services within the premises of a convention hall, exhibition hall, auditorium, stadium, theater, arena, civic center, performing arts center,

publicly owned recreational facility, or any business operated under a permit issued pursuant to chapter 550. A person providing retail concessionaire services involving the sale of food and drink or other tangible personal property within the premises of an airport shall be subject to tax on the rental of real property used for that purpose, but shall not be subject to the tax on any license to use the property. For purposes of this subparagraph, the term "sale" shall not include the leasing of tangible personal property.

11. Property occupied pursuant to an instrument calling for payments which the department has declared, in a Technical Assistance Advisement issued on or before March 15, 1993, to be nontaxable pursuant to rule 12A-1.070(19)(c), Florida Administrative Code; provided that this subparagraph shall only apply to property occupied by the same person before and after the execution of the subject instrument and only to those payments made pursuant to such instrument, exclusive of renewals and extensions thereof occurring after March 15, 1993.

12. Property used or occupied predominantly for space flight business purposes. As used in this subparagraph, "space flight business" means the manufacturing, processing, or assembly of a space facility, space propulsion system, space vehicle, satellite, or station of any kind possessing the capacity for space flight, as defined by s. 212.02(23), or components thereof, and also means the following activities supporting space flight: vehicle launch activities, flight operations, ground control or ground support, and all administrative activities directly related thereto. Property shall be deemed to be used or occupied predominantly for space flight business purposes if more than 50 percent of the property, or improvements thereon, is used for one or more space flight business purposes. Possession by a landlord, lessor, or licensor of a signed written statement from the tenant, lessee, or licensee claiming the exemption shall relieve the landlord, lessor, or licensor from the responsibility of collecting the tax, and the department shall look solely to the tenant, lessee, or licensee for recovery of such tax if it determines that the exemption was not applicable.

13. Rented, leased, subleased, or licensed to a person providing telecommunications, data systems management, or Internet services at a publicly or privately owned convention hall, civic center, or meeting space at a public lodging establishment as defined in s. 509.013. This subparagraph applies only to that portion of the rental, lease, or license payment that is based upon a percentage of sales, revenue sharing, or royalty payments and not based upon a fixed price. This subparagraph is intended to be clarifying and remedial in nature and shall apply retroactively. This subparagraph does not provide a basis for an assessment

of any tax not paid, or create a right to a refund of any tax paid, pursuant to this section before July 1, 2010.

(b) When a lease involves multiple use of real property wherein a part of the real property is subject to the tax herein, and a part of the property would be excluded from the tax under subparagraph (a)1., subparagraph (a)2., subparagraph (a)3., or subparagraph (a)5., the department shall determine, from the lease or license and such other information as may be available, that portion of the total rental charge which is exempt from the tax imposed by this section. The portion of the premises leased or rented by a for-profit entity providing a residential facility for the aged will be exempt on the basis of a pro rata portion calculated by combining the square footage of the areas used for residential units by the aged and for the care of such residents and dividing the resultant sum by the total square footage of the rented premises. For purposes of this section, the term "residential facility for the aged" means a facility that is licensed or certified in whole or in part under chapter 400, chapter 429, or chapter 651; or that provides residences to the elderly and is financed by a mortgage or loan made or insured by the United States Department of Housing and Urban Development under s. 202, s. 202 with a s. 8 subsidy, s. 221(d)(3) or (4), s. 232, or s. 236 of the National Housing Act; or other such similar facility that provides residences primarily for the elderly.

(c) For the exercise of such privilege, a tax is levied in an amount equal to 6 percent of and on the total rent or license fee charged for such real property by the person charging or collecting the rental or license fee. The total rent or license fee charged for such real property shall include payments for the granting of a privilege to use or occupy real property for any purpose and shall include base rent, percentage rents, or similar charges. Such charges shall be included in the total rent or license fee subject to tax under this section whether or not they can be attributed to the ability of the lessor's or licensor's property as used or operated to attract customers. Payments for intrinsically valuable personal property such as franchises, trademarks, service marks, logos, or patents are not subject to tax under this section. In the case of a contractual arrangement that provides for both payments taxable as total rent or license fee and payments not subject to tax, the tax shall be based on a reasonable allocation of such payments and shall not apply to that portion which is for the nontaxable payments.

