IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

USCA Case No. 14-14524-D
United States District Court, Southern District of Florida
Case No.: 0:12-cv-62140-RNS

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.

ANSWER BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE PURSUANT TO FRAP 26.1 AND 11TH CIR. R. 26.1-1

Pursuant to F.R.A.P. 26.1 and 11th Cir. R. 26.1-1, Appellee, SEMINOLE TRIBE OF FLORIDA, a federally-recognized Indian Tribe, by and through its undersigned counsel, hereby discloses the following trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the appeal, including subsidiaries, conglomerates, affiliates, and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock:

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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. (Trial Counsel for Plaintiff/Appellee)
12. Stankee, Glen A. (Attorney 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 (Appellate Counsel for Defendant/Appellant)
17. Winsor, Allen, Solicitor General, Office of the Attorney General of Florida (Appellate Counsel for Defendant/Appellant)

STATEMENT REGARDING ORAL ARGUMENT

Appellee respectfully submits oral argument is not necessary in this case. This case involves straightforward legal issues that are resolved by statutory law and well-established legal principles that are adequately addressed in the parties' briefs.

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2. Whether Florida may impose its Utilities Tax on the sale and transportation of electricity to an Indian tribe on its reservation.

3. Whether the comity doctrine deprives a federal court of jurisdiction in an action for prospective injunctive and declaratory relief when an unrelated plaintiff subsequently commences a state court action for a tax refund in which it makes a common legal argument.

STATEMENT OF THE CASE

Nature of the Case

Appellant, Marshall Stranburg ("**Stranburg**"), is the Executive Director of the Florida Department of Revenue, the state agency responsible for collecting state taxes. Stranburg appeals the district court's entry of final summary judgment in favor of Appellee, the Seminole Tribe of Florida (the "**Tribe**"), in the Tribe's action seeking: (**1**) a declaration that state taxation of rentals of Indian land is prohibited by federal law and an injunction prohibiting the assessment and collection of Rental Tax on such rentals in the future; and (**2**) a declaration that state taxation of utility services sold and delivered to the Tribe on its reservations

is prohibited by federal law and an injunction prohibiting the assessment and collection of Utilities Tax on such utilities in the future. [DE 1; DE 84.]

Course of Proceedings and Facts

The Tribe is a federally recognized Indian tribe. [DE 58 at 1.] It leases land on its reservations to non-Indians. [DE 58 at 2.] It also conducts various activities on its reservations for which it uses electricity. [DE 58 at 3.]

Stranburg assessed and collected the Rental Tax imposed by Fla. Stat. § 212.031 on the rentals paid by two lessees of the Tribe's reservation land during the period July 1, 2005, through June 30, 2008, and expressed his intention to do so in the future. [DE 1 at 6.] Stranburg also assessed and collected the Utilities Tax imposed by Fla. Stat. § 203.01 on utility services sold and delivered to the Tribe on its reservations, and expressed his intention to do so in the future. [DE 1 at 7.]

The Tribe commenced this action in the federal district court seeking a declaration that state taxation of rentals of Indian land is prohibited by federal law and an injunction prohibiting the assessment and collection of Rental Tax on such rentals in the future. [DE 1.] The Tribe also sought a declaration that state taxation of utility services sold and delivered to the Tribe on its reservations is prohibited by federal law and an injunction prohibiting the assessment and collection of Utilities Tax on such utilities in the future. [DE 1.]

Stranburg moved to dismiss the Tribe's complaint on various grounds including standing, failure to state a cause of action, Eleventh Amendment immunity, the Tax Injunction Act, and the comity doctrine [DE 12], each of which was rejected by the district court [DE 46]. Stranburg contended that the comity doctrine deprived the federal court of jurisdiction because two of the Tribe's lessees subsequently sued the state agency in state court for a refund of the Rental Taxes that it paid, under protest, on rentals it paid to the Tribe under a lease of reservation land. [DE 12 at 25-27.] The district court determined that the comity and/or abstention doctrine did not bar the Tribe's federal action because it "involves a different plaintiff, seeking prospective injunctive relief and declaratory relief unrelated to [the lessees'] requested refund." [DE 46 at 6.]

The district court ultimately entered final summary judgment in favor of the Tribe. [DE 84.] Because the Supreme Court held in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 158 (1973), that 25 U.S.C. § 465 explicitly relieves the "use" of Indian land from state tax burdens, the district court held that "Florida's Rental Tax on the Seminole Tribe's lease of reservation land has been prohibited by Congress by virtue of 25 U.S.C. § 465." [DE 84 at 3.][1]

Separately, the district court determined that "the federal regulatory scheme regarding leases of restricted Indian land is so pervasive that it precludes the

[1] 25 U.S.C. § 465 is reproduced in the Addendum to this brief.

additional burdens imposed by Florida's Rental Tax" [DE 84 at 6] and, therefore, under *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980), "federal law preempts the application of the Rental Tax to the Tribe's leases with the [lessees]". [DE 84 at 8.]

Also, the Federal Surface Leasing Regulations, 25 C.F.R. Part 162, expressly provide in § 162.017(c) that state taxation of leasehold or possessory interests in Indian land is prohibited. In the preamble to those regulations, the Secretary of the Interior asserted that the regulations preempt state tax on rentals of Indian land. Stranburg contended that such assertion was not entitled to deference. [DE 66 at 7.] The district court determined that the Secretary's "preemption analysis [was so] thorough and persuasive" that it "merits the full amount of deference available under the law". [DE 84 at 5-6.]

Accordingly, the district court granted the Tribe's requested declaratory and injunctive relief and this appeal followed.

Standard of Review

The Tribe agrees this Court reviews summary judgment orders *de novo*. *See* [IB at 10 (citing *Curves, LLC v. Spalding Cnty.*, 685 F.3d 1284, 1289 (11th Cir. 2012).] The Tribe also agrees the district court's decision not to dismiss the action on comity grounds is reviewed for abuse of discretion. *See* [IB 10-11 (citing *Bowden v. Lincoln Cnty. Health Sys.,* No. 08-10855, 2009 WL 323082 (11th Cir.

Feb. 10, 2009) (unpublished); *S. Ry. Co. v. State Bd. of Equalization*, 715 F.2d 522, 530 (11th Cir. 1983).] However, "statutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit." *Mont. v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (citing *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 174 (1973); *Choate v. Trapp*, 224 U.S. 665, 675 (1912)).

SUMMARY OF THE ARGUMENT

Rental Tax. The district court correctly held that "Florida's Rental Tax on the Seminole Tribe's lease of reservation land has been prohibited by Congress by virtue of 25 U.S.C. § 465". [DE 84 at 3.] Section 465 expressly exempts from state taxation all rights in Indian land. As the Supreme Court explained in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 158 (1973), § 465 explicitly relieves the "use" of Indian land from all state tax burdens. Since leasing is obviously a "use" of the land, any state tax on rentals paid to the Tribe under leases of reservation land is explicitly prohibited.

Section 465 resolves any question about the validity of the Rental Tax as applied to rentals of Indian land. However, the district court separately held that "the federal regulatory scheme regarding leases of restricted Indian land is so pervasive that it precludes the additional burdens imposed by Florida's Rental Tax". [DE 84 at 6.] In such circumstances, the state tax is preempted under *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980), unless the state

demonstrates that the tax serves some legitimate regulatory purpose or is "narrowly tailored" to compensate the state for services it specifically provides in connection with the particular taxed activity. Since the state performs no regulatory function or services in connection with the surface leasing of Indian land, the Rental Tax does not pass muster under *Bracker*. The Rental tax is a tax of general application that funds off-reservation services to the state's residents. Accordingly, the district court correctly held that "federal law preempts the application of the Rental Tax to the Tribe's leases with the [lessees]". [DE 84 at 8.]

The Federal Surface Leasing Regulations at 25 C.F.R. Part 162 expressly prohibit state taxation of leasehold or possessory interests in Indian land. Stranburg contends that the regulations, as well as the assertion of the Secretary of the Interior that the regulations preempt state taxation, should be disregarded as undeserving of deference. In fact, the Secretary promulgated these regulations in compliance with the Administrative Procedures Act, 5 U.S.C. § 500, *et seq.,* pursuant to the very broad authority that Congress delegated to him in 25 U.S.C. § 2 to manage "all Indian affairs and . . . all matters arising out of Indian relations." Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), the regulations are entitled to controlling weight unless they are shown to be arbitrary, capricious, or manifestly contrary to the statute. Even under the strict standard prescribed by *U.S. v. Mead Corp.*, 533 U.S. 218 (2001), the Federal

Surface Leasing Regulations, and the Secretary's assertion that they preempt state law, are entitled to deference where, as here, the Secretary's analysis is thorough, consistent, and persuasive. *See also Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The district court correctly held that the Secretary's "preemption analysis [was so] thorough and persuasive" that it "merits the full amount of deference available under the law." [DE 84 at 5-6.]

Utilities Tax. The district court also correctly held that the Utilities Tax, as applied to electricity sold and delivered to the Tribe on its reservation, was categorically barred based on *Oklahoma Tax Commission v. Chickasaw Nation,* 515 U.S. 450, 458 (1995). [DE 84 at 8-15.] The court correctly held that the legal incidence of the tax rests with the Tribe, and not the utility service provider, because the tax is necessarily passed through to, and collected from, the consumer. Even though the utility service provider is charged with the ministerial administrative duty of remitting the Utilities Tax it collects from the consumer, the legal incidence of the Utilities Tax rests with the consumer because the Florida legislature intended that it be paid by the consumer.

The district court properly rejected Stranburg's argument that the taxable event that triggers the Utilities Tax is the utility service provider's off-reservation receipt of the consumer's payment of the tax. The taxable event that triggers a tax on services is the performance of the services. It occurs where the services are

performed. Fla. Stat. § 203.01(1)(c) 1 provides that the Utilities Tax is levied for the "sale of utilities" and the "transportation of electricity to the retail consumer", both of which services occur on the reservation.

