No. _____

# In The Supreme Court of the United States

SEMINOLE TRIBE OF FLORIDA, PETITIONER,

*v.*

MARSHALL STRANBURG, INTERIM EXECUTIVE DIRECTOR AND DEPUTY EXECUTIVE DIRECTOR.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Florida imposes a tax on gross receipts from utility services that are delivered to retail customers. Under express statutory authority, utility providers may separately itemize this utility tax on a customer's bill and add it to the total charge for utility services. If the utility provider does so, the customer is legally required to remit the tax to the utility provider, which then transfers the payment to the State. Here, petitioner is a federally recognized Indian tribe that has purchased utility services delivered to tribal reservations. Petitioner's utility providers have exercised their statutory right to separately itemize the utility tax when billing the Tribe for such services.

The question presented is:

When a utility provider exercises a state-law right to expressly pass on a utility tax to a federally recognized Indian tribe for utility services delivered to the tribe's reservations and the tribe is therefore legally obligated to pay the tax, is the tax an impermissible direct tax on the tribe?

## PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

The parties to the proceeding are listed in the caption.

Petitioner Seminole Tribe of Florida is a federally recognized American Indian tribe. It is not a corporation; it does not issue any stock; and it has no parent corporation.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Seminole Tribe of Florida ("Tribe") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-68a) is reported at 799 F.3d 1324. The opinion of the district court (App., *infra*, 69a-96a) is reported at 49 F. Supp. 3d 1095.

## JURISDICTION

The court of appeals entered judgment on August 26, 2015. Petitioner's timely petition for rehearing was denied on October 27, 2015 (App., *infra*, 97a-100a). On January 11, 2016, Justice Thomas extended the time for the Tribe to file a petition for a writ of certiorari to and including March 25, 2016. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

Fla. Stat. §§ 203.01, 203.0111, 203.012, 203.02, 203.03, 203.04, 203.06, 203.07 and Fla. Admin Code r. 12B-6.0015 and 12B-6.005 are set forth in an appendix to the petition. App., *infra*, 101a-133a.

## INTRODUCTION

This case concerns Florida's attempt to tax utility services sold and delivered to the Tribe on its reservations. "The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes * * *, and in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985). Indeed, unless Congress has permitted it, a State is categorically "without power to tax reservation lands and reservation Indians." *Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 258 (1992). In applying this rule, the key question is where the legal incidence of the tax lies: a state tax is "unenforceable" if its "legal incidence rest[s] on a tribe or on tribal members inside Indian country." *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995).

At issue here is a Florida tax on utility companies' gross receipts from utility services delivered to retail consumers. *See* Fla. Stat. § 203.01 ("Utility Tax"). Florida law expressly authorizes utility companies to itemize the Utility Tax on their customers' bills, as a line item separate from the charges for the utility services. When the company does so, the customers become legally obligated to remit the tax to the company, which in turn transmits that payment to the State.

Virtually every utility provider in Florida exercises its right to espressly pass the tax along to customers. Indeed, a state tax official testified that he knows of no utility provider that does *not* separately charge the Utility Tax on its customers' bills. The Tribe's utility providers are no different; they have always passed the Utility Tax on to the Tribe, making the Tribe legally obligated to pay it.

The district court agreed with the Tribe that the legal incidence of the Utility Tax rests on the Tribe, and that the tax is therefore unenforceable as to the Tribe. But the court of appeals reversed, holding that even when a utility company passes along the tax in a separate line item on the Tribe's bill, the legal incidence of the tax remains with the utility—on the ground that the utility company was not *required* to pass the tax through.

In so ruling, the Eleventh Circuit deepened a conflict in the courts of appeals over the effect of a permissive, rather than mandatory, pass-through provision on the legality of a state tax as applied to Indian tribes. The Tenth and now the Eleventh Circuits hold that where the taxing scheme does not require a seller to pass a tax along to a purchaser, the legal incidence of the tax necessarily remains with the seller. The Sixth and Ninth Circuits, by contrast, have held that the legal incidence of a tax can fall on a purchaser despite the absence of a mandatory pass-through provision. This Court's intervention is needed to resolve the disagreement among the circuits.

The Eleventh Circuit's decision is also contrary to this Court's precedents. This Court has expressly rejected the notion that an explicit statutory pass-through provision is required to find that the legal incidence of a tax falls on the consumer. Under this Court's decisions, while the *presence* of a mandatory pass-through provision may be dispositive, the *absence* of such a provision is not. In the absence of a mandatory pass-through requirement, a tax's legal incidence rests on the consumer if the entire tax scheme indicates that the state legislature intended the consumer to pay the tax.

Here, several elements of the statutory scheme demonstrate that the Florida legislature intended consumers to pay the Utility Tax. Most significantly, when a utility provider passes the Utility Tax on to its customer, the customer becomes legally obligated to pay the tax, and the provider acts only as a transmittal agent for that payment.

The question presented here is important to Indian tribes, States, and the federal government. By permitting state taxation of activities on Indian reservations, the court of appeals' ruling undermines tribes' core sovereign interests. The decision may also threaten the sovereign and fiscal interests of the United States because the same "legal incidence" inquiry at issue here also determines whether a state tax can apply to activities occurring on federal land. Indeed, the court of appeals' decision provides a road-map for States wishing to extend taxes to Indian reservations and federal facilities: structure the tax

in a way that makes it virtually inevitable that a tribal or federal customer will be legally obligated to pay it pursuant to a pass-through, without making that pass-through formally mandatory. This Court should grant the petition and reverse.

## STATEMENT

### A. Statutory Background

Florida imposes a 2.5% Utility Tax "on gross receipts from utility services that are delivered to a retail consumer in this state." Fla. Stat. § 203.01(1)(a)1, (b)1. A "[u]tility service" is defined as "electricity for light, heat, or power; and natural or manufactured gas for light, heat, or power, including transportation, delivery, transmission, and distribution of the electricity or natural or manufactured gas." *Id.* § 203.012(3).

While the Utility Tax states that it taxes "the privilege of conducting" the business of providing utility services, *id.* § 203.01(5), it is levied only on particular sales by utility companies: sales to "retail consumer[s]," *id.* § 203.01(1)(a)1, (c)1. The tax therefore does not apply to wholesale sales to other utilities. *Id.* § 203.01(3)(a)-(c).

Florida law expressly authorizes a utility company to pass the Utility Tax on to its customers, who then become liable for it. Specifically, the law provides that "at the option of the person supplying the taxable services," *i.e.*, the utility company, the tax "may be separately stated as Florida gross receipts

tax on the total amount of any bill * * * and may be added as a component part of the total charge." *Id.* § 203.01(4). If the utility company elects to separately state the Utility Tax on the retail consumer's bill, the retail consumer "shall remit the tax to the person who provides such taxable services as a part of the total bill." *Ibid.* The tax becomes "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." *Ibid.*

Florida exempts some sales of utility services, depending on how the retail consumer uses them. For example, Florida does not impose the Utility Tax on natural-gas sales to certain industrial customers that use the gas "as an energy source or a raw material." *Id.* § 203.01(3)(d). The statute treats those retail customers as the entities exempt from the tax: when such a customer provides the utility with a written certification "certifying the purchaser's entitlement to the exclusion permitted by this paragraph," the utility provider is relieved "from the responsibility of remitting tax on the nontaxable amounts." *Ibid.* If it later turns out "that the purchaser was not entitled to the exclusion," the Department of Revenue "shall look solely to the purchaser," *i.e.*, not to the utility, "for recovery of such tax." *Ibid.*

## B. Factual Background

The Seminole Tribe of Florida is a federally recognized Indian tribe with reservations throughout Florida. App., *infra*, 2a. The Tribe uses utility services in connection with substantially all of the Tribe's activities on Indian Land. C.A. Supp. App., Tab 58, Ex. A at 4. The Tribe's utility providers always pass through the Utility Tax to the Tribe, as the retail consumer, on all the utility services the Tribe purchases. *Ibid.*; App., *infra*, 5a. Accordingly, the Tribe alone pays the Utility Tax on the utility services delivered on its reservations. C.A. Supp. App., Tab 58, Ex. A at 4.

The Tribe applied to the Florida Department of Revenue for a refund of the $181,209 in Utility Tax it paid from August 1, 2008, to July 31, 2011. App., *infra*, 5a; C.A. App., D.E. 1 at 7. The Department denied the Tribe's request. App., *infra*, 5a. The Tribe continues to pay the Utility Tax on all utility services provided to the Tribe on Indian Land. C.A. Supp. App., Tab 58, Ex. A at 4.

## C. Proceedings Below

### *1. Proceedings before the district court*

After the Tribe's refund request was denied, the Tribe sued respondent, the Executive Director of the Florida Department of Revenue, in the United States

District Court for the Southern District of Florida.[1] The Tribe sought a declaration that the tax could not be lawfully applied to it and an injunction against collection of the tax. App., *infra*, 5a-6a.[2]

The district court granted summary judgment to the Tribe. The court noted that a "state may not directly tax an Indian Tribe on an Indian reservation unless a federal statute expressly permits the tax." App., *infra*, 83a-84a (citing *Chickasaw Nation*, 515 U.S. at 458). Accordingly, "'[i]f the legal incidence of an excise tax rests on a tribe * * * for sales made inside Indian country, the tax cannot be enforced.'" App., *infra*, 84a (quoting *Chickasaw Nation*, 515 U.S. at 459); *see ibid.* (noting that the Utility Tax is an excise tax). The court thus explained that "the dispositive question on this issue is whether the legal incidence of Florida's Utility Tax falls upon the Seminole Tribe or upon the utility company." *Ibid.* Because Florida law does not expressly state who bears the legal incidence of the tax, the district court explained that it "must make a 'fair interpretation of the taxing statute as written and applied.'" App.,

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[1] The Tribe also sued the State of Florida, but the district court dismissed the claims against the State on Eleventh Amendment immunity grounds.

[2] In addition, the Tribe challenged a separate tax on the Tribe's leases on tribal land. The district court granted summary judgment for the Tribe on that claim (App., *infra*, 71a-83a), and the court of appeals affirmed (App., *infra*, 8a-43a). That portion of the court of appeals' judgment is not at issue here.

*infra*, 86a (quoting *Chickasaw Nation*, 515 U.S. at 461).

Applying this test, the district court held that the legal incidence of the Utility Tax "falls upon the consumer," *i.e.*, the Tribe, and "not the utility company." *Ibid*. The court observed that when the Utility Tax is separately stated on the retail consumer's bill, the consumer "is required to 'remit the tax' to the utility company," and the "utility company then pays the taxes to the Florida Department of Revenue." *Ibid.* (quoting Fla. Stat. § 203.01(4)).

The district court rejected respondent's argument "that the utility company is ultimately 'fully and completely liable for the tax,' and thus the legal incidence falls upon the utility company." App., *infra*, 87a (citation omitted). The court explained that if the utility provider has itemized the tax on the consumer's bill, then "in reality, the utility company is only liable for the tax if and when the consumer remits the tax to the utility company as a part of the consumer's utility bill." *Ibid.*

In support of that conclusion, the district court cited the deposition testimony of Peter Steffens, the head of the Florida Department of Revenue's field-audit program. App., *infra*, 91a. Steffens explained that because the tax applies only to amounts actually paid, no tax is owed if a customer does not pay its bill. D. Ct. ECF No. 63-1 at 44. And if a customer pays only part of its bill, the payment is allocated proportionally as (1) a partial payment of the utility services

and (2) the Utility Tax owed on that partial payment. *Id.* at 30-31, 38-44; *see id*. at 39 ("The statute presumes that every dollar they collect contains two-and-a-half cents of gross receipts tax[.]"); *see* App., *infra*, 91a. He thus confirmed that a utility provider could never be responsible for paying any part of the Utility Tax that the customer does not remit to the utility company. D. Ct. ECF No. 63-1 at 38.

Accordingly, the district court concluded that "[i]f the consumer does not remit the tax to the utility company, then the utility company is not required to pay the tax over to the State." App., *infra*, 86a. Thus, "the utility company is no more than a transmittal agent for the tax imposed on the consumer." App., *infra*, 87a.

The court cited several other features of Florida law in support of its conclusion that the legal incidence of the Utility Tax falls on customers. *See, e.g.*, App., *infra*, 87a-88a (exemptions "based on the identity of the consumer"); App., *infra*, 89a (application only to consumer sales, not sales to other utility companies).

The district court thus concluded that "the fairest reading of Florida's utility-tax scheme as a whole is that the legal incidence of the tax falls upon the consumer" and that the tax is therefore "an impermissible direct tax upon the Seminole Tribe on its reservation." App., *infra*, 95a. The court accordingly awarded the Tribe a declaratory judgment that utility services provided to the Tribe on its reservation are

not subject to the Utility Tax and enjoined respondent from imposing or collecting the tax on those services. D. Ct. ECF No. 85.

### *2. Proceedings before the court of appeals*

The Eleventh Circuit reversed the district court's judgment with respect to the Utility Tax. *See* App., *infra*, 48a-67a. The court of appeals, like the district court, focused its analysis on whether Florida law places the "legal incidence" of its Utility Tax on the utility provider or the retail consumer. App., *infra*, 48a-49a. The court stated that "both parties' positions" on legal incidence "have some merit" and acknowledged that the Utility Tax "does bear some hallmarks" of state taxes that this Court has barred. App., *infra*, 49a, 64a. But the court of appeals nonetheless concluded that "the legal incidence of the tax falls on the non-Indian utility company." App., *infra*, 48a-49a.

The court of appeals read this Court's decision in *Chickasaw Nation* as holding that the legal incidence of a tax does not rest on the consumer unless the seller is *required* to pass on the tax to the consumer: "To shift the legal incidence to a consumer, *Chickasaw Nation* insists that any pass-through be mandatory." App., *infra*, 58a. In ruling that the legal incidence of the Utility Tax is on the utility provider, the court therefore repeatedly emphasized that although utility providers *may* pass on the Utility Tax to consumers as a separate charge on their bills, utility providers are not *required* to do so. The court reasoned: "Although an itemized amount of the Utility

Tax becomes a component of the consumer's bill that is, in a sense, transmitted by the utility to the state once collected, it is key in our view that nothing about this section *requires* a utility provider ever to itemize the tax." App., *infra*, 54a. In the court of appeals' view, the absence of such a requirement was fatal to the Tribe's challenge: "there is no *requirement* from the legislature to pass the tax through to the consumer, and it is the *requirement* that matters." *Ibid.*; *see also* App., *infra*, 60a ("But *Chickasaw Nation* insists on mandatory legal requirements over economic realities, no matter how 'automatic' those realities may be."); App., *infra*, 61a ("But it must be a *requirement* nonetheless."); *ibid.* ("[A]t the end of the day, there is simply nothing in the Florida scheme requiring a utility to pass the tax along to its customers.").

The court of appeals discounted reliance on the fact that certain natural-gas consumers can claim a consumer-based exemption from the Utility Tax, as well as the fact that if such a consumer's claimed exemption is improper, the Department of Revenue can collect the tax only from the consumer, not the utility provider. App., *infra*, 57a-58a. The court disagreed with the "notion that consumer-based exemptions illustrate that the legislature implicitly intended the tax to fall on consumers because the exemptions necessarily recognize that the tax can be passed through to consumers." App., *infra*, 58a. Instead, the court reasoned, "recognition that a tax may, or even likely will be passed through to a

consumer is not the same as *mandating* that the tax be passed through." *Ibid.*[3]

## REASONS THE PETITION SHOULD BE GRANTED

The court of appeals' decision permits Florida to tax activities on a federally recognized Indian tribe's reservations. That represents a grave encroachment on tribal sovereignty. The court reached that result by adopting and applying a bright-line rule that the legal incidence of the tax falls on the non-tribal utility company, rather than the Tribe, because the statute does not *require* the company to pass the tax on to its customers. Both this Court's decisions and those from other courts of appeals squarely reject that rule. Where, as here, (1) a utility company is expressly authorized to pass through to customers a tax on receipts from retail sales, (2) it actually does so by including a separate line-item on the customers' bills, and (3) the customer then becomes legally obligated to pay it, the legal incidence of that tax falls on customers. Here, the customer in question is a sovereign

[3] The court of appeals also held that, on the present record, the Utility Tax is not categorically preempted by federal law under the balancing approach of *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). App., *infra*, 65a-66a. The court held that the *Bracker* analysis requires a particularized inquiry into the "specific" tribal "activit[ies]" involved, and it remanded to the district court for such an inquiry. App., *infra*, 66a-67a & n.22. The district court has granted the parties' joint request for a stay of proceedings pending this Court's consideration of this petition for a writ of certiorari. D. Ct. ECF No. 100.

Indian tribe, so the tax cannot lawfully be applied. This Court's review is warranted.

### A. The Circuits Are Divided Over How To Determine The Legal Incidence Of A Tax When The Taxing Scheme Contains A Permissive Pass-Through Provision

The Eleventh Circuit's decision in this case deepens a divide among the courts of appeals concerning how to determine the legal incidence of a state tax. That is the "initial and frequently dispositive question" in determining whether a tax is valid as applied to Indian tribes (or federal facilities). *Chickasaw Nation*, 515 U.S. at 458; *see United States v. Cty. of Fresno*, 429 U.S. 452, 459 (1977). Yet "identifying whether the tribe or a tribal member bears the tax's legal incidence" has proven to be the "most nettlesome element" of the analysis into the permissibility of a state tax on on-reservation tribal activity. Conference of Western Attorneys General, American Indian Law Deskbook § 11:3 (2015). That is problematic because, as this Court has recognized, there is a "need for substantial certainty as to the permissible scope of state taxation authority" vis-à-vis Indian tribes. *Chickasaw Nation*, 515 U.S. at 460 (internal quotation marks and citation omitted).

As particularly relevant here, the circuits are divided on where the legal incidence of a tax falls when the seller must remit the tax to the taxing authority but the seller is permitted, although not required, to add the tax as an item to the customer's bill. This question of a tax's legal incidence has

arisen in several scenarios. An Indian tribe may be the seller of a product, the sale of which is taxed, and the tribe may challenge the tax on the ground that the state is unlawfully taxing its on-reservation sales. Alternatively, as here, the Indian tribe may be the consumer in a transaction occurring on a reservation, and the tribe may assert that it cannot be taxed in connection with that sale. Likewise, the federal government may be the consumer, asserting that a tax on the government's purchase is an unlawful state tax on the federal government. In all of those scenarios, the question is the same. Courts must decide whether the "legal incidence" of the tax falls on the seller or the purchaser in order to decide whether it can lawfully be applied. *Id.* at 458-59; *Fresno*, 429 U.S. at 459 & n.7 (collecting cases).

As explained below, the circuits have taken different approaches to answering that question when the taxing scheme contains a permissive pass-through provision allowing the seller to add the tax to the customer's bill. On one side of the divide, the Sixth and Ninth Circuits have (correctly) held that where the pass-through is permissive rather than mandatory, the legal incidence of an excise tax may still fall on the consumer due to the tax scheme's other features. By contrast, the Eleventh Circuit in this case joined the Tenth Circuit in (erroneously) holding that the permissive nature of a pass-through provision automatically means that the legal incidence of the excise tax remains with the seller.

### *1. The Sixth and Ninth Circuits have held that the legal incidence of a tax falls on the consumer despite a permissive pass-through provision*

a. In *Keweenaw Bay Indian Community v. Rising*, the Sixth Circuit held that the legal incidence of Michigan's excise tax on the sale of tobacco products fell on the retail consumer even though the statute expressly allowed, but did not require, the retailer to pass the tax on to the consumer. 477 F.3d 881, 886-90 (6th Cir. 2007). In that case, the Keweenaw Bay Community was the retailer, and it challenged the application of the tax to the Community's on-reservation sales to non-tribal members, arguing that the legal incidence of the tax fell on the Community retailers. *Id.* at 886-87. The statute required the retailer to initially pay the tax to obtain tobacco products for sale, but it allowed the retailer the option of passing the tax on to the consumer. *Id.* at 887. Specifically, the statute provided that "[a] person liable for the tax may reimburse itself by adding to the price of the tobacco products an amount equal to the tax levied under this act." *Ibid.* (alteration in original) (quoting Mich. Comp. Laws §§ 205.427, 205.427a).

The Community argued that the incidence of the tax fell on the retailer because of, *inter alia*, "the permissive, rather than mandatory pass-through provision." *Id.* at 889. The Sixth Circuit rejected that contention, concluding that "[a]lthough a mandatory pass-through provision strongly supports finding that

the legal incidence falls on the consumer," such a provision "is not an absolute prerequisite." *Ibid.*; *see id.* at 887, 889 (observing that this Court "has found legal incidences to be on consumers under statutes without mandatory pass-through provisions" and that the Sixth Circuit was unaware of any case where a court concluded that "a permissive pass-through suggests the incidence lies with the retailer").

Far from concluding that the permissive pass-through provision meant that the legal incidence of the tax remained with the seller, the Sixth Circuit instead found that the presence of that provision supported the conclusion that the legal incidence fell on the consumer. *Id.* at 889. "The critical inquiry," the court noted, "is whether the retailer is *encouraged* to pass on the cost of the tax to non-tribal consumers—whether or not the pass-through is described by the statutory language as mandatory does not appear to be determinative of the legal incidence." *Ibid.* The court found that the statute did encourage pass-through and that the legal incidence of the tax accordingly fell on customers rather than the retailer. *Id.* at 889-90.

b. In *United States v. California State Board of Equalization*, the Ninth Circuit held that the legal incidence of a gross-receipts tax fell on consumers even though the statute contained only a permissive pass-through provision. 650 F.2d 1127, 1130-32 (9th Cir. 1981), *summarily aff'd*, 456 U.S. 901 (1982). The tax at issue—which applied to, among other things, equipment leases—was nominally "imposed upon all

retailers" and lessors "[f]or the privilege of selling" or leasing "tangible personal property." *Id.* at 1130 n.4 (quoting Cal. Rev. & Tax. Code § 6051 (West Supp. 1980)); *see id.* at 1128 n.2. The lessor was required to remit the tax to the State, and the statute was "facially neutral" as to whether the lessor could pass the tax on to lessees, providing that the permissibility of such pass-through "depends solely upon the terms" of the lease agreement. *Id.* at 1131 (quoting Cal. Civil Code § 1656.1(a) (West Supp. 1980)).

The United States contended that California's imposition of the tax on the United States' equipment leases "infringed on the United States' constitutional immunity from state taxation because the legal incidence of the tax fell on the United States[ ]" as lessee. *Id.* at 1128; *see infra* pp. 33-34 (noting that the same legal incidence test for determining whether a state tax can be applied to Indian tribes applies for determining whether state tax can be applied to the federal government). Notwithstanding the absence of any requirement that lessors pass the tax to the United States or other lessees, the Ninth Circuit found it invalid as applied to the United States' leases. The court deemed dispositive that the tax scheme "manifests a legislative intent" that the lessee pay the tax. *Id.* at 1132. On that basis, it held the legal incidence of the tax was on the lessee. *Ibid.* The court reasoned that "[d]espite the facial neutrality" of the statute concerning whether the tax would be passed through, the statute creates a "strong

economic incentive" that "all but compels the lessor to collect the tax from the lessee." *Ibid.*

More recently, the Ninth Circuit has continued to adhere to its view that a permissive pass-through provision does not preclude the legal incidence of a tax from falling on the consumer. In *Confederated Tribes & Bands of Yakama Indian Nation v. Gregoire*, the court confirmed that the lack of a mandatory pass-through is "not outcome determinative" and concluded that the legal incidence of a cigarette tax fell on consumers "despite the absence of a statutory pass through." 658 F.3d 1078, 1087, 1089 (9th Cir. 2011).