(d) When the rental or license fee of any such real property is paid by way of property, goods, wares, merchandise, services, or other thing of value, the tax shall be at the rate of 6 percent of the value of the property, goods, wares, merchandise, services, or other thing of value.

(2)(a) The tenant or person actually occupying, using, or entitled to the use of any property from which the rental or license fee is subject to taxation under this section shall pay the tax to his or her immediate landlord or other person granting the right to such tenant or person to occupy or use such real property.

(b) It is the further intent of this Legislature that only one tax be collected on the rental or license fee payable for the occupancy or use of any such property, that the tax so collected shall not be pyramided by a progression of transactions, and that the amount of the tax due the state shall not be decreased by any such progression of transactions.

(3) The tax imposed by this section shall be in addition to the total amount of the rental or license fee, shall be charged by the lessor or person receiving the rent or payment in and by a rental or license fee arrangement with the lessee or person paying the rental or license fee, and shall be due and payable at the time of the receipt of such rental or license fee payment by the lessor or other person who receives the rental or payment. Notwithstanding any other provision of this chapter, the tax imposed by this section on the rental, lease, or license for the use of a convention hall, exhibition hall, auditorium, stadium, theater, arena, civic center, performing arts center, or publicly owned recreational facility to hold an event of not more than 7 consecutive days' duration shall be collected at the time of the payment for that rental, lease, or license but is not due and payable to the department until the first day of the month following the last day that the event for which the payment is made is actually held, and becomes delinquent on the 21st day of that month. The owner, lessor, or person receiving the rent or license fee shall remit the tax to the department at the times and in the manner hereinafter provided for dealers to remit taxes under this chapter. The same duties imposed by this chapter upon dealers in tangible personal property respecting the collection and remission of the tax; the making of returns; the keeping of books, records, and accounts; and the compliance with the rules and regulations of the department in the administration of this chapter shall apply to and be binding upon all persons who manage any leases or operate real property, hotels, apartment houses, roominghouses, or tourist and trailer camps and all persons who collect or receive rents or license fees taxable under this chapter on behalf of owners or lessors.

(4) The tax imposed by this section shall constitute a lien on the property of the lessee or licensee of any real estate in the same manner as, and shall be collectible as are, liens authorized and imposed by ss. 713.68 and 713.69.

(5) When space is subleased to a convention or industry trade show in a convention hall, exhibition hall, or auditorium, whether publicly or privately

owned, the sponsor who holds the prime lease is subject to tax on the prime lease and the sublease is exempt.

(6) The lease or rental of land or a hall or other facilities by a fair association subject to the provisions of chapter 616 to a show promoter or prime operator of a carnival or midway attraction is exempt from the tax imposed by this section; however, the sublease of land or a hall or other facilities by the show promoter or prime operator is not exempt from the provisions of this section.

(7) Utility charges subject to sales tax which are paid by a tenant to the lessor and which are part of a payment for the privilege or right to use or occupy real property are exempt from tax if the lessor has paid sales tax on the purchase of such utilities and the charges billed by the lessor to the tenant are separately stated and at the same or a lower price than those paid by the lessor.

(8) Charges by lessors to a lessee to cancel or terminate a lease agreement are presumed taxable if the lessor records such charges as rental income in its books and records. This presumption can be overcome by the provision of sufficient documentation by either the lessor or the lessee that such charges were other than for the rental of real property.

(9) The rental, lease, sublease, or license for the use of a skybox, luxury box, or other box seats for use during a high school or college football game is exempt from the tax imposed by this section when the charge for such rental, lease, sublease, or license is imposed by a nonprofit sponsoring organization which is qualified as nonprofit pursuant to s. 501(c)(3) of the Internal Revenue Code.

