The Honorable Barbara J. Rothstein

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE TULALIP TRIBES, and THE CONSOLIDATED BOROUGH OF QUIL CEDA VILLAGE,

Plaintiffs,

and

THE UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

vs.

THE STATE OF WASHINGTON, Washington State Governor JAY INSLEE, Washington State Department of Revenue Director VIKKI SMITH, SNOHOMISH COUNTY, Snohomish County Treasurer KIRKE SIEVERS, and Snohomish County Assessor LINDA HJELLE,

Defendants.

No. 2:15-cv-00940-BJR

DEFENDANTS' RESPONSE TO PLAINTIFFS' AND PLAINTIFF-INTERVENOR'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT REGARDING GOVERNMENT SERVICES

NOTE ON MOTION CALENDAR:
October 14, 2016

ORAL ARGUMENT REQUESTED

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330/FAX: (425)388-6333

TABLE OF CONTENTS

I. INTRODUCTION

The Tulalip Tribes, Quil Ceda Village, and the United States ask this Court to ignore controlling precedent and adopt an unworkable rule limiting the evidence the Court can consider. The Court should decline.

As an initial matter, the Court need not even address Plaintiffs' motions. Defendants' motion for summary judgment explained that the particularized preemption inquiry described in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), applies only to on-reservation transactions between non-Indians and tribes or tribal members. Dkt. 72 at 21-32. The transactions at issue in this case do not involve tribes or tribal members. The Court should therefore apply a more traditional preemption inquiry, grant Defendants' summary judgment motion, and deny Plaintiffs' motions as moot.

If the Court does address Plaintiffs' motions, it should reject them. Plaintiffs contend that in evaluating the State's and County's interests and the services they provide under the *Bracker* preemption test, the Court may consider only "matters within or directly affecting commerce in Quil Ceda Village." Dkt. 77 at 2. Controlling case law says the opposite.

"The Supreme Court has identified a number of factors to be considered when determining whether a state tax borne by non-Indians is preempted, including: 'the degree of federal regulation involved, the respective governmental interests of the tribes and states (both regulatory and revenue raising), and the provision of tribal or state services *to the party the state seeks to tax*.'" *Salt River Pima-Maricopa Indian Cmty. v. State of Ariz.*, 50 F.3d 734, 736 (9th Cir. 1995) (quoting Felix S. Cohen, Handbook on American Indian Law 413 (1982)) (emphasis added), *cert.*

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330/FAX: (425)388-6333

denied, 516 U.S. 828 (1995); *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1190 (9th Cir. 2008) (same). Here, the primary tax at issue is the sales tax, the incidence of which falls on non-Indian buyers entering the Village. Wash. Rev. Code § 82.08.050(1) (tax must be paid by the buyer to the seller). Thus, the State and County primarily "seek to tax" non-Indian buyers, so the Court must consider "'the provision of tribal or state services'" to those buyers, who receive a complete range of state and local government services outside the Village, from education to health care to recreational opportunities. The other taxes at issue—business and occupation tax and personal property tax—apply to the non-Indian businesses located in the Village. None of those businesses could function without a wide range of government services provided outside the Village, such as roads, highways, and mass transit allowing customers and employees to reach them; schools where their employees and customers can send their children; courts to resolve civil disputes; police and a criminal justice system to keep their customers and employees safe; and parks, community centers, and a clean environment that make their employees and customers want to live nearby. Nothing in the case law supports an artificial distinction that would exclude these services from consideration.

Lacking legal support for their position, Plaintiffs appeal to purported concerns about inefficient discovery. But the discovery rules themselves provide ample means to prevent burdensome or irrelevant requests. And the primary discovery burden in demonstrating state and county services provided to the taxpayers here falls on Defendants, not Plaintiffs.

The truth is that Plaintiffs seek to avoid discovery about various government services not because they are irrelevant, but rather because Plaintiffs know they cannot prevail if the Court properly applies the law to the transactions at issue here, which involve non-Indian buyers

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330/FAX: (425)388-6333

purchasing non-Indian goods from non-Indian sellers. Under these circumstances, the Ninth Circuit has adopted a near-universal rule: "When state taxes are imposed on the sale of non-Indian products to non-Indians, as is the case here . . . , the preemption balance tips toward state interests." *Salt River*, 50 F.3d at 737; *Barona Band*, 528 F.3d at 1191 (same). The Court should not allow Plaintiffs to avoid this result by making highly relevant facts off limits to the Court's consideration. Plaintiffs' motions should be denied.

II. STATEMENT OF FACTS

A. Creation and Composition of Quil Ceda Village As A Retail Center

Quil Ceda Village (Village) is a political subdivision of the Tulalip Tribes (Tulalip) incorporated as a tribal municipality, but it primarily serves as a retail center and entertainment complex. Dkt. 1, ¶ 18; Dkt. 73-2 at 147; Dkt. 1, ¶¶ 2, 37. There is no housing in the Village, and no one resides there. Dkt. 73-1 at 7.

Located within the Village is the Seattle Premium Outlets, a premium brand shopping center with approximately 130 retail sublessees. The Village also contains a Wal-Mart; a Home Depot; a casino; a hotel, resort, and spa; a bingo hall; an amphitheater; a Cabela's; numerous restaurants, bank branches, a pharmacy, and other retail outlets; and Tulalip Data Services, which provides services to Plaintiffs and to private individuals and businesses in the community. Dkt. 1, ¶¶ 32-40; Dkt. 73-1 at 73-80; Declaration of Rebecca J. Guadamud in Support of Defendants' Response to Motion for Partial Summary Judgment, Ex. C at 20-21.

B. Intertwined Revenue and Funding for Tulalip and the Village

Under its Tribal Code, Tulalip tribal municipalities exist for several purposes, including to provide revenues that "may be used to fund governmental programs and for the protection and

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330 FAX: (425)388-6333

security of Tribal members and residents of the Reservation." Tulalip Tribal Code § 1.25.020(6) (Guadamud Decl., Ex. D at 24). Tulalip and the Village can generate revenue through taxes, Dkt. 1, ¶ 8, but also engage in for-profit commercial activities like developing and managing shopping centers and casinos, activities prohibited for state and local governments. Wash. Const., art. VIII, § 7; Tulalip Tribal Code 1.25.020(3)(d) (Guadamud Decl., Ex. D at 23); Guadamud Decl., Ex. M at 96. Tulalip and the Village can and do use both streams of revenue to fund government services. Guadamud Decl., Ex. H at 41, 45.

The Village constitutes an administratively separate component unit of Tulalip, and the two entities are by design deeply financially intertwined. Guadamud Decl., Ex. E at 33-34, Ex. G at 38-39, Ex. H at 42, 44-45. Their finances are also intertwined with the finances of the Tulalip Gaming Organization, a separate tribally-chartered entity. Guadamud Decl., Ex. H at 42-43. Under the lease agreements, Tulalip is the land owner and lessor, but in many instances the Village is identified as the manager. Guadamud Decl., Ex. I at 47, 49, 59, 62, 65.[1] Revenue generated from leased property in the Village is sometimes treated as Tulalip revenue and other times treated as Village revenue. Guadamud Decl., Ex. H at 41, 43, 45, Ex. I at 47, 50, 56, 60, 63, 66, 68, Ex. J at 72. Tulalip collects rent from its lessees as well as various fees. These fees include those for traffic mitigation, road impacts, utility connections, development and permitting, inspection, signage, Tulalip Tribes Employment Rights Office fees, common area maintenance, operating costs (e.g., taxes; insurance; utilities and trash; HVAC costs; landscaping; management fees; parking lot, sidewalk, and road maintenance; and legal and accounting services), public area maintenance services fees for access way and storm water system maintenance, and fire, police,

[1] *See also* http://www.quilcedavillage.org/Government/Departments/PropertyManagement (last visited September 29, 2016).