***2. The Tenth and Eleventh Circuits have held that a permissive pass-through provision precludes the legal incidence of a tax from falling on the consumer***

a. In contrast to those courts, the Tenth Circuit takes a different approach. In *Sac & Fox Nation of Missouri v. Pierce*, that court held that the legal incidence of a motor-fuel tax fell on the wholesale fuel distributor rather than the tribe that purchased the fuel to sell it at retail, owing to the permissive nature of a statutory pass-through provision. 213 F.3d 566, 577-80 (10th Cir. 2000). The tax scheme expressly allowed fuel distributors to pass along the tax to purchasers; indeed, the court acknowledged that the law "presumes distributors will include the cost of the tax in their wholesale price to the Tribes." *Id.* at 579. But the court thought it "[s]ignificant[ ]" that

the pass-through provision "is permissive rather than mandatory." *Ibid.* In ruling that the legal incidence of the tax remained with the distributor, the court emphasized that the law "does *not* require distributors to pass the cost of the motor fuel tax to retailers; it simply permits them to do so." *Ibid.* The court explained: "Certainly, if the fuel tax law required distributors to include the amount of the fuel tax in their wholesale price, we would be justified in concluding that the legal incidence of the tax falls upon the Tribes. But the law does not require distributors to charge retailers the cost of the tax." *Id.* at 580 (citation and footnote omitted).

b. The Eleventh Circuit in the decision below deepened the conflict by adopting a categorical approach based on the permissive nature of the pass-through provision in the Utility Tax. The court began by acknowledging this Court's instruction that in the absence of a mandatory "pass through" provision "'the question is one of fair interpretation of the taxing statute as written and applied.'" App., *infra*, 51a (quoting *Chickasaw Nation*, 515 U.S. at 461). But the court then immediately proceeded to create a rule that the absence of a mandatory "pass through" provision is outcome determinative.

In determining that the legal incidence of the Utility Tax falls on the utility companies, the Eleventh Circuit repeatedly emphasized and relied upon the permissive nature of the pass-through provision. The court thought that "[t]o shift the legal incidence to a consumer, *Chickasaw Nation* insists that any

pass-through be mandatory." App., *infra*, 58a. The court explained that "it is key in our view that nothing about this section *requires* a utility provider ever to itemize the tax." App., *infra*, 54a. The court stressed that "there is no *requirement* from the legislature to pass the tax through to the consumer, and it is the *requirement* that matters." *Ibid.*; *see also* App., *infra*, 58a ("[R]ecognition that a tax may, or even likely will be passed through to a consumer is not the same as *mandating* that the tax be passed through."); App., *infra*, 60a ("But *Chickasaw Nation* insists on mandatory legal requirements over economic realities, no matter how 'automatic' those realities may be."); App., *infra*, 61a ("But it must be a *requirement* nonetheless."); *ibid.* ("[A]t the end of the day, there is simply nothing in the Florida scheme requiring a utility to pass the tax along to its customers.").

While that approach is consistent with that of the Tenth Circuit, it is irreconcilable with the approaches taken by at least the Sixth and Ninth Circuits. Only this Court can resolve these intractable differences.

### B. The Court Of Appeals Erroneously Concluded That The Legal Incidence Of The Utility Tax Is On The Utility Company Rather Than On The Tribe

The court of appeals' decision not only conflicts with those of other circuits, it is also contrary to this Court's precedents.

### *1. This Court's precedents do not require a mandatory pass-through provision for the legal incidence of a tax to fall on the consumer*

This Court has never required the presence of a mandatory pass-through provision before concluding that the legal incidence of a tax falls on the consumer. To the contrary, this Court has expressly rejected that proposition. As this Court has explained, "[n]one of our cases has suggested that an express statement that the tax is to be passed on to the ultimate purchaser is necessary" to conclude that the incidence of the tax falls on the purchaser. *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 11 (1985) (per curiam). "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." *Ibid.*; *see also Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 142 & n.9 (1980) (concluding that legal incidence of tax falls on consumer despite lack of mandatory pass-through provision).

Rather, in the absence of a mandatory pass-through requirement, the legal incidence of a tax rests on the consumer if the entire tax scheme indicates that the legislature intended the consumer to pay the tax. As this Court has explained, the question is one of "a fair interpretation of the taxing statute as written and applied, without any requirement that pass-through provisions or collection

requirements be 'explicitly stated.'" *Chemehuevi Tribe*, 474 U.S. at 11.

In concluding to the contrary, the court of appeals misconstrued this Court's precedents. For example, the court of appeals quoted this Court's observation in *Chickasaw Nation* that the tax at issue there did not "'contain a "pass through" provision, *requiring* distributors and retailers to pass on the tax's cost to consumers.'" App., *infra*, 54a (emphasis in decision below) (quoting *Chickasaw Nation*, 515 U.S. at 461). But the court of appeals disregarded the very next sentence of *Chickasaw Nation*, which made clear that while the *presence* of a mandatory pass-through provision may be "dispositive," the *absence* of such a provision is not. 515 U.S. at 461 ("In the absence of such dispositive language, the question is one of 'fair interpretation of the taxing statute as written and applied.'" (quoting *Chemehuevi Tribe*, 474 U.S. at 11)). Indeed, the Court in *Chickasaw Nation* went on to hold that the legal incidence of the motor fuels tax at issue there fell on the Indian retailers, not the non-Indian distributors, even though the distributors were not required to pass the tax through. *Id.* at 461-62. This Court's holding in *Chickasaw Nation* is therefore fundamentally irreconcilable with the court of appeals' holding in this case.

Similarly, the court of appeals quoted this Court's statement that "where 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." App., *infra*, 54a (alteration and emphasis omitted) (quoting *United States v. State Tax Comm'n of Mississippi*, 421 U.S. 599, 608 (1975)). But, again, that statement was limited to the effect of the *presence* of a mandatory pass-through provision. The court of appeals erred by holding that the *absence* of such a provision is also dispositive. Under this Court's decisions, it is not. *See, e.g.*, *Chickasaw Nation*, 515 U.S. at 461-62; *Chemehuevi Tribe*, 474 U.S. at 11.

### *2. The legal incidence of the Utility Tax falls on the Tribe*

The legal incidence of a tax rests on the party that, in light of a fair interpretation of the taxing statute as written and applied, is expected to be responsible for paying the tax. *See Chickasaw Nation*, 515 U.S. at 461-62. Here, the legal incidence of the Utility Tax plainly falls on purchasers of utility services who are legally obligated to pay the tax that is stated as a separate line item on their bills.

a. In determining which party bears the legal incidence of a tax, this Court has differentiated "legal incidence" from two other concepts, neither of which is determinative: "economic incidence" and "legal liability." The economic incidence of a tax focuses on the party who in fact ends up bearing all or part of the economic burden of the tax as a practical matter. *See id.* at 460; App., *infra*, 84a-85a. All taxes on those selling services can be expected to have some impact on the prices they charge. This Court has held, however, that such price impacts are not relevant

because a test based on them would be inadministrable. "If we were to make 'economic reality' our guide, we might be obliged to consider, for example, how completely retailers can pass along tax increases without sacrificing sales volume—a complicated matter dependent on the characteristics of the market for the relevant product." *Chickasaw Nation*, 515 U.S. at 460; *see also Washington v. United States*, 460 U.S. 536, 540 (1983); *United States v. New Mexico*, 455 U.S. 720, 734 (1982).

At the same time, the Court has declined to make dispositive the placement of legal liability for the tax. To the contrary, this Court has "squarely rejected the proposition that the legal incidence of a tax falls always upon the person legally liable for its payment." *Miss. Tax Comm'n*, 421 U.S. at 607; *see First Agric. Nat'l Bank of Berkshire Cty. v. State Tax Comm'n*, 392 U.S. 339, 347 (1968). Instead, courts must look "beyond the bare face of the taxing statute to consider all relevant circumstances." *United States v. City of Detroit*, 355 U.S. 466, 469 (1957). For example, even if a seller is legally liable for paying the tax, the legal incidence falls on the purchaser where the seller functionally acts merely as a collection and transmittal agent for the tax. *Chickasaw Nation*, 515 U.S. at 461-62.

b. Instead of looking to economic incidence or legal liability, the Court has analyzed "legal incidence," meaning "the 'who' and the 'where' of the challenged tax." *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101 (2005). Here, the statutory scheme provides every indication that the Florida

legislature intended consumers to pay the Utility Tax. At a minimum, where, as here, the utility distributor actually exercises its statutory right to pass through the tax to a consumer—making the consumer legally responsible for paying it—the legal incidence of the tax is shifted onto that consumer.

This conclusion is supported by several aspects of the statute. Most importantly, Florida law expressly allows utility companies to add the Utility Tax to their customers' utility bills and label it as such: the tax "may be separately stated as Florida gross receipts tax on the total amount of any bill * * * and may be added as a component part of the total charge." Fla. Stat. § 203.01(4). If the utility company exercises this option, the consumer becomes legally obligated to pay the full amount of the tax: the consumer "shall remit the tax to the person who provides such taxable services as a part of the total bill," and any unpaid tax is "recoverable at law." *Ibid.* When a tax appears on a consumer's bill and state law makes the consumer legally obligated to pay it, the legal incidence of that tax plainly falls on the consumer.

This conclusion is confirmed by the fact that the utility provider is not responsible for paying the Utility Tax unless and until the consumer remits the tax to the utility provider. *Cf. Chickasaw Nation*, 515 U.S. at 461 (legal incidence was on seller where seller could take a credit for tax it was unable to collect from the purchaser). If the customer does not pay its bill at all, there is no Utility Tax owed because there is no taxable gross receipt. App., *infra*, 56a; D. Ct.

ECF No. 63-1 at 44. The court of appeals appeared to believe, however, that a customer could choose to pay the utility services portion of a utility bill but not the Utility Tax portion, thus leaving the utility company on the hook for the unpaid Utility Tax. App., *infra*, 56a n.18. But as the head of Florida's field-audit program testified, that is incorrect. If a customer pays only part of the bill, the payment is allocated proportionately as a partial payment toward the utility services and a 2.5% tax on that partial payment. D. Ct. ECF No. 63-1 at 30-31, 38-44; *see* App., *infra*, 91a; *see also* D. Ct. ECF No. 63-1 at 39 ("The statute presumes that every dollar they collect contains two-and-a-half cents of gross receipts tax[.]"). The only Utility Tax that the utility provider pays the State is the portion of the customer's payment that was allocated toward the Utility Tax. Thus, as the district court recognized, "[t]here could never be a situation where the utility company could be responsible to the State for the Utility Tax unless it collected the tax from the consumer." App., *infra*, 91a.

By contrast, in certain circumstances, the *consumer* may be directly liable for paying the tax to the State if the utility provider does not collect it. As the district court explained, the statute makes "certain consumers * * * exempt from paying the Utility Tax when purchasing natural gas." App., *infra*, 87a-88a (citing Fla. Stat. § 203.01(3)(d)). "If it turns out that the consumer was not entitled to the exemption," however, "the Department of Revenue will look to collect the tax *directly from the consumer*, not the utility company." App., *infra*, 88a (emphasis added);

*see* Fla. Stat. § 203.01(3)(d) (the Department of Revenue "shall look solely to the purchaser for recovery of such tax"). Likewise, when a consumer imports electricity or natural gas into Florida for its own use, that consumer must pay the Utility Tax directly to the State. Fla. Stat. § 203.01(1)(f).

The court of appeals gave great weight to the fact that the utility distributor is generally the party that is legally required to remit the Utility Tax to the Department of Revenue. App., *infra*, 52a-53a. Reasoning that it "points strongly toward a legislative intent to impose the tax on utility companies," the court quoted with emphasis the statutory provision that "'each provider of the taxable services remains fully and completely liable for the tax, even if the tax is separately stated as a line item or component of the total bill.'" App., *infra*, 52a-53a (emphasis omitted) (quoting Fla. Stat. § 203.01(5)). As just noted, the court of appeals' premise does not always hold, as the statute envisions consumers directly paying the tax to the State in certain circumstances.

Even putting that aside, however, the provision invoked by the court of appeals simply makes clear which party is legally responsible for remitting the tax to the State, not which party is responsible for actually paying it. On the latter point, Florida law expressly provides that customers are legally obligated to pay the Utility Tax when it appears on their bill. *See* Fla. Stat. § 203.01(4). The utility company is therefore a mere "transmittal agent for the taxes imposed on" its customers. *Chickasaw Nation*, 515

U.S. at 461-62 (international quotation marks omitted). And, as discussed above, legal liability for merely transmitting tax money to the State is not the standard. *Miss. Tax Comm'n*, 421 U.S. at 607.

Additional features of the Utility Tax support the conclusion that its legal incidence rests with customers. For example, the Utility Tax applies only to sales to retail customers and not to wholesale sales to other utilities. Fla. Stat. § 203.01(3)(a)-(c). In *Chickasaw Nation*, this Court concluded that the "inference that the tax obligation" at issue there was "legally the retailer's, not the distributor's [was] supported by the prescriptions that sales between distributors [were] exempt from taxation, but sales from a distributor to a retailer [were] subject to taxation." 515 U.S. at 461 (citations omitted). The same inference holds here.

Moreover, the Florida statute provides that the amount of Utility Tax "shall be reduced by the amount of any like tax [from another jurisdiction] lawfully imposed on and paid by the person from whom the retail consumer purchased the electricity." Fla. Stat. § 203.01(1)(d)4. The Utility Tax mandates that such "reduction in tax shall be available to the *retail consumer* as a refund" and "does not inure to the benefit of" the utility provider. *Ibid.* (emphasis added); *see id.* § 203.01(1)(e)4 (same for natural gas). If the scheme did not assume payment of the Utility Tax by consumers, there would be no basis for providing Utility Tax refunds directly to consumers.

c. In ruling that the legal incidence of the Utility Tax falls on the Tribe, the court of appeals repeatedly cited *Wagnon*, but that reliance was misplaced. App., *infra*, 54a, 60a-61a. *Wagnon* held that the legal incidence of a Kansas motor-fuel tax fell on fuel distributors, not their customers. 546 U.S. at 102-10. The tax was imposed on fuel distributors' receipt of motor fuel from their upstream suppliers. *Id.* at 99-100. Kansas law provided that distributors were "'entitled' to pass along the cost of the tax to downstream purchasers" but were "not required to do so." *Id.* at 103 (quoting Kan. Stat. Ann. § 79-3409 (2003 Cum. Supp.)).

But there are critical differences between *Wagnon* and this case. Most importantly, Kansas law expressly provided that "the incidence of [the motor fuel] tax is imposed on the distributor of the first receipt of the motor fuel"—language that this Court referred to as "dispositive." *Id.* at 102 (citations omitted, alteration in *Wagnon*). Florida's Utility Tax contains no such provision.

Additionally, as the district court here observed (App., *infra*, 90a), the motor-fuel tax in *Wagnon* was imposed well before—and even in the absence of—sale to downstream customers. The "event that generate[d] a distributor's tax liability [was] its receipt of fuel" from its upstream fuel supplier, *not* its sale of fuel to its downstream customer. *Wagnon*, 546 U.S. at 108 n.3; *see id.* at 106 ("[I]t is the distributor's off-reservation receipt of the motor fuel, and not any subsequent event, that establishes tax liability.").

Significantly, the distributor had to "pay tax on that fuel even if it [was] not subsequently delivered or sold" to an Indian tribe or any other customer. *Id.* at 108 n.3; *see id.* at 109 n.4 ("And a distributor must pay the tax even if the fuel is *never* delivered."). Here, by contrast, no tax is imposed unless and until a customer purchases and pays for utility services. Fla. Stat. § 203.01(1)(a)1. As the district court explained, "[t]he fact that the Utility Tax is not owed unless and until it is actually delivered to a consumer, supports [the] conclusion that the legal incidence of the Utility Tax is on the consumer (not the utility company)." App., *infra*, 90a.

### C. Review Is Warranted Because The Question Presented Implicates Important Tribal and Federal Sovereignty Interests

The issue presented in this case is of tremendous importance to Indian tribes because it goes directly to the core of tribes' ability to govern themselves on their own lands. The Constitution vests the federal government with exclusive authority over relations with tribes. U.S. Const. art. I, § 8, cl. 3; *see Oneida Indian Nation v. Cty. of Oneida*, 414 U.S. 661, 670 (1974). Thus, from the earliest days of this Nation, this Court has adhered to the principle that federally recognized Indian communities are sovereigns distinct from States and that, absent congressional approval, States cannot regulate the activities of tribes and tribal members on their own lands. *Worcester v. Georgia*, 31 U.S. 515, 561 (1832). As the Court explained in *The Kansas Indians*, if a tribe is

"recognized by the political department of the government as existing, then they are a 'people distinct from others,' capable of making treaties, separated from the jurisdiction of [the State], and to be governed exclusively by the government of the Union." 72 U.S. (5 Wall.) 737, 755 (1867); *see McClanahan v. State Tax Comm'n*, 411 U.S. 164, 168 (1973) ("'[T]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.'" (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945))).

The principle of tribal immunity from state taxation is a "corollary" that flows directly from the tribe's sovereignty. *Blackfeet Tribe*, 471 U.S. at 764. Thus, in *The New York Indians*, the Court characterized a State's attempt to tax Indian reservation land as "illegal" and "an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations." 72 U.S. (5 Wall.) 761, 770-71 (1867). This Court has "never wavered" from these principles. *Blackfeet Tribe*, 741 U.S. at 765.

This case, therefore, is not simply about taxation. It is about Florida's unlawful attempt to tax another sovereign's activities on that sovereign's own land. After all, "the power to tax involves the power to destroy." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). This Court's intervention is warranted to stop Florida's unlawful encroachment and to preserve the "unique trust relationship between the United States and the Indians." *Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985).

There is also a compelling need for this Court to decide the question presented because permissive pass-through provisions like the one at issue here are common features of state tax laws.[4] As noted above, courts of appeals are divided on the impact of such provisions on the legal incidence of a tax. States and tribes would benefit from guidance on whether States may tax transactions involving Indian tribes when the tax does not contain mandatory pass-through language. Only this Court can resolve the circuit split and provide that guidance.

Finally, the implications of the decision below go beyond Indian sovereignty and extend to the sovereign and fiscal interests of the federal government. The same "legal incidence" test at issue when assessing whether a state tax can apply to an Indian tribe also determines whether a State can tax a

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[4] *See, e.g.*, Ariz. Rev. Stat. Ann. § 42-5002.A.1. ("A person who imposes an added charge to cover the tax levied by this article or which is identified as being imposed to cover transaction privilege tax shall not remit less than the amount so collected to the department."); Mich. Comp. Laws § 205.73(1) ("This act does not prohibit any taxpayer from reimbursing himself or herself by adding to the sale price any tax levied by this act."); Mo. Rev. Stat. § 144.285.5 ("Amounts which a vendor charges to and receives from the purchaser in accordance with this section shall not be includable in his gross receipts if the amounts are separately charged or stated."); S.C. Code Ann. § 12-36-940 ("Each retailer may add to the sales price as a result of the five percent sales tax * * * ."); Wis. Stat. § 77.52(3) ("The taxes imposed by this section may be collected from the consumer or user.").

transaction or property involving the federal government. *See, e.g.*, *Fresno*, 429 U.S. at 459 ("States may not * * * impose taxes the legal incidence of which falls on the Federal Government."); *see also Chickasaw Nation*, 515 U.S. at 460 n.9 ("Support for focusing on legal incidence [in cases involving Indian tribes] is also indicated in cases arising in the analogous context of the Federal Government's immunity from state taxation.").

The decision below therefore has serious implications for the federal government's activities and land in the State of Florida. Under the decision below, the Florida Utility Tax could seemingly be applied, for example, to the federal government's purchase of electricity for military bases and federal buildings throughout Florida. *See, e.g.*, *United States v. Delaware*, 958 F.2d 555 (3d Cir. 1992) (involving Delaware's attempt to tax a public utility company's sale of electricity to the federal government for the Dover Air Force Base). Utility companies could simply add the Utility Tax as a line item on the government's utility bills, and (absent congressional intervention) the federal government would be legally required under Florida law to pay this state tax on federal activities. *See* Fla. Stat. § 203.01(4) (consumer's legal obligation to pay the tax applies even if the consumer is a "governmental unit[ ]"). For this reason as well, this Court's review is warranted.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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FEBRUARY 19, 2016

**APPENDIX A**

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 14-14524

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D.C. Docket No. 0:12-cv-62140-RNS

SEMINOLE TRIBE OF FLORIDA,
a Federally recognized Indian Tribe,

Plaintiff-Appellee,

versus

Marshall STRANBURG, Interim
Executive Director And Deputy
Executive Director,

Defendant-Appellant.

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

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(August 26, 2015)

Before MARTIN and ROSENBAUM, Circuit Judges, and COOGLER,* District Judge.

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* Honorable L. Scott Coogler, United States District Judge for the Northern District of Alabama, sitting by designation.

ROSENBAUM, Circuit Judge:

Benjamin Franklin said, "[I]n this world nothing can be said to be certain, except death and taxes."[1] He was almost right. As this case illustrates, even taxes are not certain when it comes to matters affecting Indian tribes. In this appeal, we consider whether Florida's Rental Tax and Florida's Utility Tax, as applied to matters occurring on Seminole Tribe lands, violate the tenets of federal Indian law. For the reasons that follow, we find that the Utility Tax as it involves activities on Tribe land does not, but the Rental Tax does.

## I. Background

### *A. Factual Background*

The Seminole Tribe of Florida ("the Tribe") is a federally recognized Indian tribe with multiple reservations in Florida, including one near the city of Hollywood and one near the city of Tampa. The Tribe operates casinos on its Hollywood and Tampa reservations.

In May 2005, the Tribe entered into 25-year leases with two non-Indian corporations—Ark Hollywood, LLC, and Ark Tampa, LLC ("the Ark Entities")—to provide food-court operations at each

[1] Letter from Benjamin Franklin to Jean-Baptiste Le Roy (Nov. 13, 1789), *in* 12 THE WORKS OF BENJAMIN FRANKLIN 160, 161 (John Bigelow, ed., Federal ed.1904) (1888).

casino. The leases required the Ark Entities to pay "to the applicable Federal, tribal and/or Florida governmental authority, any and all sales, excise, property and other taxes levied, imposed or assessed."[2] Through the Bureau of Indian Affairs ("BIA"), the Secretary of the Interior approved the leases, as required by statute.

The State of Florida taxes commercial rent payments (the "Rental Tax"). *See* Fla. Stat. § 212.031. Florida describes the Rental Tax as a tax on the "privilege [of engaging] in the business of renting, leasing, letting, or granting a license for the use of any real property" in the state. *Id.* § 212.031(1)(a). The tax is assessed against the lessee based on the total amount of rent paid. *Id.* § 212.031(1)(c), (2)(a). Under the law, the landlord collects and remits the

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[2] The text of the lease provides,

> Tenant shall pay . . . to the applicable Federal, tribal and/or Florida governmental authority, any and all sales, excise, property and other taxes levied, imposed or assessed with respect to (i) the occupancy by Tenant of space on Reservation Land, (ii) the operation of Tenant's business, (iii) Tenant's inventory, furniture, trade fixtures, apparatus, equipment, and all leasehold improvements installed by Tenant or by Landlord on behalf of Tenant (except to the extent such leasehold improvements shall be covered by Taxes referred to in Section 6.1) and any other property of Tenant, and/or (iv) utility services provided to Tenant at the Premises (except those provided by Landlord), including, without limitation, [Broward County/Hillsborough County] taxes on electricity, gas, water and telecommunication services.

tax to the state and is liable to pay the tax and incur penalties if it fails to perform these duties. *Id.* § 212.031(3); *see id.* § 212.07(2), (3). The tax itself constitutes a lien on the personal property of the lessee, and not, apparently, the land or property of the lessor. *Id.* § 212.031(4).

Florida also imposes a tax "on gross receipts from utility services that are delivered to a retail consumer" in Florida ("the Utility Tax"). *See* Fla. Stat. § 203.01(1)(a)(1) (2012).[3] The statute permits a utility provider, at its discretion, to separately state this Utility Tax as a line item on the customer's bill but does not require it to do so. *See id.* § 203.01(4). If the provider does separately state the tax on the bill, the statute requires the consumer to remit the tax to the service provider and states that the tax becomes part of the debt owed to (and recoverable by) the service provider. *Id.* The statute clarifies, though, that the "tax is imposed upon every person for the privilege of conducting a utility or communications services business, and each provider of the taxable services remains fully and completely liable for the tax, even if the tax is separately stated as a line item or component of the total bill." *Id.* § 203.01(5).