Fla. Stat. § 203.01

Tax on gross receipts for utility and communications services.

(1)(a)1. A tax is imposed on gross receipts from utility services that are delivered to a retail consumer in this state. The tax shall be levied as provided in paragraphs (b)-(j).

2. A tax is levied on communications services as defined in s. 202.11(1). The tax shall be applied to the same services and transactions as are subject to taxation under chapter 202, and to communications services that are subject to the exemption provided in s. 202.125(1). The tax shall be applied to the sales price of communications services when sold at retail, as the terms are defined in s. 202.11, shall be due and payable at the same time as the taxes imposed pursuant to chapter 202, and shall be administered and collected pursuant to chapter 202.

3. An additional tax is levied on charges for, or the use of, electrical power or energy that is subject to the tax levied pursuant to s. 212.05(1)(e)1.c. or s. 212.06(1). The tax shall be applied to the same transactions or uses as are subject to taxation under s. 212.05(1)(e)1.c. or s. 212.06(1). If a transaction or use is exempt from the tax imposed under s. 212.05(1)(e)1.c. or s. 212.06(1), the transaction or use is also exempt from the tax imposed under this subparagraph. The tax shall be applied to charges for electrical power or energy and is due and payable at the same time as taxes imposed pursuant to chapter 212. Chapter 212 governs the administration and enforcement of the tax imposed by this subparagraph. The charges upon which the tax imposed by this subparagraph is applied do not include the taxes imposed by subparagraph 1. or s. 166.231. The tax imposed by this subparagraph becomes state funds at the moment of collection and is not considered as revenue of a utility for purposes of a franchise agreement between the utility and a local government.

(b)1. The rate applied to utility services shall be 2.5 percent.

2. The rate applied to communications services shall be 2.37 percent.

3. An additional rate of 0.15 percent shall be applied to communication services subject to the tax levied pursuant to s. 202.12(1)(a), (c), and (d). The exemption provided in s. 202.125(1) applies to the tax levied pursuant to this subparagraph.

4. The rate applied to electrical power or energy taxed under subparagraph (a)3. shall be 2.6 percent.

(c)1. The tax imposed under subparagraph (a)1. 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.

2. To the extent practicable, the Department of Revenue must distribute all receipts of taxes remitted under this chapter to the Public Education Capital Outlay and Debt Service Trust Fund in the same month as the department collects such taxes.

(d)1. Each distribution company that receives payment for the delivery of electricity to a retail consumer in this state is subject to tax on the exercise of this privilege as provided by this paragraph unless the payment is subject to tax under paragraph (c). For the exercise of this privilege, the tax levied on the distribution company's receipts for the delivery of electricity shall be determined by multiplying the number of kilowatt hours delivered by the index price and applying the rate in subparagraph (b)1. to the result.

2. The index price is the Florida price per kilowatt hour for retail consumers in the previous calendar year, as published in the United States Energy Information Administration Electric Power Monthly and announced by the Department of Revenue on June 1 of each year to be effective for the 12-month period beginning July 1 of that year. For each residential, commercial, and industrial customer class, the applicable index posted for residential, commercial, and industrial shall be applied in calculating the gross receipts to which the tax applies. If publication of the indices is delayed or discontinued, the last posted index shall be used until a current index is posted or the department adopts a comparable index by rule.

3. Tax due under this paragraph shall be administered, paid, and reported in the same manner as the tax due under paragraph (c).

4. The amount of tax due under this paragraph shall be reduced by the amount of any like tax lawfully imposed on and paid by the person from whom the retail consumer purchased the electricity, whether imposed by and paid to this state, another state, a territory of the United States, or the District of Columbia. This reduction in tax shall be available to the retail consumer as a refund made

pursuant to s. 215.26 and does not inure to the benefit of the person who receives payment for the delivery of the electricity. The methods of demonstrating proof of payment and the amount of such refund shall be made according to rules of the Department of Revenue.