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330/FAX (425)388-6333

and emergency services. Guadamud Decl., Ex. I at 47-48, 51-54, 57-58, 61, 64, 69, Ex. J at 72. To the extent that Tulalip incurs government services costs for the Village, it passes some or all of these costs on to its lessees through fees. *Id.*

Tax collections are similarly directed to Village accounts without reference to the geographical location of the transaction. Guadamud Decl., Ex. K. For example, the Village budget includes motor fuel taxes collected by the State for fuel sales on the Reservation and remitted to Tulalip pursuant to a state-tribal compact. Guadamud Decl., Ex. J. But only one of the gas stations located on the Tulalip Indian Reservation is located in the Village. Guadamud Decl., Ex. C at 20-21.[2] A similar fact pattern exists for cigarette tax revenues. *Id.*

The Village also provides substantial funding to Tulalip. In 2014, the Village covered all of its expenses and was still able to distribute profits of nearly $10 million to Tulalip. Guadamud Decl., Ex. H at 42. Other examples of transfers from the Village to Tulalip for expenditure outside the Village include, but are not limited to, $3.8 million to construct an early learning center, $3.75 million to design and construct the Marine Drive fueling station, and $1.2 million for the Elders Home Replacement Program. Guadamud Decl., Ex. L.

Based on discovery produced by Plaintiffs to date, it does not appear that there is any way to track an individual dollar from collection to expenditure to verify that revenues collected within the Village are in turn spent on Village infrastructure.

C. Tax Dollars and Government Services at Issue

[2] *See also* http://www.quilcedavillage.com/Maps (last visited October 4, 2016).

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330/FAX: (425)388-6333

The non-Indian customers purchasing non-Indian goods at the non-Indian businesses in the Village pay state and local sales taxes on their purchases.[3] Wash. Rev. Code §§ 82.08.020, 82.14.030. None of these customers live at the Village. Dkt. 73-1 at 7. Rather, they live and receive a wide range of government services throughout the State.

They also receive a wide range of state and local government services that facilitate their shopping in the Village. They access the Village by roads owned or maintained by the County and State. Wash. Rev. Code §§ 47.17.015, 36.75.020; Guadamud Decl., Ex. M at 97. They stop at traffic lights in the Village owned and maintained by either the County or State. Guadamud Decl., Ex. N. They have access to the state and local courts to sue for injuries they may suffer while at the Village or from defective products they purchased in the Village. Wash. Const. art. IV, §§ 1, 6. Their purchases are protected by the State's uniform commercial code and consumer protection laws. Wash. Rev. Code Title 62A; Wash. Rev. Code. Chapter 19.86. When they call 911 within the Village, SNOPAC—the local dispatching entity financed in part by Snohomish County—dispatches the call to the Snohomish County Sheriff's Office. Guadamud Decl., Ex. A, Ex. O, Ex. Q at 110. They are protected by law enforcement services from the Snohomish County Sheriff's Office on the Tulalip Reservation, including in Quil Ceda Village. *Id.*, Ex. Q at 105-106, 109-111.

[3] Neither Tulalip nor its members pay state or local sales and use tax on goods purchased Reservation-wide, including within Quil Ceda Village. *See Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 453 (1995) (a state's excise tax does not apply if its legal incidence falls on a tribal member for sales within Indian country absent Congressional instruction otherwise).

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330/FAX (425)388-6333

Non-Indian-owned businesses within the Village pay business and occupation tax[4] and personal property tax. Wash. Rev. Code §§ 82.04.220, 84.36.005, 84.36.110, 84.40.190. They use roads owned or maintained by the State and County to bring their goods into the Village. Wash. Rev. Code §§ 47.17.015, 36.75.020. They pay state unemployment insurance to support workers who lose their jobs. Wash. Rev. Code Title 50. They follow the myriad of state worker safety laws to safeguard their employees. Wash. Rev. Code Title 49. They are protected by the civil and criminal justice system for civil disputes and crimes committed by non-Indians. Wash. Const. art. IV, §§ 1, 6; Guadamud Decl., Ex. Q at 106-108. This protection includes resources from the County sheriff's office, the prosecutor's office, the public defender's office, the jail, the clerk's office, and the courts. Guadamud Decl., Ex Q. They are also protected by the Washington State Patrol, which provides law enforcement on Interstate 5, including that stretch running through the Village. Wash. Rev. Code § 43.43.030. As a specific example, the Washington State Patrol has pulled over numerous intoxicated persons who list the Tulalip Resort Casino as the last place of alcohol consumption. Guadamud Decl., Ex. R.

Another significant service provided to both customers, employees, and businesses in the Village is the funding of state schools, which are attended by non-Indians and tribal members alike. Wash. Const. art. IX, §§ 1, 12; Wash. Rev. Code §§ 28A.150.010, 28A.150.210, 28A.150.220. Non-Indian and tribal businesses at Quil Ceda Village depend on employees educated by state schools, on the ability of their employees to send their children to state schools, and on non-Indian customers whose state-funded education enables them to earn wages they can

[4] Other jurisdictions in Washington State with significant retail establishments impose a business and occupation tax on top of the State's business and occupation tax. *See* Seattle Municipal Code ch. 5.45 and Bellevue City Code ch. 4.09.

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330/FAX: (425)388-6333

spend within the Village. Wash. Const. art. IX, §§ 1, 12; Wash. Rev. Code §§ 28A.150.010, 28A.150.210, 28A.150.220.

All of these services are funded by the tax dollars at issue. Guadamud Decl., Ex. B at 12-13, 15, 16-18; *see* Albright Decl., Dkt. 75 at 10-23.

III. QUESTION PRESENTED

If the Court applies the *Bracker* preemption analysis, which requires a "particularized" and sensitive factual examination, should the Court ignore facts about State and County services provided to the taxpayers here (non-Indian customers and businesses) merely because those services are provided outside Quil Ceda Village or "do not directly support commerce" in the Village?

IV. STANDARD OF REVIEW

A party moving for summary judgment must show that there is "no genuine issue as to any material fact" and that the moving party is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In deciding a motion on summary judgment, only admissible evidence may be considered. *Miller v. Glenn Miller Productions, Inc.*, 454 F.3d 975, 988 (9th Cir. 2006). The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in the non-movant's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

V. ARGUMENT

Plaintiffs move for partial summary judgment "regarding the legal effect of government services provided by Defendants outside the boundaries of the Consolidated Borough of Quil Ceda Village and that do not directly support the economic activities subject to the taxes in dispute." Dkt. 74 at 1; Dkt. 77 at 2. Plaintiffs thus attempt to narrow the *Bracker* inquiry in two

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330 FAX: (425)388-6333

respects: (1) restricting the inquiry's geographic scope to the political boundaries of Quil Ceda Village, and (2) limiting discovery and presentation of evidence to County and State services that directly support or relate to the economic activities being taxed.

The Court should deny Plaintiffs' motions as legally baseless and unworkable in practice. To begin with, the *Bracker* inquiry is inapplicable in circumstances such as this where the state and local taxes apply to transactions between non-Indian customers and non-Indian businesses on a reservation. *See* Defs.' Mot. for Summ. J., Dkt. 72 at 21-32.