The district court also correctly rejected Stranburg's claim that Fla. Stat. § 203.01(5) places the legal incidence of the Utilities Tax on the utility service provider because it "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" (which, under § 203.01(4) passes liability for the tax through to the consumer). Contrary to Stranburg's argument, this provision never imposes liability for the Utilities Tax on the utility service provider. The utility service provider's responsibility is limited to remitting only the Utilities Tax it has collected from the consumer. It is never required to go "out-of-pocket" to pay the tax.

Comity. In this appeal, Stranburg has abandoned each of his jurisdictional challenges other than the comity doctrine. The district court correctly held that a federal action is not barred by the comity doctrine simply because an unrelated plaintiff seeking entirely different relief makes a common legal argument in a subsequently filed state court action.

This Court should affirm the entry of summary judgment in the Tribe's favor on all grounds.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DETERMINED THE RENTAL TAX IS BARRED AND PREEMPTED BY FEDERAL LAW.

Because 25 U.S.C. § 465 explicitly relieves the use of Indian land from all state tax burdens, it is dispositive of the validity of the Rental Tax as applied to rentals of Indian land. However, even without § 465, the Rental Tax would be invalid as applied to rentals of Indian land because it is preempted by federal law.

A. *25 U.S.C. § 465 Bars The Application Of The Florida Rental Tax To Rentals Of Indian Land.*

25 U.S.C. § 465 provides that any "lands or rights acquired pursuant to this [Indian Reorganization] Act[2] . . . shall be exempt from State and local taxation".[3] The Tribe's reservation land was acquired pursuant to that Act. The district court correctly held that the right to lease property is among the rights exempted by § 465[4] and that "Florida's Rental Tax on the Seminole Tribe's lease of reservation land has been prohibited by Congress by virtue of 25 U.S.C. § 465". [DE 84 at 3.]

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[2] 25 U.S.C. §§ 461-466, 470-479.

[3] 25 U.S.C. § 465, which was enacted as part of the Indian Reorganization Act of 1934, provides: "Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation." [Emphasis added].

[4] The § 465 exemption applies to both the Indian tribe and its non-Indian lessee (who bears the legal incidence of the tax). *Confederated Tribes of Chehalis*

Stranburg nevertheless contends that the Supreme Court and other courts have consistently read § 465 to bar only taxes on the land itself or permanent fixtures on the land. [IB at 11.] That contention is without merit. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), the Supreme Court said that § 465 explicitly relieves the "use" of off-reservation Indian land from state tax burdens because "'use' is among the 'bundle of privileges that make up property or ownership' of property and . . . a tax upon 'use' is a tax upon the property itself". *Id.* at 158 (citing *Henneford v. Silas Mason Co.* 300 U.S. 577, 582 (1937)).

The Court said that § 465 prohibits the imposition of a state use tax on materials that the Indian tribe used to construct improvements on off-reservation Indian land.[5] The Court explained that this is because the "use of permanent improvements upon land is so intimately connected with the use of the land itself that an explicit provision relieving the latter [i.e., the use of the land itself] of state tax burdens must be construed to encompass an exemption for the former [i.e., the use of permanent improvements upon the land]." *Mescalero*, 411 U.S. at 158

Reservation v. Thurston Cnty. Bd. of Equalization, 724 F.3d 1153 (9th Cir. 2013). In *Chehalis*, § 465 applied to the lessee, a Delaware chartered limited liability company of which only 51% was owned by the Indian tribe. The other 49% was owned by non-Indians.

[5] Although the Indian land involved in *Mescalero* was off-reservation, it was acquired under a lease with the United States pursuant to the Indian Reorganization Act and its use was therefore exempt from state taxation under § 465.

(citation omitted). This statement recognizes that § 465 does not exempt the use of property on off-reservation Indian land unless the property is a permanent improvement to the land itself. It cannot be construed as limiting the exemption for the use of reservation land or property used on-reservation. Property owned and used by an Indian tribe on-reservation is exempt from state taxation, regardless of its connection to the land. *See, e.g., Wash. v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (invalidating a motor vehicle excise tax on vehicles used on-reservation by the Indian tribe or its members); *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976) (invalidating a state personal property tax on vehicles that were owned by members of the Indian tribe who reside on-reservation). Because "leasing" is unquestionably a "use" of the land, § 465 explicitly relieves rentals of Indian land of all state tax burdens.

Stranburg's contention that *Mescalero* authorizes state taxation of rentals of Indian land because (i) "§ 465 does *not* reach taxes on all income generated from land" [IB at 11 (emphasis in original)]; and (ii) not all income derived from the land is exempt, even though the right to income is "arguably in the 'bundle of privileges'" [IB at 18], is also without merit. The only income the Court held not to be exempt in *Mescalero* was income that the Indian tribe derived from activities conducted on its off-reservation Indian land. 411 U.S. at 157. That federal law prohibits state

taxation of income an Indian tribe derives from activities conducted on its reservation (which obviously includes rentals from the leasing of reservation land itself) is so firmly settled that it cannot be seriously debated. In *Mescalero* the Court said "[A]bsent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing . . . Indian income from activities carried on within the boundaries of the reservation". *Id.* at 148. If there could be any doubt about whether § 465 relieves rentals of reservation land from state taxation (there cannot), that doubt must be resolved in favor of the Tribe. *See Mont. v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (explaining "[s]tatutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit.") (citations omitted).

Stranburg relies on *Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163 (1989) and *Oklahoma Tax Commission v. Texas Company*, 336 U.S. 342 (1949) as authority for his claim that § 465 does not exempt rentals for surface rights in Indian land. [IB at 14-17.] He contends the Court necessarily considered the application of § 465 in *Cotton Petroleum* when it upheld the state severance tax on extracted oil and gas, and would have invalidated that tax if § 465 applied in the manner the district court applied it. Stranburg apparently contends that the Court's failure to mention § 465 in *Cotton Petroleum* should be interpreted as a holding that it does not apply to surface leases of Indian land.

However, Stranburg's arguments are predicated on the erroneous notion that the mineral leasing involved in *Cotton Petroleum* and the surface leasing involved here are the same activity. In fact, they are different activities that are regulated by entirely different statutes and regulations. Surface leasing is regulated by 25 U.S.C. § 415 and the Federal Surface Leasing Regulations at 25 C.F.R. Part 162. Mineral leasing is regulated by the Indian Mineral Leasing Act of 1938 (25 U.S.C. § 396) and the Mineral Leasing Regulations at 25 C.F.R. Parts 211-213, 225-227. The Federal Surface Leasing Regulations do not apply to mineral leases. 25 C.F.R. § 162.006. By its own terms, § 465 applies to "surface rights to [Indian] lands", and not to mineral rights. The Court did not mention § 465 in *Cotton Petroleum* because it does not apply to mineral leases. Its silence cannot be interpreted as a holding that § 465 does not apply to surface leasing of Indian land.

Stranburg also contends that *Confederated Tribes of Chehalis Reservation v. Thurston Cnty. Bd. of Equalization*, 724 F.3d 1153 (9th Cir. 2013) holds that § 465 applies only to state ad valorem taxation of Indian land and improvements. [IB at 15.] Stranburg further contends *Fort Mojave Tribe v. San Bernadino County*, 543 F.2d 1253 (9th Cir. 1976) holds that leasehold interests in Indian land are subject to state taxation. [IB at 15-16, 26.] Stranburg's reliance on these Ninth Circuit holdings is misplaced.

In *Chehalis,* the Ninth Circuit held that § 465 prohibits the state from imposing its ad valorem tax on a non-Indian lessee's leasehold improvements.[6] It did not involve state taxation of leasehold interests. However, in dicta, the court distinguished its pre-*Mescalero* decision, *Agua Caliente Band of Mission Indians v. Riverside County*, 442 F.2d 1184 (9th Cir. 1971) (which upheld the application of the California Possessory Interest Tax to a non-Indian's leasehold interest in Indian land) and *Fort Mojave* (which simply reaffirmed *Agua Caliente*) on the grounds that neither *Agua Caliente* nor *Fort Mojave* "involved property taxes". *Chehalis*, 724 F.3d at 1158. Citing *Agua Caliente*, the court said it is not bound by § 465 when "state or local governments impose taxes on interests other than the 'lands or rights' covered by § 465", *Chehalis*, 724 F.3d at 1158 n.7, without indicating what "lands or rights" are covered by § 465.

Stranburg apparently interprets these statements as holding that § 465 applies only to ad valorem property taxes. However, in making those statements, the court relied on *Agua Caliente*, in which § 465 was not even mentioned. Stranburg suggests that the court's silence should be interpreted as a holding that § 465 does not apply to leases of Indian land. However, that interpretation cannot be reconciled with *Mescalero* in which the Supreme Court held, two years after *Agua*

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[6] State taxation of a non-Indian lessee's leasehold improvements on Indian land is now expressly prohibited by 25 U.S.C. § 162.017(a).

Caliente was decided, that § 465 also relieves the "use" of Indian land of state tax burdens.

Furthermore, the California Possessory Interest Tax involved in *Agua Caliente* and *Fort Mojave* is an entirely different type of tax than the Rental Tax. As the Ninth Circuit noted in *Agua Caliente*, the California Possessory Interest Tax "taxes the 'full cash value' of the lessee's interest". 442 F.2d at 1186. It is an ad valorem tax on the value of a non-government lessee's possessory interest in government-owned property that, itself, is exempt from the state's ad valorem tax.[7] The California Possessory Interest is a tax on the lessee's property, not a tax on the lessee's payments of income to the Indian tribe.