(e)1. A distribution company that receives payment for the sale or transportation of natural or manufactured gas to a retail consumer in this state is subject to tax on the exercise of this privilege as provided by this paragraph. For the exercise of this privilege, the tax levied on the distribution company's receipts for the sale or transportation of natural or manufactured gas shall be determined by dividing the number of cubic feet delivered by 1,000, multiplying the resulting number by the index price, and applying the rate in subparagraph (b)1. to the result.

2. The index price is the Florida price per 1,000 cubic feet for retail consumers in the previous calendar year as published in the United States Energy Information Administration Natural Gas Monthly and announced by the Department of Revenue on June 1 of each year to be effective for the 12-month period beginning July 1 of that year. For each residential, commercial, and industrial customer class, the applicable index posted for residential, commercial, and industrial shall be applied in calculating the gross receipts to which the tax applies. If publication of the indices is delayed or discontinued, the last posted index shall be used until a current index is posted or the department adopts a comparable index by rule.

3. Tax due under this paragraph shall be administered, paid, and reported in the same manner as the tax due under paragraph (c).

4. The amount of tax due under this paragraph shall be reduced by the amount of any like tax lawfully imposed on and paid by the person from whom the retail consumer purchased the natural gas or manufactured gas, whether imposed by and paid to this state, another state, a territory of the United States, or the District of Columbia. This reduction in tax shall be available to the retail consumer as a refund pursuant to s. 215.26 and does not inure to the benefit of the person providing the transportation service. The methods of demonstrating proof of payment and the amount of such refund shall be made according to rules of the Department of Revenue.

(f) Any person who imports into this state electricity, natural gas, or manufactured gas, or severs natural gas, for that person's own use or consumption as a substitute for purchasing utility, transportation, or delivery services taxable

under subparagraph (a)1. and who cannot demonstrate payment of the tax imposed by this chapter must register with the Department of Revenue and pay into the State Treasury each month an amount equal to the cost price, as defined in s. 212.02, of such electricity, natural gas, or manufactured gas times the rate set forth in subparagraph (b)1., reduced by the amount of any like tax lawfully imposed on and paid by the person from whom the electricity, natural gas, or manufactured gas was purchased or any person who provided delivery service or transportation service in connection with the electricity, natural gas, or manufactured gas. The methods of demonstrating proof of payment and the amount of such reductions in tax shall be made according to rules of the Department of Revenue.

(g) Electricity produced by cogeneration or by small power producers which is transmitted and distributed by a public utility between two locations of a customer of the utility pursuant to s. 366.051 is subject to the tax imposed by subparagraph (a)1. The tax shall be applied to the cost price, as defined in s. 212.02, of such electricity and shall be paid each month by the producer of such electricity.

(h) Electricity produced by cogeneration or by small power producers during the 12-month period ending June 30 of each year which is in excess of nontaxable electricity produced during the 12-month period ending June 30, 1990, is subject to the tax imposed by subparagraph (a)1. The tax shall be applied to the cost price, as defined in s. 212.02, of such electricity and shall be paid each month, beginning with the month in which total production exceeds the production of nontaxable electricity for the 12-month period ending June 30, 1990. As used in this paragraph, the term "nontaxable electricity" means electricity produced by cogeneration or by small power producers which is not subject to tax under paragraph (g). Taxes paid pursuant to paragraph (g) may be credited against taxes due under this paragraph. Electricity generated as part of an industrial manufacturing process that manufactures products from phosphate rock, raw wood fiber, paper, citrus, or any agricultural product is not subject to the tax imposed by this paragraph. The term "industrial manufacturing process" means the entire process conducted at the location where the process takes place.

(i) Any person other than a cogenerator or small power producer described in paragraph (h) who produces for his or her own use electrical energy that is a substitute for electrical energy produced by an electric utility as defined in s. 366.02 is subject to the tax imposed by subparagraph (a)1. The tax shall be applied to the cost price, as defined in s. 212.02, of such electrical energy and shall be paid

each month. This paragraph does not apply to electrical energy produced and used by an electric utility.

