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AGUA CALIENTE BAND OF CAHUILLA INDIANS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

AGUA CALIENTE BAND OF CAHUILLA INDIANS,

Plaintiff,

v.

RIVERSIDE COUNTY, *et al.*,

Defendants,

DESERT WATER AGENCY,

Defendant-Intervenor.

Case No.: ED CV 14-00007-DMG (DTBx)

AGUA CALIENTE BAND OF CAHUILLA INDIANS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Trial Date: June 13, 2017
Hearing Date: March 31, 2017, 3:00 pm
Action Filed: January 2, 2014

TABLE OF CONTENTS

KILPATRICK TOWNSEND & STOCKTON
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101

TABLE OF AUTHORITIES

Page

Cases

KILPATRICK TOWNSEND & STOCKTON
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101

Rules

Regulations

KILPATRICK TOWNSEND & STOCKTON
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SEATTLE, WA 98101

The Agua Caliente Band of Cahuilla Indians (Agua Caliente or the Tribe) is entitled to summary judgment declaring that the state possessory interest tax (PIT) assessed by Defendant Riverside County (the County) against lessees of trust lands within the Agua Caliente Reservation is unlawful on the grounds that it is preempted by federal law and impermissibly interferes with Agua Caliente's sovereignty. Agua Caliente is further entitled to an injunction barring the County from engaging in any further efforts to assess and collect this unlawful tax on Indian trust lands within the Agua Caliente Reservation and any permanent improvements situated thereon.

Federal law expressly provides that land and interests in land held in trust by the United States for the benefit of Indians is exempt from state and local taxation. *See* 25 U.S.C. § 465.[1] The Supreme Court has held that this tax exemption encompasses taxes on Indian trust lands themselves as well as permanent improvements on such lands and "the bundle of privileges that make property or ownership of property." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 158 (1973). Because the PIT taxes the right to possess or use Indian trust land and permanent improvements thereon, and because the rights of possession and use are at the very foundation of property and property ownership, federal law expressly preempts the PIT in this case.

Federal common law provides a separate and independent basis for preempting the PIT. When states or local governments seek to tax non-Indians on Indian lands, the courts use a fact-specific balancing approach to determine whether such taxes are preempted by federal law. This approach, frequently referred to as the *Bracker* balancing analysis, weighs federal and tribal interests avoiding state regulation of on-reservation activity against the state interest in collecting its tax. Where, as here, the activity being taxed is comprehensively and pervasively regulated, it affects tribal rights of self-governance, and the tax in question is a general revenue tax not directly

[1] Since the filing of this case, § 465 has been recodified as 25 U.S.C. § 5108. The statutory text is unchanged. To avoid confusion and maintain consistency with prior filings and court decisions, the brief continues to refer to the provision as § 465.

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SEATTLE, WA 98101

tied to specific services that the County provides to taxpayers, the *Bracker* balancing analysis tips heavily in favor of preemption.

Finally, the PIT is preempted because it impermissibly interferes with Agua Caliente's sovereignty and its rights of self-governance in its territory. This provides a third independent grounds for a preemption finding and the granting of summary judgment in favor of Agua Caliente.

FACTUAL BACKGROUND

I. Strong and pervasive federal interests predominate the leasing of Agua Caliente's Indian trust lands.

Agua Caliente is a federally recognized sovereign Indian tribe with a reservation comprising more than 31,000 acres of land within the exterior geographic boundaries of Riverside County, California. *See* Statement of Undisputed Material Facts (SF) 1-3. Much of the land within the Agua Caliente Reservation is held in trust by the United States for the benefit of Agua Caliente and its members. SF 4. Such lands are referred to herein as Reservation or Indian trust lands. Agua Caliente exercises legal jurisdiction over its Reservation. SF 5. In the course of exercising its jurisdiction, Agua Caliente has enacted numerous statutes and ordinances, including a tribal tax code. SF 6-7.