Even if *Bracker* applies, the Supreme Court and Ninth Circuit have rejected Plaintiffs' narrow interpretation of the government services relevant to *Bracker*'s particularized inquiry. Courts have never imposed the type of geographic limitation on the discoverability or admissibility of evidence requested by Plaintiffs. Rather, the factors to be considered expressly include government services provided *to persons who pay the taxes*. *Salt River*, 50 F.3d at 736. Here, the State and County seek to tax non-Indian customers making purchases in the Village and non-Indian businesses selling to them. The case law makes crystal clear that the full range of government services provided to these non-Indians is relevant here. In arguing to the contrary, Plaintiffs have been highly selective in choosing facts and cases to support their motions. Only by disregarding the most directly relevant case law are Plaintiffs able to request the legal standard they propose. This Court should reject their arguments and refuse to ignore relevant evidence.

A. *Bracker* Is Inapplicable Where Non-Indians Conduct Transactions with Other Non-Indians.

Plaintiffs' motions should be denied because the *Bracker* preemption analysis is inapplicable in circumstances such as this where the state and local taxes apply to transactions between non-Indian customers and non-Indian businesses. As described in Defendants' Motion

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330/FAX: (425)388-6333

for Summary Judgment, *Bracker* applies only in situations where the taxable transaction involves a nontribal entity and a tribe or tribal member. Dkt. 72 at 21-32.

B. Plaintiffs' Proposed Legal Standard Is Contrary to Controlling Precedent.

Plaintiffs claim that in analyzing whether the taxes at issue here are preempted, any State and County services "that do not directly support the economic activities subject to the taxes in dispute" are irrelevant. Dkt. 74 at 1. That is not the law.

Where the *Bracker* preemption analysis applies, courts engage in a particularized inquiry into the nature of the state, federal, and tribal interests at stake to determine whether, in the specific context, the exercise of state authority would violate federal law. *Bracker*, 448 U.S. at 145. In this inquiry, "[t]he Supreme Court has identified a number of factors to be considered . . . , including: 'the degree of federal regulation involved, the respective governmental interests of the tribes and states (both regulatory and revenue raising), *and the provision of tribal or state services to the party the state seeks to tax.*'" *Salt River*, 50 F.3d at 736 (emphasis added).

As with many multi-factor tests, the strength of the evidence as to one factor can impact the required showing as to other factors. *See, e.g.*, *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107, 1111 (9th Cir. 1997), *cert. denied*, 522 U.S. 1076 (1998). In particular, as to the first factor, "[f]ederal interests are greatest when the government's regulation of a given sphere is 'comprehensive and pervasive.'" *Barona Band*, 528 F.3d at 1192. When that is the case, courts have sometimes required evidence of a close relationship between the taxes at issue and State funding of services related to those taxes. *Yavapai*, 117 F.3d at 1111. But where federal regulation is not comprehensive, as here, courts have imposed no such requirement. *Id.* (citing *Salt River*, 50 F.3d at 737; *Gila River Indian Community v. Waddell*, 91 F.3d 1232, 1239 (9th Cir. 1996)

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330/FAX: (425)388-6333

(*Gila River II*)). As to the second factor, tribes have "an interest in raising revenues, but that interest is at its weakest when goods are imported from off-reservation for sale. The State, too, has an interest in raising revenues, and this interest is at its strongest when non-Indians are taxed, and those taxes are used to provide them with government services." *Salt River*, 50 F.3d at 739. As to the final factor, where "the party the state seeks to tax" is effectively the tribe or a tribal member, preemption is nearly certain. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 183-86 (1989) (discussing and distinguishing facts in *Bracker* and *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982)). But "'when state taxes are imposed on the sale of non-Indian products to non-Indians,'" preemption is never found—"'the preemption balance tips toward state interests.'" *Barona Band*, 528 F.3d at 1191 (quoting *Salt River*, 50 F.3d at 737).

These principles refute Plaintiffs' arguments here. As explained in Defendants' Motion for Summary Judgment, the State taxes at issue here do not interfere with any "comprehensive and pervasive" system of federal regulation. *Barona Band*, 528 F.3d at 1192; Dkt. 72 at 13-21. Thus, the proper approach, as demonstrated by the case law, is to consider all services the state and local government provide to the non-Indian customers and non-Indian businesses in applying the *Bracker* test. *See Yavapai*, 117 F.3d at 1111 (citing *Salt River*, 50 F.3d at 737; *Gila River II*, 91 F.3d at 1239). The cases Plaintiffs cite applying a narrower approach are all inapposite, as they involved either comprehensive federal regulatory schemes, taxes that effectively fell on tribes or their members, taxes on sales of Indian goods or resources, or all of these elements. None of these elements is present here. Rather, these "'state taxes are imposed on the sale of non-Indian products

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330/FAX (425)388-6333

to non-Indians,'" so "'the preemption balance tips toward state interests.'" *Barona Band*, 528 F.3d at 1191 (quoting *Salt River*, 50 F.3d at 737).

1. Where a State taxes non-Indian customers buying non-Indian goods from non-Indian businesses, as here, courts consider all services provided to those taxpayers and virtually never find preemption.

Plaintiffs' briefs largely ignore three Ninth Circuit cases most analogous to this one, all of which demonstrate the inaccuracy of Plaintiffs' argument here. Those cases, although relegated to footnotes or ignored altogether by Plaintiffs, deserve the Court's careful attention because they painstakingly applied Supreme Court precedent in rejecting Plaintiffs' precise argument here.

The case most conspicuously absent from all but a footnote of Tulalip's brief is also the most factually similar to this one. In *Salt River*, a tribe leased its land to a non-Indian developer for a shopping mall. 50 F.3d at 735. The developer sublet the property to non-Indian businesses such as Circuit City, J. C. Penney, and Home Depot, *id.*, just as at Quil Ceda Village. Also, as at Quil Ceda Village, the vendors sold primarily non-Indian goods. *Id.* The primary question concerned whether a 5.5 percent state tax on sales imposed on the non-Indian sellers to the non-Indian buyers was preempted.[5]

In its preemption analysis, the Ninth Circuit concluded that it was "clear that the balance tips in favor of Arizona's taxation." *Id.* at 737. Reaching this conclusion, the Ninth Circuit explained that (1) "the goods and services sold are non-Indian," (2) "the legal incidence of Arizona's taxes falls on non-Indians," and (3) "Arizona and its agents provide the majority of the governmental services used by these taxpayers." *Id.*

[5] Arizona has what is referred to as a vendor-based sales tax, which is imposed on the retail seller. *See* Ariz. Rev. Stat. § 42-5008. In contrast, Washington's sales tax, which is the largest tax in dispute in this case, is imposed on the purchaser of goods within the Village. Wash. Rev. Code § 82.08.050(1). This fact makes the state interest here even stronger than it was in *Salt River*.

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330 FAX: (425)388-6333

It is indisputable that the Ninth Circuit was considering the off-reservation services provided to the non-Indian taxpayers, both the businesses that paid the tax and the purchasers of the taxed goods (who were not directly subject to Arizona's tax). In the fact section of the opinion, the court explained that while the developer, state, and tribe all provided services to the mall, "[i]t is undisputed that Arizona and its subordinate entities provide the governmental services used by the non-Indian purchasers off the reservation." *Id.* at 735. The Court began its analysis by emphasizing that one of the crucial reasons it found no preemption was "because Arizona provides most of the governmental services used by the non-Indian taxpayers." *Id.* at 736. In the heart of its opinion, the Court emphasized that "the legal incidence of Arizona's taxes falls on non-Indians," and "Arizona and its agents provide the majority of the governmental services used by these taxpayers." *Id.* at 737. The Court noted that "[t]he Supreme Court has rejected the idea that a tax imposed on reservation activities must be proportionate to the services provided to the Indians." *Id.* (citing *Cotton Petroleum*, 490 U.S. at 185 n.15). And in conclusion, the Ninth Circuit explained that the State's interest was at its strongest when non-Indians are taxed and those taxes are used to provide them with government services. 50 F.3d at 739. The Ninth Circuit made no distinction between services provided on or off-reservation.