(j) Notwithstanding any other provision of this chapter, with the exception of a communications services dealer reporting taxes administered under chapter 202, the department may require:

1. A quarterly return and payment when the tax remitted for the preceding four calendar quarters did not exceed $1,000;

2. A semiannual return and payment when the tax remitted for the preceding four calendar quarters did not exceed $500; or

3. An annual return and payment when the tax remitted for the preceding four calendar quarters did not exceed $100.

(2)(a) In addition to any other penalty provided by law, any person who fails to timely report and pay any tax imposed on gross receipts from utility services under this chapter shall pay a penalty equal to 10 percent of any unpaid tax, if the failure is for less than 31 days, plus an additional 10 percent of any unpaid tax for each additional 30 days or fraction thereof. However, such penalty may not be less than $10 or exceed a total of 50 percent in the aggregate of any unpaid tax.

(b) In addition to any other penalty provided by law, any person who falsely or fraudulently reports or unlawfully attempts to evade paying any tax imposed on gross receipts from utility services under this chapter shall pay a penalty equal to 100 percent of any tax due and is guilty of a misdemeanor of the second degree, punishable as provided under s. 775.082 or s. 775.083.

(3) The tax imposed by subparagraph (1)(a)1. does not apply to:

(a)1. The sale or transportation of natural gas or manufactured gas to a public or private utility, including a municipal corporation or rural electric cooperative association, for resale or for use as fuel in the generation of electricity; or

2. The sale or delivery of electricity to a public or private utility, including a municipal corporation or rural electric cooperative association, for resale, or as part of an electrical interchange agreement or contract between such utilities for the purpose of transferring more economically generated power;

if the person deriving gross receipts from such sale demonstrates that a sale, transportation, or delivery for resale in fact occurred and complies with the

following requirements: A sale, transportation, or delivery for resale must be in strict compliance with the rules of the Department of Revenue; and any sale subject to the tax imposed by this section which is not in strict compliance with the rules of the Department of Revenue shall be subject to the tax at the appropriate rate imposed on utilities under subparagraph (1)(b)1. on the person making the sale. Any person making a sale for resale may, through an informal protest provided in s. 213.21 and the rules of the Department of Revenue, provide the department with evidence of the exempt status of a sale. The department shall adopt rules that provide that valid proof and documentation of the resale by a person making the sale for resale will be accepted by the department when submitted during the protest period but will not be accepted when submitted in any proceeding under chapter 120 or any circuit court action instituted under chapter 72;

(b) Wholesale sales of electric transmission service;

(c) The use of natural gas in the production of oil or gas, or the use of natural or manufactured gas by a person transporting natural or manufactured gas, when used and consumed in providing such services; or

(d) The sale or transportation to, or use of, natural gas or manufactured gas by a person eligible for an exemption under s. 212.08(7)(ff)2. for use as an energy source or a raw material. Possession by a seller of natural or manufactured gas or by any person providing transportation or delivery of natural or manufactured gas of a written certification by the purchaser, certifying the purchaser's entitlement to the exclusion permitted by this paragraph, relieves the seller or person providing transportation or delivery from the responsibility of remitting tax on the nontaxable amounts, and the department shall look solely to the purchaser for recovery of such tax if the department determines that the purchaser was not entitled to the exclusion. The certification must include an acknowledgment by the purchaser that it will be liable for tax pursuant to paragraph (1)(f) if the requirements for exclusion are not met.

(4) The tax imposed pursuant to subparagraph (1)(a)1. relating to the provision of 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. If a provider of taxable services elects to separately state such tax as a component of the charge for the provision of such taxable services, any 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 is not subject to regulatory approval.

(5) The tax is imposed upon every person for the privilege of conducting a utility or communications services business, and each provider of the taxable services remains fully and completely liable for the tax, even if the tax is separately stated as a line item or component of the total bill.