Indian trust lands are subject to an array of federal statutes and regulations governing their use. SF 8. This specifically includes, but is not limited to, statutes and regulations governing the surface leasing of Indian trust lands. SF 9. These statutes and regulations require federal approval of any lease of Agua Caliente Reservation Indian trust lands, limit the duration of such leases, and govern many other aspects of such leases. SF 10-11.

Pursuant to these statutes and regulations, and with the approval of the United States, Agua Caliente and its members lease certain parcels of Indian trust lands within the Agua Caliente Reservation for commercial development and other purposes. SF 12-13. There are approximately 20,000 master leases, mini-master

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SEATTLE, WA 98101

leases, subleases, and sub-subleases for the use and occupancy of Agua Caliente Reservation Indian trust lands. SF 14. Many of the leased parcels of Indian trust lands include permanent improvements that are either owned outright by the Indian lessor or in which the Indian lessor holds a reversionary interest that will vest upon expiration or termination of the lease. SF 15-16. Income generated from the leasing of Indian trust lands and associated improvements benefits the Indian landowners and helps fund Agua Caliente's government and its provision of governmental services. SF 17.

II. The PIT is a general revenue tax disconnected from services provided to the Agua Caliente Reservation.

The PIT is a state property tax assessed by the County. SF 18, 20. It is a general revenue tax. SF 19. It is based upon the value of the taxpayer's "(a) Possession of, claim to, or right to the possession of land or improvements that is independent, durable, and exclusive of rights held by others in the property, except when coupled with ownership of the land or improvements in the same person; and (b) Taxable improvements on tax-exempt land." Cal. Rev. & Tax. Code § 107; SF 21. The lessee of Indian trust lands is responsible for paying the PIT. SF 22. The economic burden of the tax, however, falls on the Indian lessor. SF 23. If the County did not assess and collect the PIT on Indian trust lands, more residences and businesses could seek to locate themselves on such lands. SF 24. Additionally, Agua Caliente's own lawfully enacted possessory interest tax is held in abeyance as long as the County assesses and collects the PIT on Indian trust lands within the Agua Caliente Reservation, meaning that collection of the PIT directly reduces Agua Caliente's own tax revenues. SF 25-27.

The County's share of revenues from the collection of the PIT on Agua Caliente Reservation Indian trust lands goes directly into the County's discretionary general fund. SF 28. The County's spending of its PIT revenues is entirely discretionary. SF 29. The County does not track PIT revenues separately from other property tax revenues, and it does not specifically track how or where PIT revenues are spent,

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either on or off the Agua Caliente Reservation. SF 30-31. PIT revenues are not tied to any particular service that the County provides to taxpayers. SF 34. PIT revenues fund the County government and general governmental services that the County provides on a countywide basis. SF 35-36. Services funded in part by the PIT benefit all County residents; they are not provided specifically to the Agua Caliente Reservation or to taxpayers who pay the PIT. SF 37-39. Lessees of Indian trust lands within the Agua Caliente Reservation are obligated to pay the PIT regardless of whether they use any of the services that it funds. SF 40.

The County's total annual budget is approximately $5 billion. SF 47. The County's total annual property tax collections are approximately $3 billion. SF 48. Total annual revenues from the collection of the PIT on Indian trust lands on the Agua Caliente Reservation are approximately $22.8 million. SF 49. The County's annual share of revenues from the collection of the PIT on Indian trust lands is approximately $3 million. SF 50.

A significant portion – more than $4.3 million – of Agua Caliente Reservation Indian trust land PIT revenues are directed each year into the state Education Revenue Augmentation Fund (ERAF). SF 51. This fund is used to alleviate statewide school funding obligations that would be paid from the State of California's general fund if they were not paid with PIT revenues. SF 52-53. To the extent that they are used to fund the ERAF, PIT revenues are effectively a statewide general revenue tax. SF 54.