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[3] A new version of the utility tax statute took effect on July 1, 2014, with minor changes in language that are not relevant to this lawsuit. Act of May 12, 2014, ch. 38, sec. 4, 2014 Fla. Laws 4-9. We cite language from the version that was in effect at the time the Tribe filed its lawsuit in October 2012.

Similarly, Florida's administrative regulations specify that even when stated on the consumer's bill, the "tax is imposed on the privilege of doing business, and it is an item of cost to the distribution company," who "remains fully and completely liable for the payment of the tax, even when the tax is wholly or partially separately itemized on the customer's bill." Fla. Admin. Code R. 12B-6.0015(3)(a). A service provider may, however, claim a credit or refund for net uncollected billings when it prepays the tax to the state based on gross billings, as opposed to actual gross receipts. Fla. Admin. Code R. 12B-6.005(1)(e). A service provider who fails to remit the tax to the state is also guilty of a misdemeanor. Fla. Stat. § 203.01(6).

Florida assessed the Rental Tax against the Ark Entities for the period of July 2005 through June 2008. The Tribe has paid the Utility Tax stated as a component of its utility bill. Although the Tribe applied to the Florida Department of Revenue for a refund of the amount of the Utility Tax it paid beginning in 2008 through July 2011, it was denied a refund. The Ark Entities also applied for a refund of the Rental Tax, which was denied.

### *B. Procedural History*

Following these denials, on October 30, 2012, the Tribe filed a federal complaint against the State of Florida and Marshall Stranburg, the interim Executive

Director of the Florida Department of Revenue,[4] seeking declaratory and injunctive relief. Within the next few days, the Ark Entities filed suits in the Florida state courts contesting the denials of their refunds. Both state cases were still pending at the time this appeal was filed, although the case related to the Hollywood casino was apparently stayed pending the disposition of the federal case.

Stranburg sought dismissal of the Tribe's federal complaint on multiple grounds, including "the abstention doctrine and the principles of exhaustion and comity." The United States District Court for the Southern District of Florida rejected the abstention argument, noting that "this case involves a different plaintiff, seeking prospective injunctive relief and declaratory relief unrelated to Ark Hollywood's and Ark Tampa's requested refund. This Court will not shirk its obligation to adjudicate this matter, when it so clearly has jurisdiction over the issues presented." Stranburg did not raise the comity or abstention issue again in the district court.[5]

After conducting limited discovery, the parties cross-moved for summary judgment. The district court granted summary judgment in favor of the Tribe on all of its claims. With respect to the Rental

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[4] Stranburg was appointed the Executive Director of the agency on April 23, 2013.

[5] The district court dismissed the State of Florida as a defendant based on Eleventh Amendment immunity grounds.

Tax, the court concluded that 25 U.S.C. § 465 expressly prohibits the Rental Tax because the Rental Tax is a tax on Indian land rights. *See Seminole Tribe of Fla. v. Florida*, 49 F. Supp. 3d 1095, 1097-98 (S.D. Fla. 2014). The district court also held in the alternative that if the statute did not expressly prohibit the Rental Tax, the tax was nonetheless preempted by federal law and impermissibly interfered with tribal sovereignty. *Id.* at 1098-102. In reaching this holding, the district court gave deference, short of full *Chevron* deference, to BIA regulations that prohibit taxes on leases of Indian land. *See id.* at 1099-100.

As for the Utility Tax, the district court similarly found it to be impermissible. In particular, the court reasoned that the legal incidence of the Utility Tax fell on the Tribe, not on the utility company, and federal law generally prohibits taxing Indians for on-reservation activities. *See id.* at 1103-08.

Stranburg now appeals the district court's rulings. With respect to the Rental Tax, Stranburg contends that the district court erred both in finding a statutory prohibition of the tax and federal preemption of the tax. Stranburg also revives his comity argument, asserting that the district court should never have adjudicated the Rental Tax claim while the Ark Entities' state-court cases were pending.

Stranburg further contends that the district court erred in determining the legal incidence of the Utility Tax to be on the Tribe rather than on the utility company. Because, in Stranburg's view, the tax

falls on the utility company, he argues that the district court should have conducted a preemption inquiry. With the benefit of the parties' briefs and oral argument, we now affirm in part and reverse in part.

## II. Standards of Review

We review a district court's grant of summary judgment *de novo*, considering all the evidence and viewing facts in the light most favorable to the nonmoving party. *Morales v. Zenith Ins. Co.*, 714 F.3d 1220, 1226 (11th Cir. 2013). Summary judgment is appropriate only when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* A court should grant summary judgment against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986).

We review a district court's ruling on abstention for an abuse of discretion. *Ambrosia Coal & Constr. Co. v. Pagés Morales*, 368 F.3d 1320, 1332 (11th Cir. 2004). A district court abuses its discretion if it misapplies the law or makes findings of fact that are clearly erroneous. *Id.* (citations omitted).

## III. Florida's Rental Tax

Stranburg contends on appeal that the district court erred in finding the Ark Entities statutorily

exempt from Florida's Rental Tax, in its alternative holding that federal law preempts the Rental Tax, and in its failure to dismiss the Tribe's challenge on comity grounds. After carefully considering this issue of first impression in our Circuit, we conclude that the district court correctly interpreted 25 U.S.C. § 465 to preclude Florida from collecting its Rental Tax on the rent payments made by non-Indian lessees of protected Indian reservation land. Although Stranburg's arguments are not without some appeal, we nonetheless find that the Tribe's interpretation best comports with the statutory text and purpose, the relevant Supreme Court case law, and the general canon that statutes be construed in Indians' favor. Accordingly, we affirm the district court on this basis.

We further hold that, even if the statutory exemption did not apply, federal law preempts the Rental Tax in this case under the balancing inquiry outlined in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S. Ct. 2578 (1980). While we respectfully disagree with the district court's application of the *Bracker* inquiry because it relied on a conclusion of preemption promulgated by the Secretary of the Interior instead of conducting its own particularized inquiry, we nonetheless affirm the ultimate preemption holding based on a *de novo* *Bracker* analysis of the record before us.

*A. Statutory Exemption*

The district court concluded that 25 U.S.C. § 465 barred Florida from assessing its Rental Tax against the non-Indian lessees of the Tribe's reservation land. The district court, as does the Tribe on appeal, relied heavily on the Supreme Court's decision in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S. Ct. 1267 (1973), for the proposition that § 465 prohibits taxes on land rights that are so connected to the land that the tax amounts to a tax on the land itself. We agree with the district court's analysis.

The Indian Reorganization Act of 1934 was passed by Congress with the intent of "rehabilitat[ing] the Indian's economic life and [giving] him a chance to develop the initiative destroyed by a century of oppression and paternalism," through, among other things, giving tribes greater control over their affairs and property. *See Mescalero*, 411 U.S. at 152, 93 S. Ct. at 1272 (citations and internal quotation marks omitted). Section 5 of the Act, codified at 25 U.S.C. § 465, has been described as the "capstone" of the Indian Reorganization Act's land provisions, provisions that were designed to improve Indians' economic standing through the use of land acquired by the Secretary of the Interior "with at least one eye directed toward how tribes will use those lands to support economic development." *See, e.g.*, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2211 (2012). Accordingly, Section 5 of the Act authorizes the Secretary "to acquire . . . any interest in lands, water rights, or

surface rights to lands . . . for the purpose of providing land for Indians." 25 U.S.C. § 465. The statute provides that title to the land or rights acquired will be taken by the United States in trust for the Indian tribe and that "such lands or rights shall be exempt from State and local taxation."[6] *Id.* The Supreme Court has held that, "[o]n its face, the statute exempts land and rights in land" from state taxation. *Mescalero*, 411 U.S. at 155, 93 S. Ct. at 1274.

In *Mescalero*, the Indian plaintiffs operated a ski resort on off-reservation land in New Mexico that was developed under the 1934 Act.[7] *Id.* at 146, 93 S. Ct. at 1269. New Mexico sought to levy two taxes related to the ski resort: a gross-receipts tax from the sale of services and tangible property at the resort and a use tax based on the purchase price of materials used to construct two ski lifts at the resort. *Id.* at 147, 93 S. Ct. at 1269-70. The Supreme Court first rejected a blanket characterization of the resort as a "federal instrumentality" that would be exempt from all state taxation, *id.* at 150-55, 93 S. Ct. at 1271-74, and then considered the language from § 465.

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[6] Stranburg does not appear to contest that the Tribe's Hollywood and Tampa reservations qualify as land acquired and held in trust under this statute.

[7] The land was actually leased from the United States Forestry Service, but the Court found that the land fell under § 465 despite its unique provenance. *See* 411 U.S. at 155 n.11, 93 S. Ct. 1274 n.11.

In analyzing § 465's application to the gross-receipts tax, the Court observed that while the statute precluded taxes on land or on rights in land, it did not exempt from state taxation the income derived from the use of the land. *Id.* at 155, 93 S. Ct. at 1274. The Court first noted that tax exemptions are not granted by implication and then recalled that not all state and federal taxes on Indians are categorically barred. *Id.* at 156-57, 93 S. Ct. at 1274-75. For example, the Court cited its prior decisions in *Choteau v. Burnet*, 283 U.S. 691, 51 S. Ct. 598 (1931), and *Leahy v. State Treasurer*, 297 U.S. 420, 56 S. Ct. 507 (1936), in which the Court upheld, respectively, federal and state income taxes on income derived from oil, gas, and mineral exploration on Indian lands after that income was distributed from a federal trust fund to individual Indians. In those cases, the Supreme Court decided, in part, that income distributed to individual Indian tribe members and freely useable by them was taxable even when the source of that income was exempt from taxation. *See Choteau*, 283 U.S. at 696-97, 51 S. Ct. at 600-01; *Leahy*, 297 U.S. at 421, 56 S. Ct. at 507. Ultimately, the *Mescalero* Court likened the gross-receipts tax to these taxes on income, as opposed to a tax on property, and found that it was not barred by § 465. 411 U.S. at 157, 93 S. Ct. at 1275.

In contrast, the Court did hold that § 465 prohibited the state's use tax on the ski-lift materials. The Court observed that under the statute, "these permanent improvements on the Tribe's tax-exempt land

would certainly be immune from the State's ad valorem property tax." *Id.* at 158, 93 S. Ct. at 1275. As the Court explained, use "is among the 'bundle of privileges that make up property or ownership' of property and, in this sense, at least, a tax upon 'use' is a tax upon the property itself." *Id.* (citation omitted). While conceding that not all use taxes could be viewed as property taxes, the Court concluded that "use of permanent improvements upon the land is so intimately connected with use of the land itself that an explicit provision relieving the latter of state tax burdens must be construed to encompass an exemption for the former." *Id.* at 158, 93 S. Ct. at 1275-76.

In our view, *Mescalero* stands for the proposition that § 465 precludes state taxation of that "bundle of privileges that make up property or ownership of property." *See id.* at 158, 93 S. Ct. at 1275 (citation and internal quotation marks omitted). The ability to lease property is a fundamental privilege of property ownership. *See, e.g.*, *Terrace v. Thompson*, 263 U.S. 197, 215, 44 S. Ct. 15, 17-18 (1923) (noting that "essential attributes of property" include "the right to use, lease, and dispose of it for lawful purposes"). By taxing the "privilege" of "engag[ing] in the business of renting, leasing, letting, or granting a license for the use of any real property," the State of Florida is taxing a privilege of ownership just as New Mexico's tax in *Mescalero* taxed the privilege of use.

Stranburg attempts to overcome this analysis in several ways. First, he tries to distinguish the Rental Tax from the tax in *Mescalero* and limit the holding of

that case. Next, he asserts that the Supreme Court has foreclosed the district court's reading of *Mescalero* with its decision in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 109 S. Ct. 1698 (1989). And finally, he relies on caselaw from the Ninth Circuit purportedly upholding a similar tax in California. We find none of Stranburg's arguments ultimately persuasive.

### 1. The Rental Tax Is Not Materially Distinguishable from the Use Tax in *Mescalero* that the Supreme Court Determined Violated § 465

Stranburg's efforts to distinguish the Rental Tax from the tax at issue in *Mescalero* gain no traction. Specifically, Stranburg characterizes the Rental Tax as a "transactional tax on the payment of rent" and likens it more to the gross-receipts tax in *Mescalero* as a tax on income rather than on the land.[8] And, of

[8] Although Stranburg analogizes rent to income derived from the land, elsewhere, he is careful to describe the legal incidence of the Rental Tax as falling on the payments by the non-Indian lessees rather than on the Tribe's income. His reasons for doing so are well-founded, as states generally may not tax Indian tribes for on-reservation activities. *See Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458, 115 S. Ct. 2214, 2220 (1995). We assume for this opinion that Stranburg is correct that the legal incidence of Florida's Rental Tax falls on the non-Indian lessees, an assumption not challenged by the Tribe. Even so, our conclusion does not change. By the plain text of the statute, the tax exemption contained in § 465 attaches to the land and the rights in that land protected under the statute.

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course, the Tribe receives income from the rent payments.

But these payments secure a lessee's possessory interest *in the land* for the duration of the lease. *See generally Winters Coal Co. v. Comm'r*, 496 F.2d 995, 998 (5th Cir. 1974) (plurality op.) ("There is little conflict or disagreement with the old hornbook principle that a lease is a conveyance and creates in the lessee an estate which entitles him to exclusive possession unless certain rights are reserved by the lessor."); *Lease*, Black's Law Dictionary (10th ed. 2014) ("A contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration, usu[ally] rent"). Just as the use of permanent improvements on land "is so intimately connected with use of the land itself," *Mescalero*, 411 U.S. at 158, 93 S. Ct. at 1275, payment under a lease is intimately and indistinguishably connected to the leasing of the land itself. And in this respect, the Rental Tax is distinguishable from the gross-receipts sales tax in *Mescalero* or the severance and excise taxes discussed in cases like *Cotton Petroleum*, 490 U.S. at 168-69 & n.4, 109 S. Ct. at 1703, or *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342, 345-47, 69 S. Ct. 561, 563-64

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*See* 25 U.S.C. § 465 ("[S]uch *lands or rights* shall be exempt from State and local taxation." (emphasis added)). So, even if the legal incidence of the Rental Tax falls on the Ark Entities, the tax itself is expressly precluded because a tax on the payment of rent is indistinguishable from an impermissible tax on the land.

(1949).[9] Florida's Rental Tax is a tax on *a right in land*, while the others tax economic activity (sales

[9] *Cotton Petroleum*, which is discussed more fully below, involved a challenge to five taxes levied by New Mexico on the production of oil and gas from leased Indian lands. 490 U.S. at 168-69 & n.4, 109 S. Ct. at 1703 & n.4. *Texas Co.* involved a challenge by non-Indian lessees to two Oklahoma taxes, one a tax on the gross production value of oil and gas and the other an excise tax on every barrel of oil produced in the state. 336 U.S. at 345-47, 69 S. Ct. at 563-64. In *Texas Co.*, the Oklahoma Supreme Court had invalidated the taxes on the basis that the lessees were instrumentalities of the Federal government. *Id.* at 348, 69 S. Ct. at 565. In reversing the state supreme court, the United States Supreme Court noted that intergovernmental immunity did not extend tax immunity to property or gains earned by private persons under a lease of restricted Indian land. *Id.* at 363, 69 S. Ct. at 572. Although the Court's holding rested on interpreting the intergovernmental-immunity doctrine, significantly, the Court emphasized in *Texas Co.* that the case "present[ed] no question concerning the immunity of the Indian lands themselves from state taxation," *id.* at 353, 69 S. Ct. at 567, and distinguished the taxable nature of oil removed from the land itself, *see, e.g.*, *id.* at 354, 358, 69 S. Ct. at 568, 570.

In its discussion of New Mexico's gross-receipts tax, *Mescalero* also cited *Texas Co.* for the proposition that "[l]essees of otherwise exempt Indian lands are also subject to taxation." *Mescalero*, 411 U.S. at 157, 93 S. Ct. at 1275. Stranburg seizes on this statement as a declaration that *all* lessees of Indian land are subject to *all* state taxation. But Stranburg's assertion ignores both the context of *Mescalero*—where the statement was included in the discussion of the gross-receipts tax, and not the tax on land—and the context of *Texas Co.*—which dealt with taxes on oil that had been removed from the land. Accordingly, the citation to *Texas Co.* in *Mescalero* does not have the reach Stranburg attributes to it and stands for the now uncontroversial proposition that non-Indian lessees of Indian land may be

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receipts) or tangible property (oil or gas) removed by one or more degrees from the land.

Additionally, to the extent any ambiguity exists with respect to the tax exemption contained in § 465, resolving that ambiguity in favor of the Tribe comports with the long-standing canon that statutes be construed liberally in favor of Indians. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 2403 (1985) (citations omitted) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."). We acknowledge that the Supreme Court has cautioned that this canon "is offset by the canon that warns us against interpreting federal statutes as providing tax exemptions unless those exemptions are clearly expressed." *Chickasaw Nation v. United States*, 534 U.S. 84, 95, 122 S. Ct. 528, 535-36 (2001). But no "offset" is warranted here. Unlike a tax exemption purportedly legislated "through an inexplicit numerical cross-reference," *id.* at 90, 122 S. Ct. at 533, § 465 expressly exempts land and rights in that land from state taxation. Any "ambiguity" present centers not around the existence of a tax exemption, but rather the scope of the land rights included within that exemption.

In sum, we find that construing § 465 to preclude Florida's Rental Tax aligns with the text and purpose

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subject to some state taxation. *See, e.g.*, *Cotton Petroleum*, 490 U.S. at 175, 109 S. Ct. at 1707.

of the Indian Reorganization Act, the Supreme Court's interpretation of § 465 in *Mescalero*, and the general canon that statutes be construed in Indians' favor.

2. *Cotton Petroleum* Does Not Foreclose the Statutory Exemption

Stranburg argues further, though, that even if *Mescalero* can be read to preclude the Rental Tax, that reading was subsequently abrogated by the Supreme Court in *Cotton Petroleum*. We disagree.

In *Cotton Petroleum*, the Supreme Court confronted the question of whether New Mexico could impose taxes on oil and gas produced by non-Indian lessees of wells located on the tribe's reservation. 490 U.S. at 166, 109 S. Ct. at 1702. In answering that question, the Court looked to the Indian Mineral Leasing Act of 1938 ("1938 Act"), 25 U.S.C. § 396a, and its predecessors, which permitted the tribe to lease reservation land for mineral exploitation, subject to approval by the Secretary of the Interior. *Id.* at 167, 109 S. Ct. at 1702.

The Court recounted its shifting doctrines concerning state taxation of non-Indian lessees' oil production, noting that its old rule required the tax to be specifically authorized by Congress, while the new rule upheld the state's tax unless it was "expressly or impliedly prohibited by Congress." *Id.* at 173, 109 S. Ct. at 1706. The "current doctrine" permits a state, absent a grant of tax immunity by Congress, to

"impose a nondiscriminatory tax on private parties with whom the United States or an Indian tribe does business, even though the financial burden of the tax may fall on the United States or tribe." *Id.* at 175, 109 S. Ct. at 1707.

Although the Court found no express discussion of taxation in the 1938 Act, it concluded that the silence of Congress on the issue was explained by the shifting doctrines. As the Court noted, predecessors to the 1938 Act dealing with leasing of Indian lands for mineral exploitation expressly permitted state taxation. *See id.* at 181-83, 109 S. Ct. at 1710-11; *see also* 25 U.S.C. § 398; 25 U.S.C. § 398c. These express authorizations in 1924 and 1927 were in line with the earlier doctrine. But by 1938 the new doctrine was in place, and the Court refused to read the silence of the 1938 Act as either a repeal of the previously authorized state taxes or an implied prohibition on state taxation. *Id.* at 182, 109 S Ct. at 1710.

Although the *Cotton Petroleum* Court was analyzing the 1938 Act, in a footnote, it commented that the Indian Reorganization Act of 1934, among other Indian-related statutes, "no more express[es] a congressional intent to pre-empt state taxation *of oil and gas lessees than does the 1938 Act.*" *Id.* at 183 n.14, 109 S. Ct. at 1711 n.14 (emphasis added). Based on this footnote, Stranburg asserts that the Supreme Court "concluded squarely" that § 465 does not express a congressional intent to preempt state taxation on *all* lessees of Indian land. But Stranburg's argument overlooks the fact that the Supreme Court's

comment applies to just oil and gas lessees specifically, which are fundamentally different from general land leases, in that they allow extraction of products from the land. The Court, in this footnote, simply did not address the full scope of § 465's tax exemption. Extending the *Cotton Petroleum* footnote to encompass all lessees of Indian land would ignore both the express text and the larger context of the Court's opinion.

3. The Ninth Circuit's Construction of the Statute

Stranburg also relies heavily on the Ninth Circuit cases of *Agua Caliente Band of Mission Indians v. Riverside County*, 442 F.2d 1184 (9th Cir. 1971), *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253 (9th Cir. 1976), and *Confederated Tribes of Chehalis Reservation v. Thurston County Board of Equalization*, 724 F.3d 1153, 1158 n.7 (9th Cir. 2013), for the proposition that § 465 does not preclude the Rental Tax. In *Agua Caliente*, the Ninth Circuit upheld (over a persuasive dissent that foreshadowed the *Bracker* inquiry) California's possessory-interest tax, which it characterized as a tax on the "full cash value of the lessee's interest" in the land rather than a tax on the "land as such." *See* 442 F.2d at 1186. In *Fort Mojave*, the Ninth Circuit held that another section of the Indian Reorganization Act did not preempt the possessory-interest tax because the tax did not threaten to encumber the Indian's interest. 543 F.2d at 1256. Significantly, neither the *Agua*

*Caliente* nor *Fort Mojave* decisions mentioned or apparently considered § 465 at all.

In *Chehalis Reservation*, the Ninth Circuit recently invalidated a Washington state tax on permanent improvements owned by a non-Indian corporation on Indian land acquired under § 465. 724 F.3d at 1157-58. In a footnote in that opinion, the Ninth Circuit panel commented that the taxes upheld in *Agua Caliente* and *Fort Mojave* were distinguishable from the Washington tax and the New Mexico tax in *Mescalero* because, in the former cases, the state imposed taxes on non-Indian lessees' possessory interests while, in the latter, the states imposed property taxes on the land, which included permanent improvements to the land. *Id.* at 1158 n.7.

Stranburg argues that after *Chehalis Reservation*, the Ninth Circuit has determined that § 465 "bars state taxes directly on land or on permanent improvements to land, and only those two areas," and urges us to adopt that reading here. But Stranburg's construction is too narrow. First, the *Chehalis Reservation* footnote did not limit § 465's application to only land and permanent improvements on land. Indeed, it recognized that § 465 precluded taxes on land *and on land rights*; it just implicitly decided, without elaboration, that possessory interests were not rights in the land. *See id.* Moreover, in *Mescalero*, the Supreme Court itself did not expressly limit its holding to only permanent improvements. The opinion points out that not all "use taxes for all purposes" can be deemed to be property taxes. *See Mescalero*,

411 U.S. at 158-59, 93 S. Ct. at 1275-76. The necessary implication is that some use taxes, of which permanent improvements are but one, may be deemed so akin to property taxes that § 465 would bar their imposition.

Further, while the language of the *Chehalis Reservation* footnote suggests that the Ninth Circuit determined in *Agua Caliente* that § 465 did not bar taxes on non-Indian possessory interests of Indian land, the fact remains that neither *Agua Caliente* nor *Fort Mojave* ever analyzed the applicability of § 465 to the possessory interests being taxed.[10] Thus, even to the extent that a tax on the full-cash value of a lessee's possessory interest can be viewed as analogous to a tax on the payment of rent, we do not find the Ninth Circuit's bare statement in the *Chehalis Reservation* footnote that § 465 does not apply to taxes on such interests to be persuasive.

