UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 12-62140-Civ-Scola

SEMINOLE TRIBE OF FLORIDA,
a Federally recognized Indian Tribe,

Plaintiff,

v.

STATE OF FLORIDA, DEPARTMENT
OF REVENUE, and MARSHALL STRANBURG,
AS INTERIM EXECUTIVE DIRECTOR AND
DEPUTY EXECUTIVE DIRECTOR,

Defendants.
_____/

**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR ENTRY OF FINAL JUDGMENT IN ACCORDANCE WITH THE OPINION OF THE ELEVENTH CIRCUIT COURT OF APPEALS**

Plaintiff, the Seminole Tribe of Florida (the "Tribe"), by its it undersigned counsel, files this Memorandum in Opposition to Defendants' Motion for Entry of Final Judgment in Accordance with the Opinion of the Eleventh Circuit of Appeals [ECF 105] (the "Motion").

## Introduction

Based on a single statement contained in the Eleventh Circuit's 64 page opinion (the "Appellate Opinion")[1] that "the Utility Tax does not violate federal law," Defendants claim that judicial labor has come to an end except for the ministerial act of entering a final judgment in this case. However, a review of the Eleventh Circuit's opinion, considered in light of the procedural posture of the case, belies Defendants' assertion. The Eleventh Circuit reversed this

[1] The Appellate Opinion is published at *Seminole Tribe of Florida v. Stranburg*, 799 F3d. 1324 (11th Cir. 2015).

Court's order granting the Tribe's motion for summary judgment with respect to the Utility Tax. It did not, however, direct this Court to ***grant*** the ***Defendants'*** motion for summary judgment or to otherwise "***enter a judgment*** consistent with this opinion" as would be the procedure if the Eleventh Circuit intended its opinion to end the controversy.[2]

Rather, the Court merely held that the Utility Tax as applied to all electricity used on Indian land ***generally*** did not violate federal law. See, Appellate Opinion, 799 F. 3d at 1353 ("we conclude that [the Tribe] has not established that Florida's Utility Tax is ***generally*** preempted as a matter of law in this case" and "the Tribe has not demonstrated that the Utility Tax is ***generally*** preempted by federal law.") (Emphasis added).

The Eleventh Circuit explained that the record before it was insufficient to engage in the "particularized inquiry" required by *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980), in order to determine whether the Utility Tax, as applied to any "specifically regulated on-reservation activities," would be preempted by federal law. *Id.* Indeed, the Eleventh Circuit expressly stated that it "offer[ed] 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." 799 F.3d 1324, n. 22. Accordingly, the Eleventh Circuit remanded the matter to this Court, not for entry of final judgment, but for the Court to conduct the "particularized inquiry" into "specifically regulated on-reservation activities" required by *Bracker.*

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[2] See e.g., *Singletary v. Vargas*, 804 F.3d 1176, 1185 (11th Cir. 2015) ("we REVERSE the order of the district court denying [Defendant's] motion for summary judgment **and direct that court to enter judgment** consistent with opinion"); *Dyer v. Barnhart*, 395 F.3d 1206, 1212 (11th Cir. 2005) ("we reverse and remand to the district court **with instructions to enter judgment** consistent with the ALJ's findings'); *U.S. v. Lowndes County Board of Ed.*, 878 F.2d 1301, 1308 (11th Cir. 1989) ("we direct the district court **to enter judgment consistent with this opinion**".) Emphasis added in each instance.

## Background

On September 5, 2014, this Court entered its Order on Cross Motions for Summary Judgment (the "Summary Judgment Order")[3] granting the Tribe's motion in its entirety, and denying the Defendants' cross motion. The Summary Judgment Order found that (i) Florida was prohibited from collecting a Rental Tax from lessees of real property on Indian land by both 25 U.S.C. §465 and federal preemption; and (ii) Florida was prohibited from collecting a Utility Tax from the Tribe because the legal incidence of the Utility Tax falls on the Tribe. 49 F.Supp. 3d at 1108. Because the Court's determination that the legal incidence of the Utility Tax fell on the Tribe was dispositive of the Utility Tax issue, the Court did not analyze or determine whether the tax would be preempted under *Bracker* if it were determined that the legal incidence rested with the service provider. *Id.*