Salt River was not an outlier opinion untethered from Supreme Court precedent. It applied Supreme Court decisions in reaching its conclusions. In particular, it relied on a preemption case that preceded *Bracker* by just a few weeks, *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). *Colville* involved tribal cigarette sales to non-Indians who travelled onto the reservation to purchase them. There was no comprehensive federal regulation of the cigarette sales. *See id.* at 155. And unlike the facts in *Bracker*, the State's interest

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330 FAX: (425)388-6333

was at its strongest because the tax was directed at off-reservation value and the taxpayer was "the recipient of state services." *Id.* at 157, *quoted in Salt River*, 50 F.3d at 737.

If *Colville* left any doubt whether off-reservation services to taxpayers and tribes could be considered in a case not involving comprehensive federal regulation, the Supreme Court's 1989 decision in *Cotton Petroleum* removed that doubt. *Cotton Petroleum* involved a non-Indian oil and gas drilling company operating under a lease with the Jicarilla Apache Tribe. 490 U.S. at 168. New Mexico and the Tribe imposed taxes on the reservation activities of the business. *Id.* The Court focused extensively on the 1938 Mineral Leasing Act for any indication of Congressional intent to preempt state taxes, and it found none. *Id.* at 177-83.

The Court then turned to distinguishing *Bracker* and *Ramah Navajo*. Each of those cases had explained that federal law imposed a "comprehensive regulatory scheme." *Ramah Navajo*, 458 U.S. at 846; *see Bracker*, 448 U.S. at 151. In addition, in each of those cases, the tribes bore the ultimate economic burden of the taxes. *Cotton Petroleum*, 490 U.S. at 184. In the case of the oil and gas extraction at issue in *Cotton Petroleum*, the federal and tribal regulations were "extensive," but not "exclusive." *Id.* at 186. And the trial court found that "New Mexico provides substantial services to both the Jicarilla Tribe and Cotton, costing the State approximately $3 million per year." *Id.* at 185 (internal quotations omitted).[6]

The Court also considered and rejected the nearly identical argument being made by Plaintiffs here. Cotton argued that the "tax payments by reservation lessees far exceed the value

[6] By context, it is clear that these services were not provided in direct relation to the oil and gas operations. We know this because Cotton argued that it received only $89,384 in services for its operations (the direct activity being taxed). The Court rejected that argument, concluding that there was no proportionality requirement between the state services provided and the taxes paid. 490 U.S. at 185. This disposes of Plaintiffs' argument here that only services provided that are directly connected to the taxed activity are relevant to a *Bracker* analysis.

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330/FAX: (425)388-6333

of services provided by the State to the lessees, or more generally, to the reservation as a whole." *Id.* at 189. The Court rejected that argument, explaining in part:

> the *relevant services provided by the State include those that are available to the lessees and the members of the Tribe off the reservation* as well as on it. The intangible value of citizenship in an organized society is not easily measured in dollars and cents. . . .

Id. (emphasis added). The Supreme Court has therefore expressly addressed whether services provided to a tribe and to taxpayers off the reservation are relevant to the preemption inquiry. It concluded that they are. The Ninth Circuit in *Salt River* also appropriately relied on *Cotton Petroleum*. 50 F.3d at 737-38.

In addition to being well-grounded in Supreme Court precedent, the principles the Ninth Circuit articulated in *Salt River* have also been repeatedly reaffirmed in later Ninth Circuit cases. In *Gila River II,* the Ninth Circuit directly confronted the argument being made by the Plaintiffs in this case. *Gila River II*, 91 F.3d at 1239. The case involved a preemption challenge to Arizona's taxation of ticket sales at entertainment events within the Gila community. Like Plaintiffs here, the Gila River Tribe argued that there must be a direct connection between state sales tax revenues and the services provided to the Tribe.

The Ninth Circuit emphatically rejected the Tribe's direct connection argument: "The Tribe's insistence that there be a direct connection between the state sales tax revenues and the services provided to the Tribe is similarly meritless." *Id.* at 1239. The Ninth Circuit viewed the argument as a reformulation of the proportionality argument that the Supreme Court had rejected in *Cotton Petroleum*. *Id.* The Ninth Circuit's application of this portion of *Cotton Petroleum* in a *Bracker* preemption analysis forecloses the United States' crabbed reading of *Cotton Petroleum* as solely addressing a different legal issue. *See* Dkt. 77 at 10-11.

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330 FAX: (425)388-6333

The Ninth Circuit again addressed an argument virtually identical to Plaintiffs' position in *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997), which involved a preemption challenge to taxes non-Indians paid in purchasing food, beverages, and room rentals. *Yavapai-Prescott* explains that the narrow tailoring or direct connection requirement advocated by Plaintiffs here is inapplicable unless the activity the State seeks to tax is comprehensively and pervasively regulated by the federal government. *Id.* at 1111. The Court explained that under the Ninth Circuit's decisions in *Salt River* and *Gila II*, there is "no requirement that a state tax on reservation activities 'must be proportionate to the services provided to the Indians.'" *Id.* This precedent has been treated "as dispositive of [a] Tribe's objection that the taxes were not narrowly tailored." *Id.* (citing *Gila II*).

The Ninth Circuit did not apply a narrow tailoring requirement in *Yavapai-Prescott*, just as it had not in *Salt River* or *Gila River II*. Thus, under controlling Ninth Circuit case law, which is consistent with the Supreme Court's holdings in *Colville* and *Cotton Petroleum*, narrow tailoring or a direct connection between taxes paid and services provided in support of the taxed activity is not required in the absence of comprehensive federal regulation.[7]

Plaintiffs have no serious argument that the federal government comprehensively regulates sales by non-Indian businesses to non-Indian customers at Quil Ceda Village. *See* Defs.' Mot. for Summ. J., Dkt. 72 at 13-20. Because non-Indians pay the generally applicable taxes at issue and receive services and benefits from the State and County both on and off the reservation,

[7] The Tenth Circuit also found off-reservation infrastructure allowing a company that extracted oil and gas to transport its goods to market was relevant to determining the extent of the State's interest. *Ute Mountain Ute Tribe v. Rodriguez*, 660 F.3d 1177, 1202 (10th Cir. 2011), *cert. denied*, ___ U.S. ___, 132 S. Ct. 1557 (2012). The court expressly disagreed with the district court's finding that off-reservation infrastructure and services provided by the State should "play no part in the analysis." *Id.*

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330/FAX: (425)388-6333

the State and County interests are at their strongest. Accordingly, a requirement that taxes be narrowly tailored to activities in Quil Ceda Village is not appropriate in this case. Plaintiffs' suggested relief cannot be squared with controlling case law from the Supreme Court and Ninth Circuit and should be rejected.

2. The cases in which courts have required narrow tailoring and found preemption involved taxes directly impacting tribes, tribal resources, or taxing activities comprehensively regulated by the federal government, none of which is present here.

Plaintiffs cite a number of cases for the proposition that the only government services relevant to the *Bracker* inquiry are those provided within the Village or that "directly support the economic activities" in the Village. Dkt. 74 at 1. All of those cases are inapposite because they involve facts dramatically different from those here.

As explained above, courts have identified a number of factors to be considered when determining whether a state tax borne by non-Indians is preempted, and one of them is "the provision of tribal or state services to the party the state seeks to tax." *Salt River*, 50 F.3d at 736. The Ninth Circuit and Supreme Court have required a close connection between the taxes levied and services provided only when the federal regulation of the taxed activities was pervasive and comprehensive, *Yavapai*, 117 F.3d at 1111, where the economic burden of the tax fell on tribes or tribal members, *Cotton Petroleum*, 490 U.S. at 184 (describing facts in *Ramah Navajo* and *Bracker*), where the tax reduced tribal revenues from the sales of Indian goods or resources, *Bracker*, 448 U.S. at 148-49, or where several of these factors were present. At least one of these factors was present in every case Plaintiffs cite in support of their argument. None of them is present here.