Diving more deeply into the Ninth Circuit cases similarly does not help Stranburg. Significantly, *Agua Caliente* was decided before *Mescalero.* In the absence of *Mescalero*, the Ninth Circuit likened California's tax to the tax found permissible in *United States v. City of Detroit*, 355 U.S. 466, 78 S. Ct. 474 (1958), in which the Supreme Court upheld a state tax on the

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[10] In fact, it is not entirely clear that the Indian land at issue in *Fort Mojave* or, especially, in *Agua Caliente* fell within the ambit of § 465 at all. *See, e.g.*, *Fort Mojave*, 543 F.2d at 1255; *Agua Caliente*, 442 F.2d at 1187 & n.13.

privilege of commercially renting property, even though the property in question was owned by the United States. At the time that the cases were decided, the Supreme Court in *City of Detroit* and the Ninth Circuit in *Agua Caliente* both viewed a "tax imposed upon the use of property [as] something distinct from a tax imposed upon the property itself." *City of Detroit*, 355 U.S. at 470, 78 S. Ct. at 476; *Agua Caliente*, 442 F.2d at 1186-87.

But two problems exist with relying on these cases here. First, the Supreme Court's subsequent decision in *Mescalero* expressly recognized that some uses are so intimately connected with the land that a tax on those uses is essentially a tax on the land, obliterating any categorical distinction between use taxes and property taxes. *See Mescalero*, 411 U.S. at 158, 93 S. Ct. at 1275-76.

Second, *City of Detroit* is distinguishable in that the source of any tax exemption for the United States was the intergovernmental immunity doctrine, a doctrine that has been "'thoroughly repudiated' by modern case law." *See Cotton Petroleum*, 490 U.S. at 174, 109 S. Ct. at 1706. Here, the source of the tax exemption is a federal statute. Section 465 contains an explicit congressional expression of a tax exemption, the contours of which must be interpreted like any other statute.

So we are not persuaded by Stranburg's reliance on the Ninth Circuit's cases involving California's possessory-interest tax. Instead, we hold that § 465

bars Florida from assessing its Rental Tax against the Ark Entities. This construction of the statute more closely comports with what the statutory text actually protects, with what the Supreme Court decided in *Mescalero*, with the purposes of § 465 more generally, and with the general statutory canon that statutes be construed in favor of Indians. Accordingly, we affirm the district court's order invalidating the application of Florida's Rental Tax to the properties at issue in this case.

### *B. Federal Law Preempts the Rental Tax*

We could, of course, stop our analysis regarding the Rental Tax at this point, since we have concluded that application of the Rental Tax in this case violates § 465. But this case raises a matter of first impression, so we also consider the alternative basis that the district court relied on in invalidating the Rental Tax.

Even if § 465 did not expressly preclude assessment of the Rental Tax against the Ark Entities, the Rental Tax is nonetheless preempted by federal law. The district court concluded that the state Rental Tax was preempted because the district court accorded "the full amount of deference available under the law" to a balancing test conducted by the Secretary of the Interior in promulgating regulations governing the leasing of Indian land—including a regulation that prohibits rental taxes. *Seminole Tribe*, 49 F. Supp. 3d at 1099-100.

On appeal, Stranburg contests this ruling on a number of fronts. He contends that the Secretary's analysis is entitled to no deference by any court because, in Stranburg's view, it does not purport to decide the preemption question, it was the product of flawed rulemaking, and it is substantively incorrect. Stranburg also suggests that even if the regulations and analysis must be given weight, that weight should be minimal because the terms of the Ark Entities' leases are controlling. And finally, Stranburg argues that he prevails on a *de novo Bracker* balancing analysis because the Tribe has not put forth any evidence of its interests while the state has demonstrated its interest in the Rental Tax based on the services it provides on the Tribe's reservations. Although we decline to accord the regulations deference in conducting a *Bracker* inquiry, we nonetheless find that under a *de novo Bracker* analysis, the Rental Tax is preempted by federal law.

In *Bracker*, the Supreme Court addressed a challenge to Arizona's motor-carrier license and use fuel taxes as applied to non-Indian timber enterprises harvesting timber on reservation land. 448 U.S. at 137-38, 100 S. Ct. at 2580-81. The Court outlined several general Indian law taxation principles, including "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be preempted by federal law. . . . Second, it may unlawfully infringe 'on the right of reservation Indians to make their own laws and be

ruled by them.'" *Id.* at 142, 100 S. Ct. at 2583 (citations omitted). The Court also "rejected the proposition that in order to find a particular state law to have been preempted by operation of federal law, an express congressional statement to that effect is required." *Id.* at 144, 100 S. Ct. at 2584. Of note, the Court commented that it is "generally unhelpful" to apply existing law regarding federal-state preemption to Indian law preemption. *Id.* at 143, 100 S. Ct. at 2583.

As the Court explained, state law is generally inapplicable to on-reservation conduct by Indians, given the overwhelming federal interest in encouraging tribal self-government. *Id.* at 144, 100 S. Ct. at 2584. To analyze the more difficult question of whether state regulation of non-Indian activity on the reservation is preempted by federal law, *Bracker* called for "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 144-45, 100 S. Ct. at 2584.

In turning to Arizona's tax scheme, the Court first considered the federal interests at stake, observing that the "Federal Government's regulation of the harvesting of Indian timber is comprehensive" and citing congressional statutes, Department of the Interior regulations, and day-to-day supervision by the BIA. *Id.* at 145-48, 100 S. Ct. at 2584-86. Indeed, the Court stated, the "federal regulatory scheme is so pervasive as to preclude the additional burdens

sought to be imposed" by the state taxes. *Id.* at 148, 100 S. Ct. at 2586. Moreover, the Court reasoned that the state taxes would undermine federal policies of guaranteeing the benefit of timber harvests to Indians, as well as general policies designed to revitalize Indian economies and self-government. *Id.* at 149, 100 S. Ct. at 2586. For instance, the Court determined that the taxes would complicate the Secretary's setting of fees, reduce tribal revenues, and diminish the profit that potential contractors could realize. *Id.* at 149, 100 S. Ct. at 2587.

With regard to the state's interest, the Court found none beyond a "general desire to raise revenue." *Id.* at 150, 100 S. Ct. at 2587. Nor, as the Court observed, was this "a case in which the State seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall." *Id.*, 100 S. Ct. at 2587. Even though the fuel tax was designed to compensate the state for the use of its highways, the on-reservation roads at issue were neither built nor maintained by the state. *Id.* As a result, the Court concluded that the state's generalized interest was insufficient to overcome the comprehensive and pervasive regulation of the harvesting of Indian timber and the threats to federal policies posed by the taxes. *See id.* at 151, 100 S. Ct. at 2588.

Two years later, the Court decided *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832, 102 S. Ct. 3394 (1982). In *Ramah*, the Court struck down New Mexico's gross-receipts tax as assessed on a non-Indian contractor who built a school on the

reservation. *Id.* at 834, 102 S. Ct. at 3396. The Court found the tax preempted, in part, because the state did "not seek to assess its tax in return for the governmental functions it provides to those who must bear the burden of paying this tax." *Id.* at 843, 102 S. Ct. at 3401. While the New Mexico tax was "intended to compensate the State for granting 'the privilege of engaging in business,' " the state had "not explained the source of its power to levy such a tax . . . where the 'privilege of doing business' on an Indian reservation is exclusively bestowed by the Federal Government." *Id.* at 844, 102 S. Ct. at 3402.

The Supreme Court once again applied the *Bracker* balancing test in *Cotton Petroleum*, this time upholding the state tax. In so doing, the Court emphasized that the test is a "flexible one sensitive to the particular state, federal, and tribal interests involved." *Cotton Petroleum*, 490 U.S. at 184, 109 S. Ct. at 1711. In contrasting Cotton Petroleum's situation with those found in *Bracker* and *Ramah*, the Court observed that those two cases "involved complete abdication or noninvolvement of the State in the on-reservation activity," while in *Cotton Petroleum*, New Mexico provided "substantial services" to Cotton Petroleum and the tribe. *Id.* at 185, 109 S. Ct. at 1712. The Court further distinguished Cotton Petroleum's situation by finding that no economic burden fell on the tribe due to the state taxes and that the state did regulate "the spacing and mechanical integrity of [oil] wells located on the reservation," meaning the federal regulations of mineral extraction,

while extensive, were not exclusive. *Id.* at 185-86, 109 S. Ct. at 1712. As a result, the Court concluded that the state taxes were not preempted, in part, because "[t]his [was] not a case in which the State has had nothing to do with the on-reservation activity, save tax it." *Id.* at 186, 109 S. Ct. at 1713. The Court also noted that any marginal effect on the demand for leases that could be attributed to increased state taxes was "simply too indirect and too insubstantial to support Cotton's claim of pre-emption . . . absent some special factor as those present [in *Bracker* and *Ramah*]." *Id.* at 186-87, 109 S. Ct. at 1713.

To summarize, then, *Bracker* requires a particularized inquiry into the federal, tribal, and state interests implicated by a state's tax on non-Indians for on-reservation activity. *Bracker*, 448 U.S. at 144-45, 100 S. Ct. at 2584. Federal statutes, agency regulations, and day-to-day agency supervision can all inform the federal and tribal interests and can also signal a federal regulatory scheme that is so pervasive that it preempts the state tax. *Id.* at 145-48, 100 S. Ct. at 2584-86. A state's interests in a particular tax can outweigh federal and tribal interests, but to do so, the state's tax must relate to services it provides in connection with the entity and activity being taxed and not merely serve a generalized interest in raising revenue. *Id.* at 150-51, 100 S. Ct. at 2587-88.

1. Should the Secretary's Analysis Be Accorded Deference?

Before turning to the merits of the *Bracker* analysis, we must first address what measure of deference, if any, courts should accord to the Secretary of the Interior's *Bracker*-like balancing conducted in the regulatory context. The issue arises because the Secretary of the Interior adopted substantial regulations, made effective in January 2013, concerning the Secretary's approval and supervision of Indian land leases. *See* 25 C.F.R. Part 162. Included among those regulations is a section entitled "What taxes apply to leases approved under this part?" 25 C.F.R. § 162.017. That section expressly provides that "activities under a lease conducted on the leased premises" are not subject to state taxation, *id.* § 162.017(b), and that "the leasehold or possessory interest" is not subject to state taxation, *id.* § 162.017(c).

According to the regulations' preamble published in the Federal Register, this section was added as "clarification regarding other taxation arising in the context of leasing Indian land." Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,440, 72,447 (Dec. 5, 2012) (codified at 25 C.F.R. pt. 162) ("Preamble"). In this Preamble, the Secretary outlined the *Bracker* balancing test and then applied it generally.

First, the Secretary listed the extensive federal regulations that it said "occupy and preempt the field

of Indian leasing." *Id.* at 72,447. The Secretary also analyzed the federal and tribal policies at stake in land leasing and noted that the "ability of a tribe . . . to convey an interest in trust or restricted land arises under Federal law, not State law [and] Federal legislation has left the State with no duties or responsibilities for such interest." *Id.* at 72,447-48. Finally, the Secretary asserted generally that state taxation undermines federal interests with respect to leases. *Id.* at 72,447-49.

The district court concluded that the regulations, including the Secretary's *Bracker* analysis in the Preamble, were entitled to the "full amount of deference available under the law," which it defined as "some deference" short of full *Chevron*[11] deference. *Seminole Tribe*, 49 F. Supp. 3d at 1099-100. Relying on *Wyeth v. Levine*, 555 U.S. 555, 129 S. Ct. 1187 (2009), the district court reasoned that deference was appropriate based on the specialized experience of the Secretary in Indian affairs, the complex and extensive history of federal Indian law, and the thoroughness and persuasiveness of the Secretary's analysis. 49 F. Supp. 3d at 1099-100. Ultimately, the district court held, based on "the reasons detailed by the Secretary of the Interior," that federal regulation of Indian land leasing was so pervasive as to preclude the additional burdens of Florida's Rental Tax and that, "in these circumstances, 25 U.S.C. § 415 and 25

[11] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984).

C.F.R. § 162.017 prohibit the imposition of the Rental Tax to the Ark leases." *Id.* at 1100.

We agree with the district court's ultimate conclusion. But to the extent that the district court gave deference to the Secretary's ultimate application of *Bracker* and the agency's conclusion that federal law preempts lease-related taxation, we find that the district court went a step too far. *Bracker* and its progeny call for a *particularized* balancing of the specific federal, tribal, *and state* interests involved. *See Bracker*, 448 U.S. at 145, 100 S. Ct. at 2584 ("This inquiry . . . has called for a *particularized* inquiry into the nature of the state, federal, and tribal interests *at stake*, an inquiry designed to determine whether, *in the specific context*, the exercise of state authority would violate federal law." (emphasis added)); *Ramah*, 458 U.S. at 838, 102 S. Ct. at 3398 ("Preemption analysis . . . requires a *particularized* examination of the *relevant* state, federal, and tribal interests." (emphasis added)); *Cotton Petroleum*, 490 U.S. at 176, 109 S. Ct. at 1707 ("Instead, we have applied a flexible pre-emption analysis sensitive to the *particular facts and legislation involved.*" (emphasis added)). Because the Secretary's analysis did not examine *Florida's* interests in imposing this particular Rental Tax, the balancing in the Preamble cannot substitute for the particularized inquiry required by *Bracker*. As for *Wyeth*, although it dealt with preemption outside the context of federal Indian law, that decision observed that while some weight can be given to an agency's views on a state law's impact on

a federal regulatory scheme, deference to an agency's ultimate conclusion of federal preemption is inappropriate. *See Wyeth*, 555 U.S. at 576-77, 129 S. Ct. at 1201.

2. The Federal and Tribal Interests at Stake

This is not to say that the Secretary's analysis is not without value in delineating the federal and tribal interests implicated in the leasing of Indian land. As *Wyeth* noted, an agency's analysis of the regulatory scheme it administers deserves some weight, particularly when the subject matter and history are complex and extensive, and the analysis is thorough, consistent, and persuasive. 555 U.S. at 576-77, 129 S. Ct. at 1201. Here, those factors apply with force. Accordingly, the Preamble analysis and the actual statutes and regulations themselves provide, in this case, substantial evidence of the extensive federal regulation of Indian land leasing to inform the *Bracker* balancing inquiry.

Stranburg raises a number of specific arguments about why deference is inappropriate, but none of those arguments succeed in showing why the Secretary's analysis cannot serve as evidence of the federal and tribal interests involved. Because we have determined that deference to the Secretary's preemption conclusion is inappropriate and will conduct an independent *Bracker* inquiry, we need not address Stranburg's deference arguments in further depth.

Although we cannot defer to the Secretary's ultimate conclusion that federal law preempts the Rental Tax, we nonetheless agree that is the correct conclusion. As in the cases of *Bracker* and *Ramah*, the extensive and exclusive federal regulation of Indian leasing—as evidenced by federal law and regulations—precludes the imposition of state taxes on that activity. *See Bracker*, 448 U.S. at 148-49, 100 S. Ct. at 2586; *Ramah*, 458 U.S. at 841-42, 102 S. Ct. at 3400-01; *see also*, *e.g.*, 25 U.S.C. § 415; 25 C.F.R. Part 162; Preamble at 72,447-48. Florida has not shown that the Rental Tax is designed to compensate for any state services or regulations related to the act of renting of commercial property on Indian land; rather, the interests the state advances are more akin to raising revenue for providing statewide services generally. Accordingly, the *Bracker* analysis leads us to conclude that Florida's Rental Tax is preempted by federal law.

Nor are we persuaded by Stranburg's various arguments that the inquiry should tip in his favor. Initially, he attacks the pervasive character of the federal regulatory scheme, asserting that *Cotton Petroleum* established that regulation of all lessees of Indian land is not exclusively federal. *See Cotton Petroleum*, 490 U.S. at 185-86, 109 S. Ct. at 1712-13 (holding that the state's regulation of oil-well spacing and integrity meant that federal regulation, while extensive, was not exclusive). In support of this point, Stranburg contends that the oil and gas leases in *Cotton Petroleum* were subject to the same federal

regulations that govern the Ark Entities' leases, and since federal regulation was not deemed exclusive in *Cotton Petroleum*, it cannot be deemed exclusive here.

This argument fails, though, for a number of reasons. First, *Bracker* requires a particularized balancing of specific interests. In *Cotton Petroleum*, the Supreme Court pointed to state regulation of oil wells independent of the federal regulations. Stranburg, however, has not pointed to any Florida regulation of the commercial leasing of Indian land or regulation of the activities occurring under the lease.

Second, the federal regulations concerning Indian oil leases are separate and distinct from the Indian surface land-leasing regulations. *See* 25 C.F.R. § 162.006(b) (noting that this part of the regulations does not apply to "mineral leases, prospecting permits, or mineral development agreements," which are covered by six separate parts of the Code of Federal Regulations). The regulations cited in *Cotton Petroleum* came from Part 211 of the Code, one of the mineral-leasing parts. *See* 490 U.S. at 186 n.16, 109 S. Ct. at 1712 n.16. Significantly, they were not found in Part 162, the surface-leasing regulations.

Similarly, Stranburg's reliance here on the case of *Gila River Indian Community v. Waddell*, 91 F.3d 1232 (9th Cir. 1996), cannot help him. Contrary to Stranburg's suggestion, *Waddell* did not make a broad pronouncement that the federal leasing regulations were insufficient to preempt all state taxes.

Instead, the court found the leasing interests insufficient to preempt a state *sales tax* on non-Indians' attendance at entertainment events on the reservation. *See* 91 F.3d at 1237 ("The Arizona sales tax would not interfere with the use and development of the Tribe's property. Thus, the regulatory scheme that governs the leasing of Indian lands does not require the preemption of the tax.").[12]

Stranburg next remarks that the federal interest in promoting Indian economic development does not automatically preempt all state taxes when any reduction of Indian income is threatened. This proposition certainly is true. *See Cotton Petroleum*, 490 U.S. at 180, 109 S. Ct. at 1709 ("We thus agree that a purpose of the 1938 Act is to provide Indian tribes with badly needed revenue, but find no evidence for the further supposition that Congress intended to remove all barriers to profit maximization."); *id.* at 187, 109 S. Ct. at 1713 (rejecting the notion that "[a]ny adverse effect on the Tribe's finances caused by the taxation of a private party contracting with the Tribe would be ground to strike the state tax."). But this argument goes only so far because the Tribe is not contending that the sole federal interest at stake

[12] Of note, *Waddell* did reject the Indians' position that the federal leasing regulations were sufficient to preempt all state taxation generally. 91 F.3d at 1237. Of course, this just means that we are left with a particularized balancing of the leasing interests and the specific tax at issue.

here is income maximization or that income maximization automatically preempts any state taxation. Rather, Indian economic well-being is one of the many federal interests embodied in the extensive federal regulation of leasing activity, and it is a valid interest weighing in favor of preemption in the final balance. *See Bracker*, 448 U.S. at 149, 100 S. Ct. at 2586.

Stranburg further asserts that tribal interest in self-government is not threatened by dual state taxation. But while the Supreme Court precedent seems clear that dual taxation does not threaten tribal interests, *see Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 114-15, 126 S. Ct. 676, 688-89 (2005), that fact is of limited utility here because the Tribe is not assessing its own rental tax (or even arguing on appeal that the state tax precludes it from doing so). So though the Preamble's general statements expressing concern about the potential of state taxes to "chill" the imposition of tribal taxes cannot support a federal or tribal interest in avoiding dual taxation, Preamble at 72,448, that fact removes little weight from the Tribe's side of the scale here under the particularized circumstances of this case.

Finally, in a variation on the income-maximization argument, Stranburg asserts that any increase in costs for on-reservation projects attributable to the state tax is too indirect for the economic consequences of the tax to support preemption. Of course, it is true that *Cotton Petroleum* held that such indirect

burdens were insufficient to support preemption. 490 U.S. at 186-87, 109 S. Ct. at 1713. But *Cotton Petroleum* indicated that such indirect burdens were insufficient "absent some special factor such as those present in [*Bracker and Ramah*]," with that special factor necessarily being the extensive and exclusive federal regulation of the activities at issue in those two cases. *See id.*; *see also id.* at 184-86, 109 S. Ct. at 1711-1713; *see also Bracker*, 448 U.S. at 151 & n.15, 100 S. Ct. at 2587-88 & n.15. As in *Bracker* and *Ramah*, the Tribe is not relying solely on adverse economic impact here; the extensive and exclusive federal regulation of Indian land leasing provides the "special factor" absent in *Cotton Petroleum.*

In sum, the federal government administers an extensive, exclusive, comprehensive, and pervasive regulatory framework governing the leasing of Indian land. Stranburg's attempt to diminish the value of tribal economic and taxing interests does nothing to minimize the pervasiveness of the federal regulatory scheme, which involves dozens of congressional statutes and federal regulations. *See, e.g.*, 25 U.S.C. §§ 415-416j; 25 C.F.R. §§ 162.001-162.703. This scheme is sufficient to bring the federal interests within the scope of *Bracker* and *Ramah*, where "the federal regulatory scheme is so pervasive as to preclude the additional burdens sought to be imposed" by the state. *Bracker*, 448 U.S. at 148, 100 S. Ct. at 2586; *Ramah*, 458 U.S. at 845, 102 S. Ct. at 3402. Accordingly, absent a state interest of sufficient weight—and raising revenue for providing statewide services

generally lacks that heft—Florida's Rental Tax is preempted. *See, e.g.*, *Bracker*, 448 U.S. at 148-151, 100 S. Ct. at 2587-88 (conducting an analysis of the state interests after finding the federal scheme was pervasive).

Stranburg cannot alter the results of this analysis through his assertions that the Tribe did not meet its burden[13] of producing any evidence on the federal and tribal interests at stake because it "introduced no record evidence whatsoever of the impact of the Rental tax on the Tribe's business operations or its sovereignty." In Stranburg's view, the Tribe was required to put forth evidence that "it was less able to lease the property, had to engage in unique marketing

[13] The parties vigorously dispute who bears the "burden" in this case. Stranburg contends that the Tribe has the "burden of proof . . . to put forth facts showing that federal and tribal interests outweighed the state's interest." The Tribe fires back that the "burden of justifying the tax in these circumstances rests with the state." But the *Bracker* inquiry itself imposes no burden-shifting framework. Any burden necessarily arises from the summary-judgment posture of the case. Since both parties moved for summary judgment, each had the burden of demonstrating no dispute of material fact that its interests outweighed the other's as a matter of law. *See generally Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986) ("Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." (citation omitted)).

efforts, or had to reduce the rent to accommodate the tax." According to Stranburg, the Tribe's reliance on generalized economic arguments is insufficient to support preemption after *Cotton Petroleum* rejected the indirect-economic-consequences argument. As discussed above, though, the Supreme Court's rejection of that argument matters only in the absence of an extensive and exclusive federal regulatory scheme. While such specific economic evidence certainly would have bolstered the Tribe's argument, the regulatory scheme itself is a sufficient federal interest to satisfy the Tribe's burden of production here.

3. The State's Interest at Stake

To establish the state's interest in imposing the Rental Tax, Stranburg points to the evidence he introduced of the services that the state provides on the reservation, including law enforcement, criminal prosecution, and health services, as well as "intangible off-reservation benefits . . . such as infrastructure and transportation services." But none of these services are tied to the business of renting commercial property on Indian land. Both *Bracker* and *Ramah* note that the state tax must be sufficiently connected to the particular activity taxed to amount to more than just a generalized interest in raising revenue. *See Bracker*, 448 U.S. at 150-51, 100 S. Ct. at 2587-88 ("[T]his is not a case in which the State seeks to assess taxes in return for government functions it performs for those on whom the taxes fall. Nor have respondents been able to identify a legitimate

regulatory interest served by the taxes they seek to impose."); *Ramah*, 458 U.S. at 843-45 & n.10, 102 S. Ct. at 3401-3402 & n.10 ("We are similarly unpersuaded by the State's argument that the significant services it provides to the Ramah Navajo Indians justify the imposition of this tax. The State does not suggest that these benefits are in any way related to the construction of schools on Indian land.").

Even *Cotton Petroleum*, while finding that some state services were provided to the plaintiff and tribe, affirmed the general principle that the services rendered must be connected to the tax. *See* 490 U.S. at 185, 109 S. Ct. at 1712 ("Rather, [*Bracker* and *Ramah*] involved complete abdication or noninvolvement of the State *in the on-reservation activity*." (emphasis added)); *cf. id.* at 186, 109 S. Ct. at 1713 ("This is not a case in which the State has had *nothing to do with the on-reservation activity*, save tax it." (emphasis added)). Here, Stranburg has offered no evidence that Florida is involved in any way with a non-Indian's leasing of commercial property from an Indian tribe on Indian land except taxing it.