In *Cotton Petroleum*, the Court distinguished between these types of state taxes. While state taxes on mineral royalty payments to the Indian tribe were held to be invalid in *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985),[8] the Court

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[7] The Florida counterpart to the California Possessory Interest Tax is not the Rental Tax, but the ad valorem tax on leasehold interests in Fla. Stat. § 196.199(2)(a) ("Leasehold Tax"), which Stranburg did not impose in this case. Although leasehold and possessory interests are generally not subject to state ad valorem tax (since they are neither real nor personal property), the California Possessory Interest Tax and the Florida Leasehold Tax are ad valorem taxes specially imposed on leasehold or possessory interests of non-government lessees in government-owned property because the property itself is exempt from the state's ad valorem tax. § 196.199, Fla. Stat.

[8] Although the lower courts questioned whether the legal incidence of the royalty tax in *Blackfeet* rested with the Indian lessor or the non-Indian lessee, the Supreme Court did not find it necessary to resolve that issue in striking down the state tax on

upheld the severance tax on the lessee's extracted oil and gas in *Cotton Petroleum* because "[n]o state tax is imposed on the royalties received by the Tribe." 490 U.S. at 169. The Court reiterated the rule that "the State may not tax Indian . . . income from leases" unless "Congress has made its intention to [lift the tribe's exemption] unmistakably clear." *Id.* at 178-179 (citing *Blackfeet*, 471 U.S. at 765-768). The Rental Tax is indistinguishable from the tax on the lessee's royalty payments that were held to be invalid in *Blackfeet*. Because Congress has not made unmistakably clear its intention to lift the exemption from state taxation of rentals of reservation land, the Rental Tax is invalid as applied to those rentals.

The California Possessory Interest Tax is distinguishable from the Rental Tax in another critical respect. In *Agua Caliente,* the court upheld the California Possessory Interest Tax on a non-Indian's leasehold interest in Indian land only after finding that "[u]pon default in the payment of the tax the Indian lessor is not liable for the payment of it and the Indian's title to the land is not encumbered." 442 F.2d at 1186. The California Possessory Interest Tax would not have been upheld if, upon default, the Indian tribe was liable for its payment. Under Florida law, liability for the Rental Tax is expressly imposed on every lessor, including an Indian lessor, who fails to collect and remit it. *See* § 212.07(2),(3), Fla. Stat. Florida law also

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royalty payments to the Indian tribe. The facts indicate that the lessee deducted the taxes from its royalty payments to the tribe, but that does not appear to have been required by statute and it does not appear to have influenced the Court's conclusion that a state tax on royalties paid to the tribe is prohibited.

imposes severe civil and criminal penalties (including imprisonment) on the Indian lessor who fails to collect and remit the tax.[9]

Further, *Agua Caliente* cannot be considered good law after *Mescalero* and *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980). Congress unquestionably has the power "to immunize . . . lessees from [State] taxes". *Mescalero,* 411 U.S. at 150; *Texas Company*, 336 U.S. at 365-66. Congress exercised that power when it enacted § 465. However, the Supreme Court did not specifically hold that § 465 exempts the "use" of Indian land until it decided *Mescalero* two years after *Agua Caliente* was decided. At the time it decided *Agua Caliente,* the Ninth Circuit understandably, but erroneously, determined that "no statute . . . expressly forbids the imposition of a state use tax". 442 F.2d at 1186. It said that a state use tax is permissible in the absence of "legislation dealing with Indians and Indian lands [that] demonstrates a congressional purpose to forbid the imposition of it." *Id.* To the extent *Agua Caliente* (and, therefore, *Fort Mojave* and *Chehalis*) can be construed as permitting a state tax on the leasing or other "use" of Indian land, it was overturned by *Mescalero.* However, even if § 465 could be

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[9] Even if the Tribe's sovereign immunity prevented enforcement of the tax or penalties, the Florida statute, as written, impermissibly imposes liability for the Rental Tax and both civil and criminal penalties on the Indian lessor. The validity of a state tax statute depends on its terms as written. The state cannot salvage an invalid statute by relying on the Tribe's sovereign immunity or by selectively enforcing it. *See Wash. v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 163-164 (1980).

construed as permitting state taxation of rentals of Indian land after *Mescalero* (it cannot), a congressional purpose to prohibit such tax has now been clearly demonstrated in the Federal Surface Leasing Regulations.

Stranburg cites *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342 (1949) for the proposition that, while Indian Land is exempt from state tax, lessees of Indian land are not. [IB at 17.] However, that case did not involve § 465. It was cited in *Mescalero*, along with *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938) and *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943), to chronicle the evolution and ultimate demise of the "federal instrumentality" theory discussed in *M'Culloch v. Maryland*, 17 U.S. 316 (1819). Under that theory, all income derived from activities conducted by non-Indian lessees on leased Indian land was exempted from state income taxes. In this case, the Tribe has not contended that non-Indian lessees are exempt from state tax on income they earn on leased Indian land. In any event, the demise of the "federal instrumentality" theory is academic where, as here, the state taxes are expressly prohibited by federal law.

In any event, the proposition espoused in *Agua Caliente* (and followed in *Fort Mojave*) that congressional authorization of a state tax is presumed whenever a congressional purpose to forbid it has not been demonstrated was laid to rest in *Bracker*. *Bracker* eliminated any presumption that a state tax on the on-reservation

activities of a non-Indian is valid. After *Bracker,* unexpressed congressional intent to permit or prohibit the state tax must be determined by balancing the federal, state, and tribal interests. When the Secretary of the Interior applied the *Bracker* balancing test, congressional intent to prohibit state taxation of rentals of Indian land was clearly indicated. *See* 77 Fed. Reg. 72447-72448.

B. *The Florida Rental Tax Is Preempted By Federal Law.*

The issue of preemption arises only if this Court determines that state taxation of rentals of on-reservation Indian land is not prohibited by 25 U.S.C. § 465. Although the district court correctly held that § 465 prohibits such tax, it separately held, under *Bracker,* "the federal regulatory scheme regarding leases of restricted Indian land is so pervasive that it precludes the additional burdens imposed by Florida's Rental Tax," [DE 84 at 6], and therefore, "federal law preempts the application of the Rental Tax to the Tribe's leases with the [lessees]". [DE 84 at 8.]

Indeed, the Federal Surface Leasing Regulations, 25 C.F.R. Part 162, 77 Fed. Reg. 72440-72509, so exhaustively and pervasively regulate every detail of surface leasing of Indian land that they leave absolutely no role for the state.[10] "[A]ny concurrent jurisdiction the states might inherently have possessed to regulate Indian use of reservation lands has long ago been preempted by extensive

[10] These regulations are reproduced at [DE 59-1].

Federal policy and legislation." *Santa Rosa Band of Indians v. King Cnty.*, 532 F.2d 655, 658 (9th Cir. 1975) (citing *Warren Trading Post v. Ariz. Tax Comm'n*, 380 U.S. 685 (1965); *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973)). "[W]e have little doubt that Congress assumed and intended that states had no power to regulate the Indian use or governance of the reservation provided, except as Congress chose to grant that power." *Santa Rosa*, 532 F.2d at 658 (citing *McClanahan,* 411 U.S. at 175). "[S]tate efforts to tax or regulate Indian use of the reservation [were] pre-empted by the grant of the reservation." *Santa Rosa*, 532 F.2d at 659 n.2.

The Federal Surface Leasing Regulations are far more comprehensive and pervasive than the federal regulations that the Supreme Court held to preempt state taxation in *Bracker* and *Ramah Navajo School Board v. Bureau of Revenue of New Mexico,* 458 U.S. 832 (1982). The Ninth Circuit specifically said that the Federal Surface Leasing Regulations preempt state taxation of leases of Indian land in *Gila River Indian Community v. Waddell*, 967 F.2d 1404, 1411 (9th Cir. 1992) ("25 C.F.R. §§ 162.1-162.14 (1991) . . . are of a scope and detail sufficient to support an argument that, as the Supreme Court held in *Bracker* and *Ramah*, there exists no room for additional regulation by the State."). Indeed, Stranburg is unable to identify a single regulatory function or service that is performed by the state in connection with surface leasing of Indian land.

State tax "is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law unless the state interests at stake are sufficient to justify the assertion of State authority." *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 334 (1983) (citing *Bracker*, 448 U.S. at 145). The burden of justifying the tax in these circumstances rests with the state. *Bracker*, 448 U.S. at 150. The state's "generalized interest in raising revenues in this context is [not] sufficient to permit its proposed intrusion into the federal regulatory scheme." *Id.*; *see also Mescalero*, 462 U.S. at 343.

Where the federal regulation of the activity is exclusive and pervasive, it preempts any state taxes that do not serve some legitimate regulatory purpose or that are not "narrowly tailored" to compensate the state for services it specifically provides in connection with the taxed activity. *Bracker*, 448 U.S. at 150; *Mescalero*, 462 U.S. at 343; *see also, e.g.*, *Crow Tribe of Indians v. Mont.,* 819 F.2d 895, 900 (9th Cir. 1987) (holding that state taxes on coal miners were justified only if "narrowly tailored" to fund additional government services required by coal miners or to treat pollution and solid waste that attend coal production); *Hoopa Valley Tribe v. Nevins,* 881 F.2d 657 (9th Cir. 1989) (holding that a state tax fails the "narrowly tailored" requirement where revenues from the tax are allocated to the state's general fund, or are used to fund services, such as law enforcement, that the state provides to its residents in general). "To be valid, the [state] tax must bear

some relationship to the activity being taxed." *Nevins*, 881 F.2d at 661 (citing *Crow Tribe*, 819 F.2d at 900). "Showing that the tax serves legitimate state interests, such as raising revenues for services used by tribal residents and others, is not enough." *Id.* The Rental Tax cannot pass muster under *Bracker* because it is allocated to the state's general fund to pay for off-reservation services provided to the state's residents in general. It bears no relationship to the activity being taxed. The state provides no services in connection with the surface leasing of Indian land and Stranburg has not contended otherwise.