On appeal, the Defendants persuaded the Eleventh Circuit that the legal incidence of the Utility Tax rests with the service provider. The Tribe argued that, in those circumstances, the tax is preempted under *Bracker* to the extent that it is applied to utilities, specifically electricity, that the Tribe uses in connection with on-reservation activities that are exclusively and pervasively regulated by federal law. As examples of those activities, the Tribe cited (i) the performance of such essential governmental services as police and fire protection and education, which is regulated by the Indian Self-Determination and Educational Assistance Act, 25 U.S.C. § 450 *et seq.*; (ii) the leasing of Indian land, which is regulated by the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.* and 25 U.S.C. § 415 *et. seq.* and the regulations at 25 C.F.R. Part 162; and (iii) Indian gaming, which is regulated by the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* The Tribe argued that these regulations were sufficiently pervasive so as to allow

[3] The Summary Judgment Order is published at *Seminole Tribe of Florida v. State of Florida*, 49 F.Supp. 3d 1095 (S.D. Fla. 2014).

a court to determine that the Utility Tax, as applied to electricity used on tribal lands in connection with on-reservation activities that are exclusively and pervasively regulated by federal law, would be preempted.

**_Bracker's_ "Particularized Inquiry"**

In *Bracker*, the Supreme Court explained:

> where . . . a State asserts authority over the conduct of non-Indians engaging in activity on the reservation . . . we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but 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.

448 U.S. at 144-145. In *Bracker*, the Court held that a state tax on fuel used by a non-Indian contractor to haul timber on-reservation was preempted because the federal regulation of Indian forestry operations is exclusive and pervasive. "The federal regulatory scheme is so pervasive as to preclude the additional burdens sought to be imposed [by the State] . . . There is no room for these taxes in the comprehensive federal regulatory scheme. . . these state taxes would obstruct federal policies." *Id.* at 148. "Where, as here, the Federal Government has undertaken comprehensive regulation of the [activity], where a number of the policies underlying the federal regulatory scheme are threatened by the taxes . . ., and where [the State is] unable to justify the taxes except in terms of a generalized interest in raising revenue, we believe that the proposed exercise of state authority is impermissible." 448 U.S. at 151. *See also, Warren Trading Post Co. v. Arizona Tax Comm'n,* 380 U.S. 685, 688 (where the Court said that the "comprehensive federal regulation of Indian traders" prohibited the assessment of the state tax). The Court said that fuel tax was incompatible with the objectives of the federal regulation of Indian timber

harvesting including, specifically, "guaranteeing Indians that they will 'receive . . . the benefit of whatever profit [the forest] is capable of yielding . . . ", 448 U.S. at 149, citing 25 CFC §141.3(a)(3) (1979). "That objective is part of the general federal policy of encouraging tribes 'to revitalize their self-government' and to assume control over their 'business and economic affairs'", *Id*. at 149, citing *Mescalero Apache Tribe v. Jones*, 441 U.S. 145, 151 (1973).

When a state tax is incompatible with the objectives of the federal regulation of the activity (such as enabling the Tribe to revitalize its self-government and assume control over its business and economic affairs), the state's "generalized interest in raising revenue" is insufficient "to permit its proposed intrusion into the federal regulatory scheme". 448 U.S. at 150. "State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law unless the State interests at stake are sufficient to justify the assertion of State authority." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983) (citing *Bracker*). The burden of justifying the tax rests with the State. *Bracker*, 448 U.S. at 150. A state tax that burdens an activity that is exclusively and pervasively regulated by federal law can be justified only if it serves a "legitimate regulatory interest" or compensates the State for "the governmental functions it performs for those on whom the taxes fall." *Id.*. The state tax must be “narrowly tailored” to compensate the State for services it specifically provides in connection with the taxed activity. *Bracker*, 448 U.S. at 150; *Mescalero*, 462 U.S. at 343; *see also, e.g., Crow Tribe of Indians v. Mont.*, 819 F. 2d 895, 900 (9th Cir. 1987) (holding that state taxes on coal miners were justified only if “narrowly tailored” to fund additional government services required by coal miners or to treat pollution and solid waste that attend coal production); *Hoopa Valley Tribe v. Nevins*, 881 F. 2d 657 (9th Cir. 1989) (holding that a state tax fails the “narrowly tailored” requirement where revenues from the tax are allocated to the state’s general

fund, or are used to fund services, such as law enforcement, that the State provides to its residents in general). "To be valid, the tax must bear some relationship to the activity being taxed." *Id.* at 661, citing *Crow Tribe*, 819 F. 2d at 900. "Showing that the tax serves legitimate state interests, such as raising revenues for services used by tribal residents and others, is not enough." *Id.*

**The Eleventh Circuit's Opinion**

The determination of whether a state tax affecting specific activities on Indian lands is preempted by federal law requires a detailed and case specific analysis of the tax involved, the activity affected and the federal regulatory scheme relating to the activity at issue. The Eleventh Circuit recognized this in the Appellate Opinion:

> *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 ("Pre-emption 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*.").
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> 799 F.3d at 1338 (emphasis in original).