Nor can Stranburg's reliance on *Waddell* rescue the state's interest from being insufficient to sustain the tax. The relationship of the services provided to the interest taxed differed materially in *Waddell*. In *Waddell*, the Ninth Circuit concluded that the provision of the law-enforcement services, including crowd and traffic control, "was critical to the success" of the specific entertainment events being taxed. *Waddell*,

91 F.3d at 1238-39. Stranburg has not shown a similar link here.

Stranburg also cites *Ute Mountain Ute Tribe v. Rodriguez*, 660 F.3d 1177, 1199-1200 (10th Cir. 2011), for the proposition that off-reservation services can support a state interest. But *Ute Mountain* addressed New Mexico's oil and gas taxes and found that they supported "the off-reservation infrastructure used to transport the oil and gas after it is severed." *Id.* at 1199.

In both of these cases, the tax was clearly and critically connected to the services rendered. While the dollar value of services rendered need not match the amount of taxes paid, *Cotton Petroleum*, 490 U.S. at 185, 109 S. Ct. at 1712, the services and taxes nonetheless must be connected beyond a mere desire to raise revenue. Although the presence of law enforcement or off-reservation roads in some sense makes leasing on-reservation property more attractive, none of the services cited by Stranburg is critically connected to the business of commercial land leasing on Indian property—the activity taxed by the Rental Tax—in the way that crowd and traffic control was to entertainment events in *Waddell* and the use of off-reservation roads was to the transportation of oil and gas from Indian lands in *Ute Mountain.*

In conclusion, we do not defer to the Secretary's ultimate determination of federal preemption because *Bracker* and its progeny require a particularized, case-specific balancing of federal, tribal, and state

interests. Nevertheless, Florida's Rental Tax is preempted by federal law under *Bracker*. Federal statutes, regulations, and even the analysis conducted by the Secretary's Preamble demonstrate the pervasive and comprehensive federal regulation of the leasing of Indian land. The State of Florida has not shown any state interest in its Rental Tax beyond the general raising of revenue to provide generalized services nor has it pointed to any state regulation of Indian-land leasing that would render the federal regulations nonexclusive. Consequently, the pervasive federal scheme for regulating Indian land leasing preempts Florida's Rental Tax just as the federal schemes regulating timber and education preempted the state taxes in *Bracker* and *Ramah*.[14]

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[14] Stranburg also argues that federal law cannot preempt the Rental Tax as applied to the Ark Entities because the Ark Entities purportedly agreed in their leases to pay all taxes levied. This argument is based on a "grandfather" clause in the federal leasing regulations that provides, "If we approved your lease document before January 4, 2013, this part applies to that lease document; however, if the provisions of the lease document conflict with this part, the provisions of the lease govern." 25 C.F.R. § 162.008(a). Because the Secretary approved the Ark Entities' leases prior to January 4, 2013, Stranburg contends that the lease provisions should prevail. But there are two problems with Stranburg's argument. First, the lease never specifies that the Ark Entities will pay the Rental Tax. Instead, the lease applies only to taxes generally, so there is no plausible argument that the parties expressly agreed to pay the Rental Tax in the lease or that the lease even conflicts with the federal regulations. But more significantly, if Congress intended for federal law to preempt the Rental Tax, the state lacks authority to levy the tax in the first place. *See Cotton Petroleum*, 490 U.S.

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### C. Does Comity Require Dismissal of the Rental Tax Challenge?

Stranburg concludes his attack on the district court's Rental Tax ruling by renewing his argument that the district court should have abstained from reaching the merits of the Rental Tax issue in the first place. He mentions in passing that the Tribe "should not be able to create an end-run around" the Tax Injunction Act, 28 U.S.C. § 1341—which would preclude the Ark Entities from bringing a similar federal suit. To the extent that Stranburg is raising a Tax Injunction Act argument against the Tribe on appeal, the argument is foreclosed by Supreme Court precedent. *See Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 472-75, 96 S. Ct. 1634, 1640-42 (1976) (holding that Indian tribes can challenge state taxation in federal court despite the prohibitions of the Tax Injunction Act); *see also Osceola v. Fla. Dep't of Revenue*, 893 F.2d 1231, 1234 (11th Cir. 1990). Primarily, though, Stranburg argues that "principles of comity weigh against allowing the Rental Tax claims to proceed."

This issue was raised and rejected at the motion-to-dismiss stage. Stranburg did not renew the comity argument at the summary-judgment stage. More

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at 175-76, 109 S. Ct. at 1707. Despite Stranburg's assertions to the contrary, this logic is not "circular" because the state's authority to levy the tax does not depend on whether the Ark Entities agreed to pay it in the lease, but rather on whether Congress has acted expressly or impliedly to preempt the tax.

significantly, Stranburg did not include the district court's ruling on the motion to dismiss in his Notice of Appeal, which mentioned just the final judgment order and the summary-judgment order as the rulings appealed.

This Court has determined that it lacks jurisdiction to consider an appeal of an order not specifically mentioned in the appellant's Notice of Appeal. *See Osterneck v. E.T. Barwick Indus., Inc.*, 825 F.2d 1521, 1528-29 (11th Cir. 1987); *Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365, 1374-75 (11th Cir. 1983). "We have previously concluded that, where some portions of a judgment and some orders are expressly made a part of the appeal, we must infer that the appellant did not intend to appeal other unmentioned orders or judgments." *Osterneck*, 825 F.2d at 1529. By the terms of our precedent and under our continuing obligation to examine jurisdiction at every stage of the proceeding, *id.* at 1525 n.5, we conclude that we do not have jurisdiction to address Stranburg's appeal of the district court's order rejecting the comity argument.

But even if no jurisdictional bar existed, we find that the district court did not abuse its discretion when it declined to dismiss the federal suit on comity grounds. In the district court, Stranburg primarily invoked *Younger* abstention,[15] but on appeal, he

[15] *Younger* abstention is a judicial doctrine, named for *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746 (1971), where the

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instead relies heavily on *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 130 S. Ct. 2323 (2010), a case focused more on the comity doctrine in the context of federal challenges to state tax statutes.

In *Levin*, the Supreme Court decided that a federal court should decline a constitutional challenge to allegedly discriminatory state tax exemptions when an adequate state-court forum is available to decide the challenge. 560 U.S. at 421, 130 S. Ct. at 2330. In reaching this conclusion, the Supreme Court relied on a unique confluence of factors: the plaintiff sought federal-court review of commercial matters over which the state had wide regulatory authority; the suit did not involve fundamental rights or heightened judicial scrutiny; the plaintiffs were essentially seeking to improve their own economic position in relation to other private parties; and, the state courts

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Supreme Court recognized a limited exception to a federal court's "virtually unflagging obligation" to exercise its jurisdiction when "extraordinary circumstances" counsel abstention in favor of pending state proceedings. *See For Your Eyes Alone, Inc. v. City of Columbus*, 281 F.3d 1209, 1215-16 (11th Cir. 2002). *Younger* itself dealt only with attempts to restrain pending state criminal prosecutions, but the doctrine has been expanded to state civil proceedings akin to criminal prosecutions or proceedings to enforce state-court judgments. *See Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 588 (2013). Nevertheless, the Supreme Court has emphasized that circumstances warranting *Younger* abstention are "exceptional," and the mere pendency of parallel state proceedings is not itself a bar to federal court litigation. *See id.* at 588, 593-94. None of the exceptional circumstances warranting *Younger* abstention exist here.

were more familiar with the state legislative preferences at stake and were not hampered in the type of remedies they could administer, unlike federal courts constrained by the Tax Injunction Act. *Id.* at 431-32, 130 S. Ct. at 2336. On appeal, Stranburg asserts generally that the same considerations motivating abstention in *Levin* apply here.

Stranburg acknowledges that the Supreme Court has not had occasion to consider *Levin* in the context of federal Indian law, and he admits that the Second Circuit has rejected dismissal on comity grounds when an Indian tribe challenges state taxation. In *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 465-66 (2d Cir. 2013), the Second Circuit concluded that two factors counseled against applying *Levin*'s comity analysis in an Indian case: a strong federal interest in determining the contours of a pervasive federal regulatory scheme, particularly when Congress has favored a federal forum for Indians to vindicate federal rights, and the observed fact that federal courts regularly entertain tribal challenges to state taxation. *Id.* at 466. The Second Circuit also noted that dismissal of the tribe's state-tax challenge on comity grounds would have been the first such dismissal of an Indian tribe's challenge by a federal court ever. *See id.* at 466 n.7. These factors similarly counsel against dismissal on comity grounds here.

Stranburg tries to distinguish *Mashantucket* by pointing out that there, the state-court action was filed two years after the federal action, whereas here,

the state action was filed just two days after the federal action. But *Mashantucket* acknowledged only that the state-court proceedings would have merited greater deference if they had been filed *before* the federal proceedings. 722 F.3d at 466 n.6. In any event, the two factors counseling against a comity dismissal in *Mashantucket* do not turn on the filing date of related state-court proceedings.

Beyond the factors in *Mashantucket*, this case presents other facts that distinguish it from *Levin*. First, the key legal issue here does not involve interpretation of state law, but rather interpretation of federal Indian law, federal statutes, and federal preemption. Little reason exists to believe that a federal court would be less suited than a state court to adjudicate these issues. Second, unlike in *Levin*, the Tax Injunction Act would not preclude or constrain any federal remedies because the plaintiff here is an Indian Tribe. In light of these circumstances, the district court did not abuse its discretion in declining to dismiss the Tribe's Rental Tax claim on comity grounds.

## IV. Florida's Gross-Receipts Utility Tax

Stranburg contends on appeal that the district court also erred in finding that the legal incidence of Florida's Gross-Receipts Utility Tax falls on the Tribe. After careful consideration of the Florida tax scheme, we agree with Stranburg and hold that the legal incidence of the tax falls on the non-Indian utility

company. Although the district court did not conduct an alternative *Bracker* inquiry for the Utility Tax, we also find that the Tribe has not established as a matter of law that federal law preempts the Utility Tax.

### *A. Legal Incidence*

The district court concluded that the legal incidence of Florida's Gross-Receipts Utility Tax fell on the Tribe. *Seminole Tribe*, 49 F. Supp. 3d at 1103-08. Relying on *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 115 S. Ct. 2214 (1995), the district court determined that the Utility Tax was categorically barred as an "impermissible direct tax upon the Seminole Tribe on its reservation." *Id.* at 1108. While both parties' positions have some merit, following a *de novo* review, we conclude that the district court's legal-incidence determination is not the "fair[est]" reading of the Florida taxing scheme, *Chickasaw Nation*, 515 U.S. at 461, 115 S. Ct. at 2221, so we find that the district court erred in placing the legal incidence on the Tribe.

1. *Chickasaw Nation* and the Legal Incidence Inquiry

In *Chickasaw Nation*, the Supreme Court considered a tribal challenge to Oklahoma's fuel excise tax.[16] 515 U.S. at 452-53, 115 S. Ct. at 2217. The tribe contended that Oklahoma's tax fell on the tribe, as retailer of gasoline at its on-reservation convenience stores. *Id.* at 455, 115 S. Ct. at 2218-19. The state countered that its tax did not fall upon retailers (and therefore upon the tribe), but rather on the fuel distributors or fuel consumers. *Id.* at 456, 461-62, 115 S. Ct. at 2219, 2221-22. Because the tax did not fall on the tribe, the state argued, its interest in imposing the tax outweighed any incompatible federal or tribal interests. *See id.*

The Supreme Court first recalled that, generally, a state may not levy a tax on an Indian tribe or its members for on-reservation activities. *Id.* at 458, 115 S. Ct. at 2220. In the Court's view, "[t]he initial and frequently dispositive question in Indian tax cases, therefore, is who bears the *legal incidence* of a tax." *Id.* (emphasis added). The Court specifically rejected a test that would focus on economic realities, finding that legal incidence provided a predictable and certain test for state taxing authorities. *Id.* at 459-60, 115 S. Ct at 2221. In doing so, the Court conceded

[16] The *Chickasaw Nation* Court also considered the validity of Oklahoma's income tax, but that discussion is not relevant to our analysis here. *See* 515 U.S. at 462-67, 115 S. Ct. at 2222-24.

that it would be easy for the state to amend its law and shift the legal incidence by simply "declaring the tax to fall on the consumer and directing the Tribe to collect and remit the levy." *Id.* at 460, 115 S. Ct. at 2221 (internal quotation marks omitted).

As a result, the legal incidence of a tax is a question of state law. *See id.* at 460-61, 115 S. Ct. at 2221. A clear declaration of legal incidence or a mandatory "pass through" provision requiring a tax to be passed on to the consumer is "dispositive language" of legal incidence. *See id.* at 461, 115 S. Ct. at 2221. But "[i]n the absence of such dispositive language, the question is one of 'fair interpretation of the taxing statute as written and applied.'" *Id.* (quoting *Cal. Bd. of Equalization v. Chemehuevi Tribe*, 474 U.S. 9, 11, 106 S. Ct. 289, 290 (1985) (per curiam)).

Because the Oklahoma statute did not contain dispositive language, the Court analyzed several factors in concluding that the legal incidence of the fuel tax fell on the tribal retailers. First, the Court observed that the statutory language required the distributor to remit the tax due "on behalf of a licensed retailer." *Id.* at 461, 115 S. Ct. at 2221-22 (emphasis omitted). Second, the Court took into account the fact that the tax was not imposed on sales between distributors, but was imposed on sales from a distributor to a retailer. *Id.* at 461, 115 S. Ct. at 2222. Third, the Court noted the distributor's ability under the law to deduct any subsequently uncollected amount of tax previously paid. *Id.* And fourth, the fact that the distributor was able to retain

a small portion of the tax as compensation for serving as the state's tax collector also pointed towards the determination that the legal incidence of the fuel tax fell on the tribal retailers. *Id.* at 462, 115 S. Ct. at 2222. In view of these circumstances, the Court determined that the distributor served as merely a "transmittal agent" for taxes imposed on the retailer. *Id.* at 462, 115 S. Ct. at 2222. The lack of any similar statutory language regarding the relationship between retailers and consumers, the Court concluded, meant that the tax was legally imposed on the retailer. *Id.*

2. The Legal Incidence of Florida's Utility Tax Falls on the Utility Company

Florida imposes a tax on the "gross receipts from utility services that are delivered to a retail consumer" in Florida. *See* Fla. Stat. § 203.01(1)(a)(1) (2012). In evaluating where the legal incidence of this tax falls, we consider the framework and language of the statute.

The statute, which is contained in Chapter 203 of the Florida Statutes—a chapter devoted exclusively to gross-receipts taxes (as opposed to, for example, sales or property taxes)—explains that the "tax is imposed upon every person for the privilege of conducting a utility or communications services business, and *each provider of the taxable services remains fully and completely liable for the tax, even if the tax is separately stated as a line item or component of the*

*total bill.*" *Id.* § 203.01(5) (emphasis added). Florida's administrative regulations similarly provide that the Utility Tax "is imposed on the privilege of doing business, and it is an *item of cost to the distribution company,*" who "remains *fully and completely liable for the payment of the tax, even when the tax is wholly or partially separately itemized on the customer's bill.*" Fla. Admin. Code R. 12B-6.0015(3)(a) (emphasis added). While none of this language represents a "dispositive statement" of legal incidence, we find that it points strongly towards a legislative intent to impose the tax on utility companies.

In determining that the legal incidence of Florida's Utility Tax fell on the consumer Tribe, the district court relied on § 203.01(4), Fla. Stat., to conclude that "[e]very consumer is required to 'remit the tax' to the utility company as part of the total bill." *Seminole Tribe*, 49 F. Supp. 3d at 1104. On appeal, the Tribe similarly invokes § 203.01(4) in an effort to show that the legislature intended to require the Utility Tax to be passed through to the consumer. But this provision of the statute applies only when the utility service provider has elected to itemize the tax separately on its bills—a choice completely left to the discretion of the service provider. *See* Fla. Stat. § 203.01(4) ("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 . . . . *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 . . . ." (emphasis added)).

Although an itemized amount of the Utility Tax becomes a component of the consumer's bill that is, in a sense, transmitted by the utility to the state once collected, it is key in our view that nothing about this section *requires* a utility provider ever to itemize the tax. Ultimately, then, there is no *requirement* from the legislature to pass the tax through to the consumer, and it is the *requirement* that matters. *See Chickasaw Nation*, 515 U.S. at 459-60, 115 S. Ct. at 2221 (rejecting an "economic realities" inquiry into, among other things, "how completely retailers can pass along tax increases"); *id.* at 461, 115 S. Ct. at 2221 ("[N]or does it contain a 'pass through' provision, *requiring* distributors and retailers to pass on the tax's cost to consumers." (emphasis added)); *see also Wagnon*, 546 U.S. at 103, 126 S. Ct. at 682 ("While the distributors are 'entitled' to pass along the cost of the tax to downstream purchasers, . . . they are not required to do so." (citation omitted)); *Chemehuevi Indian Tribe*, 474 U.S. at 10-11, 106 S. Ct. at 289-90; *United States v. State Tax Comm'n of Miss.*, 421 U.S. 599, 608, 95 S. Ct. 1872, 1878 (1975) ("[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." (emphasis added)).[17]

The district court also looked at Florida's administrative regulations and concluded that, under them, "[i]f the consumer does not remit the tax to the utility company, then the utility company is not required to pay the tax over to the State." *Seminole Tribe*, 49 F. Supp. 3d at 1104. Based on this reasoning, the district court determined that the utility serves merely as a transmittal agent not unlike the distributors in *Chickasaw Nation*. *Id.* This comparison elides a necessary distinction between an excise tax and a gross-receipts tax, though.

Florida's Utility Tax law taxes receipts of payments. As detailed in the regulations cited by the district court, though, the utility may elect to pay the tax to the state based on total billings for the month as opposed to total receipts. *See* Fla. Admin. Code R. 12B-6.005(1)(e)(1). Because customers do not always pay their bills, the utility is permitted to take a credit or seek a refund of taxes it paid on billings that go uncollected. *See id.* R. 12-B-6.005(1)(e)(2)-(3). On the

[17] *Mississippi Tax Commission* did not involve taxes on Indian reservations but rather state taxes of alcohol on military bases. 421 U.S. at 600, 95 S. Ct. at 1874. There, the Supreme Court found that the legal incidence of the taxes fell on the military purchasers because the distillers were required to include the tax markup in the price, the military purchasers were required to pay the markup to the distillers, and the distillers were required to remit the markup to the tax commission. *Id.* at 608-09, 95 S. Ct. at 1878.

surface, then, this regulation may look similar to the Oklahoma law that permitted a distributor to take a credit for taxes unpaid by the retailer and may create the impression that the utility is in the same position as the Oklahoma distributor. *See Chickasaw Nation*, 515 U.S. at 461-62, 115 S. Ct. at 2221-22; *Seminole Tribe*, 49 F. Supp. 3d at 1104.

But the nature of Florida's tax necessitates a different result. The taxable event under the Florida tax is the *receipt of payments*, while in *Chickasaw Nation*, the taxable event was the sale of fuel to the retailer. *See Chickasaw Nation*, 515 U.S. at 462, 115 S. Ct. at 2222. Under the Utility Tax law, no tax liability exists until a consumer actually pays the utility something.[18] Consequently, when a Florida utility takes a credit for uncollected billings, it is

[18] The district court commented that "in reality, the utility company is only liable for the tax if and when the consumer remits the tax to the utility company as part of the consumer's utility bill." *Seminole Tribe*, 49 F. Supp. 3d at 1104. The Tribe stresses this point on appeal, arguing that the utility never pays "out of pocket" if the customer does not pay the tax portion of its bill. The Tribe's argument is true to a point, but it tells only part of the story, as (a) no one is liable for the Utility Tax if the utility never receives payment from its customers, and (b) the utility is liable for taxes on any fraction of payment received. In other words, if a customer chose not to pay the itemized portion of the tax but did pay the rest of its utility bill, then the utility would still owe tax on the smaller amount received. If, for some reason, the utility did not pass along the tax as part of its bill, it would still be required to pay the tax based on the amount it receives from its customers. *See* Fla. Admin. Code R. 12B-6.0015(3)(a)-(b).

seeking a refund to itself of a tax that it never owed in the first place. In contrast, in *Chickasaw Nation*, the tax was still owed by the retailer and any credit sought by the distributor was merely for taxes it prematurely transmitted. Given the nature of the Florida tax, the refund and credit regulations are far less indicative of transmittal-agent status[19] here than in *Chickasaw Nation*.

The district court also put significant weight on a provision of the statute concerning an exemption regarding certain natural-gas customers. *Seminole Tribe*, 49 F. Supp. 3d at 1104-05 (citing Fla. Stat. § 203.01(3)(d)). That provision states that the Utility Tax does not apply to natural-gas sales to a limited class of industrial customers that use the gas as an energy source or a raw material. Fla. Stat. § 203.01(3)(d) (cross-referencing Fla. Stat. § 212.08(7)(ff)(2)). The paragraph further provides that if the exempt consumer gives the utility a written certification of its industrial exemption, the utility is relieved "from the responsibility of remitting tax on the nontaxable amounts, and the department shall look solely to the purchaser for recovery of such tax if the department determines that the purchaser was not entitled to the

[19] Additionally, in contrast to *Chickasaw Nation*, nothing in Florida law states that the utility remits the tax "on behalf of" its customers, nor does Florida law permit a utility to keep a fraction of the gross-receipts tax as compensation for collecting the tax. *See Chickasaw Nation*, 515 U.S. at 461-62, 115 S. Ct. at 2221-22.

exclusion." *Id.* From this provision, the district court drew the conclusion that the existence of exemptions based on the identity of the consumer "reveals the legal incidence of the tax is upon the consumer." 49 F. Supp. 3d at 1104-05.

This holding rests upon the notion that consumer-based exemptions illustrate that the legislature implicitly intended the tax to fall on consumers because the exemptions necessarily recognize that the tax can be passed through to consumers. But as with the provision allowing for optional itemization of the bill to reflect the amount of the Utility Tax, recognition that a tax may, or even likely will be passed through to a consumer is not the same as *mandating* that the tax be passed through.[20] To shift the legal incidence to a consumer, *Chickasaw Nation* insists that any pass-through be mandatory.

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[20] In fact, it's hard to imagine any business tax that wouldn't be passed along ultimately to the consumer unless doing so was expressly or economically prohibited. *Cf. Chickasaw Nation*, 515 U.S. at 460, 115 S. Ct. at 2221 (noting the "complicated" relationship between passing along tax increases and sales volume). Or as Ronald Reagan once explained, "Who pays the business tax anyway? *We do! You* can't tax business. Business doesn't *pay* taxes. It *collects* taxes." Manuel Klausner, *Inside Ronald Reagan: A Reason Interview*, REASON, July 1975 (emphasis in original), http://reason.com/archives/1975/07/01/inside-ronald-reagan/print (last visited Aug. 18, 2015). But again, the Supreme Court has been clear in rejecting an economic-realities test in determining legal incidence.

Similarly, the district court pointed to another provision of Florida's overall gross-receipts tax code that it interpreted as "expressly stat[ing] that no other 'exemptions or exceptions' apply to the Utility Tax." 49 F. Supp. 3d at 1104-05 (citing Fla. Stat. § 203.04). In the district court's view, the "fact that the Florida legislature provided some exemptions to the Utility Tax, and disavowed many other exemptions, reveals that the legislature intended the legal incidence of the Utility Tax to fall upon consumer," because "[i]f the legal incidence of the tax were on the utility company, there would be no need for the disavowal of most exemptions and exceptions, or the inclusion of others." *Id.*

We respectfully disagree with this conclusion. First, this passage of Florida law merely creates a statutory rule of construction requiring that any tax exceptions or exemptions be clearly expressed by the legislature. Fla. Stat. § 203.04. Second, we discern no inherent incompatibility between placing the *legal* incidence of the tax on the utility provider and tying exemptions from the tax to certain types of consumers. Surely, the legislature can act to encourage certain industries with exemptions that essentially *prohibit* permissive pass-through without making pass-through mandatory. Moreover, the legislature can encourage the utility provider's business through targeted tax exemptions (for example, encouraging the utility to provide services to an underserved area by reducing the taxes on the receipts obtained from

those underserved areas) without impacting the legal incidence of the tax.