Where, as here, the federal regulation of the activity is exclusive and pervasive, none of the factors cited by Stranburg, including the severity of the impact of the state tax on the Indian tribe or the availability of off-reservation state services to tribal members, justifies the tax. Although the fuel tax in *Bracker* was negligible compared to the Indian tribe's timber harvesting activities, it was preempted because it was incompatible with the federal goal of maximizing the tribe's income from its land.

Stranburg's reliance on *Cotton Petroleum* as support for his contention that the Rental Tax is not preempted by federal law [IB at 15] is misplaced. The issue in that case was whether Congress's intent to exempt extracted oil and gas from the state's severance tax could be inferred from its failure to mention state taxation in the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396 (the "1938 Act"). While

the 1938 Act is silent on state taxation of extracted oil and gas, such taxes were expressly authorized by its predecessors, the Indian Oil Act of 1927 (25 U.S.C. § 398) and the Indian Oil Leasing Act of 1924 (25 U.S.C § 398). In those circumstances, the Court said it could not interpret Congress's silence as a prohibition of the tax. The Court reasoned that, if Congress had intended to create an exemption that did not previously exist, it would have done so expressly. *Cotton Petroleum*, 490 U.S. at 182-83. The Court then applied the *Bracker* balancing test to determine whether Congress intended to permit or prohibit the state severance tax.

The Court found that the federal regulation of mineral leasing was not exclusive. Regulation of that activity was shared with the state. Specifically, the state performed the important function of regulating the spacing and mechanical integrity of the on-reservation wells. *Cotton Petroleum*, 490 U.S. at 186. This distinguished it from *Bracker* and *Ramah*[11] and meant that the state severance tax was not preempted by federal law. *Cotton Petroleum*, 490 U.S. at 186-87. In those circumstances, the state could justify the severance tax under a standard for balancing the federal, state, and tribal interests that is far more lenient than the "narrowly tailored" standard that applies when the activity is regulated exclusively

[11] The Court said that, in *Bracker* and *Ramah*, "the State has had nothing to do with the on-reservation activity, save tax it." *Cotton Petroleum*, 490 U.S. at 186. That is certainly true of the state's involvement in the surface leasing of Indian land.

and pervasively by federal law. In applying this standard, such factors as the severity of the impact of the tax on the Indian tribe, and the availability of off-reservation state services to tribal members, are considered.

Stranburg's reliance on *Cotton Petroleum* is predicated on the mistaken notion that mineral leasing and surface leasing are the same activity. In fact, they are different activities that are regulated by entirely different statutes and regulations, as explained above on page 13. While the regulation of mineral leasing is shared with the state, the regulation of surface leasing lies exclusively with the federal government, specifically the Secretary of the Department of the Interior. Accordingly, the standard applied in *Cotton Petroleum* for balancing the federal, state, and tribal interests has no application to state taxes on the surface leasing of Indian land.

As explained in the preamble to the Federal Surface Leasing Regulations, in applying the *Bracker* balancing test, the Secretary of the Interior determined that:

> The Federal statutory scheme for Indian leasing . . . precludes State taxation. The purposes of . . . leasing on Indian land are to . . . allow Indian landowners to use their land profitably for economic development, ultimately contributing to tribal well-being and self-government. . . Congress intended to maximize income to Indian landowners and encourage all types of economic development on Indian lands. . . Assessment of State and local taxes would obstruct Federal policies supporting tribal economic development, self-determination, and strong tribal governments. State and local taxation also threatens substantial tribal interests in effective tribal government, economic self-sufficiency, and territorial autonomy. . . State and local taxation of . . . the leasehold interest also has the potential to increase

> project costs for the lessee and decrease the funds available to the lessee to make rental payments to the Indian landowner. Increased project costs can impede a tribe's ability to attract non-Indian investment to Indian lands where such investment and participation are critical to the vitality of tribal economies. . . [T]he very possibility of an additional State or local tax has a chilling effect on potential lessees as well as the tribe that as a result might refrain from exercising its own sovereign right to impose a tribal tax to support its infrastructure needs. . . Subject only to applicable Federal law, the leasehold or possessory interest itself is not taxable by States or local governments. . . Compelling Federal interests in self-determination, economic self-sufficiency, and self-government, as well as strong tribal interests in sovereignty and economic self-sufficiency, are undermined by State and local taxation of the leasehold interest.

77 Fed. Reg. 72447-72448 [emphasis added].

Now that Congress's intent to prohibit state taxation of rentals of Indian land has been revealed by the *Bracker* balancing test and expressed in the Federal Surface Leasing Regulations, there is no need, or reason, to re-determine it through repetitive applications of the same test. *Red Mountain Machinery Co. v. Grace Inv. Co.*, 29 F.3d 1408, 1410 (9th Cir. 1994) ("Although we ordinarily would apply a fact-specific balancing test among federal, state, and tribal interests to determine if a state law applies in a given case, *see* [*Bracker*], in this case we conclude that we need not engage in such a balancing test because the Secretary, pursuant to his statutory authority, has already engaged in such an analysis".) "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron,*

U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

Stranburg challenges the validity of the exemption in § 162.017(c) of the Federal Surface Leasing Regulations on the grounds that the Secretary incorrectly applied the *Bracker* balancing test. [IB at 24-30.] There is no merit to that contention. Under *Bracker*, the tax is preempted if the federal regulation of the taxed activity is exclusive and pervasive. The Secretary correctly determined that:

> [T]he Federal statutes and regulations governing leasing on Indian lands . . . occupy and preempt the field of Indian leasing. The Federal statutory scheme for Indian leasing is comprehensive, and accordingly precludes State taxation. In addition, the Federal regulatory scheme is pervasive and leaves no room for State law. Federal regulations cover all aspects of leasing.

77 Fed. Reg. 72447. That the federal statutory scheme and Federal Surface Leasing Regulations comprehensively and pervasively regulate surface leasing of Indian land is indisputable. Because they are also exclusive (Stranburg is unable to identify a single regulatory function that is performed by the state in connection with surface leasing of Indian land), they preempt the Rental Tax because it is not is not "narrowly tailored" to compensate the state for services specifically provided in connection with the surface leasing of Indian land. The state provides no such services.

In any event, Stranburg's contention that the Secretary incorrectly applied *Bracker* is misdirected because the validity of the exemption does not depend on

whether the Secretary's policy decision is "correct". As the Court said in *Chevron,* "[w]hen a challenge . . . really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress[[12]], the challenge must fail." 467 U.S. at 866; *see also Batterton v. Francis*, 432 U.S. 416, 424 (1977) ("The actual issue we must decide is not how the statutory term should be interpreted, but whether the Secretary's regulation is proper.") The validity of the exemption does not depend on whether the Secretary correctly applied the *Bracker* test, but on whether the exemption is a reasonable exercise of his authority within the "gap" left open for him by Congress.

Congress left a "gap" for the Secretary to fill only if 25 U.S.C. § 465 (which generally exempts all rights in Indian land) is held not to reach rentals of Indian land. In that case, the Secretary filled the "gap" by naturally and reasonably extending that exemption to rentals of Indian land. The Secretary's choice could be considered unreasonable only if it were contrary to congressional intent as clearly expressed in a federal statute. There are no federal statutes in which congressional intent to permit state taxation of surface leasing of Indian land has been expressed or implied, and Stranburg has not contended otherwise.

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[12] Only if the court determines that the exemption in 25 U.S.C. § 465 does not apply to rentals of Indian land, does the validity of the exemption in 25 C.F.R. § 162.017(c) arise. In that case, the issue of whether state may tax rentals of Indian land is a "gap" left by Congress to be filled by the Secretary.

Stranburg claims that certain statements the Secretary made in a brief he filed in support of his motion to dismiss the state agency's complaint in *Desert Water Agency v. United States Department of the Interior,* No. 13-cv-006006 (C.D. Cal.) should be construed as a concession that the Federal Surface Leasing Regulations do not preempt state taxes on rentals of Indian Land. [IB at 20.] That contention is without merit. *Desert Water* did not involve state taxation of leasehold interests in Indian land. It addressed only jurisdictional issues and did not address any substantive issues concerning the preemptive effect of the Federal Surface Leasing Regulations.

In *Desert Water*, the state water agency sued the Department of the Interior for a declaration that § 162.017 does not prohibit its water taxes, which specifically compensate the state for the water it delivers to lessees of Indian land. The Secretary moved to dismiss the agency's complaint on various grounds including lack of Article III standing, lack of prudential standing, and ripeness. Under *Abbott Labs v. Gardner*, 387 U.S. 136, 149 (1967)[13], a challenge to a regulation that has not yet affected the plaintiff is ripe only if it involves a purely legal issue. The Secretary argued that the application of § 162.017 to water taxes did not involve a

[13] *Abbott Labs* was overruled on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977).

purely legal issue since it could depend on the terms of a particular lease.[14] He argued that the application of the exemption should be determined in the context of an actual case or controversy; noting that no lessee had refused to pay the water tax and probably never would since that would result in the loss of the water supply to his desert property. The court agreed that, until a lessee refused to pay the tax or sued for a refund of the tax, the court did not have jurisdiction.

In his brief, the Secretary noted that the exemption in § 162.017 was subject to "applicable federal law", which might include *Bracker.* Because these water taxes were "narrowly tailored" to compensate the state for the water services it delivered to lessees of Indian land, they would be valid under *Bracker,* and therefore might not be prohibited by § 162.017,[15] even though the federal regulation of surface leasing of Indian land is exclusive and pervasive. However,

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[14] If the terms of a lease entered into prior to the effective date of the regulation were in conflict with the regulation, the terms of the lease would control under § 162.008.