Based on the single statement that "the Utility Tax does not violate federal law," 799 F. 3d 1352, Defendants contend that the Eleventh Circuit's opinion should be interpreted as precluding this Court from conducting the "particularized inquiry" required by *Bracker* to determine whether the Utility Tax, as applied to any of the activities on tribal lands, is preempted. However, it is clear from the context in which that statement was made that the Eleventh Circuit remanded the case to this Court for the specific purpose of conducting that "particularized inquiry."

The context in which this appeal arose is significant. The Tribe sought summary

judgment arguing that the Utility Tax on electricity used in connection with on-reservation activities that are exclusively and pervasively regulated by federal law is preempted. In support of that argument, the Tribe listed examples of activities occurring on tribal lands that it argued are subject to such regulation. The Eleventh Circuit treated the Tribe's motion as seeking a blanket ruling that state taxation of all electricity used on Tribal lands is preempted by federal law. In that context, the Eleventh Circuit said that "we discern here no pervasive federal interest or 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." 799 F. 3d at 1352. Accordingly, the Court "conclude[d] that [the Tribe] has not established that Florida's Utility Tax is ***generally preempted as a matter of law*** in this case." *Id*. at 1353 [Emphasis added]. The Eleventh Circuit explained:

> 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, we conclude that it has not established that Florida's Utility Tax is generally preempted as a matter of law in this case.
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> 799 F.3d 1353.

While the Eleventh Circuit held that the Utility Tax is not ***generally preempted*** on Tribal lands, it expressly left open the issue of whether the tax, as applied to ***specific*** activities on Tribal lands, would be preempted. The Court explained:

> 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.***
>
> 799 F.3d 1324, n. 22.

Thus, the Court expressly left open, and did not rule upon, whether the Utility Tax as applied to electricity used for specific on-reservation activities would be preempted by federal law. Such a determination requires the particularized inquiry contemplated by *Bracker*. The Eleventh Circuit remanded the case to this Court to conduct just such an inquiry.

**Defendants Acknowledge That This Case Was Remanded for the *Bracker* Analysis in Prior Pleadings in This Case**

The parties, including Defendants, have always interpreted the Eleventh Circuit's opinion as directing this Court to conduct the "particularized inquiry" to determine whether, and to what extent, the Utility Tax is preempted. On December 18, 2015, the Tribe and the Defendants filed a Joint Scheduling Report with this Court in which they agreed that the sole issue to be tried was "whether, and to what extent, the Utility Tax is preempted." [ECF 97, ¶3a]

Thereafter, the Tribe filed a petition for a writ of certiorari with the United States Supreme Court to review the Eleventh Circuit's conclusion that the legal incidence of the Utility Tax rests with the service provider. On February 3, 2016, the Tribe and the Defendants filed a Joint Motion to Stay the Deadlines in the Court's Scheduling Order while that petition was pending. In that motion, the Defendants agreed that "the Eleventh Circuit acknowledged that the Tribe might be able to demonstrate that the Utility Tax is preempted by federal law with respect to electricity that the Tribe uses in connection with on-reservation activities that are exclusively and pervasively regulated by federal law." [ECF 99, ¶¶ 3,4] This Court granted that motion on

February 5, 2016. [ECF 100] The Tribe's petition was thereafter denied by the United States Supreme Court and, on June 17, 2016, this Court ordered the parties file a new Joint Scheduling Report. [ECF 102]. The parties filed that report on July 7, 2016, in which the parties again represented that the sole issue to be tried was "whether, and to what extent, the Utilities Tax is preempted." [ECF 103].

Clearly, the Defendants understood that the Eleventh Circuit remanded this matter to conduct the particularized inquiry mandated by *Bracker*. The current motion is simply after the fact "creative lawyering."