In essence, arguments concerning consumer-based tax exemptions appear to us to conflate legal and economic incidence by viewing economically inevitable pass-through as indistinguishable from legally mandatory pass-through. *See, e.g.*, *Seminole Tribe*, 49 F. Supp. 3d at 1105 ("Under Florida law the tax *is* passed on to consumers, whether it is separately itemized or not . . . ." (emphasis added)). But *Chickasaw Nation* insists on mandatory legal requirements over economic realities, no matter how "automatic" those realities may be.

The district court also contrasts this case with *Wagnon*, where the Kansas statute expressly permitted the distributor to pass on the tax without requiring it to do so. *See Seminole Tribe*, 49 F. Supp. 3d at 1105 (citing *Wagnon*, 546 U.S. at 103, 126 S. Ct. at 682). But the absence of statutory language expressly permitting pass-through of a tax does not equate to a statutory requirement that the tax must be passed through, even when the economic realities of the situation all but make such pass-through automatic. The distinction might be one of form over substance, but the Supreme Court recognized as much was possible when it acknowledged that a state can shift the legal incidence of a tax through wordsmithing. *See Chickasaw Nation*, 515 U.S. at 460, 115 S. Ct. at 2221.

Of course, a pass-through requirement need not be explicitly stated in dispositive language and instead may be fairly interpreted from the statute and its application. *Chemehuevi Indian Tribe*, 474 U.S. at 10-11, 106 S. Ct. at 289-90. But it must be a *requirement* nonetheless. *See id.*; *Chickasaw Nation*, 515 U.S. at 461, 115 S. Ct. at 2221; *Wagnon*, 546 U.S. at 103, 126 S. Ct. at 682; *Miss. Tax Comm'n*, 421 U.S. at 608, 95 S. Ct. at 1878. Despite the Tribe's emphasis on the inevitability of pass-through, at the end of the day, there is simply nothing in the Florida scheme requiring a utility to pass the tax along to its customers.

Finally, the Tribe attempts to liken Florida's gross-receipts tax to a sales tax, where, generally under Florida law, the legal incidence falls on the consumer. *See Fla. Dep't of Revenue v. Naval Aviation Museum Found., Inc.*, 907 So. 2d 586, 587 (Fla. 1st DCA 2005). And, indeed, Florida's sales-tax statute initially describes the sales tax in a manner similar to the Utility Tax. *Compare* Fla. Stat. § 212.05 ("It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state . . . .") *with* Fla. Stat. § 203.01(5) (2012) ("The tax is imposed upon every person for the privilege of conducting a utility or communications services business . . . ."). But this is where the similarities end.

The Supreme Court has recognized that sales and gross-receipts taxes are distinguishable based on the legal incidence of the tax:

> We follow standard usage, under which gross receipts taxes are on the gross receipts from sales payable by the seller, in contrast to sales taxes, which are also levied on the gross receipts from sales but are payable by the buyer (although they are collected by the seller and remitted to the taxing entity).

*Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 n.3, 115 S. Ct. 1331, 1335 n.3 (1995). Florida has embraced this distinction by labeling the Utility Tax as a gross-receipts tax and codifying it in a separate chapter—Chapter 203—from Florida's sales taxes, which are found in Chapter 212.

Beyond the traditional definitions, Florida has also expressly codified that the sales tax must be passed through to, and be paid by, the consumer—something it has not done with respect to the gross-receipts tax. *See, e.g.*, Fla. Stat. § 212.06(3)(a) ("[E]very dealer making sales, . . . *shall*, at the time of making sales, collect the tax imposed by this chapter *from the purchaser*." (emphasis added)); *id.* § 212.07(1)(a) ("The privilege tax herein levied measured by retail sales *shall* be collected by the dealers *from the purchaser or consumer*." (emphasis added)); *id.* § 212.07(4) ("A dealer engaged in any business taxable under this chapter may not advertise or hold out to the public, in any manner, directly or indirectly, that he or she will absorb all or any part of the tax, or that he or she will

relieve the purchaser of the payment of all or any part of the tax, or that the tax will not be added to the selling price of the property or services sold or released or, when added, that it or any part thereof will be refunded either directly or indirectly by any method whatsoever.").

Additionally, the State of Florida cannot pursue utility customers for unpaid Utility Tax amounts, while it can pursue purchasers for unpaid sales taxes. Fla. Stat. § 212.07(8); Steffens Dep. 36:16-37:19. The Tribe tries to undermine this point by arguing that having the utility provider remit the tax is merely designed for the "administrative convenience of the state," because it would be too onerous for the state to collect the tax directly from consumers. But the Tribe's argument does not matter to the issue of legal incidence. As the Supreme Court noted in *Chickasaw Nation*, a state can intentionally place the legal incidence of a tax on one entity while requiring another entity to collect and remit the levy. *See Chickasaw Nation*, 515 U.S. at 460, 115 S. Ct. at 2221.

Finally, we observe that Florida also levies a sales tax on electricity, the legal incidence of which falls on the purchaser of electricity. Fla. Stat. § 212.05(1)(e)(1)(c); *see* Fla. Stat. § 203.01(1)(a)(3); *id.* § 212.06(3)(a). While separate gross-receipts and sales taxes do not necessarily indicate that the taxes have separate legal incidences, given the traditional usage of those terms and the structure of Florida's tax code, we find the separate taxes more indicative

of an intent to impose the legal incidence of the Utility Tax on the utility rather than to place both taxes on the consumer.

This is not to say that the district court's analysis is not valid in other respects, and in fact, the Florida tax does bear some hallmarks of the Oklahoma tax discussed in *Chickasaw Nation*. For example, just as Oklahoma did not tax sales between distributors in *Chickasaw Nation*, Florida generally does not apply its tax to sales of natural gas or electricity from one utility service provider to another. *See* Fla. Stat. § 203.01(3)(a)(1), (2); Fla. Admin. Code R. 12B-6.0015(1)(b), (2)(c). Nevertheless, we conclude that the "fair[est]" interpretation of Florida's Utility Tax statute as written and applied demonstrates that the state intended the legal incidence of the tax to fall on the utility company.

### B. Is the Utility Tax Preempted Under *Bracker*?

Having concluded that the Utility Tax impermissibly fell on the Tribe, the district court declined to determine in the alternative whether the Utility Tax would be preempted by federal law under *Bracker*. *See Seminole Tribe*, 49 F. Supp. 3d at 1108. Now that we have reached the opposite conclusion, we must determine whether federal law preempts imposition of the Utility Tax on non-Indian utility companies

operating on-reservation.[21] After careful consideration, we hold that the Utility Tax does not violate federal law.

Whether the Utility Tax is preempted by federal law is ultimately a question of congressional intent. *Cotton Petroleum*, 490 U.S. at 175-76, 109 S. Ct. 1707. Although an express congressional declaration of preemption is not required, the federal and tribal interests at stake must be sufficient to establish that the exercise of the state's taxing authority here violates congressional intent. *See id.* at 176-77, 109 S. Ct. at 1707-08; *Bracker*, 448 U.S. at 144-45, 100 S. Ct. at 2584. Unlike in the case of the Rental Tax, we discern here no pervasive federal interest or

[21] We assume, for the purposes of our inquiry, that the "taxable event" under the Utility Tax occurs on the reservation. In the district court, Stranburg argued that the taxable event occurred where the utility company physically received its payments. But Stranburg provided no legal authority for this position, nor did he even provide any record evidence indicating where the utility payments were collected. Consequently, the district court determined that the tax was imposed on-reservation and that Stranburg had "forfeited" any argument that the tax was imposed off-reservation. *Seminole Tribe*, 49 F. Supp. 3d at 1107. While Stranburg insists that we need not decide this issue, he contends on appeal that he has not abandoned his argument that the taxable event occurs off-reservation. But Stranburg has still failed to cite legal authority or factual evidence in support of his argument. Accordingly, he has likely forfeited any challenge to the district court's determination. *See Farrow v. West*, 320 F.3d 1235, 1242 n.10 (11th Cir. 2003). Regardless, because we conclude, under the record presented in this case, that the tax is validly imposed on-reservation, the issue is essentially moot.

comprehensive regulatory scheme covering on-reservation utility delivery and use sufficient to demonstrate a congressional intent to preempt state taxation of a utility provider's receipts derived from on-reservation utility service.

The Tribe asserts that the tax is preempted because the Tribe uses electricity in connection with various activities whose regulation is preempted by federal law, including the provision of essential government services, leasing of Indian land, and Indian gaming. In the Tribe's view, the Utility Tax is indistinguishable from the tax on fuel preempted in *Bracker* because fuel use was essential to the heavily regulated timber activities that preempted the tax, and electricity is essential to all on-reservation activities.

The problem with the Tribe's argument is that it ignores the nature of the *Bracker* inquiry—a "particularized" and "flexible" test "sensitive to the particular state, federal, and tribal interests involved." *Bracker*, 448 U.S. at 145, 100 S. Ct. at 2284; *Cotton Petroleum*, 490 U.S. at 184, 109 S. Ct. at 1711. The fuel tax was preempted in *Bracker* as applied to the timber company because of the extensive federal regulation of Indian timber harvesting. *Bracker* did not invalidate (or even discuss) the application of Arizona's fuel tax to other on-reservation activities. Significantly, the Tribe has not introduced evidence of a substantial federal interest in regulating Indians' utility use specifically. The Tribe essentially expresses a generalized desire to avoid the Utility Tax. Just as the state

cannot assert a generalized interest in raising revenue to support its taxes, the Tribe cannot demonstrate congressional intent to preempt a specific state tax by bundling up an assortment of unrelated federal and tribal interests tied together by the common thread of electricity use. Because the Tribe does not develop further argument with respect to electricity use in specifically regulated on-reservation activities,[22] we conclude that it has not established that Florida's Utility Tax is generally preempted as a matter of law in this case.

## V. Conclusion

In conclusion, we hold that Florida's Rental Tax is expressly precluded by 25 U.S.C. § 465, and, in the alternative, is preempted by the comprehensive federal regulation of Indian land leasing. We therefore affirm that aspect of the district court's order. We further conclude that the district court erred in

[22] The Tribe's brief contains a non-exhaustive list of activities it asserts are "exclusively and pervasively regulated by federal law," including police and fire protection, land leasing, and gaming, along with references to associated federal statutes. But the Tribe has failed to demonstrate that the existence of these statutes represents an exclusive or pervasive federal regulation of those activities. Accordingly, we are not in a position to conduct particularized inquiry with respect to each specific activity listed. But we offer no opinion on whether, if properly framed, the Tribe may be able to demonstrate that the Utility Tax is preempted with respect to some or all of the specific activities it has listed.

placing the legal incidence of the Utility Tax on the Tribe and find that, on this record, the Tribe has not demonstrated that the Utility Tax is generally preempted by federal law. Accordingly, we reverse the district court's judgment with respect to Florida's Utility Tax. This case is remanded to the district court for proceedings consistent with this opinion.

**AFFIRMED IN PART and REVERSED IN PART.**

## APPENDIX B

United States District Court
for the
Southern District of Florida

| | | |
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| Seminole Tribe Of Florida, Plaintiff<br>v.<br>State Of Florida, Department Of Revenue, and Marshall Stranburg, as Interim Executive Director and Deputy Executive Director, Defendants | ) | Civil Action No. 12-62140-Civ-Scola |

**Order On Cross Motions For Summary Judgment**

(Filed Sep. 5, 2014)

The Seminole Tribe of Florida filed this lawsuit challenging the imposition of two Florida taxes: the Rental Tax and the Utility Tax. After considering the extensive briefing by the parties, as well as hearing oral argument from each side, the Court finds that Federal law prohibits both taxes from being imposed.

### 1. Background

The Seminole Tribe of Florida is a federally recognized Indian tribe, with reservations throughout Florida. The Florida Department of Revenue is the agency responsible for collecting tax revenues and

enforcing Florida's tax laws. Marshall Stranburg is the executive director of the Department of Revenue.

The Seminole Tribe owns and operates entertainment and gaming facilities, including the Seminole Hard Rock Hotel and Casinos, at its Hollywood Reservation and its Tampa Reservation. (*Compare* Compl. ¶ 10, ECF No. 1 *with* Answer ¶ 10, ECF No. 52.) As part of these operations, the Tribe has leased a portion of the space at the Seminole Hollywood Casino to Ark Hollywood, LLC, and a portion of the space at the Seminole Tampa Casino to Ark Tampa, LLC. (Answer ¶¶ 12-13, ECF No. 52.) Florida assessed a tax on the rent paid to the Seminole Tribe by Ark Hollywood and Ark Tampa for the leases on the Tribe's Reservations. (*Compare* Compl. ¶ 18, ECF No. 1 *with* Answer ¶ 18, ECF No. 52.) The Seminole Tribe asserts that Federal law prohibits this Rental Tax. Stranburg disagrees.

Florida imposes a Utility Tax on electricity that is delivered to the Seminole Tribe on tribal reservations. (*Compare* Compl. ¶¶ 22, 24, ECF No. 1 *with* Answer ¶¶ 22, 24, ECF No. 52.) The Tribe argues that Federal law prohibits Florida from imposing this tax. Again, Stranburg disagrees.

Previously, this Court determined that the State of Florida is immune from suit under the Eleventh Amendment, but that Stranburg, as executive director of the Florida Department of Revenue, was a proper defendant in this lawsuit.

**2. Florida's Rental Tax**

Florida imposes a Rental Tax on tenants leasing commercial property within the State. *See* Fla. Stat. § 212.013 (2012). The Tribe argues that federal law prohibits Florida from enforcing its Rental Tax against Ark Hollywood and Ark Tampa on their leases of Tribal land. Specifically, the Tribe cites to 25 U.S.C. § 465 and 25 C.F.R. §§ 162.001-162.703 for the proposition that federal law expressly prohibits Florida's Rental Tax. Stranburg argues that "the Rental Tax is not a tax on Tribal land; rather it is a privilege tax imposed on non-Indian tenants for the use of commercial property, and is not prohibited by either provision." (Def.'s Mot. Summ. J. 3, ECF No. 61.) Stranburg also argues that 25 U.S.C. § 465 does not prohibit the State from imposing nondiscriminatory taxes to non-Indian leases. (Def.'s Resp. 4, ECF No. 66.) Finally, Stranburg resolutely contends that the Secretary of the Interior (the author of federal regulations in dispute) does not have the authority to create a tax exemption and that the Supreme Court has previously rejected the Secretary's stated rationale in establishing the regulations. (*Id.* 3-8.) This Court finds that federal law prohibits Florida from collecting the Rental Tax from the Ark entities, despite Stranburg's arguments to the contrary.

### A. The Rental Tax is unlawful by virtue of 25 U.S.C. § 465.

The Seminole Tribe's Reservations fall under Section 465's exemption from state taxes. In 1956, Congress conveyed land in Florida to the Seminole Tribe. Act of July 20, 1956, Pub. L. No. 736, 70 Stat. 581 (conveying equitable title to the Seminole Tribe and administrative jurisdiction to the Secretary of the Interior). The Act of July 20, 1956 also declared "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 of June 18, 1934, Pub. L. No. 383, 48 Stat. 984]" are "a reservation for the use and benefit" of the Seminole Tribe.[1] (*Id.*) Reservation lands acquired by virtue of the Act of June 18, 1934, Pub. L. No. 383, 48 Stat. 984 are "exempt from State and local taxation." 25 U.S.C. 465.

The Supreme Court has interpreted Section 465 as prohibiting a state from imposing a "use tax" on "permanent improvements" that an Indian tribe installs on off-reservation land. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 158 (1973). A *use tax* is a "tax imposed on the use of certain goods that are bought

[1] The Act of July 20, 1956 refers to "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." The Act of June 18, 1934, Pub. L. No. 383, 48 Stat. 984 was later codified in several sections of the United States Code, including 25 U.S.C. § 465.

outside the taxing authority's jurisdiction." *Black's Law Dictionary* 1688 (10th ed. 2014). The rationale supporting this rule is that "use is among the bundle of privileges that make up property or ownership of property and, in this sense, at least, a tax upon use is a tax upon the property itself." *Mescalero Apache Tribe v. Jones*, 411 U.S. at 158 (internal quotation marks omitted).

Among the other bundle of privileges that make up property ownership are the right to manage the property and the right to the income from the property. *See Burns v. Pa. Dep't of Corr.*, 544 F.3d 279, 287 (3d Cir. 2008) (citing A.M. Honoré, *Ownership*, in Oxford Essays In Jurisprudence 107 (A.G. Guest, ed. 1961) and Denise R. Johnson, *Reflections on the Bundle of Rights*, 32 Vt. L. Rev. 247, 253 (2007)). The right to manage the property consists of the right to decide who may use the property and how it may be used; the right to the income from the property consists of the right to the benefits derived from allowing others to use the property. Denise R. Johnson, *Reflections on the Bundle of Rights*, 32 Vt. L. Rev. 247, 253 (2007). The right to lease property to another for profit, like use, is among the bundle of privileges that make up property or ownership of property. *See Terrace v. Thompson*, 263 U.S. 197, 215 (1923) (explaining that a property owner's rights includes [sic] the right to lease the land). In this sense, a tax upon a lease is a tax upon the property itself. *See Mescalero Apache Tribe v. Jones*, 411 U.S. at 158. Accordingly, this Court finds 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.

### B. The Rental Tax is also preempted by Federal Law and impermissibly interferes with the Tribe's ability to exercise its sovereign functions.

The Indian Commerce Clause coupled with the semi-autonomous status of Indian tribes prohibits state taxes on non-Indians engaged in commerce on an Indian reservation if (1) the tax is preempted by federal law or, if (2) the tax interferes with a tribe's ability to exercise its sovereign functions. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980); *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 837 (1982). While either preemption or interference alone can be a sufficient basis for striking down a state tax, the two barriers are usually analyzed in conjunction with each other. *See Bracker*, 448 U.S. at 143; *see Ramah Navajo Sch. Bd.*, 458 U.S. at 837.

Current federal regulations expressly prohibit the Rental Tax, as applied to tribal leases. "In the area of Indian affairs, the [President] has long been empowered to promulgate rules and policies, and the power has been given explicitly to the Secretary [of the Interior] and his delegates at the [Bureau of Indian Affairs]." *Morton v. Ruiz*, 415 U.S. 199, 231, 231 n.25 & n.26 (1974) (citing 25 U.S.C. §§ 2 & 9). Consistent with this authority, the Secretary of the

Interior promulgated regulations that apply to leases of Indian land entered into under 25 U.S.C. § 415 ("Leases of restricted lands"). One such regulation states that when an Indian tribe leases restricted Indian land to a non-Indian, under 25 U.S.C. § 415, "the leasehold or possessory interest is not subject to any fee, tax, assessment, levy, or other change imposed by any State or political subdivision of a State." 25 C.F.R. § 162.017. In enacting this regulation, the Secretary of the Interior undertook a comprehensive evaluation of existing federal law, both statutory and decisional. The Secretary concluded that "[t]he Federal statutory scheme for Indian leasing is comprehensive, and accordingly precludes State taxation [of Indian leases]." Residential, Bus., & Wind & Solar Res. Leases on Indian Land, 77 Fed. Reg. 72440-01, at *72447-72448 (December 5, 2012).

Neither the Supreme Court, nor the Eleventh Circuit Court of Appeals has directly addressed the question of whether the current federal statutes and regulations governing the leasing of restricted Indian lands (under 25 U.S.C. § 415) have preempted state taxation of such lessees. In the past, the Supreme Court has analyzed the preemption issue regarding the taxing of leases for mining purposes (25 U.S.C. § 396a), and the taxing of fuel used in connection with harvesting of Indian timber (25 U.S.C. §§ 405-407). *Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163 (1989); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). In the *Cotton Petroleum* case, the Court found that the state tax was not preempted,

while in *Bracker*, the Court found the federal regulatory scheme was so persuasive that it precluded the state from imposing the tax. *Cotton Petrol.*, 490 U.S. at 186; *Bracker*, 448 U.S. at 148.

This Court must give some weight and deference to the new regulations. Unlike in *Cotton Petroleum* or *Bracker*, this Court now has the benefit of the comprehensive analysis performed by the Secretary of the Interior showing how tribal interests are affected by state taxes on leases of restricted Indian land. This is not to say that the Secretary's conclusions are entitled to full *Chevron* deference. They are not. *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001). But, "given the specialized experience and broader investigations and information available to the [Secretary], and given the value of uniformity in its administrative and judicial understandings of what a national law requires" the Secretary's analysis is entitled "some deference." *Id.* When the relevant history and background of a particular subject are "complex and extensive," courts may give "some weight" to a Secretary's views about the impact of state laws on federal objectives. *Wyeth v. Levine*, 555 U.S. 555, 576 (2009). And there is no dispute that the topic of state taxation of Indian tribes has a complicated history and background. *See, e.g.*, *Washington v. Confed'd Tribes of Colville Indian Res.*, 447 U.S. 134, 176 (1980) (Rehnquist, J concurring in part, concurring in the result in part, and dissenting in part) (explaining that for the past 200 years, the courts of this Nation have struggled to develop "a coherent doctrine by

which to measure with some predictability the scope of Indian immunity from state taxation."). "While [Secretaries] have no special authority to pronounce on pre-emption absent delegation by Congress, they do have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Wyeth*, 555 U.S. at 576-77 (citation & quotation marks omitted). The amount of weight a court should give to a Secretary's "explanation of state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness." *Id.* at 577.

The Secretary of the Interior's analysis on the issue of preemption of state taxes on leases of restricted Indian land merits the full amount of deference available under the law. First, the Secretary of the Interior, through the Bureau of Indian affairs, is involved with Indians and Indian tribes on a daily basis. *Cf Bracker*, 448 U.S. at 147. In enacting its new regulations, the Secretary examined this Nation's extensive history with Indian tribes. The Secretary cited case law dating back to the 1800s and several treatises in detailing the historical backdrop of traditional notions of Indian self-government. 77 Fed. Reg. 72440-01, at *72447. The Secretary then painstakingly listed nearly 30 separate aspects of Indian leasing that federal regulations cover. *Id.* Next, the Secretary examined the legislative history of congressional

enactments regulating the leasing of restricted Indian lands. *Id.* The Secretary identified multiple federal policies that state taxes would obstruct, including tribal economic development, traditional notions of tribal sovereignty, and territorial autonomy. *Id.* The Secretary also reviewed and cited to a strategy paper on tribal economic development, a 2001 study by the U.S. Department of the Treasury, and a 2006 U.S. Census Report. *Id.* at *72447-72448. Finally, the Secretary detailed the practical reality—a reality that can only be known by an agency that oversees the day-to-day existence of Indians and tribes on reservations across the country—that "the 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." *Id.* at *72448.

The Court finds the Secretary's preemption analysis thorough and persuasive. For the reasons detailed by the Secretary of the Interior, this Court finds 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. Florida's assessment of its Rental Tax to the leases in this case would obstruct federal policies. The Court concludes that, in these circumstances, 25 U.S.C. § 415 and 25 C.F.R. § 162.017 prohibit the imposition of the Rental Tax to the Ark leases.

Stranburg argues that the Rental Tax is not a tax on the leasehold or possessory interest of the tribal

land, but rather an "excise tax on the privilege of renting or leasing real property." (Def.'s Mot. Summ. J. 6-8, ECF No. 61.) This argument is not persuasive. Section 162.017 reads that a state may not tax the "leasehold or possessory interest" under a lease, nor may it apply "privilege" or "excise" taxes to activities associated with the lease. Stranburg's argument that the Rental Tax is an excise tax on the privilege of renting or leasing real property provides no traction. Even if the Rental Tax is an "excise" or "privilege" tax, it is still impermissible as applied to the Seminole Tribe-Ark leases in this case. 25 C.F.R. § 162.017(b)-(c). Of course, to the extent Stranburg is arguing that the Rental Tax is taxing the Seminole Tribe directly for the privilege of renting the property, the tax would be barred by *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 458 (1995) as an impermissible direct tax upon the Seminole Tribe for transactions occurring on their Reservations.