[15] In *Desert Water*, the Secretary also argued that the state agency's pre-enforcement challenge to the application of § 162.017 failed to satisfy the requirement expressed in *Alaska Right To Life Political Action Comm. v. Feldman*, 504 F.3d 840, 848-49 (9th Cir. 2007), that any threat of the state agency's injury be "imminent". The state agency countered with the claim that the threat was "imminent" because § 162.017, if applicable, would have immediate preemptive effect. The Secretary responded that the exemption in § 162.017 did not change existing law, but merely reflects what the law has been since at least 1980 when *Bracker* was decided. It argued that, if the state agency's imposition of the water tax violated § 162.017, it had always violated federal law. Consequently, the preemptive effect of § 162.017, and the threat of the state agency's injury, could hardly be considered "imminent".

even if § 162.017 were subject to *Bracker*, the Rental Tax would be invalid. Unlike the water taxes in *Desert Water*, the Rental Tax is not "narrowly tailored" to compensate the state for services it provides in connection with the taxed activity. Florida provides no services in connection with the surface leasing of Indian land.

C. *The District Court Correctly Held That The Federal Surface Leasing Regulations Are Valid And Entitled To Deference.*

The Federal Surface Leasing Regulations expressly and unconditionally prohibit state taxation of leasehold or possessory interests in Indian land. Section 162.017(c) provides: "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." The district court correctly held that "25 U.S.C. § 415 and 25 C.F.R. § 162.017 prohibit the imposition of the Rental Tax." [DE 84 at 6.]

Stranburg nevertheless contends that the Federal Surface Leasing Regulations do not preempt state law because they "do not purport to decide the preemption question". [IB at 18.] He contends, alternatively, that, to the extent the Federal Surface Leasing Regulations purport to decide the preemption question, they are not entitled to deference. [IB at 18.]

Stranburg's contention that federal regulations preempt state taxes only if they purport to do so is without merit. "Pre-emption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the

statute's language or implicitly contained in its structure and purpose.'" *Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53 (1982) (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). "Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because '[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it' [or] because 'the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" 458 U.S. at 152 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)).

Here, the Federal Surface Leasing Regulations preempt state law because "[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Id.* They "touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject." *Id.* It was for this reason that the federal regulations in *Bracker* and *Ramah* were held to preempt state law even though they did not purport to do so.

In any event, Stranburg's contention that the Federal Surface Leasing Regulations do not purport to preempt state tax is patently incorrect. Unlike the regulations in *Bracker* and *Ramah,* § 162.017(c) specifically acknowledges state

statutes that impose tax on leasehold interests in Indian land and expressly declares them null and void.

Even under the strictest standard, the federal regulations (and the agency's assertion regarding the preemptive effect of the regulations) are entitled to deference where, as here, the Secretary's analysis is thorough, consistent and persuasive. *U.S. v. Mead Corp.*, 533 U.S. 218 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The district court correctly held that the Secretary's "preemption analysis [was so] thorough and persuasive" that it "merits the full amount of deference available under the law". [DE 84 at 5-6.]

Where, as here, the federal regulations are promulgated pursuant to the Administrative Procedures Act ("**APA**"), 5 U.S.C. § 500, *et seq.*[16], they are entitled to controlling weight unless they are shown to be arbitrary, capricious, or manifestly contrary to the statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984); *Ohio v. U.S. Dep't of the Interior*,

[16] The Secretary complied with the APA by publishing the current version of the Federal Surface Leasing Regulations in the Federal Register on December 5, 2012. The Secretary published the preamble and proposed regulations in the Federal Register on November 29, 2011. All interested parties were given the opportunity to comment on them until January 30, 2012. 76 Fed. Reg. 73784. The Bureau of Indian Affairs held three consultation sessions on the Federal Surface Leasing Regulations: January 10, 2012, in Seattle, Washington; January 12, 2012, in Palm Springs, California; and January 18, 2012, in Rapid City, South Dakota. 77 Fed. Reg. 72440, 72442. Stranburg had the opportunity to submit comments and present its argument that Congress intends to permit state taxation of rentals of Indian Land.

880 F.2d 432, 438 (D.C. Cir. 1989) (holding the court must defer to the Secretary's interpretation of the statute unless the regulations are "directly contrary to the clearly expressed intent of Congress."). This Court's standard of review evaluates whether the Secretary's interpretation of the law is reasonable or arbitrary and capricious and gives substantial deference to the interpretation of a statute by the agency charged with its administration. *See Blum v. Bacon*, 457 U.S. 132 (1982); *Memorial Hospital v. Heckler*, 706 F.2d 1130, 1134 (11th Cir. 1983); *Lloyd Noland Hosp. & Clinic v. Heckler*, 762 F.2d 1561, 1565 (11th Cir. 1985). "Absent a clear error of judgment, the agency's construction should be upheld." *Tallahassee Mem'l Reg. Med. Ctr. v. Bowen*, 815 F.2d 1435, 1458 (11th Cir. 1987) (citation omitted). The exemption in § 162.017(c) is a natural and reasonable extension of 25 U.S.C. § 465, which generally exempts all rights in Indian land from state taxation. No federal statute expressly or impliedly authorizes state taxation of rentals of Indian land.

As explained in *Wyeth v. Levine*, 555 U.S. 555 (2009), deference analysis is performed when federal and state regulation of the same activity conflict. *See also Fidelity Fed. Savings*, 458 U.S. at 153 ("[S]tate law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility'" or "when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and

objectives of Congress'") (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Jones*, 430 U.S. at 526; *Bethlehem Steel Co. v. N. Y. State Labor Relations Bd.*, 330 U.S. 767 (1947)).

Surface leasing of Indian land is exclusively regulated by federal law. The only state statute Stranburg has sought to apply to surface leasing of Indian land is Fla. Stat. § 212.031, which serves no purpose other than impose the tax. The conflict here is between state law that imposes the tax and federal law that prohibits it. Compliance with both is impossible. In those circumstances, the state law is nullified. *Fidelity Fed. Savings*, 458 U.S. at 153.

Stranburg's reliance on *Wyeth* is misplaced. In that case, a drug manufacturer contended that federal drug labeling laws preempted state law claims based entirely on an assertion in the preamble that "FDA approval of labeling . . . preempts conflicting or contrary State law." 555 U.S. at 575. While the Court said an agency's regulation can preempt conflicting state law requirements, 555 U.S. at 576 (citing *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000); *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707 (1985)), in *Wyeth* there was nothing but an agency's assertion that state law obstructed the achievement of federal objectives. In those circumstances, the Court said the amount of weight accorded such an assertion depended on its thoroughness, consistency, and persuasiveness. 555 U.S. at 577 (citing *U.S. v. Mead Corp.*, 533 U.S. 218 (2001);

Skidmore v. Swift & Co., 323 U.S. 134 (1944)).[17] However, the Court found the assertion to be contrary to clear indications of congressional intent[18] and therefore not entitled to the usual weight.

Here, the district court did not have to rely on the Secretary's assertion in the preamble to conclude that the Federal Surface Leasing Regulations preempt state law. The court's conclusion is based on the undisputed fact that the regulations exhaustively, exclusively, and pervasively regulate the activity. Further, the exemption in § 162.017(c) is perfectly consistent with the intent of Congress as clearly expressed in 25 U.S.C. § 465 to generally exempt all rights in Indian land.

Even if Stranburg disputes the district court's conclusion that the Secretary's preemption analysis was thorough and persuasive, it was incumbent upon him to show how that analysis was lacking. He has not challenged a single aspect of that analysis—only the conclusion that the analysis inevitably reached. Whether the Secretary's analysis was sufficiently thorough and persuasive is a question of fact.

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[17] The Court said that, while agencies have no special authority to pronounce on preemption absent delegation by Congress, they have a unique understanding of the statutes they administer and are able to make informed decisions about how state requirements pose an obstacle to achieving the purposes of Congress.

[18] It was clear that Congress did not intend that federal law preempt state law from the fact that federal law did not provide a remedy for consumers who were injured by mislabeled drugs. Congress necessarily intended that those injuries be remedied through state court actions. This meant that federal law did not preempt state court actions as the FDA contended.

The district court's factual determination should not be overturned where, as here, it is amply supported by the record.

Anyone who fails to submit comments during the period permitted under the APA waives his right to judicial review of the regulations. *See Univ. Health Servs., Inc. v. Thompson*, 363 F.3d 1013 (9th Cir. 2004); *Exxon Mobil Corp. v. EPA*, 217 F.3d 1246 (9th Cir. 2000); *Desert Water Agency v. U.S. Dep't of the Interior,* No. 13-cv-006006 (C.D. Cal.). Stranburg did not submit comments and lost his right to challenge the regulations. Stranburg contends this rule should not apply to him because state taxation of leasehold interests was not specifically mentioned until the final rule was issued on December 4, 2012. [IB at 23-24.] However, the rule recognizes no exception in such circumstances. Stranburg had the same opportunity to submit comments that everyone else had. Although the regulations mentioned "leasehold or possessory interests" for the first time in the final rule, the Secretary proclaimed that the leasing of Indian land was exempt from all state taxation in the proposed rule that was published more than a year earlier:

> These regulations are intended to preempt the field of leasing of Indian lands. The Federal statutory and regulatory scheme for leasing, including the regulation of improvements, is so pervasive as to preclude the additional burden of State taxation. The assessment of State taxes would obstruct Federal policies supporting tribal economic development and self-determination, and tribal interests in effective tribal government and economic self-sufficiency.