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330/FAX (425)388-6333

The cases Plaintiffs cite fall into three overlapping categories that distinguish them from this case. First, many of those cases involved activities comprehensively and pervasively regulated by the federal government. For example, in *Bracker* itself, six logging companies contracted with the White Mountain Apache Tribe to harvest timber on reservation land, cut the timber to size, and haul it to the Tribe's on-reservation sawmill. *Bracker*, 448 U.S. at 139. The Tribe and the logging companies challenged Arizona's motor carrier license and fuel taxes. *Id.* at 139-40. The timber was owned by the United States for the benefit of the Tribe and could only be harvested with Congressional consent. *Id.* at 138. Federal statutes provided the Secretary of the Interior broad authority over reservation timber sales. *Id.* at 145. Accordingly, the Secretary promulgated detailed regulations regarding clear-cutting, timber sale requirements, advertising, bids, contracts, and fire protective measures. The regulations required the Secretary's approval of all contracts and timber-cutting permits, and created a board of administrative appeals. *Id.* at 147.

In sum, the federal government exercised "literally daily supervision" over tribal timber management and harvesting. *Id.* The federal government also regulated the use and maintenance of tribal roads. *Id.* at 147-48. The Court concluded that there was "no room" for the challenged state taxes in this "comprehensive federal regulatory scheme." *Id.* at 148.

Unlike this case, *Bracker* was not a case where the "State seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall." *Id.* at 150. The State's generalized interest in raising revenue was insufficient to overcome the "comprehensive regulation of the harvesting and sale of tribal timber. . . ." *Id.* at 151. Likewise, in *Ramah Navajo School Bd.*, federal regulation of the construction and financing of Indian educational institutions was "both comprehensive and persuasive," precluding New Mexico from imposing its gross

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330/FAX: (425)388-6333

receipts tax on a contractor who built an on-reservation school for an Indian school board. *Ramah Navajo*, 458 U.S. at 839.

Similarly, in *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 659 (9th Cir. 1989), the Court noted that "[f]ederal laws and policies comprehensively support and regulate the harvest of timber on tribal lands." The coal extraction in *Crow Tribe* was subject to the federal Mineral Leasing Act of 1938 and corresponding federal regulations.[8] *Crow Tribe of Indians v. State of Montana*, 819 F.2d 895, 897 (9th Cir. 1987), *affirmed sub nom., Montana v. Crow Tribe of Indians*, 484 U.S. 997 (1988). The off-track betting activities in *Cabazon Band v. Wilson* were regulated by the federal government under the Indian Gaming Regulatory Act. *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 432 (9th Cir. 1994).

And the Eleventh Circuit addressed similar issues with regard to Florida's rental tax, noting that the federal government's "extensive, comprehensive, and pervasive regulatory framework governing the leasing of Indian land" was "sufficient to bring the federal interests within the scope of *Bracker* and *Ramah* . . . ." *Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324, 1341 (11th Cir. 2015), *cert. denied sub nom. Seminole Tribe of Florida v. Biegalski*, __ U.S. __, 136 S. Ct. 2480 (2016). It was in that context, of comprehensive significant federal regulation, that the Court required a more sufficient state interest than raising revenue for providing statewide services. *Id.* Plaintiffs characterize *Seminole* as having explicitly rejected consideration of a broader suite of state services, *see* Dkt. 74 at 15; Dkt. 77 at 13, but because there is no extensive and exclusive federal regulatory scheme governing the retail sales between non-Indians at issue here, Plaintiffs' characterization of *Seminole* is misleading and misplaced.

[8] The Ninth Circuit also decided *Crow Tribe* before the Supreme Court interpreted the 1938 Mineral Leasing Act in *Cotton Petroleum*.

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330/FAX: (425)388-6333

Second, the cases Plaintiffs rely on involved taxes on transactions in which the tribes were either parties or bore the tax burden. For example, "it was undisputed in *Bracker* that the economic burden of the taxes ultimately fell on the Tribe." *Cotton Petroleum*, 490 U.S. at 184. Similarly, in *Ramah*, "the economic burden of the tax ultimately fell on the Tribe." *Id. Hoopa Valley* involved California's timber yield tax, for which "[t]he burden of tax concededly falls on the tribe." 881 F.2d at 660. In *Cabazon Band of Mission Indians v. Wilson*, the Court noted that "the Bands bear the actual burden of the license fee." 37 F.3d at 434.

Third, the taxes preempted by those cases were imposed "on *Indian* resources or services being sold, which is not the case here." *Salt River*, 50 F.3d at 738 (emphasis in original) (citing, *inter alia*, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (bingo), *Bracker*, 448 U.S. 136 (timber), *Crow Tribe*, 819 F.2d at 900-02 (coal), *Hoopa Valley*, 881 F.2d 657 (timber)). The timber and coal resources for which taxes were preempted in *Bracker, Hoopa Valley,* and *Crow Tribe* had belonged to the tribes and thus had derived their value almost exclusively on the reservation. Even the wagering activities for off-reservation horseracing at issue in *Cabazon Band v. Wilson* had derived substantial value on the reservation, because the tribe had constructed and operated wagering facilities and did not "merely serv[e] as a conduit for the products of others." 37 F.3d at 435.

Plaintiffs rely extensively on *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), but that case did not involve state taxes at all and highlights all three of the distinctions above. First, in preempting the State hunting and fishing laws at issue there, the Court emphasized that federal law created a "comprehensive scheme" governing hunting and fishing on tribal lands. *Id.* at 338. Second, the Court noted that applying state laws to hunting and fishing on tribal lands

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330/FAX (425)388-6333

would burden the tribe itself, not just non-members. *Id.* at 336 ("The exercise of State authority which imposes *additional burdens on a tribal enterprise* must ordinarily be justified by functions or services performed by the State in connection with such activity.") (emphasis added). Finally, that case involved "fish and wildlife resources" that belonged to the tribe. *Id.* at 342.

In short, the cases upon which Plaintiffs rely arose in very different contexts than this case, with tribes directly impacted by the taxes, comprehensive federal regulation, and Indian goods or services being taxed. Rather than relying on these inapposite cases, the Court should follow the highly relevant cases Defendants have cited above that involve the fact pattern here: where "'state taxes are imposed on the sale of non-Indian products to non-Indians.'" *Barona Band*, 528 F.3d at 1191 (quoting *Salt River*, 50 F.3d at 737).

3. The Supreme Court has consistently rejected attempts to require proportionality between the burdens and benefits of taxation.

By attempting to limit the geographic scope of evidence in this case, Plaintiffs also are implicitly arguing for proportionality between the burdens and benefits of taxation, despite the fact that they face none of the burdens[9] of taxes and receive many of the benefits. While Indian taxation case law does require narrow tailoring of benefits to a taxed activity in situations of comprehensive regulation, the same case law rejects proportionality. Plaintiffs have asked this Court to exclude evidence of State and County government services outside the boundaries of Quil Ceda Village. By doing so, they hope to show that the tax income derived from the shopping mall and entertainment complex exceeds—or is out of proportion with—the benefits that the same

[9] The Tulalip Tribes, Consolidated Borough of Quil Ceda Village, and tribal members do not pay the taxes at issue within the Tulalip Reservation.

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330/FAX: (425)388-6333

shopping mall and entertainment complex receives from the taxes. The Supreme Court has already rejected this proportionality requirement.