III. DWA's share of the PIT is not tied to services provided to the Agua Caliente Reservation.

Defendant-Intervenor Desert Water Agency (DWA) is a water utility whose service area includes parts of the Agua Caliente Reservation. DWA's share of revenues from the collection of the PIT on Agua Caliente Reservation Indian trust lands goes directly into DWA's general fund. SF 55. DWA does not track PIT revenues separately from other property tax revenues that go into its general fund. SF 56. DWA obtains most of the water that it provides to its customers from the State

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Water Project (SWP). SF 57. DWA uses its general fund revenues to pay for the costs of its SWP contract. SF 58. DWA's payment of its SWP obligations benefits all customers within its service area, not just those taxpayers who pay the PIT. SF 59. DWA's services, including those funded in part by the PIT, are identical on and off Indian trust lands. SF 60. DWA is contractually obligated to pay its SWP obligations regardless of whether it receives any PIT revenues. SF 61.

For the 2014/15 fiscal year (FY), DWA's general fund revenues were in excess of $23 million. SF 62. In 2015, DWA's total SWP contract expenses were $20-21 million. SF 63. DWA's general fund revenues – which are used to pay its SWP obligations – exceed its SWP obligations by well over $1 million. SF 64-65. DWA also has a restricted reserve fund that can only be used to pay SWP obligations in the event of a shortfall in property tax revenues. SF 66. That fund holds between $45-50 million. SF 67. DWA has an additional $60-70 million in unrestricted reserve funds. SF 68. For the 2015/16 FY, DWA received approximately $160,000 from the County's collection of the PIT on Agua Caliente Reservation Indian trust lands. SF 69.

THE LAW OF THE CASE

The Court's February 8, 2016 Order denying Defendants' motion for judgment on the pleadings addressed a number of the substantive legal issues that are key to the resolution of this motion. *See* Doc. 118 (the 12(c) Order).

The Court held that the reasoning of the Ninth Circuit's decisions in *Agua Caliente Band of Mission Indians v. Riverside County*, 442 F.2d 1184 (9th Cir. 1971) and *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253 (9th Cir. 1976), cases which held that federal law did not preempt the PIT, "has been repudiated by [*White Mountain Apache Tribe v.*] *Bracker* [448 U.S. 136 (1980)] and its progeny" to the extent that those decision are no longer binding precedent on the question of whether federal law preempts the PIT. Doc. 118 at 10-11 & 11 n.5.

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SEATTLE, WA 98101

The Court further held that the comprehensiveness of the federal regulatory scheme for the leasing of Indian trust lands and the express language of 25 C.F.R. § 162.017(c), as well as the Preamble to 25 C.F.R. Part 162, are "highly indicative of a significant federal interest that would be thwarted by the imposition of the County's tax" and that must be weighed when applying the *Bracker* balancing test. *See* Doc. 118 at 17-20. And the Court affirmed that neither "the County's general interest in raising revenue" nor "the general provision of services to the Tribe by the County" is sufficient to overcome such a strong federal interest as a matter of law. *Id.* at 21-22 (citing *Bracker*, 448 U.S. at 150 & *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 845 (1982)) (noting "lack of connection between the services provided [by the County] and the activity being taxed.").

The Court also determined that footnote 7 of the Ninth Circuit's decision in *Confederated Tribes of Chehalis Reservation v. Thurston County Board of Equalization*, 724 F.3d 1153 (9th Cir. 2013), which states that § 465 does not apply to a possessory interest tax, is nonbinding dicta, although the Court was also careful to note that the 12(c) Order did not resolve the merits of Agua Caliente's argument that 25 U.S.C. § 465 precludes the PIT. *See* Doc. 118 at 11-12 & 16.

Finally, the Court made clear exactly what factual showing it needs to see from the Defendants in order to defeat summary judgment in Agua Caliente's favor, namely: "the County may attempt to demonstrate a direct connection between its tax and any services that it provides to the Tribe." Doc. 118 at 22 n.9.