76 Fed. Reg. 73785 (emphasis added).

Stranburg's contention that the Federal Surface Leasing Regulations are not entitled to deference on the grounds that they are "substantively incorrect" [IB at 24] is also without merit. "The actual issue we must decide is not how the statutory term should be interpreted, but whether the Secretary's regulation is proper." *Batterton v. Francis*, 432 U.S. 416, 424 (1977). In any event, the regulations would be "substantively incorrect" only if they contradicted a federal statute that expressly authorizes the tax. *See, e.g., Ohio v. U.S. Dep't of the Interior*, 880 F.2d 432, 438 (D.C. Cir. 1989) (holding the court must defer to the Secretary's interpretation of the statute absent a showing that the regulations are "directly contrary to the clearly expressed intent of Congress".) However, there are no federal statutes that authorize state taxation of rentals of Indian land, expressly or impliedly. The regulations are consistent with clearly expressed congressional intent to generally exempt all rights in Indian land.

Stranburg's contention that the Secretary exceeded his authority when he promulgated § 162.017(c) of the Federal Surface Leasing Regulations on the grounds that only Congress can grant tax exemptions [IB at 21] is also without merit. While a tax exemption can be granted in a federal statute, such as 25 U.S.C. § 465, a tax exemption exists whenever Congress intended to prohibit the tax. That intent is revealed through the application of the *Bracker* balancing test. State taxation of income that an Indian tribe derives from its on-reservation activities is

exempt unless Congress has expressly authorized it. *See, e.g., Mescalero*, 411 U.S. at 148. None of the state tax exemptions found to exist in *Bracker, Ramah*, or their progeny were granted by statute. Stranburg relies on a single case, *Alexander v. Sandoval*, 532 U.S. 275 (2001), as the authority for his claim that an exemption is invalid unless it is granted in a federal statute [IB at 21-22], but that case did not even involve a tax exemption.

There is no merit to Stranburg's contention that federal regulations preempt state law only if Congress has expressly authorized the agency to preempt it. [IB at 22.] *See Fidelity Fed. Savings*, 458 U.S. at 152-53 ("Pre-emption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'") (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). The regulations that governed the activities in *Bracker* and *Ramah* preempted state law even though Congress did not expressly authorize the Secretary to preempt it.

In any event, Congress did give the Secretary the authority to preempt state law. The Federal Surface Leasing Regulations were promulgated by the Secretary of the Interior and the Commissioner of Indian Affairs pursuant to the very broad authority that Congress delegated to them in 25 U.S.C. § 2 to manage "all Indian affairs and . . . all matters arising out of Indian relations." In 25 U.S.C. § 415, "Congress conferred upon the Secretary of the Interior the power to promulgate

regulations governing tribal leases." Congressional Findings and Declaration of Purposes, Pub. L. 106-568, title XII, §1202, December 27, 2000, 114 Stat. 2933(a)(4). In administering the Indian Reorganization Act of 1934, Congress authorized the Secretary to fill every regulatory "gap" that it left. It left the regulation of every aspect of surface leasing of Indian land to the Secretary.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE UTILITIES TAX IS PROHIBITED BY FEDERAL LAW.

To the extent the Tribe uses electricity in on-reservation activities that are exclusively and pervasively regulated by federal law, federal law prohibits the Utilities Tax, regardless of who bears the legal incidence of the tax. However, because the legal incidence of the Utilities Tax rests with the Tribe as the consumer, it is prohibited by federal law regardless of the purpose for which the electricity is used.

A. *The Utilities Tax Is Barred By Federal Law Because The Legal Incidence Rests With The Tribe As The Consumer.*

The district court correctly held that the state tax prescribed by Fla. Stat. § 203.01 ("Utilities Tax") on utilities services that are sold and delivered to the Tribe on the reservation is categorically barred because the legal incidence of that tax rests with the Tribe as the consumer. *See McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164 (1973); *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995) ("If the legal incidence of an excise tax rests on a tribe or on tribal

members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization"); *Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Nation,* 502 U.S. 251, 258 (1992) ("'[A]bsent cession of jurisdiction or other Federal statutes permitting it,' we have held a State is without power to tax reservation lands and reservation Indians." (internal citations omitted)); *Mescalero*, 411 U.S. at 148 ("[I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and [*McClanahan*] lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent." (internal citations omitted)); *Mont. v. Blackfeet Tribe of Indians,* 471 U.S. 759, 764-65 (1985) ("Indian tribes and individuals generally are exempt from State taxation within their own territory. An Indian tribe's exemption from State taxation is lifted 'only when Congress has made its intention to do so unmistakably clear.'"). Congress has never authorized state taxation of utility services sold and delivered to an Indian tribe on its reservation.

While § 203.01 does not mention "legal incidence", Stranburg contends that the legal incidence of the Utilities Tax rests with the utility service provider because § 203.01(1)(a)1 provides that the Utilities Tax "is imposed on the gross

receipts from utility services that are delivered to a retail consumer in the state". Stranburg also contends the legal incidence rests with the utility service provider because § 203.01(5) imposes on that provider the obligation to collect the Utilities Tax from the consumer and remit it to the state "for the privilege of conducting a utility . . . services business".[19] While the utilities service provider is required to perform the ministerial administrative duties of collecting the tax from the consumer and remitting it to the state, these duties have nothing to do with the legal incidence of the tax. The legal incidence of the tax rests with the party from whose pocket the tax is ultimately paid.

The duty to collect and remit the Florida retail sales tax is placed on the seller of tangible personal property for the privilege of "engag[ing] in the business of selling tangible personal property at retail in this state"[20]. *See* § 212.05, Fla. Stat. But it is well settled that the legal incidence of the retail sales tax rests with the purchaser, because the seller passes the tax through to, and collects the tax from, the purchaser. *Fla. Dep't of Revenue v. Naval Aviation Museum Found., Inc.*, 907 So. 2d 586, 587 (Fla. 1st DCA 2005) ("The legal incidence of the Florida sales tax falls upon the purchaser or consumer.") (citing § 212.07(1), Fla. Stat.). Similarly,

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

[20] Electrical services are also subject to Florida sales tax under § 212.05(1)(e)1c, under the theory that electrical power is tangible personal property under § 212.02(19) rather than a taxable service.

the duty to collect and remit the Rental Tax is placed on the lessor for the privilege engaging in the business of leasing commercial real property in the state. *See* § 212.031(1)(a), Fla. Stat. However, the legal incidence of the Rental Tax indisputably rests with the lessee, because the lessor passes the tax through to, and collects the tax from, the lessee.

Where the pass-through is mandatory, the legal incidence rests with the consumer as a matter of law. *U.S. v. State Tax Comm'n of Miss.*, 421 U.S. 599, 607 (1975) (rejecting the district court's definition of "legal incidence" as "'the legally enforceable, unavoidable liability for nonpayment of the tax'"). In *Mississippi*, a liquor distributor had the legal liability for collecting and remitting the tax, but, because the tax was passed through to, and collected from, the purchaser, the Court held the legal incidence of the tax necessarily rested with the purchaser. "[W]e squarely rejected the proposition that the legal incidence of a tax falls always upon the person legally liable for its payment." *Id.* at 607-08 (citing *First Agricultural Nat'l Bank v. Tax Comm'n*, 392 U.S. 339, 347-48 (1968)). "It would appear to be indisputable that a sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser. . . [W]here a State requires that its sales tax be passed on to the purchaser and be collected by the vendor from him, this establishes as a matter of law that the legal incidence of the tax falls upon the purchaser. . . [B]y requiring the passing on of the tax and its

collection from the purchaser, [the taxing statute] placed the legal incidence of the tax on the purchaser." *Id.* at 608-10 (citing *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954); *Alabama v. King & Boozer*, 314 U.S. 1 (1941)).

Like the Florida retail sales tax and Rental Tax, the Utility Tax is passed through to, and collected from, the consumer. Section 203.01(4) provides as follows:

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

Section 203.01(4) contains explicit pass-through language for the Utilities Tax. However, Stranburg attempts to distinguish Utilities Tax from Florida sales tax and Rental Tax on the grounds that § 203.01(4) purports to make the pass-through of the Utilities Tax "optional" while the pass-through of the sales tax and Rental Tax is mandatory. In actuality, however, the pass-through of the Utilities

Tax is mandatory because neither the utility service provider, nor consumer, can avoid it.

According to Stranburg's own witness, Mr. Steffens, each payment that the utility services provider receives from a consumer is deemed to include a proportionate share of the Utilities Tax, regardless of whether the utilities provider separately itemizes the tax on the bill and regardless of how the consumer designates his payment. [DE 63-1 at 30-32, 38-39, 43-44.] If, for example, the charges for utility services total $100.00, the consumer will receive a bill for $102.50, which includes $2.50 of Utilities Tax. If the consumer pays only $100.00 of the bill, $97.56 ($100/1.025) will be deemed to constitute a payment of the charges for services, and $2.44 will be deemed to constitute a payment of Utilities Tax. He will still owe $2.44 of charges plus 6 cents of tax.

Mr. Steffens also testified that, to his knowledge, no utility service provider has ever failed to separately state the Utilities Tax as a separate component of the total charges for the utility services. [DE 63-1 at 34, 51-52.] He testified that the utilities service provider invariably passes the Utilities Tax through to the consumer by separately itemizing it pursuant to § 203.01(4). [DE 63-1 at 34, 51-52.] In 37 years of employment with the state agency, he was unaware of a single incident in which that did not occur. [DE 63-1 at 10, 34, 51-52.]