(6) Any person who provides such services and who fails, neglects, or refuses to remit the tax imposed in this chapter, either by himself or herself, or through agents or employees, is liable for the tax and is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(7) Gross receipts subject to the tax imposed under subparagraph (1)(a)1. for the provision of electricity must include receipts from monthly customer charges or monthly customer facility charges.

(8) Notwithstanding the provisions of subsection (4) and s. 212.07(2), sums that were charged or billed as taxes under this section and chapter 212 and that were remitted to the state in full as taxes shall not be subject to refund by the state or by the utility or other person that remitted the sums, when the amount remitted was not in excess of the amount of tax imposed by chapter 212 and this section.

(9) Any person who engages in the transportation of natural or manufactured gas shall furnish annually to the Department of Revenue a list of customers to whom transportation services were provided in the prior year. This reporting requirement does not apply to distribution companies. Any person required to furnish such a list may elect to identify only those customers who take direct delivery without purchasing interconnection services from a distribution company. Such reports are subject to the confidentiality provisions of s. 213.053. Any person required to furnish a customer list may instead comply by maintaining a publicly accessible customer list on its Internet website. Such list shall be updated no less than annually.

25 C.F.R. § 162.008

Does this part apply to lease documents I submitted for approval before January 4, 2013?

This part applies to all lease documents, except as provided in § 162.006. If you submitted your lease document to us for approval before January 4, 2013, the qualifications in paragraphs (a) and (b) of this section also apply.

(a) If we approved your lease document before January 4, 2013, this part applies to that lease document; however, if the provisions of the lease document conflict with this part, the provisions of the lease govern.

(b) If you submitted a lease document but we did not approve it before January 4, 2013, then:

(1) We will review the lease document under the regulations in effect at the time of your submission; and

(2) Once we approve the lease document, this part applies to that lease document; however, if the provisions of the lease document conflict with this part, the provisions of the lease document govern.

25 C.F.R. § 162.017

What taxes apply to leases approved under this part?

(a) Subject only to applicable Federal law, permanent improvements on the leased land, without regard to ownership of those improvements, are not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Improvements may be subject to taxation by the Indian tribe with jurisdiction.

(b) Subject only to applicable Federal law, activities under a lease conducted on the 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 a State. Activities may be subject to taxation by the Indian tribe with jurisdiction.

(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. Leasehold or possessory interests may be subject to taxation by the Indian tribe with jurisdiction.

Addendum B

Excerpts from Briefs filed by Secretary of Interior in *Desert Water Agency v. U.S. Department of the Interior*, No. 13-cv-00606 (C.D. Cal.)

Excerpt from Memorandum in Support of Motion to Dismiss,
June 11, 2013 (C.D. Cal. DE 15-1)

Excerpt from Reply in Support of Motion to Dismiss,
Sep. 20, 2013 (C.D. Cal. DE 20)

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

DESERT WATER AGENCY, Plaintiff, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants.	Case No. CV -13-606 DMG (OPx) MEMORANDUM IN SUPPORT OF THE UNITED STATES' MOTION TO DISMISS Hearing Date: Sept. 20, 2013 9:30am Dolly M. Gee

Pursuant to the Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendants, the United States Department of the Interior; Sally Jewell, the Secretary of the Interior; the Bureau of Indian Affairs; and Kevin Washburn, Assistant Secretary for Indian Affairs (the "United States"), respectfully submit this Memorandum in Support of Its Motion to Dismiss Desert Water Agency's("DWA or "Plaintiff") Complaint for Declaratory and Injunctive Relief ("Complaint"). Plaintiff challenges the promulgation of a final regulation by the Bureau of Indian Affairs ("BIA") governing surface leasing on Indian lands under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"). *See* Final Rule, Residential, Business, and Wind and Solar Resource Leases on Indian Lands, 77 Fed. Reg. 72440, 72442 (Dec. 5, 2013)(codified at 25 C.F.R. Part 162) ("Final Rule"). The Complaint suffers from a myriad of jurisdictional and prudential defects that require dismissal.