Stranburg next argues that the lease agreements between the Seminole Tribe and Ark Hollywood and Ark Tampa are contrary to 25 C.F.R. § 162.017 because the lease agreements require Ark Hollywood and Ark Tampa to pay the Rental Tax. (Def.'s Mot. Summ. J. 6, ECF No. 61.) Stranburg contends that the Rental Tax must apply to these leases because 25 C.F.R. § 162.008(a) states that "if the provisions of the lease document conflict with this part, the provisions of the lease govern." As the Seminole Tribe points out, Stranburg's argument is flawed for several reasons. First, the lease agreements do not specifically refer to

Florida's Rental Tax. (*See* Am. & Restated Lease Agreement § 6.3, ECF Nos. 1-4 & 1-5.) Instead, the lease agreements state in general terms that the Ark entities are responsible for paying all applicable taxes on the leased property. (*Id.*) Since the Rental Tax is unlawful, as applied to these leases, it is not applicable to this property. In other words, there is no conflict between the lease agreements and 25 C.F.R. § 162.017. The language of the lease agreements cannot be read to require the Ark entities to pay unlawfully imposed taxes. The second problem with this argument is that, even if the language of the lease agreements was in conflict with 25 C.F.R. § 162.017, the lease agreement is a contract between the Seminole Tribe and the Ark entities—it conveys no rights upon Stranburg to enforce an otherwise unlawful tax. The law requires a party to "assert his *own* legal rights and interests," and not to rely on "the legal rights or interests of third parties." *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 984 (11th Cir. 2005). And the lease agreements expressly disclaim that the terms of the agreements convey third-party-beneficiary rights to anyone. (Am. & Restated Lease Agreement § 22.15, ECF Nos. 1-4 & 1-5.) Stranburg has not offered any legal authority to the contrary.

Stranburg also argues that the case of *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), requires this Court to uphold the Rental Tax. This argument is not convincing because there are several material differences between the Rental tax at issue here, and the state taxes that were challenged in the

*Cotton Petroleum* case. First, in *Cotton Petroleum* the challengers of the tax were relying on a single sentence contained in a letter from the Secretary of the Interior to Congress regarding proposed legislation. *Cotton Petrol.*, 490 U.S. at 177-78. In contrast, here, the Seminole Tribe has offered the detailed and comprehensive analysis from the Secretary of the Interior. This case does not involve a solitary sentence in a missive, but instead a comprehensive set of regulations "addressing non-agricultural surface leasing of Indian land." 77 Fed. Reg. 72440-01, at *72440. This case does not involve the unilateral view of the Secretary of the Interior speaking to the legislature, but instead a set of collaborative regulations enacted through the regular notice-and-comment rulemaking process.

The second material difference between the Rental tax and the oil-and-gas-severance tax challenged in the *Cotton Petroleum* case is that in *Cotton Petroleum* the Court found that the "legislative background" and "relevant backdrop of tribal independence" revealed that Congress had expressly permitted states to tax oil-and-gas production on Indian land on several occasions in the past. *Cotton Petrol.*, 490 U.S. at 180-82. There is no similar Congressional history expressly permitting states to tax non-agricultural surface leasing of Indian land. Stranburg has not cited to any such laws, nor has he argued that such a legislative history exists. In this case then, the relevant backdrop of tribal independence is the "deeply rooted" historical "policy of leaving Indians free from

state jurisdiction and control." *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 168 (1973) (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945)). In this case, where there is no Congressional history of allowing states to tax non-agricultural surface leasing of Indian land, the Court must resolve these "ambiguities in federal law . . . in favor of tribal independence." *Cotton Petrol.*, 490 U.S. at 177. Because the facts and tax in this case are so different from those in the *Cotton Petroleum* case, the Court is not persuaded by Stranburg's arguments that this Court should reach the same result as the Court in *Cotton Petroleum.*

Finally, Stranburg argues that the Court should uphold the Rental Tax because the Seminole Tribe has not presented adequate evidence that the Rental Tax imposes an economic burden on the Tribe. (Def.'s Mot. Summ. J. 10-11, ECF No. 61.) This argument also fails for several reasons. First, the *Bracker* case does not require a finding that a state's tax imposes an economic burden upon a Tribe. The Supreme Court explained that its analysis and decision was not based on the economic burden of the tax falling upon the Tribe—rather, the Court struck the tax because federal law preempted it. *Bracker*, 448 U.S. at 151 n.15. Even if such an economic burden were required, the Court in *Bracker* accepted the proposition that the state tax, although imposed on non-Indians engaged in activities on the reservation, affected the amount of revenue available to the Tribe. *Id.* at 150. Of course, this is nothing more than an

acknowledgment of the law of scarcity—a fundamental concept of economics. *See* Paul A. Samuelson & William D. Nordhaus, Economics 333 (James A. Bittker, *et al.* eds., 14th ed. 1992) ("At the very core of economics lies the fact of scarcity."). If Florida's Rental Tax does not apply, an entity leasing tribal land will have additional money in its pocket—money that would then be available to the Tribe, either through negotiated higher rent or through a tribal tax.

In conclusion, the Court finds that federal law preempts the application of the Rental Tax to the Tribe's leases with the Ark entities. The Secretary of the Interior's new regulations have changed the landscape of this area of the law, specifically regarding the issue of preemption. To ignore these regulations would be contrary to well-established precedent.

**3. Florida's Utility Tax**

Florida's Utility Tax is "imposed on gross receipts from utility services that are delivered to a retail consumer." Fla. Stat. § 203.01(1)(a)(1) (2012). The Seminole Tribe asks this Court to declare that "utility services provided to the Tribe on Tribal Land are not subject to [Florida's] Utilities Tax;" and to prevent "further imposition or collection of [the] Utilities Tax on utility services provided to the Tribe on Tribal Land." (Compl. 1-2, ECF No. 1.)

A state may not directly tax an Indian Tribe on an Indian reservation unless a federal statute

expressly permits the tax. *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 . . . for sales made inside Indian country, the tax cannot be enforced." *Id.* at 459. Florida's utility tax is an excise tax. *Cf. Heriot v. City of Pensacola*, 146 So. 654, 655 (Fla. 1933) (holding that a tax on the purchase of electricity is "clearly an excise tax"). So the dispositive question on this issue is whether the legal incidence of Florida's Utility Tax falls upon the Seminole Tribe or upon the utility company. This Court finds that it rests upon the Tribe.

### A. The Concept of Legal Incidence.

The *incidence* of a tax refers to who pays the tax. *See* Paul A. Samuelson & William D. Nordhaus, Economics 333 (James A. Bittker, *et al.* eds., 14th ed. 1992); *see also Dictionary.com Unabridged.* Random House, Inc. http://dictionary.reference.com/browse/incidence (accessed: August 22, 2014) (defining *incidence* as "falling upon, affecting, or befalling."). Economists distinguish between the *economic incidence* of a tax and its *statutory incidence.* George R. Zodrow, Incidence of Taxes, in The Encyclopedia of Taxation and Tax Policy 168-72 (Joseph J. Cordes *et al.* eds., 1999). The distinction accepts the reality that just because a legislature enacts a statute requiring *A* to pay a certain tax doesn't mean that *A* will ultimately bear the full impact of the tax because *A* will likely pass the burden of the tax onto *B. Id.* at 169. "Businesses may be able to shift the tax 'forward' onto their customers by

raising their price by the amount of the tax." Samuelson & Nordhaus, *supra.* Discerning the actual economic incidence of a tax is an extremely complicated and controversial undertaking. *See generally* 4 Don Fullerton & Gilbert E. Metcalf, Handbook of Public Economics Ch. 26, (A.J. Auerbach, *et al.* eds., 2002).

Some legal questions require a court to decide who bears the incidence of a particular tax. *See, e.g.*, *First Agric. Nat'l Bank of Berkshire Cnty. v. State Tax Comm'n*, 392 U.S. 339, 346-47 (1968) ("And essentially the question for us is: On whom does the incidence of the tax fall?"). Since the law requires predictability and certainty, when faced with this question courts look only to the statutory—or legal—incidence of the tax. *See Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. at 459-60 ("If we were to make 'economic reality' our guide, we might be obliged to consider, for example, how completely retailers can pass along tax increases without sacrificing sales volume—a complicated matter dependent on the characteristics of the market for the relevant product."); *cf. also Laurence H. Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 Harv. L. Rev. 682, 713 n.104 (1976) ("The legal incidence test might be said to focus on who is 'hit' rather than on who is 'hurt.' ").

### B. The legal incidence of Florida's Utility Tax impermissibly falls upon the Seminole Tribe.

If a statute does not "expressly identify who bears the tax's legal incidence" a court must make a "fair interpretation of the taxing statute as written and applied." *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. at 461.

Both the language and structure of Florida's Utility Tax reveal that its legal incidence falls upon the consumer, not the utility company. Florida's Utility Tax is "imposed on gross receipts from utility services that are delivered to a retail consumer." Fla. Stat. § 203.01(1)(a)(1) (2012). Every consumer is required to "remit the tax" to the utility company as a part of the total bill. Fla. Stat. § 203.01(4). The utility company then pays the taxes to the Florida Department of Revenue on a monthly basis. Fla. Admin. Code R. 12B-6.005(1)(a). Although a utility company may separately itemize the tax on a consumer's bill, the consumer is still required to "remit the tax" to the utility company and the utility company is still responsible for collecting the tax and paying the State. *See* Fla. Stat. § 203.01(4) & (5).

If the consumer does not remit the tax to the utility company, then the utility company is not required to pay the tax over to the State. Fla. Admin. Code R. 12B-6.005(1)(e)(2) & (3); (Steffens Dep. 37:20-38:11, Nov. 13, 2013, ECF No. 63-1). A utility company may deduct uncollected taxes from future

payments to the Florida Department of Revenue. Fla. Admin. Code R. 12B-6.005(1)(e)(2) ("[The utility company] may take a credit for net uncollectables for which gross receipts tax has been previously paid to the Department."). In other words, the utility company is no more than a transmittal agent for the tax imposed on the consumer of the utility. This scenario is identical to the tax analyzed by the Supreme Court in *Oklahoma Tax Commission v. Chickasaw Nation*, where the Court determined the legal incidence was not on the transmittal agent, but rather on the person paying the tax to the transmittal agent. 515 U.S. at 461-62 (explaining that since "the distributor may deduct the uncollected amount [of taxes] from its future payments to the Tax Commission," the distributor was "no more than a transmittal agent for the taxes imposed on the retailor"). Stranburg argues that the utility company is ultimately "fully and completely liable for the tax," and thus the legal incidence falls upon the utility company. (Def.'s Mot. Summ. J. 12, ECF No. 61.) But in reality, the utility company is only liable for the tax if and when the consumer remits the tax to the utility company as a part of the consumer's utility bill. (Steffens Dep. 30:17-24, 38:5-11, ECF No. 63-1); Fla. Admin. Code R. 12B-6.005(1)(e)(2).

The way the Utility Tax addresses exemptions and exceptions reveals the legal incidence of the tax is upon consumer. The Utility Tax has several provisions relating to exemptions based on the identity of the consumer. For example, certain consumers who

are engaged in industrial operations are exempt from paying the Utility Tax when purchasing natural gas. *See* Fla. Stat. § 203.01(3)(d). If it turns out that the consumer was not entitled to the exemption, the Department of Revenue will look to collect the tax directly from the consumer, not the utility company. *Id.* Although this subsection of the Utility Tax is not the subject of the Tribe's complaint, the provisions of the statute must be read as a whole. Another example regarding exemptions is found in another statute within the same Chapter. In that statute, the Florida legislature expressly stated that no other "exemptions or exceptions" apply to the Utility Tax. Fla. Stat. § 203.04. The fact that the Florida legislature provided some exemptions to the Utility Tax, and disavowed many other exemptions, reveals that the legislature intended the legal incidence of the Utility Tax to fall upon consumers. If the legal incidence of the tax were on the utility company, there would be no need for the disavowal of most exemptions and exceptions, or the inclusion of others. Stranburg argues that the legal incidence of the tax falls upon the utility company because even governmental units that would otherwise be exempt from taxation are obligated to pay the Utility Tax. (Def.'s Mot. Summ. J. 13, ECF No. 61.) This argument is unconvincing. The Florida legislature has the authority to waive the State's usual tax immunity by statute. *Cf. Dickinson v. City of Tallahassee*, 325 So. 2d 1, 3 (Fla. 1975). It has expressly done so in enacting the Utility Tax.

Another feature of the Utility Tax reveals that its legal incidence is on the consumer. The Utility Tax only applies to sales to consumers, but not to sales between utility companies. *See* Fla. Admin. Code R. 12B-6.0015(2)(c). Again, this is identical to the tax considered by the Supreme Court in *Oklahoma Tax Commission v. Chickasaw Nation.* 515 U.S. at 461. In that case, the Court found that the legal incidence of a tax that applied to sales by distributors to retailors but not to sales between distributors, fell upon the retailors. In this case, Florida's Utility Tax applies to sales by utility companies to consumers, but does not apply to sales between utility companies. Consequently, it is apparent that the legal incidence of Florida's Utility Tax is upon the consumer.

The Florida Utility Tax is different from the tax considered by the Supreme Court in *Wagon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005). In *Wagon*, the Kansas tax permitted distributors "to pass along the cost of the tax to downstream purchasers" but did not require them to do so. *Wagon*, 546 U.S. at 103. The Florida Utility Tax does not give utility companies the option to choose between passing the tax downstream to consumers or not. Although Stranburg argues that the utility-tax statute "does not require the tax to be passed on to the purchaser," he provides no citation for that proposition—and the language and application of the Utility Tax are completely contrary to that statement. (Def.'s Opp'n Br. 13, ECF No. 66.) Under the structure and application of the Utility Tax, the tax is automatically

applied to, and collected from, consumers. Stranburg's argument that a utility company may itemize the tax on a consumer's bill, or not, misses the point. The fact that the tax may be separately itemized or not, is not the same as saying that the tax may be passed on or not. Under Florida law, the tax **is** passed on to consumers, whether it is separately itemized or not—the two concepts are not related in the way that Stranburg has argued.

Another key difference between the Florida Utility Tax and the Kansas fuel tax in *Wagon* is that a fuel distributor owed the Kansas tax even if it never delivered the fuel to a consumer. *Wagon*, 546 U.S. at 108-09, 109 n.4 ("[A] distributor must pay the tax even if the fuel is *never* delivered."). The fact that a fuel distributor was liable to the state for the fuel tax even if the fuel was never delivered to a consumer supports the Court's conclusion that the legal incidence of the tax was on the distributor (not the consumer). By contrast, in Florida, a utility company does not pay the Utility Tax on electricity that is never delivered to a consumer. Fla. Admin. Code R. 12B-6.0015(2)(c)(4). The fact that the Utility Tax is not owed unless and until it is actually delivered to a consumer, supports this Court's conclusion that the legal incidence of the Utility Tax is on the consumer (not the utility company).

Florida's Utility Tax is similar to the tax considered by the Supreme Court in *United States v. State Tax Commission of Mississippi*, 421 U.S. 599 (1975). In that case, the Court examined a tax scheme that

required suppliers to collect the tax from the consumer and remit it to the State. *State Tax Comm'n of Mississippi*, 421 U.S. at 608. The Court explained that the legal incidence of a tax falls on the consumer when a state requires the tax to be passed on to the consumer, collected by the seller, and then paid over to the state. *Id.* That is precisely how Florida has structured its Utility Tax. The Utility Tax is automatically imposed upon the consumer, collected by the utility company, and paid over to the Florida Department of Revenue. An example provided by Stranburg makes the point: If a consumer pays only half of a $100 utility bill, 2.5% of the consumer's $50 payment is automatically allocated to the State for the Utility Tax—but not 2.5% of the full $100 utility bill. (Def.'s Opp'n Br. 12, ECF No. 66 (citing Steffens Dep. 30:17-24, ECF No. 63-1).) There could never be a situation where the utility company could be responsible to the State for the Utility Tax unless it collected the tax from the consumer. (*See* Steffens Dep. 38:5-11.) The structure and application of the Utility Tax unavoidably requires that the utility company pass on the tax to consumers. Consequently, the legal incidence of the Florida Utility Tax falls upon the consumer. *See State Tax Comm'n of Mississippi*, 421 U.S. at 608-09 ("The Tax Commission clearly intended—indeed, the scheme unavoidably requires—that the out-of-state distillers and suppliers pass on the markup to the military purchasers.").

Stranburg argues that the legal incidence of the Utility Tax falls upon the utility company because the

statute states that the "tax is imposed . . . for the privilege of conducting a utility . . . business." Fla. Stat. § 203.01(4). Stranburg's rationale is that since the tax is on the privilege of conducting a utility business, the legal incidence of the tax must be upon the utility company as the entity exercising the privilege. This argument is not persuasive. As the Seminole Tribe points out, Florida's sales tax taxes the "privilege . . . of selling tangible personal property at retail in this state," but that tax's legal incidence falls upon the consumer, not on the retailer who is exercising the privilege. *Fla. Dep't Revenue v. Naval Aviation Museum Found., Inc.*, 907 So. 2d 586, 587 (Fla. 1st DCA 2005). Under Florida's sales tax statute, the legal incidence of the tax falls upon the consumer, even though the retailor is obligated to collect the tax and "ultimately pay the state sales tax." *Id.* The retailor "must add the amount of the tax to the sale price and separately state the amount, which then becomes part of the price of the sale." *Id.* Under the Florida Utility Tax, the tax is automatically included in, and becomes part of, the utility bill, though it may be separately stated. *See* Fla. Stat. § 203.01 (4). Although there are some differences between the statutory language of the two statutes, the structure, application, and result of both taxes is the same: The legal incidence falls upon the consumer, the seller collects the tax and pays it to the State. In both instances, although the statute purports to tax the privilege of engaging in the business, the structure and application of the taxes reveal that the legal incidence of the taxes is upon the consumer. Of course,

Stranburg's argument here would also invalidate the Rental Tax since that tax is imposed on the "privilege" of renting or leasing commercial property within the State. Fla. Stat. § 212.031(1)(a); *see also Fla. Revenue Comm'n v. Maas Bros., Inc.*, 226 So. 2d 849, 852 (Fla. 1st DCA 1969) ("It follows, since it is the landlord and not the tenant who engaged in the business, that the tax was intended to be imposed on the landlord.").

The Utility Tax arises when the utility is provided to the Seminole Tribe on its Reservation. Stranburg argues that "[t]he tax obligation arises when the utility company receives payments from its retail consumers for utility services, which occurs outside the reservation." (Def.'s Mot. Summ. J. 15, ECF No. 61.) Based on this statement, Stranburg reasons that the rule of *Chickasaw Nation* should not apply here, but that the Utility Tax should be analyzed under a completely different framework applicable when a state taxes an Indian tribe outside of a reservation. (*Id.*) Stranburg offers no legal citation for the proposition that the tax obligation of a utility tax arises when the utility company receives payment for the service. "The premise of our adversarial system is that . . . courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983). When parties do not fully develop their arguments and support them with citation to legal authority, the burden upon the Court is

improperly increased. "[T]he onus is upon the parties to formulate arguments." *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995). Generally, a "litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is sound despite a lack of supporting authority or in the face of contrary authority, forfeits the point. The court will not do his research for him." *Phillips v. Hillcrest Medical Center*, 244 F.3d 790, 800 n.10 (10th Cir. 2001) (internal quotation omitted); *McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997) ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to put flesh on its bones." (internal quotation omitted)). The Court finds that Stranburg has forfeited this argument by failing to develop it sufficiently. In any event, Seminole Tribe has cited to authority standing for the proposition that the tax obligation of a service tax arises where the service is delivered. *Cf. Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 844 (1982) (construing a gross receipts tax on construction services as being imposed on tribal lands where the construction was taking place). Stranburg's skeletal argument—that the tax obligation arises when the utility company receives payment since the utility company is not liable to pay the tax to the State until it collects it from the consumer—is flawed. The tax is a debt of the consumer, owed to the utility company (to be forwarded to the State upon collection). Fla.

Stat. § 203.01(4). As a result, the tax obligation (*i.e.*, the debt) arises when the utility company provides utility services to the consumer.

In conclusion, the fairest reading of Florida's utility-tax scheme as a whole is that the legal incidence of the tax falls upon the consumer. The utility-tax scheme unavoidably requires utility companies to include the tax in their bill to consumers (whether separately stated or not). The scheme requires utility companies to collect the tax from consumers and then to deliver the tax to the Department of Revenue. Although the utility-tax statute does not contain express language requiring a utility company to pass on and collect the tax from consumers, the Supreme Court has never required that "pass-through provisions or collections requirements be explicitly stated." *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 11 (1985).

Since the Court has concluded that Florida's Utility Tax is an impermissible direct tax upon the Seminole Tribe on its reservation, the Court need not address the Tribe's alternative arguments that the tax is impermissible under a *Bracker* preemption analysis, or that the Tribe may challenge the tax as an assignee of the utility company.

**4. Conclusion**

This Court finds that federal law prohibits Florida from collecting the Rental Tax from the Ark entities for their leases of reservation land. The Court further

finds that federal law preempts the application of the Rental Tax to the Tribe's leases with the Ark entities. The Court also finds that federal law prohibits Florida from collecting the Utility Tax from the Tribe since the legal incidence of the Utility Tax falls on the Seminole Tribe.

Consistent with these findings, the Court **grants** the Seminole Tribe's Motion for Summary Judgment (ECF No. 59), **denies** Stranburg's Motion for Summary Judgment (ECF No. 61). The Court will set out its judgment in a separate document as required by Federal Rule of Civil Procedure 58. The Order resolves all of the issues in this matter. The Court directs the Clerk to **close** this case.

**Done and ordered**, in chambers, at Miami, Florida, on September 5, 2014.

/s/ Robert N. Scola, Jr.
Robert N. Scola, Jr.
United States District Judge

**APPENDIX C**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 14-14524-DD

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SEMINOLE TRIBE OF FLORIDA,
a Federally recognized Indian Tribe,

Plaintiff-Appellee,

versus

STATE FLORIDA, DEPARTMENT OF REVENUE,

Defendant,

MARSHALL STRANBURG,
Interim Executive Director And
Deputy Executive Director,

Defendant-Appellant.

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

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(Filed Oct. 27, 2015)

BEFORE: MARTIN and ROSENBAUM, Circuit Judges, and COOGLER,* District Judge.

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* Honorable L. Scott Coogler, United States District Judge for the Northern District of Alabama, sitting by designation.

PER CURIAM:

The petition(s) for panel rehearing filed by Appellee Seminole Tribe of Florida is DENIED.

ENTERED FOR THE COURT:

/s/ Robin S. Rosenbaum
UNITED STATES
CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 14-14524-DD

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SEMINOLE TRIBE OF FLORIDA,
a Federally recognized Indian Tribe,

Plaintiff-Appellee,

versus

STATE FLORIDA, DEPARTMENT OF REVENUE,

Defendant,

MARSHALL STRANBURG,
Interim Executive Director And
Deputy Executive Director,

Defendant-Appellant.

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

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ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Filed Oct. 27, 2015)

BEFORE: MARTIN and ROSENBAUM, Circuit Judges, and COOGLER,* District Judge.

---

* Honorable L. Scott Coogler, United States District Judge for the Northern District of Alabama, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Robin S. Rosenbaum
UNITED STATES
CIRCUIT JUDGE

# APPENDIX D

## FLORIDA STATUTE CHAPTER 203

### F.S.A. § 203.01. Tax on gross receipts for utility and communications services

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

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

3. An additional tax is levied on charges for, or the use of, electrical power or energy that is subject to the tax levied pursuant to s. 212.05(1)(e)1.c. or s. 212.06(1). The tax shall be applied to the same transactions or uses as are subject to taxation under s. 212.05(1)(e)1.c. or s. 212.06(1). If a transaction or use is exempt from the tax imposed under s. 212.05(1)(e)1.c. or s. 212.06(1), the transaction or use is also exempt from the tax imposed under this subparagraph. The

tax shall be applied to charges for electrical power or energy and is due and payable at the same time as taxes imposed pursuant to chapter 212. Chapter 212 governs the administration and enforcement of the tax imposed by this subparagraph. The charges upon which the tax imposed by this subparagraph is applied do not include the taxes imposed by subparagraph 1. or s. 166.231. The tax imposed by this subparagraph becomes state funds at the moment of collection and is not considered as revenue of a utility for purposes of a franchise agreement between the utility and a local government.