The absence of mandatory pass-through language has never meant that the legal incidence of the tax rests with the vendor as Stranburg contends. In the absence of mandatory "pass-through" language, the legal incidence rests with the consumer if a fair interpretation of the entire tax scheme indicates that the state legislature intended that the tax be passed through to, and collected from, the consumer. In *California Board of Equalization v. Chemehuevi Indian Tribe,* 474 U.S. 9, 11-12 (1985), the Court recognized: "None of our cases has suggested that an express statement that the tax is to be passed on to the ultimate purchaser is necessary. . . Nor do our cases suggest that the only test for whether the legal incidence of such a tax falls on purchasers is whether the taxing statute contains an express 'pass on and collect' provision." *See also Wash. v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134 (1980); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation,* 425 U.S. 463 (1976) (where the legal incidence of state cigarette taxes was held to rest with the consumer despite the absence of pass-through language.)

It is obvious from § 203.01(4) that the Florida legislature intended that the Utilities Tax be passed through to, and collected from, the consumer. The tax scheme is designed for the administrative convenience of the state. There are only a few utility service providers in the state, but there are millions of retail consumers. Based on a typical retail consumer's monthly residential utility bill of

$300, the amount of Utilities Tax is just $7.50. There are no cost effective means by which the state could enforce collection of the Utilities Tax from a consumer. It is the threat of losing his electrical service that motivates the consumer to pay. Only the utility service provider wields that sword. The utility service provider necessarily enforces payment of the Utilities Tax by enforcing payment for the utility services.

Stranburg nevertheless contends that the legal incidence of the Utilities Tax rests with the utilities service provider because § 203.01(5) provides that the utility service provider "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." [IB at 38 (emphasis omitted).] That contention is without merit because the Utilities Tax is imposed only on the "gross receipts" that have actually been collected by the utilities service provider from the consumer. § 203.01(1)(c)1, Fla. Stat.; Rule 12B-6.001(2)(f), F.A.C. Section 203.01(5) never imposes liability on the utilities service provider for Utilities Taxes that the consumer has not paid. The utility service provider is never required to go "out-of-pocket" with respect to the payment of any Utility Tax. It is for this reason that any refund of overpaid Utilities Tax is made to the consumer and not the utility service provider. § 203.01(1)(d), Fla. Stat. Section 203.01(5) gives the state the right to collect from the utility service provider the Utility Taxes that it collected from the consumer but failed to remit.

Since the Utilities Tax is invariably paid from the consumer's pocket, the legal incidence of the tax rests with the consumer as a matter of law.

Stranburg contended in the district court that the taxable event that triggers the Utilities Tax is the utility service provider's receipt of the consumer's payment for those services, not the provision of those services. [DE 61 at 15.] Because the payment was received by the utility service provider off-reservation, Stranburg contended that the Utilities Tax is beyond the reach of the Indian Commerce Clause under *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005), even if the legal incidence rests with the Tribe as the consumer. [DE 61 at 15.] The district court rejected that contention [DE 84 at 13-15] and it appears that Stranburg has now abandoned it, although that is not entirely clear.[21]

In any event, the argument has no merit. The taxable event that gives rise to a tax on services is always the performance of the services. Once the services are performed, the consumer's obligation to pay the tax is triggered, regardless of when, where, how, or to whom payment for the services is made. That taxable event always occurs where the services are performed. In *Ramah,* for example, the state was not allowed to tax the income that was derived by a non-Indian contractor from the performance of services because those services were performed on-reservation. *See, e.g., Central Greyhound Lines of N.Y. v. Mealey,* 334 U.S.

[21] *See* [IB at 45 n.17].

653, 663 (1948) (holding that the state could tax only the income that is attributable to services actually performed within the state). Section 203.01(1)(c)1 provides that the Utilities Tax is levied for the "sale of utility services" and the "transportation of electricity to the retail consumer", both of which services occur on-reservation.

B. *Even If the Legal Incidence Of The Utilities Tax Rests With The Utility Service Provider, It is Barred Under Bracker.*

Based on his contention that the legal incidence of the Utilities Tax rests with the utilities service provider, Stranburg claims the district court was required to determine the validity of the tax under the *Bracker* balancing test. [IB at 44-46.] He contends that the federal, state, and tribal interests should be balanced using the standard that applies when the tax burdens an activity that is not exclusively and pervasively regulated by federal law. Because the state provides services that benefit tribal members, Stranburg contends that the Utilities Tax is justified.

However, the standard by which the federal, state, and tribal interests are to be balanced depends on the activity in which the utilities are used. To the extent electricity is used in an activity that is exclusively and pervasively regulated by federal law, the Utilities Tax on that electricity is justified under *Bracker* only if the tax is "narrowly tailored" to compensate the state for services it provides specifically with respect to that activity. The Utilities Tax is not a "narrowly

tailored" tax. It is a tax of general application that is used to fund off-reservation services.

The Utilities Tax is indistinguishable from the state tax on fuel in *Bracker.* State tax on fuel used in connection with the on-reservation timber harvesting activities was invalid because the federal regulation of those activities was "so pervasive as to preclude the additional burdens sought to be imposed". *Bracker,* 448 U.S. at 148. For the same reason, the Utilities Tax is invalid under *Bracker* to the extent the utilities are used in connection with activities that are exclusively and pervasively regulated by federal law. Those activities include, *inter alia* (i) the provision of such essential governmental services as providing on-reservation police and fire protection, emergency medical services, and education pursuant to the Indian Self-Determination and Educational Assistance Act (25 U.S.C. § 450 *et seq.*); (ii) the leasing of Indian Land pursuant to the Indian Reorganization Act of 1934 (25 U.S.C. § 461, *et seq.* and 25 U.S.C. § 415, *et. seq.*, and the regulations promulgated thereunder at 25 C.F.R. Part 162); and (iii) Indian gaming pursuant to the Indian Gaming Regulatory Act (25 U.S.C. § 2701, *et seq.*). If the legal incidence of the Utilities Tax were held to rest with the utility service provider (it does not), the standard proposed by Stranburg for balancing the federal, state, and tribal interests would apply only in testing the validity of the Utilities Tax as

applied to electricity used in activities that are not exclusively and pervasively regulated by federal law.

III. THE DISTRICT COURT CORRECTLY HELD THAT THE COMITY DOCTRINE DID NOT DEPRIVE IT OF JURISDICTION TO ADJUDICATE THE TRIBE'S ACTION FOR PROSPECTIVE INJUNCTIVE AND DECLARATORY RELIEF.

Stranburg contends the comity or abstention doctrine deprived the district court of jurisdiction to adjudicate the Tribe's claims for prospective injunctive and declaratory relief because, shortly after the Tribe commenced its federal suit, two of the Tribe's lessees sued the state agency in state court for a refund of the Rental Taxes that were paid by them, under protest, on rentals they paid during the period July 1, 2005, through June 30, 2008. [IB at 46-49.] The lessees argued, *inter alia*, that federal law prohibits state taxation of rentals of Indian land. The district court correctly held that the comity doctrine did not bar the Tribe's federal action because it "involves a different plaintiff, seeking prospective injunctive and declaratory relief unrelated to [the lessees'] requested refund." [DE 46 at 6.] Abstention is inappropriate if the two proceedings involve different parties with different interests. *Sullivan v. City of Pittsburgh*, 811 F.2d 171, 177-78 (3d Cir. 1987). Federal courts should not abstain if the state court proceedings involve different parties. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930 (1975).

The purpose of the comity doctrine is to prohibit federal interference with pending state court proceedings. *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) (citing *Younger v. Harris,* 401 U.S. 37 (1971)). Here, the lessees' state court action was not pending at the time the Tribe commenced its federal action. The district court noted that federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them". [DE 46 at 6 (quoting *Colo. River Water Conserv. Dist. v. U.S.*, 424 U.S. 800, 817 (1976)).] Abstention is "the exception, not the rule." *New Orleans Public Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359 (1989) (citations and internal quotation marks omitted).[22]

Stranburg relies on *Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010), as support for his contention that the comity doctrine deprived the district court of jurisdiction. [IB at 47-49.] *Levin* holds that, in some very limited circumstances not present here[23], the plaintiff should bring his original action in state court because it is unconstrained by the Tax Injunction Act and therefore better positioned to craft a remedy to rectify a discriminatory tax scheme. 560 U.S. at 424-26. Nothing in

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[22] *New Orleans* was abrogated in part on other grounds by *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711 (1996).

[23] *Levin* applies only to suits in which the plaintiff claims to be the victim of an allegedly discriminatory tax scheme that does not involve fundamental rights. 560 U.S. at 424-26. The Tribe has not claimed to be the victim of a discriminatory tax scheme. Also, the Tribe's claim involves fundamental constitutional rights.

Levin can be construed as depriving the federal court of jurisdiction simply because an unrelated plaintiff, seeking different relief, has presented a common legal argument in a subsequently filed state court proceeding.

Further, *Levin* does not apply where, as here, no state court remedy is available to the federal plaintiff. The state court can only adjudicate tax refund claims of the person who overpaid the tax. Because Rental Taxes are paid by the lessee, a lessor has no standing in state court. The only remedy for abating the violation of the Tribe's federal rights is an injunction, and that remedy is available only in federal court. Further, as the Court explained in *Hibbs v. Winn*, 542 U.S. 88 (2004), the Tax Injunction Act (whose purpose is to avoid federal interference with state tax administration) applies only when the plaintiff contests his own tax liabilities. *Id.* at 93, 107 n.9. Here, the Tribe has contested its lessees' liabilities for the Rental Tax.

Levin is based on a rationale that has no application to Indian tribes because the Tax Injunction Act does not bar their federal suits. Under 28 U.S.C. § 1362, an Indian tribe has the same access to federal court to enjoin an illegal state tax scheme that the United States would have if it brought the suit on the tribe's behalf. *See, e.g., Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976). Since the comity doctrine would not bar a suit brought by the United States, § 1362 bars application of that doctrine to Indian

tribes' federal injunction actions just as it bars application of the Tax Injunction Act.