Plaintiff lacks constitutional standing. It has not alleged that the Final Rule itself causes it any injury. Plaintiff also lacks prudential standing. DWA is not a party to any of the Agua Caliente Reservation leases and does not fall within the zone of interest of the Indian leasing statutes and the Final Rule. Additionally, this case is not ripe. The BIA has neither taken an action against DWA nor has it reviewed any of the Agua Caliente leases under the Final Rule. Plaintiff has not alleged that any lessee refused to pay Plaintiff's charges as a result of the Final Rule. Lastly, Plaintiff waived its ability to seek judicial review of its arguments because it failed to participate in the agency's

Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 1275 S. Ct. 1955, 1964-65, 167 L. Ed.2d 929 (2007). If a plaintiff lacks prudential standing, the case is properly dismissed under Rule 12(b)(6). *See Steel*, 523 U.S. at 97 (statutory standing is not a subject matter jurisdictional question under Art. III); *Cetacean Community*, 386 F.3d at 1175 (dismissal on prudential grounds is properly under Rule 12(b)(6)).

II. OVERVIEW

A. Statement of the Case

Plaintiff filed a Complaint for Declaratory and Injunctive Relief under the APA against the United States, challenging the newly adopted Final Rule of the BIA governing surface leasing on Indian lands, 25 C.F.R. Pt. 162.

According to its Complaint, Plaintiff is a creature of California state law, Cal. Water Code App. §§ 100-1 *et seq.*, and provides water supplies and services to businesses and residents who have leased land from the Agua Caliente Band of Cahuilla Indians or individual allottees within the Agua Caliente Reservation in Riverside County, California. Compl. ¶¶ 1, 4. Plaintiff imposes on the lessees an annual *ad valorem* property tax, *id.* ¶ 17(a), a groundwater replenishment assessment, *id.* ¶ 17(b), and a monthly water service charge upon those who receive water service from Plaintiff's retail water delivery system, *id.* ¶ 17(c).

The Agua Caliente Band of Cahuilla Indians ("Tribe") is a federally recognized tribe with which the United States has a government-to-government relationship. Indian Entities Recognized and Eligible to Receive Services from the United

approximately 1,175 commercial leases, 7,671 residential leases, and 11,118 time-share leases. *Id.*

Plaintiff asks this Court to: (1) declare that the Final Rule does not apply to Plaintiff's taxes, fees and assessments that it charges lessees on the Agua Caliente Reservation; (2) declare its taxes, fees and assessments are otherwise permissible under the Final Rule and Federal law, including 25 U.S.C. § 398c and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43, 100 S. Ct. 2578, 65 L. Ed.2d 665 (1980); (3) declare that the adoption of the Final Rule is arbitrary, capricious, an abuse of discretion, not otherwise in accordance with law, and exceeds the BIA's authority under Federal law; or (4) if the Final Rule is applied to Plaintiff, it would be deprived of due process guaranteed under the Fourteenth Amendment of the United States Constitution. Compl., ¶¶ 21, 29-31, 34, 36-38, 41-42; *id.*, Relief Sought ¶¶ 1- 4. Plaintiff also seeks an injunction against the United States in accordance with the declarations sought. *Id.* ¶ 4.

It is undisputed that Plaintiff is not a party to any of the approximately 20,000 leases, subleases or sub-subleases on the Agua Caliente Reservation. It is undisputed that the BIA has not taken any action or made any final determination involving Plaintiff or the leases pursuant to the Final Rule. Plaintiff does not allege that a lessee has failed to pay or is challenging the application of DWA's charges pursuant to the Final Rule.

B. The BIA Surface Leasing Final Rule

other contracts. Compl. ¶ 38. Again, there is no dispute that the BIA has not attempted to apply its Final Rule to Plaintiff. Plaintiff's alleged due process injury is purely hypothetical which may or may not ever materialize.