The legal rulings and determinations in the 12(c) Order are the law of the case. "Under the law of the case doctrine, a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case" unless certain conditions are satisfied. *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) (internal quotations omitted). When, as here, none of those conditions exist, "[f]ailure to apply the law of the case doctrine … constitutes an abuse of discretion." *Id.* (internal quotation omitted). Because there is no reason to

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SEATTLE, WA 98101

revisit the 12(c) Order's law of the case, Agua Caliente will attempt to refrain from retreading the ground covered in that order, instead focusing on the application of the law of the case to the undisputed facts and the resolution of legal questions that the Court has yet to address.

ARGUMENT & ANALYSIS

Agua Caliente seeks summary judgment declaring that the assessment and collection of the PIT on leasehold interests in Agua Caliente Reservation Indian trust lands and permanent improvements attached thereto violates federal law. Summary judgment is appropriate where there is no genuine dispute of material facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Facts are "material" only if they may affect the outcome of the case, and disputes are "genuine" only if the evidence is such that it could support a jury verdict in favor of the non-moving party. *See, e.g.*, *Screen Actors Guild, Inc. v. Fed. Ins. Co.*, 957 F. Supp. 2d 1157, 1162 (C.D. Cal. 2013). Any necessary inferences must be drawn in favor of the non-moving party. *See id.* As applied to this case, this standard supports the entry of summary judgment in favor of Agua Caliente.

I. 25 U.S.C. § 465 expressly preempts the PIT.

25 U.S.C. § 465 authorizes the Secretary of the Interior to acquire and hold land and rights in land in trust for Indians and provides that "such lands or rights shall be exempt from State and local taxation." *Id.* The Supreme Court has held that this tax exemption extends to permanent improvements on real property held in trust for the benefit of Indians and to any tax on the use of such land or permanent improvements. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 158 (1973). This is so, the Supreme Court explained, because "use is among the bundle of privileges that make up property or ownership of property, and, in this sense, at least, a tax upon use is a tax upon the property itself." *Id.* (internal quotations omitted). Under the Supreme Court's reasoning, § 465 expressly preempts any state or local tax on the use of land that is held in trust by the United States for the benefit of Indians or on any of the

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other "bundle or privileges" associated with ownership of such lands or permanent improvements. *See id.*; *see also Seminole Tribe of Fla. v. Stranburg*, 799 F.3d 1324, 1330 (11th Cir. 2015) ("*Mescalero* stands for the proposition that § 465 precludes state taxation of the bundle of privileges that make up property or the ownership of property." (internal quotation omitted)).

The PIT indisputably taxes the use and possession of Indian trust land and permanent improvements. *See, e.g.*, Cal. Rev. & Tax. Code § 107. The Ninth Circuit recognized as much in *Agua Caliente*, where it referred to the PIT as "a tax upon the use" of property. 442 F.2d at 1187; *see also id.* at 1186-87 (analogizing the PIT to the "similar … state use tax" at issue in the since repudiated *United States v. City of Detroit* case). The right to possess or use property is unquestionably a part of the "bundle of privileges that make up property or the ownership or property." *Mescalero*, 411 U.S. at 158. Because the PIT is a tax on the use of tax exempt Indian trust lands or rights in such land – in this case, the fundamental right of possession – it is necessarily preempted by § 465 under *Mescalero*.

The Eleventh Circuit's recent decision in *Stranburg* reinforces this conclusion. *Stranburg* dealt with a Florida rental tax that was functionally very similar to the PIT. The Florida tax, like the PIT, was assessed against the renter or lessee of Indian trust property rather than against the Indian landowner, and it constituted a lien on the personal property of the lessee rather than on the trust property itself. *See Stranburg*, 799 F.3d at 1326. The Eleventh Circuit reasoned that "[t]he ability to lease property is a fundamental privilege of property ownership" and that the Florida rental tax, by taxing the privilege of property leasing, constituted a tax on "a privilege of ownership just as New Mexico's tax in *Mescalero* taxed the privilege of use." *Id.* at 1330. The Eleventh Circuit further emphasized that the Florida rental tax "is a tax on *a right in land*." *Id.* at 1331-32 (emphasis in original). So too, the PIT constitutes a tax on a privilege of property ownership and a right in land – the right of possession.