CONCLUSION

The district court's judgment should be affirmed in every respect.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 13,551 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii). This brief complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

/s/ Glen A. Stankee
GLEN A. STANKEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 9, 2015, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system. I also certify that the foregoing document is being served this day via transmission of Notices of Electronic Filing generated by CM/ECF and by Federal Express to Allen Winsor, Esq. and Osvaldo Vazquez, Esq., Office of the Attorney General, The Capitol – PL01, Tallahassee, FL 32399-1050 (allen.winsor@myfloridalegal.com and osvaldo.vazquez@myfloridalegal.com) (Attorneys for Appellant).

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ADDENDUM TO ANSWER BRIEF OF APPELLEE

25 U.S.C. § 465

AMENDMENTS

2006—Pub. L. 109–221 amended section catchline and text generally. Prior to amendment, text related to transfer and exchange of restricted Indian land and shares of Indian tribes and corporations.

2005—Pub. L. 109–157 amended section catchline and text generally. Prior to amendment, text related to transfer of restricted Indian lands or shares in assets of Indian tribes or corporation and exchange of lands.

2004—Pub. L. 108–374, §6(d)(1), (2), in first proviso, struck out ", in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located," after "descend or be devised" and ", except as provided by the Indian Land Consolidation Act, any other Indian person for whom the Secretary of the Interior determines that the United States may hold land in trust:" after "lineal descendants of such member or".

Pub. L. 108–374, §6(d)(3), which directed insertion of "in accordance with the Indian Land Consolidation Act (25 U.S.C. 2201 et seq.) (including a tribal probate code approved under that Act or regulations promulgated under that Act):" in first proviso without specifying where the insertion was to be made, was executed by making the insertion at end of first proviso, to reflect the probable intent of Congress.

2000—Pub. L. 106–462, which directed the amendment of this section by substituting "member or, except as provided by the Indian Land Consolidation Act," for "member or:", was executed by making the substitution for "member or" before "any other Indian person" to reflect the probable intent of Congress because the phrase "member or:" did not appear in text.

1980—Pub. L. 96–363, which directed the amendment of the first proviso of this section by substituting "or any heirs or lineal descendants of such member or any other Indian person for whom the Secretary of the Interior determines that the United States may hold land in trust" for "or any heirs of such members", was executed by making the substitution for "or any heirs of such member" to reflect the probable intent of Congress.

EFFECTIVE DATE OF 2006 AMENDMENT

Amendment by Pub. L. 109–221 effective as if included in the enactment of Pub. L. 108–374, see section 501(c) of Pub. L. 109–221, set out as a note under section 348 of this title.

EFFECTIVE DATE OF 2005 AMENDMENT

Pub. L. 109–157, §9, Dec. 30, 2005, 119 Stat. 2953, provided that: "The amendments made by this Act [amending this section, sections 2204 to 2206, 2212, 2214, and 2216 of this title and provisions set out as a note under section 2201 of this title] shall be effective as if included in the American Indian Probate Reform Act of 2004 (25 U.S.C. 2201 note; Public Law 108–374)."

EFFECTIVE DATE OF 2004 AMENDMENT

Amendment by Pub. L. 108–374 applicable on and after the date that is 1 year after June 20, 2005, see section 8(b) of Pub. L. 108–374, set out as a Notice; Effective Date of 2004 Amendment note under section 2201 of this title.

§ 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) 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.

(June 18, 1934, ch. 576, §5, 48 Stat. 985; Pub. L. 100–581, title II, §214, Nov. 1, 1988, 102 Stat. 2941.)

REFERENCES IN TEXT

This Act, referred to in text, is act June 18, 1934, which is classified generally to this subchapter. For complete classification of this Act to the Code, see Short Title note set out under section 461 of this title and Tables.

Act of July 28, 1955, referred to in text, is act July 28, 1955, ch. 423, 69 Stat. 392, as amended, which is classified to sections 608 to 608c of this title. For complete classification of this Act to the Code, see Tables.

AMENDMENTS

1988—Pub. L. 100–581 inserted "or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.)" after "this Act".

PAYSON BAND, YAVAPAI-APACHE INDIAN RESERVATION

Pub. L. 92–470, Oct. 6, 1972, 86 Stat. 783, provided: "That (a) a suitable site (of not to exceed eighty-five acres) for a village for the Payson Community of Yavapai-Apache Indians shall be selected in the Tonto National Forest within Gila County, Arizona, by the leaders of the community, subject to approval by the Secretary of the Interior and the Secretary of Agriculture. The site so selected is hereby declared to be held by the United States in trust as an Indian reservation for the use and benefit of the Payson Community of Yavapai-Apache Indians.

"(b) The Payson Community of Yavapai-Apache Indians shall be recognized as a tribe of Indians within the purview of the Act of June 18, 1934, as amended (25 U.S.C. 461–479, relating to the protection of Indians and conservation of resources), and shall be subject to all of the provisions thereof."

ROCKY BOY'S INDIAN RESERVATION

Pub. L. 85–773, Aug. 27, 1958, 72 Stat. 931, provided: "That the land acquired by the United States pursuant to section 5 of the Act of June 18, 1934 (48 Stat. 984) [this section], title to which was conveyed to the United States of America in trust for the Chippewa, Cree, and other Indians of Montana, and thereafter added to the Rocky Boy's Indian Reservation, Montana, by proclamation signed by the Assistant Secretary of the Interior on November 26, 1947, is hereby designated for the exclusive use of the members of the Chippewa Cree Tribe of the Rocky Boy's Reservation, Montana."

SEMINOLE INDIAN RESERVATION

Act July 20, 1956, ch. 645, 70 Stat. 581, provided: "That the equitable title to the lands and interests in lands together with the improvements thereon, acquired by the United States under authority of title II of the National Industrial Recovery Act, approved June 16, 1933 (48 Stat. 200), the Emergency Relief Appropriation Act of 1935, approved April 8, 1935 (49 Stat. 115), and section 55 of the Act entitled 'An Act to amend the Agricultural Adjustment Act, and for other purposes', approved August 24, 1935 (49 Stat. 750, 781), administrative jurisdiction over which was transferred from the Secretary of Agriculture to the Secretary of the Interior by Executive Order Numbered 7868, dated April 15, 1938, for the use of the Seminole Tribe, is hereby conveyed to the Seminole Tribe of Indians in the State of Florida, and such lands and interests are hereby declared to be held by the United States in trust for the Seminole Tribe of Indians in the State of Florida in the same manner and to the same extent as other land held in trust for such tribe.

"SEC. 2. The lands declared to be held in trust for the Seminole Tribe of Indians in the State of Florida under the first section of this Act and all lands which have been acquired by the United States for the Seminole Tribe of Indians in the State of Florida under authority of the Act entitled 'An Act to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes' approved June 18, 1934 (48 Stat. 984) [sections 461, 462, 463, 464, 465, 466 to 470, 471, 472, 473, 474, 475, 476 to 478 and 479 of this title], are hereby declared to be a reservation for the use and benefit of such Seminole Tribe in Florida.

"SEC. 3. Nothing in this Act shall deprive any Indian of any individual right, ownership, right of possession, or contract right he may have in any land or interest in land referred to in this Act."

§ 465a. Receipt and purchase in trust by United States of land for Klamath Tribe Indians

The Secretary of the Interior is authorized to receive on behalf of the United States from individual members of the Klamath Tribe of Indians voluntarily executed deeds to such lands as said Indians may own in fee simple free from all encumbrances, said lands to be held in trust by the United States for said Indians and their heirs; and, whenever restricted funds are used for the purchase of lands for individual members of the Klamath Tribe of Indians, the Secretary of the Interior is authorized, in his discretion, to take title to said lands in the United States, the same to be held in trust for said individual Indians: *Provided, however*, That while any of the foregoing lands are held in trust by the United States for said Indians, the same shall be subject to the same restrictions, immunities, and exemptions as homesteads purchased out of trust or restricted funds of individual Indians pursuant to section 412a of this title, except the restrictions, immunities, or exemptions of the second proviso of said section.

(Feb. 24, 1942, ch. 113, § 1, 56 Stat. 121.)

§ 465b. "Klamath Tribe of Indians" defined

As used in this section and section 465a of this title the term "Klamath Tribe of Indians" includes the Klamath and Modoc Tribes, and the Yahooskin Band of Snake Indians.

(Feb. 24, 1942, ch. 113, § 2, 56 Stat. 121.)

§ 466. Indian forestry units; rules and regulations

The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

(June 18, 1934, ch. 576, § 6, 48 Stat. 986.)

§ 467. New Indian reservations

The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided*, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

(June 18, 1934, ch. 576, § 7, 48 Stat. 986.)

REFERENCES IN TEXT

This Act, referred to in text, is act June 18, 1934, which is classified generally to this subchapter. For complete classification of this Act to the Code, see Short Title note set out under section 461 of this title and Tables.

§ 468. Allotments or holdings outside of reservations

Nothing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter.

(June 18, 1934, ch. 576, § 8, 48 Stat. 986.)

REFERENCES IN TEXT

This Act, referred to in text, is act June 18, 1934, which is classified generally to this subchapter. For complete classification of this Act to the Code, see Short Title note set out under section 461 of this title and Tables.

§ 469. Indian corporations; appropriation for organizing

There is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, such sums as may be necessary, but not to exceed $250,000 in any fiscal year, to be expended at the order of the Secretary of the Interior, in defraying the expenses of organizing Indian chartered corporations or other organizations created under this Act.

(June 18, 1934, ch. 576, § 9, 48 Stat. 986.)

REFERENCES IN TEXT

This Act, referred to in text, is act June 18, 1934, which is classified generally to this subchapter. For complete classification of this Act to the Code, see Short Title note set out under section 461 of this title and Tables.

§ 470. Revolving fund; appropriation for loans

There is authorized to be appropriated, out of any funds in the Treasury not otherwise appro-