The Supreme Court rejected a virtually identical proportionality argument in its decision in *Cotton Petroleum*. 490 U.S. at 190. The non-Indian company argued that the state tax should be preempted because tax payments exceeded the value of services provided by the state to lessees and the reservation. *Id.* at 189. The Court explained that "there is no constitutional requirement that the benefits received from a taxing authority by an ordinary commercial taxpayer—or by those living in the community where the taxpayer is located—must equal the amount of its tax obligations." *Id.* at 190 (citing *Keystone Bituminous Coal Assn. v. DeBenedictis,* 480 U.S. 470, 491 n.21 (1987)). The Court further reflected on its long-held rejection of the proportionality argument and the reasoning behind it:

> The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve abandonment of the most fundamental principle of government—that it exists primarily to provide for the common good.

Id. (quoting *Carmichael v. Southern Coal & Coke Co. v. Gulf States Paper Corporation*, 301 U.S. 495, 521-523 (1937)).

What was true in 1937 and 1989 remains true today: Taxes are a way of distributing the cost of government, and taxpayers may not avoid paying a tax "because it is not expended for purposes which are peculiarly beneficial to him." *Carmichael*, 301 U.S. at 523. Accordingly, the Supreme Court has foreclosed the proportionality argument to taxpayers and extended that principle to the context of state and local taxation in Indian country. This Court should deny Plaintiffs' motions.

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330/FAX: (425)388-6333

C. Plaintiffs' Proposed Legal Standard Ignores the Economic and Practical Realities of an Integrated Economy.

Plaintiffs' motions imply that they need to replace State and County taxes with tribal taxes in the Village to put those same tax dollars to work for the Village's exclusive benefit. *See* Dkt. 74 at 4 (asserting that State and County taxation "deprive[s] Tulalip of the ability to enforce its own taxes to fund the very government services that underpin the Village economy"). Tulalip's and the Village's Complaint, however, speaks to their generalized interest in raising revenue. Plaintiffs allege, among other things, that State and County taxation precludes the Village from generating revenues to support the infrastructure, government services, and economic development within the Village, the Reservation community, and for Tribal members. Dkt. 1 ¶¶ 89-90. Yet through their present motions, Plaintiffs seek to prevent the State and County from both testing these allegations as well as mounting a defense with evidence related to services and programming funded by the tax dollars at issue and provided by the Defendants to tribal members and the Reservation community.

Plaintiffs essentially ask this Court to engage in a preliminary *Bracker* balancing analysis, one that is inappropriate under case law and unworkable in practice. Plaintiffs' request is premised on a false view of Quil Ceda Village as an island, operating independently from the economic and practical realities of an integrated modern economy. This Court should reject Plaintiffs' attempt to exclude from a later application of *Bracker* relevant evidence of the State and County services funded by the tax dollars at issue for the benefit of the taxpayers, Plaintiffs, tribal members, and the Tulalip Indian Reservation.

1. Plaintiffs' proposed legal standard ignores economic reality.

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330/FAX (425)388-6333

The rigid legal standard proposed by Plaintiffs ignores the economic reality of a modern marketplace economy. Whether as business owners, employees, vendors, or customers, non-Indians enter the Village, visit, and then leave. While within the Village, these non-Indians may engage in taxable transactions. They may also make use of government services provided by state, local, federal, or tribal jurisdictions. It is undisputed, however, that prior to entering and upon leaving the Village, these non-Indians use state and local government services. *See* Dkt. 74 at 17 n.6. Whether these non-Indian visitors to the Village reside elsewhere on the Tulalip Indian Reservation, Snohomish County, the State of Washington, or beyond, the tax revenue generated by their transactions pays for the government services they receive from state and local jurisdictions. *See supra*, Section II.C at 6-8. Further, any goods they purchase are used primarily outside the Village. *Id.*

By proposing a legal standard limited by geography and whether the state service is directly related to the taxed activity, Plaintiffs ignore the entire State and County supported, off-reservation value chain that is responsible for bringing goods to the point of sale. They also ignore State and County support of the off-reservation taxpaying customer. There can be no economic value at the point of sale without these paying customers. Similarly, the State and County provide the vast majority of services to the non-Indian workforce within the Village.

Plaintiffs' requested ruling contradicts their own articulated understanding of an integrated economy. The Tulalip Comprehensive Plan states that "economic impacts from the Reservation extend out into the region, and the regional economy affects the Reservation. Goods, services, human capital, and monetary capital cross the Reservation boundaries daily benefitting the Reservation and surrounding region." Guadamud Decl., Ex. M at 95-96.

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330/FAX: (425)388-6333

The Court should acknowledge the fluidity of both the Reservation and regional economies, and reject Plaintiffs' proposed limitation on the *Bracker* preemption analysis.

2. The proposed legal standard is unworkable because it does not contemplate the complexities of the Tulalip Indian Reservation's jurisdictional checkerboard.

Plaintiffs' requested limitation of the *Bracker* preemption analysis also ignores the jurisdictional complexities of the Tulalip Indian Reservation and the Village. The Tulalip Indian Reservation is a "checkerboard" reservation where the federal, tribal, State, and County governments all provide services. *See* Guadamud Decl., Ex. T at 119. As noted by Plaintiffs, approximately 57% of the Reservation is owned by non-Indians, and non-Indians constitute approximately 75% of the Reservation's population, resulting in circumstances that, as Plaintiffs acknowledge, "dictate a different role for the state and county governments in providing services" to the Reservation outside of the Village. Dkt. 74 at 18; Dkt. 76, ¶¶ 3, 5.

Government services and programming throughout the Reservation, including the Village, remain largely interdependent and intertwined with the State and County. While some services and programming depend on the ownership or status of the underlying land, such as land use jurisdiction or maintenance of particular roads, other services and programming may turn on tribal membership, such as arrest and prosecution of misdemeanor offenses. Guadamud Decl. Ex. Q, Ex. T at 120. Yet other services and programming are delivered without any reference to tribal membership or land status, such as schools, unemployment insurance, and medical examiner (i.e. coroner) services. *See* Guadamud Decl., Ex. B at 16-18. State and County services and

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330/FAX: (425)388-6333

programming are largely delivered without reference to the Reservation or the Village boundary.[10]

Plaintiffs' proposed legal standard is premised on a false simplicity that belies the complex nature of public needs and government services for those living, working, and shopping within the boundaries of the Reservation, including the Village.

3. Quil Ceda Village does not exist in isolation from the rest of the Tulalip Tribes.

Extending discovery in this case beyond the political boundaries of the Village is mandated by the intertwined financial and legal relationships between Tulalip and the Village, with Tulalip functioning as primary government and the Village as a component unit. Quil Ceda Village resolutions, budgets, and other documents illustrate accounting practices in which monies move freely between Tulalip, the Village, and Tulalip tribal businesses. For example, rents from leases within the Village are paid to Tulalip, not to the Village. Guadamud Decl., Ex. I at 47, 49-50, 56, 59, 62, 65. Tax dollars collected by Tulalip at tribal businesses located outside the Village are allocated to the Village budget; but then Tulalip sometimes claws back those tax dollars to fund services and programming for Tribal members and businesses. Guadamud Decl. Ex. J, Ex. L. To understand the finances, services, and the business enterprise aspects of the Village component unit, it is essential to be able to obtain discovery about the Tulalip primary government.

Federal and tribal laws authorize tribes to wear multiple hats, as Tulalip and the Village do here. *See, e.g.*, 25 U.S.C. §§ 5123-24; Constitution and Bylaws for the Tulalip Tribes of

[10] Plaintiffs' suggestion that, should Plaintiffs prevail in this suit, the State and County will be made whole from other taxes collected in other parts of the Reservation ignores that prior to developing the Village, the State and County had only minimal service obligations on that tract of "barren land." Further, the state and local tax revenues are minimal for areas of the Reservation outside of the Village, as there is little commercial activity on the rest of the Reservation and limited taxable real property. Dkt. 74 at 18; *see* Guadamud Decl., Ex. M at 94.