**The "Particularized Inquiry" in this Case**

Upon remand, the Tribe will ask this Court to determine whether the federal regulation of specific on-reservation activities is so comprehensive, exclusive and pervasive that it precludes the imposition of state tax burdens. These activities include: (i) the provision of police and fire protection, which is regulated by, *inter alia*, the Indian Self-Determination and Educational Assistance Act, 25 U.S.C. 450 *et seq*., the Indian Tribal Justice Act, 25 U.S.C. § 3601 *et seq*., the Indian Tribal Justice Technical and the Legal Assistance Act of 2000, 25 U.S.C. § 3651 *et seq*.; (ii) the leasing of Indian land, which is regulated by, *inter alia*, the Indian Reorganization Act of 1934, 25 U.S.C. § 461, *et seq*. and 25 U.S.C. § 415, *et. seq.*, and 25 C.F.R. Part 162; (iii) Indian gaming, which is regulated by, *inter alia*, the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq*. (iv) education, which is regulated by, *inter alia*, the Indian Self-Determination and Educational Assistance Act, 25 U.S.C. § 450 *et seq.*, the Johnson-O'Malley Act, 25 U.S.C. § 452 *et seq.*, the Tribally Controlled Schools Act of 1988, 25 U.S.C. § 2501, *et seq.*, the Indian Financing Act of 1974, 25 U.S.C. § 1451, *et seq*., the Snyder Act, 25 U.S.C. § 13, *et seq.*, and the Tribally Controlled Colleges and Universities Assistance Act of 1978, 25 U.S.C. § 1801 *et seq.*;

(v) the provision of health and medical services, which is regulated by, *inter alia*, the Indian Health Care Improvement Act, 25 U.S.C. § 1601 *et seq*., the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, 25 U.S.C. § 2401 *et seq*., and the Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. § 3201 *et seq*.; (vi) farming and agriculture, which is regulated by, *inter alia*, the American Indian Agricultural Resource Management Act, 25 U.S.C. § 3701, *et seq.,* and 25 C.F.R. Parts 162 and 166; (vii) livestock and cattle grazing, which is regulated by, *inter alia*, 25 U.S.C. § 466 and 25 C.F.R. § § 166.1 - 166.1001; (viii) forestry and wildlife management, which is regulated by, *inter alia*, the National Indian Forest Resources Management Act, 25 U.S.C. § 3101 *et seq*., 25 U.S.C. § 466, and 25 C.F.R. Part 163; (ix) natural resource conservation, including rock mining, which is regulated by, *inter alia*, the Indian Mineral Development Act of 1982, 25 U.S.C. § 2101 *et seq*., and 25 C.F.R. Part 216; (x) water management and sanitation, which is regulated by, *inter alia*, 25 U.S.C. § 1632, 25 U.S.C. §§ 450b, 450f, and 25 C.F.R. § 900.111 - 900.113(c); (xi) road construction and maintenance, which is regulated by, *inter alia*, 25 U.S.C. §§ 311, 312, 318a and 319 and 25 C.F.R. Part 170; (xii) housing, which is regulated by, *inter alia*, the Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. § 4101 *et seq*. and the Snyder Act, 25 U.S.C. § 13, *et seq*.; (xiii) cultural preservation, and community and recreational services, which are regulated by, *inter alia*, 25 U.S.C. § 305a, 25 C.F.R. Part 308-309, the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, 25 U.S.C. § 2401 *et seq*., the Indian Self-Determination and Educational Assistance Act, 25 U.S.C. 450, *et seq.*, 25 C.F.R. § § 900.111, 900.113(c), the Indian Financing Act of 1974, 25 U.S.C. § 1451, *et seq*., 25 C.F.R. § 101.9, 25 C.F.R. § 286.10; and (xiv) economic development, which is regulated by, *inter alia*, the Native American Business Development, Trade Promotion, and Tourism Act of 2000, 25 U.S.C. § 4301 *et seq*., the Indian

Financing Act of 1974, 25 U.S.C. § 1451 *et seq*., and the Indian Trader Statutes, 25 U.S.C. § 261, *et seq*.

When the Court conducts the "particularized inquiry" in this case as directed by the Eleventh Circuit, it will conclude that the federal regulation of some or all of the activities listed above is comprehensive, exclusive and pervasive and that Utility Tax as applied to utilities that are used in connection with such activities is preempted by federal law.

**Conclusion**

For the forgoing reasons, the Tribe respectfully requests the Court enter an order denying Defendants' Motion for Entry of Final Judgment in Accordance with the Opinion of the Eleventh Circuit of Appeals.

DATED this 2nd day of August, 2016.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on August 2, 2016, a true and correct copy of the foregoing was electronically uploaded and filed with the Court through the CM/ECF system, which will send a notice of electronic filing to counsel of record who have entered an appearance.

/s/ Andrew P. Gold
Andrew P. Gold