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

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

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

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

(c) 1. The tax imposed under subparagraph (a)1. shall be levied against the total amount of gross receipts received by a distribution company for its sale of utility services if the utility service is delivered to the retail

consumer by a distribution company and the retail consumer pays the distribution company a charge for utility service which includes a charge for both the electricity and the transportation of electricity to the retail consumer. The distribution company shall report and remit to the Department of Revenue by the 20th day of each month the taxes levied pursuant to this paragraph during the preceding month.

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

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

2. The index price is the Florida price per kilowatt hour for retail consumers in the previous calendar year, as published in the United States Energy Information Administration Electric Power Monthly and announced

by the Department of Revenue on June 1 of each year to be effective for the 12-month period beginning July 1 of that year. For each residential, commercial, and industrial customer class, the applicable index posted for residential, commercial, and industrial shall be applied in calculating the gross receipts to which the tax applies. If publication of the indices is delayed or discontinued, the last posted index shall be used until a current index is posted or the department adopts a comparable index by rule.

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

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

(e) 1. A distribution company that receives payment for the sale or transportation of

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

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

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

4. The amount of tax due under this paragraph shall be reduced by the amount of any

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

(f) Any person who imports into this state electricity, natural gas, or manufactured gas, or severs natural gas, for that person's own use or consumption as a substitute for purchasing utility, transportation, or delivery services taxable under subparagraph (a)1. and who cannot demonstrate payment of the tax imposed by this chapter must register with the Department of Revenue and pay into the State Treasury each month an amount equal to the cost price, as defined in s. 212.02, of such electricity, natural gas, or manufactured gas times the rate set forth in subparagraph (b)1., reduced by the amount of any like tax lawfully imposed on and paid by the person from whom the electricity, natural gas, or manufactured gas was purchased or any person who provided delivery service or transportation service in connection with the electricity, natural gas, or manufactured

gas. The methods of demonstrating proof of payment and the amount of such reductions in tax shall be made according to rules of the Department of Revenue.

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

(h) Electricity produced by cogeneration or by small power producers during the 12-month period ending June 30 of each year which is in excess of nontaxable electricity produced during the 12-month period ending June 30, 1990, is subject to the tax imposed by subparagraph (a)1. The tax shall be applied to the cost price, as defined in s. 212.02, of such electricity and shall be paid each month, beginning with the month in which total production exceeds the production of nontaxable electricity for the 12-month period ending June 30, 1990. As used in this paragraph, the term "nontaxable electricity" means electricity produced by cogeneration or by small power producers which is not subject to tax under paragraph (g). Taxes paid pursuant to paragraph (g) may be credited against taxes due under this paragraph. Electricity generated as part of an industrial

manufacturing process that manufactures products from phosphate rock, raw wood fiber, paper, citrus, or any agricultural product is not subject to the tax imposed by this paragraph. The term "industrial manufacturing process" means the entire process conducted at the location where the process takes place.

(i) Any person other than a cogenerator or small power producer described in paragraph (h) who produces for his or her own use electrical energy that is a substitute for electrical energy produced by an electric utility as defined in s. 366.02 is subject to the tax imposed by subparagraph (a)1. The tax shall be applied to the cost price, as defined in s. 212.02, of such electrical energy and shall be paid each month. This paragraph does not apply to electrical energy produced and used by an electric utility.

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

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

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

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

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

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

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

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

2. The sale or delivery of electricity to a public or private utility, including a municipal

corporation or rural electric cooperative association, for resale, or as part of an electrical interchange agreement or contract between such utilities for the purpose of transferring more economically generated power;

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

(b) Wholesale sales of electric transmission service;

(c) The use of natural gas in the production of oil or gas, or the use of natural or manufactured

gas by a person transporting natural or manufactured gas, when used and consumed in providing such services; or

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

(4) The tax imposed pursuant to subparagraph (1)(a)1. relating to the provision of utility services at the option of the person supplying the taxable services may be separately stated as Florida gross receipts tax on the total amount of any bill, invoice, or other tangible evidence of the provision of such taxable services and may be added as a component part of the total charge. If a provider of taxable services elects to separately state such tax as a component of

the charge for the provision of such taxable services, any person, including all governmental units, shall remit the tax to the person who provides such taxable services as a part of the total bill, and the tax is a component part of the debt of the purchaser to the person who provides such taxable services until paid and, if unpaid, is recoverable at law in the same manner as any other part of the charge for such taxable services. For a utility, the decision to separately state any increase in the rate of tax imposed by this chapter which is effective after December 31, 1989, and the ability to recover the increased charge from the customer is not subject to regulatory approval.

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

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

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

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

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

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F.S.A. § 203.0111. Application of tax increase

With respect to utility services regularly billed on a monthly cycle basis, each increase in the gross receipts tax provided for in this act shall apply to any bill dated on or after July 1 in the year in which the increase becomes effective.

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F.S.A. § 203.012. Definitions

As used in this chapter:

(1) "Distribution company" means any person owning or operating local electric or natural or manufactured gas utility distribution facilities within this state for the transmission, delivery, and sale of electricity or natural or manufactured gas. The term does not include natural gas transmission companies that are subject to the jurisdiction of the Federal Energy Regulatory Commission.

(2) "Person" means any person as defined in s. 212.02.

(3) "Utility service" means electricity for light, heat, or power; and natural or manufactured gas for light, heat, or power, including transportation, delivery, transmission, and distribution of the electricity or natural or manufactured gas. This subsection does not broaden the definition of utility service to include separately stated charges for tangible personal property or services which are not charges for the electricity or natural or manufactured gas or the transportation, delivery, transmission, or distribution of electricity or natural or manufactured gas.

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F.S.A. § 203.02. Powers of Department of Revenue

The Department of Revenue may audit the reports provided for in s. 203.01; and each and every such person shall submit all records, books, papers and accounts as to business done to the department or its

duly authorized agents for examination or investigation upon demand.

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F.S.A. § 203.03. Penalties

(1) Any officer, agent, or representative of any such person who receives any payment for the furnishing of the things or the services above mentioned without first complying with the provisions of this chapter is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(2) Any person who willfully violates or fails to comply with any of the provisions of this chapter is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

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F.S.A. § 203.04. Construction of laws granting exemptions or exceptions

No statute or law, general, special, or local hereafter enacted which either directly or indirectly relates to exemptions or exceptions from taxation in this state shall be construed as including or extending to the gross receipts taxes imposed by this chapter unless its application to said chapter, either directly or indirectly, is clearly and specifically expressed and no repeals by implication shall be recognized in this connection. This is a rule of statutory construction to be applied to statutes and laws hereafter enacted.

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F.S.A. § 203.06. Interest on delinquent payments

Any payments as imposed in this chapter, if not received by the Department of Revenue on or before the due date as provided by law, shall include, as an additional part of such amount due, interest at the rate of 1 percent per month, accruing from the date due until paid.

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F.S.A. § 203.07. Settlement or compromise of penalties and interest

The department, pursuant to s. 213.21, may settle or compromise penalties or interest imposed by this chapter.

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## APPENDIX E

Fla. Admin. Code r. 12B-6.0015.
Imposition of the Gross Receipts Tax.

(1) NATURAL OR MANUFACTURED GAS.

(a) A tax is imposed at the rate of 2.5 percent on distribution companies' gross receipts from the privilege of selling or transporting natural or manufactured gas to a retail consumer in this state. The gross receipts tax on the sale or transportation of natural or manufactured gas is calculated as follows: (number of cubic feet of gas sold or transported)/1,000 x (the applicable gas index price) x (2.5 percent).

(b) The tax imposed in paragraph (1)(a) does not apply to:

1. Subject to the documentation requirements outlined in subsection (5), the sale or transportation of natural or manufactured gas to a public or private utility, including a municipal corporation or agency thereof, or rural electric cooperative association for resale.

2. The sale or transportation of natural or manufactured gas to a public or private utility, including a municipal corporation, or agency thereof, or rural electric cooperative association for use as a fuel in the generation of electricity. Distribution companies may document this exclusion from tax by obtaining a certification from public or private utilities that purchase transportation of natural or manufactured gas for use as a fuel in the

generation of electricity. The following is a suggested format of a certification to be issued by a public or private utility to a natural or manufactured gas distribution company:

CERTIFICATION

NATURAL OR MANUFACTURED GAS PURCHASED

FOR USE AS FUEL TO GENERATE ELECTRICITY

This is to certify that I have purchased natural or manufactured gas for use as a fuel in the generation of electricity.

I understand that if such purchases of natural or manufactured gas do not qualify for the exclusion as indicated on this certification, I must pay the applicable tax directly to the Department of Revenue.

Under penalties of perjury, I declare that I have read the foregoing certificate and the facts stated herein are true.

_____ _____

Purchaser's Name (Print or Type) Date

_____ _____

Signature of Authorized Person Title

_____

Federal Employer Identification Number (FEI No.)

3. a. The sale or transportation to, or use of, natural or manufactured gas by any person eligible for an exemption under Section 212.08(7)(ff) 2., F.S., for use as an energy source or a raw material. Possession by a seller of natural or manufactured gas or by any person providing transportation or delivery of natural or manufactured gas of a written certification by the purchaser, certifying the purchaser's entitlement to the exclusion permitted by this subparagraph, relieves the seller or person providing transportation or delivery from the responsibility of remitting tax on the nontaxable amounts. The Department shall look solely to the purchaser for recovery of such tax if the Department determines that the purchaser was not entitled to the exclusion. The certification must include an acknowledgment by the purchaser that it will be liable for tax pursuant to Section 203.01(1)(f), F.S., if the requirements for exclusion are not met. The following is a suggested format of a certification to be issued by a manufacturer to a natural or manufactured gas distribution company:

CERTIFICATION

NATURAL OR MANUFACTURED GAS PURCHASED BY A PERSON ELIGIBLE FOR EXEMPTION UNDER INDUSTRIAL CLASSIFICATIONS IN SECTION 212.08(7)(ff) 2., F.S.

This is to certify that I have purchased natural or manufactured gas for use as an energy source or raw material that is excluded from tax pursuant to Section 203.01(3)(d), F.S.

I certify that the applicable purchases were made by a company whose four-digit SIC Industry Number, as listed below, is classified under SIC Industry Major Group Number 10, 12 through 14, 20 or 22 through 39 or Group Number 212 in the Standard Industrial Classification (SIC) Manual, 1987, published by the Office of Management and Budget.

I acknowledge that I will be liable for tax pursuant to Section 203.01(1)(f), F.S., if the requirements for exclusion pursuant to Section 203.01(3)(d), F.S., are not satisfied.

I understand that if such purchases of natural or manufactured gas do not qualify for the exclusion as indicated on this certification, I must pay the applicable tax directly to the Department of Revenue.

Under penalties of perjury, I declare that I have read the foregoing certificate and the facts stated herein are true.

| | |
|---|---|
| Purchaser's Name (Print or Type) | Date |
| Signature of Authorized Person | Title |

Federal Employer Identification Number
(FEI No.)

b. The Standard Industrial Classification (SIC) Manual, 1987, published by the Office of Management and Budget, is provided by the U.S. Department of Labor at www.osha.gov.

(2) ELECTRICITY.

(a) A tax is imposed at the rate of 2.5 percent on a distribution company's gross receipts from the privilege of selling electricity that is delivered to a retail consumer in this state when the charge to the consumer includes charges for both the electricity and the transportation of the electricity. Tax imposed pursuant to this paragraph is calculated by multiplying the distribution company's gross receipts by 2.5 percent.

1. The tax imposed in paragraph (2)(a) does not apply to:

a. Receipts from customers for separately itemized charges for the connection, disconnection, suspension, or restoration of electricity;

b. Receipts from customers for separately itemized charges for returned checks or other forms of payment, late payments, or interest due on late payments; or

c. Receipts from customers for separately itemized charges for the sale, lease, rental, repair, or maintenance of customer premises equipment.

2. a. When charges for utility services are separately itemized as an amount for services based on a standard rate amount with a separate rate adjustment on the same billing, invoice, statement, or other evidence of sale for services, gross receipts tax is due on the receipts for utility services after the application of the rate adjustment.

   b. Example: A customer purchases electricity from an electric utility under an energy management program. The customer is billed the standard residential rate. In addition, the customer receives load management monthly credits for allowing specified electrical equipment to be interrupted at the option of the electric utility. The charge for electric service after the load management credits are applied against the charge at the standard residential rate is the amount subject to the gross receipts tax.

   c. Example: A customer purchases electricity from an electric utility at the standard residential service rate. The electric utility charges each residential customer in this rate class an additional energy cost recovery factor, called "energy charges," on a per kilowatt hour basis. The customer is billed for electricity at the standard residential rate, plus the applicable energy charges. The amount charged to the customer at the standard residential rate, plus the

amount of the energy charges, is the amount subject to the gross receipts tax.

3. Each and every fee imposed by a political subdivision of the State of Florida on the distribution company, such as a franchise fee, is included in the charge upon which the gross receipts tax is computed, when the fees are passed on to the customer and separately itemized on a customer's bill, invoice, statement, or other evidence of sale.

4. Any municipal public service tax imposed under Section 166.231 or 166.232, F.S., or any sales tax imposed under Chapter 212, F.S., on the sale or purchase of electric power or energy is not included in the charge upon which the gross receipts tax is computed when the municipal tax or sales tax is separately itemized on a customer's bill, invoice, statement, or other evidence of sale.

(b) Each distribution company that receives payment for the delivery of electricity to a retail consumer in this state is subject to tax on the exercise of this privilege as provided by this paragraph, unless the payment is subject to tax under paragraph (a). Under this paragraph, the gross receipts tax on the delivery of electricity is calculated as follows: (number of kilowatt hours delivered) x (the applicable electricity index price) x (2.5 percent).

(c) The tax imposed in paragraphs (2)(a) and (b) does not apply to:

1. The sale or delivery of electricity to a public or private utility, including a municipal corporation or agency thereof, or rural electric cooperative association, for resale subject to the documentation requirements outlined in subsection (5);

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

a. The electric utility is required to maintain a copy of the agreement or contract in its books and records and is not required to meet the provisions of this rule regarding sales for resale.

b. The internal use, including interdepartmental transfers, of the purchased power is not subject to tax.

3. Wholesale sales of electric transmission service.

4. The loss of electricity resulting from the generation, transmission, or distribution of electricity, including line losses, generation losses, and any other losses for which charges are not made to the electric utility's customers.

(3) SEPARATELY ITEMIZED CHARGES.

(a) A distribution company may wholly or partially separately itemize the gross receipts tax on the customer's bill, invoice, statement, or other evidence of sale. However, the gross receipts tax is imposed on the privilege of doing business, and it is an item of cost to the distribution company. The distribution company remains fully and completely liable for the payment of the tax, even when the tax is wholly or partially separately itemized on the customer's bill, invoice, statement, or other evidence of sale. When the tax is wholly or partially separately itemized, every person, including governmental units and charitable and religious organizations, is liable for the payment of the tax to the distribution company.

(b) Example: A distribution company bills its customer for both the electricity and the transportation of the electricity. Tax is imposed at the rate of 2.5 percent of the distribution company's gross receipts for utility services. When the distribution company separately itemizes "Florida gross receipts tax" on a customer's billing, the amount of gross receipts tax is calculated at the rate of 2.5 percent of the total amount billed for the electric services, including the amount separately itemized as "Florida gross receipts tax."

Customer Billing:

| | |
|---|---|
| Electric service amount | $100.00 |
| Florida gross receipts tax | $2.56* |
| Total amount of billing | $102.56 |

*Calculation of separately itemized "Florida gross receipts tax":

| | |
|---|---|
| Total amount of billing | $102.56 |
| x Gross Receipts Tax Rate | 2.5% |
| Total tax to be separately itemized | $2.56 |

(4) USE TAX.

(a) Gross receipts tax is levied upon a person's cost price of electricity, or natural or manufactured gas, imported into this state or severed within this state for the person's own use or consumption as a substitute for purchasing utility, transportation, or delivery services taxable under Chapter 203, F.S., and who cannot demonstrate payment of the tax imposed by subparagraph 203.01(1)(a)1., F.S. The tax implemented pursuant to this paragraph is calculated by multiplying the cost price of the utility service by 2.5 percent.

(b) The tax implemented pursuant to paragraph (4)(a) does not apply to:

1. The use of natural gas in the production of oil or gas, or the use of natural or manufactured gas by a person transporting

natural or manufactured gas, when used and consumed in providing such services;

2. The use of natural gas or manufactured gas by a person eligible for an exemption under Section 212.08(7)(ff) 2., F.S., for use as an energy source or a raw material;

3. The use of natural gas or manufactured gas by a public or private utility as fuel in the generation of electricity; or

4. The loss of electricity resulting from the generation, transmission, or distribution of electricity, including line losses, generation losses, and any other losses for which charges are not made to the electric utility's customers.

(5) SALES FOR RESALE.

(a) The sale, transportation, or delivery of utility services for resale is only exempt from the tax imposed under subparagraph 203.01(1)(a)1., F.S., if the sale, transportation, or delivery is documented in strict compliance with this rule. Distribution companies must document sales for resale by obtaining resale certificates from customers who purchase transportation, delivery, or utility services for the purposes of resale. Resale certificates submitted during the protest period will be accepted by the Department as valid proof and documentation of the resale, but will not be accepted when submitted in any proceeding under Chapter 120, F.S., or any circuit court action instituted under Chapter 72, F.S.

(b) The distribution company is only required to obtain one certificate for sales made for the purposes of resale from each customer making purchases for the purposes of resale. The certificate must contain the purchaser's name and address, the purchaser's gross receipts tax registration number and its effective date, a statement that the purchases are for the purpose of resale, the signature of the purchaser or an authorized representative of the purchaser, and the date of issuance. The following is a suggested format of a resale certificate:

RESALE CERTIFICATE FOR GROSS RECEIPTS TAX ON UTILITY SERVICES

This is to certify that the electricity for light, heat, or power or the natural or manufactured gas for light, heat, or power purchased after ___ (date) from ___ (seller's name) is purchased for the purpose of resale.

I understand that if I fraudulently issue this certificate to evade the payment of gross receipts tax I will be liable for payment of the tax directly to the Department and subject to the penalties imposed under Section 203.03(2), F.S.

I understand that I must disclose to the seller, or remit tax on, any purchase not for resale when tax was not paid to the seller and/or distribution company.

Under penalties of perjury, I declare that I have read the foregoing certificate and the facts stated herein are true.

Purchaser's Name _____

Purchaser's Address _____

Name and Title of Purchaser's Authorized Signature

_____

Certificate of Registration Number _____

Effective Date of Registration _____

By _____ (authorized signature)

Date _____

(6) RECORDKEEPING REQUIREMENTS. Distribution companies that sell, transport, or deliver utility services to retail consumers in Florida and taxpayers that import utility services into Florida for their own use must maintain electrical interchange agreements or contracts, resale certificates, exemption certificates, and other documentation required under the provisions of this rule chapter in their books and records until tax imposed under subparagraph 203.01(1)(a)1., F.S., may no longer be determined and assessed under Section 95.091, F.S. Electronic storage of required documentation through the use of imaging, microfiche, or other electric storage media will satisfy compliance with recordkeeping requirements.

## APPENDIX F

Fla. Admin. Code r. 12B-6.005.
Payment of Tax; Reports; Public Use Forms.

(1) (a) Except as provided in Rule Chapter 12-24, F.A.C., and paragraph (c) below, all taxes imposed by subparagraph 203.01(1)(a)1., F.S., on utility services are due to the Department on or before the 20th day of the month following the date of the sale or transaction. The payment and return must either reach the office of the Department or be postmarked on or before the 20th day of the month for receipts for utility services received in the preceding calendar month for a taxpayer to avoid penalty and interest for late filing. When the 20th day of the month falls on Saturday, a Sunday, or a legal holiday, payments accompanied by returns will be accepted as timely filed if postmarked or delivered to the Department on the next succeeding day that is not a Saturday, a Sunday, or a legal holiday. A tax return is required to be filed on or before the 20th day of each month even when no tax is due. The report is required to be signed by an officer or a representative duly authorized to act by the taxpayer. For this purpose, a legal holiday means a holiday that is observed by federal or state agencies as a legal holiday as this term is defined in Chapter 683, F.S., and s. 7503 of the 1986 Internal Revenue Code, as amended. A “legal holiday” pursuant to s. 7503 of the Internal Revenue Code of 1986, as amended, means a legal holiday in the

District of Columbia or a statewide legal holiday at a location outside the District of Columbia but within an internal revenue district.

(b) Form DR-133, Gross Receipts Tax Return (January 2016, hereby incorporated by reference, effective 01/16) (http://www.flrules.org/Gateway/reference.asp?No=Ref-06333), is the return to be used to report the gross receipts tax imposed on utility services. Copies of this form are available, without cost, by one or more of the following methods: 1) downloading selected forms from the Department's Internet site at www.myflorida.com/dor; or, 2) calling the Department at 1(800)352-3671, Monday through Friday, 8:00 a.m. to 5:00 p.m. (Eastern Time); or, 3) visiting any local Department of Revenue Service Center; or, 4) writing the Florida Department of Revenue, Taxpayer Services, Mail Stop #3-2000, 5050 West Tennessee Street, Tallahassee, Florida 32399-0112. Persons with hearing or speech impairments may call the Florida Relay Service at 1(800)955-8770 (Voice) and 1(800)955-8771 (TTY).

(c) When quarterly, semiannual, or annual reporting is authorized by the Department pursuant to Section 203.01(1)(j), F.S., the tax is due on or before the 20th day of the month following the authorized reporting period and becomes delinquent on the next succeeding day that is not a Saturday, a Sunday, or a legal holiday.

(d) Payments and returns for reporting tax must be submitted to the Department, as provided in Rule Chapter 12-24, F.A.C., when:

1. Payment of the tax is required to be made by electronic means;

2. Any return for reporting tax is required to be submitted by electronic means; or

3. No tax is due with a return for reporting tax.

(e) 1. For taxes levied pursuant to paragraph (2)(a) of Rule 12B-6.0015, F.A.C., the taxpayer may elect to pay the gross receipts tax on total billings for electricity for each month or on the actual gross receipts for electricity received in that month.

2. When the taxpayer elects to pay gross receipts tax on total billings for electricity, the taxpayer may take a credit for net uncollectibles for which gross receipts tax has been previously paid to the Department. The credit must be reported on the provider's return in accordance with the timing provisions of Section 215.26(2), F.S.

3. Instead of taking a credit for net uncollectibles, the taxpayer may seek a refund of tax previously paid by filing an Application for Refund (Form DR-26, incorporated by reference in Rule 12-26.008, F.A.C.) with the Department. The application for refund must be filed in accordance with the timing provisions of Section 215.26(2), F.S., and must meet the requirements of Section 213.255(2) and (3), F.S. and Rule 12-26.003, F.A.C.

4. Form DR-26, Application for Refund, must be filed with the Department within 3

years after the date the tax was paid. Credits for tax paid must be reported on the taxpayer's return within 3 years after the date the tax was paid.

(2) Persons who engage in the transportation of natural or manufactured gas must provide the Department with a list of customers to whom transportation services were provided in the prior year. A person may satisfy the customer-reporting requirement by: 1) providing a written list of customers to the Department; or 2) maintaining a publicly-accessible customer list on the person's Internet web site. The person must provide the written list of customers or the Internet address of the publicly-accessible Internet web site by January 31 of each year to GTA Miscellaneous Tax Coordinator – Communications Services and Gross Receipts Taxes, c/o GTA Program Director, Florida Department of Revenue, 5050 W. Tennessee Street, Tallahassee, Florida 32399-0100. Persons who choose to satisfy the customer-reporting requirement by posting a list of customers on a publicly-accessible Internet web site must update the list by January 31 of each year. This reporting requirement does not apply to distribution companies. Any person required to furnish such a list may elect to identify only those customers who take direct delivery without purchasing interconnection services from a distribution company.