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330/FAX: (425)388-6333

Washington, art. VI, §1 (M) (Guadamud Decl., Ex. D at 30-31); Tulalip Tribal Code §§ 10.05.010, 14.15.010 (Guadamud Decl., Ex. D at 27, 29). At the Village, this means that Tulalip and the Village function as real estate developer and landlord, business owner, and local governments. As a real estate developer and landlord, Tulalip and the Village recover their real estate development and property management costs in the form of rents and fees charged to their tenants, such as Walmart, Home Depot, Cabela's, and Simon Property Group. *See supra*, Section II.B at 4-5. As a business owner, Tulalip and the Village recover their business development costs through profits earned in their commercial operations, such as Tulalip Bingo, Tulalip Resort, Casino, and Spa, and Tulalip Amphitheatre. *Id.* at 5; Guadamud Decl., Ex. H at 41-43. As a local government, Tulalip and the Village recover their government services costs through taxes and fees, including a restaurant privilege tax, occupation and use tax, lodging tax, and leasehold excise tax, as well as fees for traffic mitigation, permitting, and tribal employment. *Id.*

In light of the roles that Tulalip and the Village play with regard to the Village, it is vital that the Court allow discovery into these roles and their implications for the federal, tribal, and state and local interests at issue here. *Bracker* calls for a "particularized inquiry," and here Defendants are entitled to present evidence regarding what portion of the Village's budget is attributable to real estate development and property management, as opposed to a local government, as well as whether Tulalip and the Village can support their allegation that they are unable to fund essential government services for tribal members and the Reservation as a whole.

4. Quil Ceda Village and the Tulalip Tribes do not exist in isolation from Snohomish County and the State of Washington.

As a real estate developer, Tulalip and the Village benefit from real estate holdings that are strategically located on Interstate 5 in the thriving Puget Sound region. The most recent rate

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330/FAX: (425)388-6333

of unemployment for the Seattle-Tacoma-Bellevue area, as reported by the Bureau of Labor Statistics, was 4.8%.[11] In 2015, the median household income in Seattle was over $80,000, significantly higher than the national median household income of $56,516.[12] Tulalip has acknowledged the interdependency of the regional and local Reservation economies, noting in its Comprehensive Plan that "[t]he economic health of the region is strong, and the Tulalip Reservation houses a microeconomy that adds to that strength." Guadamud Decl., Ex. M at 95-96.

As Plaintiffs' own market data reflects, many of the visitors to the Village come from the Puget Sound region and beyond. Guadamud Decl., Ex. U. This non-Indian customer base lives and works outside the Village in an organized society regulated by the State of Washington and its political subdivisions, such as Snohomish County. These non-Indian customers enter the Village to buy items such as camping gear, clothing, or shoes, which they use outside of the Village. Their tax dollars—paid to the state and local government that provides them with services—reflect the social contract between sovereign and constituent.

Plaintiffs attempt to flip this paradigm on its head by asserting a right to preclude State and County taxation of non-Indians with whom Plaintiffs have no social contract and no obligation to provide government services. The non-Indian taxpayers at the Village are not tribal constituents and have no voice in tribal government. They certainly do not receive monthly cash

[11] http://www.bls.gov/eag/eag.wa_seattle_msa.htm (last visited September 27, 2016).
[12] http://www.seattletimes.com/seattle-news/data/80000-median-wage-income-gain-in-seattle-far-outpaces-other-cities/ (last visited October 4, 2016); http://www.census.gov/newsroom/press-releases/2016/cb16-158.html (last visited October 4, 2016); http://www.census.gov/library/publications/2016/demo/p60-256.html (last visited October 4, 2016).

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330/FAX: (425)388-6333

payments from Tulalip as tribal members do. *See* Tulalip Tribal Code §§ 5.20.010(6), (10) (Guadamud Decl., Ex. D at 25-26); Guadamud Decl., Ex. H at 41.

The non-Indian taxpayers are entitled to the privileges—both within and without the Village and the Reservation—that their State and County taxes fund. Those privileges include, but are not limited to, the State and County roads that take products, employees, and customers into the Village; the elections that business owners, employees, and customers vote in; the State and County law enforcement apparatus that arrests, prosecutes, defends, and incarcerates those who cause harm to businesses, their employees, and customers; the courts that decide civil disputes between businesses, their employees, and customers; the commercial, insurance, and consumer protections laws that secure transactions of customers and businesses; and the education system that provides businesses with skilled employees as well as paying customers. It cannot be disputed that the Village exists in the organized society that benefits from State and County tax dollars, and Tulalip and the Village do not assert that they have any intention or authority to use the contested tax revenues to provide all of these same services to non-Indian businesses and customers off the Reservation.[13]

Additionally, products and services purchased within the Village have impacts outside the Village boundaries—impacts that exact a cost on the State and County. For example, guns or ammunition purchased at the Cabela's in the Village have been used in fatal shootings outside the

[13] Plaintiffs identify a number of services that they describe as available to "members and other persons on the Tulalip Reservation, including the thousands of non-Indians residing there," including, among others, police, utilities, housing, health and dental clinics, and family and youth services. Dkt. 74 at 18-19. However, many of these services are not generally available to non-tribal members. *See* Guadamud Decl., Ex. V, Ex. D at 28, Ex. F; *see* https://www.tulaliptribes-nsn.gov/Home/Government/Departments/HealthClinic.aspx (last visited September 28, 2016) (describing services as for tribal members only); *see* https://www.tulaliptribes-nsn.gov/Home/Government/Departments/DentalClinic.aspx (last visited September 28, 2016) (describing services as for tribal members only); *see* http://www.tulalipyouthservices.com/about.html (last visited October 7, 2016) (describing services for tribal members only).

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330 FAX: (425)388-6333

Tulalip Indian Reservation. In addition, the Tulalip Resort Casino is regularly reported as the last place of alcohol consumption by those under investigation for Driving Under the Influence. Guadamud Decl., Ex. R. All these events require a response by the State, County, and other local jurisdictions that cannot be ignored.

In sum, Plaintiffs' proposed legal standard is premised on an overly simplistic view of the Village in isolation. As is true of any retail and entertainment complex, the Village exists as part of a larger community. This Court should treat it accordingly.

D. To Decide at this Point in the Case What Government Services Are Relevant Is Premature, Both Legally and Factually.

Even if the Plaintiffs' request that the Court give "no legal effect" to State and County services unless they "directly support commerce in the Village" were not contrary to controlling Supreme Court and Ninth Circuit precedent, the request is premature. Legally, the Court should not be prejudging what weight to give State and County interests if it applies the *Bracker* preemption analysis without at the same time considering all relevant legal and factual circumstances. To do so is contrary to the nature of *Bracker*'s "particularized inquiry." The Court does not yet have the factual context, including any expert opinions, to know what specific evidence should be given weight in that inquiry. The Plaintiffs' motions amount to premature motions in limine and should be denied.

From the time *Bracker* was decided to the present, courts have recognized the case-by-case nature of the *Bracker* inquiry:

> 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.

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330/FAX: (425)388-6333

Bracker, 448 U.S. at 145 (emphasis added). "*Bracker* and its progeny call for a *particularized* balancing of the specific federal, tribal, *and state* interests involved." *Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324, 1338 (11th Cir. 2015) (emphasis in original), *cert. denied sub nom. Seminole Tribe of Florida v. Biegalski*, 136 S. Ct. 2480 (2016). *See also Ramah Navajo*, 458 U.S. at 828 ("Pre-emption analysis . . . requires a *particularized* examination of the relevant state, federal, and tribal interests") (emphasis added); *Cotton Petroleum*, 490 U.S. at 176 ("Instead, we have applied a flexible pre-emption analysis sensitive to the *particular facts and legislation involved*.") (emphasis added).