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Stranburg, like *Mescalero* and the text of § 465 itself, strongly supports the conclusion that federal law expressly preempts the PIT.

Even if § 465 were ambiguous, preemption would still result. The well-established Indian canons of construction require that any ambiguity in the statute be resolved in favor of Agua Caliente. *See Stranburg*, 799 F.3d at 1332 ("[T]o the extent any ambiguity exists with respect to the tax exemption contained in § 465, resolving that ambiguity in favor of the Tribe comports with the long-standing canon that statutes be construed liberally in favor of Indians." (citing *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 76 (1985)). Defendants prevail on this issue only if § 465 unambiguously supports their position, which it certainly does not.

Defendants likely will argue that Ninth Circuit case law prevents this Court from reaching the result that *Mescalero* compels. Any such argument is unavailing. The Court has already correctly held that the Ninth Circuit's decisions in *Agua Caliente* and *Fort Mojave*, one of which predated *Mescalero* and neither of which addressed § 465, are not binding precedent on this issue. *See* Doc. 118 at 10-11. With that holding in mind, the only intact Ninth Circuit jurisprudence that could possibly salvage the PIT from express preemption is the dicta in footnote 7 of the *Chehalis* decision. *Chehalis* held that § 465 preempted state and local taxation of permanent improvements on land held in trust for Indians by the United States regardless of the ownership of those improvements. *See Chehalis*, 724 F.3d at 1155-57; Doc. 118 at 11 (discussing the *Chehalis* case). Although it was in no way necessary to the resolution of the issue before the Court, the Ninth Circuit's opinion included a footnote stating, without further analysis, that while § 465 and *Mescalero* bar state and local taxation of "land or improvements covered by § 465," they do not preempt taxation of "non-Indian lessees' rights of possession" of such land or improvements. *Chehalis*, 724 F.3d at 1158 n.7 (citing, without further analysis, *Agua Caliente* and *Fort Mojave*).

This dicta from the *Chehalis* decision cannot bear the weight that the Defendants presumably will place upon it. Most importantly, the *Chehalis* dicta is

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flatly inconsistent with *Mescalero*. *Mescalero* does hold that § 465's tax exemption applies to trust lands and improvements, as the *Chehalis* footnote correctly states. *See* 411 U.S. at 158 ("[P]ermanent improvements on the Tribe's tax-exempt land would certainly be immune from the State's ad valorem property tax."). But *Mescalero* then immediately proceeds to explain that § 465 bars state and local taxation of the ***use*** of Indian trust lands and attached, permanent improvements, because use of land is "among the bundle of rights that make up property or ownership." *Id.*

As explained above, this is exactly what the PIT does. It taxes the use, in the form of possession, of Indian trust lands and permanent improvements on those lands. In suggesting that such a tax is permissible under *Mescalero*, the *Chehalis* dicta is simply incorrect. And while this Court would be bound by even an incorrect *holding* from the Ninth Circuit, it is not bound by Ninth Circuit dicta, particularly when that dicta is irreconcilable with Supreme Court precedent. *See* Doc. 118 at 12 ("A district court is not bound by *dicta* from an appellate court decision."). Under *Mescalero*, § 465 preempts the PIT.

It also bears reiterating that *Agua Caliente* and *Fort Mojave* did not consider whether § 465 expressly preempted the PIT. This provides a second and independent reason why the *Chehalis* footnote's citation of those decisions cannot be dispositive of § 465's effect on this case. Dicta in one case citing another case for a proposition that the latter case did not address simply has no precedential value, and it confirms the passing nature of the *Chehalis* Court's consideration of this unnecessary issue.

The Court should grant summary judgment in favor of Agua Caliente holding that § 465 expressly preempts the PIT on Agua Caliente's Indian trust lands.

II. The *Bracker* balancing analysis preempts the PIT.

In addition to being expressly preempted by § 465, the PIT is also preempted by federal common law. *See, e.g.*, *Stranburg*, 799 F.3d at 1335 (noting that § 465 and federal common law provide separate and independent grounds for finding preemption of a state tax on the use of Indian trust lands).