As to the second prong, the issues are not purely legal.[13]/ There are approximately 20,000 lease documents, each of which likely contain different terms, including concerning taxation, and cover a variety of residential and business activities that are governed by separate Final Rule provisions.

In accordance with the Final Rule, the Tribe, allottee, or the lessee may submit a new lease, amendment, renewal, or notice of violation to the BIA. *See e.g.*, 25 C.F.R. §§ 162.010(a)(3), 162.022(a). The BIA then reviews the lease and its terms to assure they fall within the scope of the Final Rule, determine whether they are consistent with the regulations, including section 162.017, tribal law and relevant Federal laws, or take action on a finding of a violation. All

[13]/ Even a purely legal challenge is not necessarily fit for immediate review. In *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164, 87 S. Ct. 1520, 1524, 18 L. Ed.2d 697 (1967), the Supreme Court held that a purely legal but generalized challenge to final agency action was not fit for judicial review since "judicial appraisal . . . is likely to stand on a much surer footing in the context of a specific application of [the agency action] . . . ." *See also NRDC v. Abraham*, 388 F.3d 701 (9th Cir. 2004). Here, the court would be better able to evaluate the issues when there is a specific application of the Final Rule. Even if Plaintiff could demonstrate that its challenge involves a purely legal question, its claim would still not be ripe because there is no showing of hardship. *See, e.g., Cent. & S.W. Servs., Inc. v. EPA*, 220 F.3d 683, 690 (5th Cir. 2000).

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

DESERT WATER AGENCY, Plaintiff, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants.	Case No. CV -13-606 DMG (OPx) UNITED STATES' REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS Hearing Date: Oct. 11, 2013 9:30AM Dolly M. Gee

U.S. 555, 1125 S. Ct. 2130, 119 L. Ed.2d 351 (1992)). However, Plaintiff misreads the Final Rule as immediately preempting its charges. It also incorrectly concludes that it is the "object" of the Final Rule. Even assuming the Final Rule automatically preempted Plaintiff's assessments, it still fails to specify an actual or imminent injury in fact.

A. The Final Rule Does not Immediately Preempt Plaintiff's Taxes, Fees and Assessments.

Plaintiff misreads the Final Rule. It does not preempt DWA's charges. Instead, section 162.017 is a statement of the strong federal interest prong articulated in the test under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed.2d 665 (1980) and its progeny. In other words, it does not change current law; it only clarifies current law within the surface leasing regulations.

In explaining section 162.017, the Preamble states:

> The *Bracker* balancing test requires a particularized examination of the relevant State, Federal, and tribal interests. In the cases of leasing on Indian lands, the Federal and tribal interests are very strong.

77 Fed. Reg. 72440, 72447. The Preamble then articulates why, in the Department of Interior's view, 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. *Id.* at 72447-48.

Section 162.017 expressly provides that state taxation of permanent improvements, activities, and possessory interests on Indian land leases are "subject only to applicable Federal law." The section incorporates the federal common test articulated in *Bracker* and its progeny. *See Confederated Tribes of Chehalis Reservation v. Thurston County Bd. Of Equalization*, -- F.3d --, 2013 WL 3888429 *6 n.6 (9th Cir. 2013)(the recently promulgated regulation, 25 C.F.R. § 162.017, "merely clarifies and confirms" what federal law already states).

In fact, no provision of the Final Rule immediately preempts existing lease terms. The Final Rule expressly states that if an existing clause in a current lease conflicts with the terms of the Final Rule, then the terms of the existing lease governs. 25 C.F.R. § 162.008(a). Thus, the Final Rule makes clear that no provision directly usurps or preempts existing lease terms that conflict with the Final Rule's requirements.[1]

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[1] The United States does not and presently cannot conclude that Plaintiff's fees, taxes, and assessments are grandfathered-in under section 162.008(a) under the terms of the Agua Caliente