The "particular facts" and the "specific context" of this case include the facts that the State and County taxes at issue are generally applicable taxes applied to retail activity between non-Indian businesses and non-Indian customers, and the personal property those businesses use in that activity. These facts alone make the inquiry in this case different from the inquiry in other cases without these facts, and they make information about generalized state and local government functions, along with benefits to tribes and tribal members, more relevant than they might be in other cases. *See Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 475 (2d Cir. 2013) (considering extent to which tribe benefits from town's generalized government functions in upholding state personal property tax imposed on lessors of slot machines used by tribe). Thus, to exclude information from this case about how Tulalip, or the Village, or Tulalip tribal members, or the non-Indian customers and businesses who pay the taxes benefit from government services is at best premature and inconsistent with *Bracker*, if not contrary to law.

Plaintiffs argue that the scope of the relevant government services should be limited in order to streamline the case and promote efficiency. They paint a doomsday picture of the fact

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330/FAX: (425)388-6333

inquiry this Court will need to undertake to decide the case. It is true that the case-by-case particularized inquiry in the *Bracker* preemption analysis can be complex, but the Supreme Court has already rejected the suggestion that a more simplistic approach should replace this particularized inquiry.

In *Ramah Navajo*, the United States argued that the Court should modify its preemption analysis to rely on the Indian Commerce Clause and hold that on-reservation activities are presumptively beyond the reach of state law, even in the absence of comprehensive federal regulation, and put the burden on states to justify a tax "by a compelling need to protect legitimate, specified state interests . . . ." *Ramah Navajo,* 458 U.S. at 845. The United States argued in part that such a rule would provide guidance for states and reduce the need for the Court's case-by-case review of these decisions. *Id.* The Court declined that invitation: "Although clearer rules and presumptions promote the interest in simplifying litigation, our precedents announcing the scope of pre-emption analysis in this area provide sufficient guidance to state courts and also allow for more flexible consideration of the federal, state, and tribal interests at issue." *Id.* at 846.[14]

The nature of the *Bracker* inquiry may require careful analysis of a wide range of evidence, but that is no basis to preclude the State and County from discovering all relevant facts and presenting a defense based on those facts.[15] If any party believes that a particular discovery request is burdensome or not proportional to the needs of the case, that party may avail itself of

[14] In addition, Kansas argued to the Supreme Court in *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005), that it should abandon the *Bracker* inquiry and find that any tax imposed on a non-Indian was valid in the absence of express federal law to the contrary. While the Court did reiterate its rule that *Bracker* applies only to on-reservation transactions where a tax is imposed on a non-Indian engaged in a transaction *with tribes or tribal members*, *see id.* at 110, and did not apply *Bracker*, it did not abandon the *Bracker* inquiry altogether.

[15] Defendants disagree with Plaintiffs' contention that their proposed legal standard will provide judicial efficiency. It would do no such thing. Instead, it would require this Court to preside over countless discovery disputes concerning whether a particular discovery request asks for information that "directly supports commerce."

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330/FAX (425)388-6333

the procedures set forth in FRCP 26(c) and LCR 26(c). Likewise, anyone displeased with a response to discovery from another party can do the same.

Trial considerations also do not provide a basis for granting Plaintiffs' motion. All parties are represented by teams of experienced attorneys. If the case goes to trial, the Court can and should assume that the parties will distill facts about government services relevant to the "particularized inquiry" into a form that will allow the Court to undertake a meaningful analysis of those facts. This might be through expert witnesses or government witnesses who summarize various facts. No basis exists to assume the parties will overload the Court with tens of thousands of documents or attempt to catalog every single instance of a government service being provided and the accompanying details. In any case, the discussion of how trial will be conducted and any limitations on the evidence is better left to a pre-trial conference.

As a final matter, the prematurity of Plaintiffs' motion to exclude facts and evidence is demonstrated in the examples they provide in Tulalip's motion in Appendices A and B. What Plaintiffs do not yet understand is that even under the "directly support" legal standard they propose, some of the services or investments they list as having no legal effect *do* meet that standard. For example, Plaintiffs list in their Appendix B evidence related to County roads on the Tulalip Indian Reservation. In doing so, they neglect to acknowledge that these are the very roads that provide access to the Village for their employees, customers, vendors, and other visitors. In short, neither this Court nor the Plaintiffs are in a position at this time to identify evidence or information that should be excluded from this Court's consideration.

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330/FAX: (425)388-6333

VI. CONCLUSION

Even if the Court concludes that the *Bracker* preemption analysis applies, the Court should deny Plaintiffs' motions for partial summary judgment. Plaintiffs' proposed exclusion of a wide range of legally and factually relevant government services, provided by the State and County to the taxpayers, is contrary to controlling Ninth Circuit and Supreme Court precedent.

DATED this ____ day of October, 2016.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: */s/ Rebecca E. Wendling*
Rebecca E. Wendling, WSBA #35887
Rebecca J. Guadamud, WSBA #39718
Christina L. Richmond, WSBA #39731
Deputy Prosecuting Attorneys
Snohomish County Prosecuting Attorney – Civil Division
3000 Rockefeller Ave., M/S 504
Everett, Washington 98201
(425) 388-6330/FAX: (425) 388-6333
Email: Rebecca.Wendling@snoco.org
Email: Rebecca.Guadamud@snoco.org
Email: Christina.Richmond@snoco.org
Counsel for Linda Hjelle, Kirke Sievers, and Snohomish County

ROBERT W. FERGUSON
Attorney General

By: */s/ David M. Hankins*
David M. Hankins, WSBA #19194
Heidi A. Irvin, WSBA #17500
Senior Counsel
Joshua Weissman, WSBA #42628
Jessica Fogel, WSBA #36846
Assistant Attorneys General
Office of the Attorney General
PO Box 40123
Olympia, WA 98504-0123
(360) 753-5528
Email: David.Hankins@atg.wa.gov
Email: Heidil@atg.wa.gov
Email: JoshuaW@atg.wa.gov
Email: JessicaF1@atg.wa.gov
Counsel for the State of Washington, Governor Jay Inslee, and Director Vikki Smith, Department of Revenue

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record at the following:

1. Jane Garrett Steadman at jsteadman@kanjikatzen.com
2. Lisa M. Koop at lkoop@tulaliptribes-nsn.gov
3. Michael E. Taylor at Michael_t763@yahoo.com
4. Phillip E. Katzen at pkatzen@kanjikatzen.com
5. Cory J. Albright at calbright@kanjikatzen.com
6. Heidi A. Irvin at HeidiI@ATG.WA.GOV
7. David M. Hankins at david.hankins@atg.wa.gov
8. Joshua Weissman at JoshuaW@agt.wa.gov
9. Daron Carreiro at daron.carreiro@usdoj.gov
10. Kyle A. Forsyth at kyle.forsyth@usdoj.gov
11. Jessica E. Fogel at JessicaF1@ATG.WA.GOV
12. Mark G. Beard at beardm@lanepowell.com
13. Riyaz Kanji at rkanji@kanjikatzen.com

and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants: N/A

By:/s/ *Kathleen Murray*
KATHLEEN MURRAY
Legal Assistant
Email: kmurray@co.snohomish.wa.us

SNOHOMISH COUNTY
PROSECUTING ATTORNEY - CIVIL DIVISION
Robert J. Drewel Bldg., 8th Floor, M/S 504
3000 Rockefeller Ave
EVERETT, WASHINGTON 98201-4060
(425)388-6330 FAX (425)388-6333