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In *Bracker*, the Supreme Court considered the circumstances in which states can tax the activities of non-Indians on an Indian reservation. It held that the proper analytical framework for such cases involves a fact-specific balancing of the federal, state, and tribal interests affected by the tax. *Bracker*, 448 U.S. at 144-45, 150-51. The Supreme Court indicated that relevant factors include, *inter alia*, the comprehensiveness of federal regulation of the activity or transaction to be taxed, where the legal and economic burden of the tax falls, the purpose of the tax, and the nexus between the tax and any governmental services provided to the taxpayer by the taxing entity. *See id.* at 145-151; *see also Ramah Navajo*, 458 U.S. at 843-45. In this case, the balance of these factors tips heavily in favor of Agua Caliente and the preemption of the PIT.

A. There is a strong and pervasive federal interest at stake.

The Court has already examined the federal interest at stake in this case at length and concluded that it is "strong" and "significant." Doc. 118 at 18 & 20. The Court's conclusions are supported by the comprehensive, pervasive nature of federal regulation of surface leasing of Indian trust lands, the explicit text of the Preamble to the recently promulgated 25 C.F.R. Part 162, which governs such leasing, and by the purpose of the federal regulation of Indian trust land leasing.

1. Comprehensive federal regulation of Indian trust land leasing.

It is well settled that comprehensive or pervasive federal regulation of a particular type of activity on Indian land weighs heavily in favor of preemption of state or local taxation of that activity. *See, e.g.*, *Bracker*, 448 U.S. at 151 (holding a state tax preempted where the federal government "has undertaken comprehensive regulation" of the activity to be taxed); *Ramah Navajo*, 458 U.S. at 838-39, 841 (citing the "detailed federal regulatory scheme" governing the subject activity as grounds for finding preemption of a state tax); *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1192 (9th Cir. 2008) ("Federal interests are greatest when the government's regulation of a given sphere is 'comprehensive and pervasive.'"

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(quoting *Ramah Navajo*, 458 U.S. at 839)). There can be no doubt, as this Court has already held, that federal regulation of Indian trust land leasing is comprehensive and pervasive. *See* Doc. 118 at 17-20.

"[T]he federal government administers an extensive, exclusive, comprehensive, and pervasive regulatory framework governing the leasing of Indian land." *Stranburg*, 799 F.3d at 1341. Federal law provides that Indian trust lands can only be leased with the approval of the Secretary of the Interior. 25 U.S.C. § 415. There is a detailed scheme of federal regulations for determining how and when the Secretary will grant her approval. *See generally* 25 C.F.R. Part 162. In fact, the Preamble published with Part 162 explicitly states that "[t]he Federal statutory scheme for Indian leasing is comprehensive … [and] pervasive and leaves no room for State law. Federal regulations cover all aspects of leasing." 77 Fed. Reg. 72440-01, 72447 (Dec. 5, 2012) (Preamble); *see also Stranburg*, 799 F.3d at 1342-43 ("Federal statutes, regulations, and even the analysis conducted in the Secretary's Preamble demonstrate the pervasive and comprehensive federal regulation of the leasing of Indian land."). The federal government's own statement of its interests regarding the leasing of Indian lands is entitled to substantial weight. *See, e.g.*, Doc. 118 at 20; *Stranburg*, 799 F.3d at 1338-39 (noting that the Secretary's analysis of the federal interest in the Preamble must be given appropriate weight in the *Bracker* balancing).

The Ninth Circuit's opinion in *Segundo v. City of Rancho Mirage*, 813 F.2d 1387 (9th Cir. 1987), speaks directly to this question. In *Segundo*, Agua Caliente allottees challenged the application of local rent control ordinances to a mobile home park constructed on leased Indian trust lands within the Agua Caliente Reservation. *Id.* at 1388-89. The Ninth Circuit offered a detailed review of the federal statutes and regulations governing the leasing of Indian lands, specifically including 25 U.S.C. § 415(a) and 25 C.F.R Part 162, noting that "the statutory and regulatory scheme present in this case is substantially similar to those involved in [*Bracker*], *Ramah Navajo*, and *Mescalero Apache*." *Segundo*, 813 F.2d at 1391 & 1393. This

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SEATTLE, WA 98101

"comprehensive regulatory scheme governing leases of Indian land" weighed heavily in the Court's preemption holding. *Id.* at 1393. While *Segundo* involved the preemption of rent control ordinances rather than the PIT, its discussion of the comprehensiveness of the federal regulation of Indian trust land leasing is directly transferable to this case.

2. Federal purpose supporting Tribal self-sufficiency.

As the Court has already noted, *Bracker* balancing considers the purposes of federal regulation of Indian lands in addition to its comprehensiveness. *See* Doc. 118 at 17 (quoting *Bracker*, 448 U.S. at 147). Here, the governing regulations explicitly state that their purpose is "to allow Indian landowners to use their land profitably for economic development, ultimately contributing to tribal well-being and self-government." Preamble, 77 Fed. Reg. at 72447. This is a purpose that the courts have given substantial weight in conducting *Bracker* balancing analysis. *See, e.g.*, *Bracker*, 448 U.S. at 149 (citing the "general federal policy of encouraging tribes to revitalize their self-government and to assume control over their business and economic affairs" (internal quotations omitted)); *Segundo*, 813 F.2d at 1393 (relying on the "overriding federal interest … to obtain the highest economic return" for Indian landowners). It also is a purpose that would be directly frustrated by imposition of the PIT. *See* Preamble, 77 Fed. Reg. at 72447 ("Assessment of State and local taxes would obstruct Federal policies supporting tribal economic development, self-determination, and strong tribal governments."). Preemption is particularly appropriate in the case of "any state tax that stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Ramah Navajo*, 458 U.S. at 845 (internal quotation omitted). Because it necessarily reduces the both the lease income to the Indian lessor and the revenue that Agua Caliente would derive from its tribal possessory interest tax, *see discussion infra*, the PIT is such a tax, and this Court should find it preempted under the *Bracker* test. The undisputed material facts demonstrate a strong federal interest

KILPATRICK TOWNSEND & STOCKTON
1420 FIFTH AVENUE, SUITE 3700
SEATTLE, WA 98101

that would be thwarted by the County's continued imposition of the PIT on Agua Caliente Indian trust lands.

B. There is a strong tribal interest at stake.

In addition to the strong federal interest at stake, there is a strong tribal interest that the Court must consider in conducting the *Bracker* balancing analysis. As the Preamble to Part 162 succinctly states, "State and local taxation … threatens substantial tribal interests in effective tribal government, economic self-sufficiency, and territorial autonomy. The leasing of trust or restricted lands is an instrumental tool in fulfilling 'the traditional notions of sovereignty and the … federal policy of encouraging tribal independence.'" Preamble, 77 Fed. Reg. at 72447 (quoting *Bracker*, 448 U.S. at 144 (as modified in Preamble)).

The tribal interest in economic self-sufficiency and autonomous government is particularly keen here, where Agua Caliente has enacted its own, tribal possessory interest tax and that tax is being held in abeyance as long as the PIT is being assessed and collected against lessees of Indian trust lands on the Agua Caliente Reservation.[2] *See* SF 7, 25-26. Based on collection figures provided by the Defendants, the displacement of the tribal tax is depriving Agua Caliente of more than $20 million per year that could be spent to provide governmental services to both Agua Caliente members and Indian trust lands within the Reservation, rather than being distributed throughout all of Riverside County or used to offset statewide funding obligations. *See* SF 19, 27-28, 36-39.

The effects of the PIT are more than just financial, however. Its application on Agua Caliente's territory also infringes on Agua Caliente's rights of sovereignty and self-governance. For example, under the current regime, Agua Caliente cannot offer possessory interest tax reductions, rebates, or other incentives to encourage particular

[2] Agua Caliente recognizes that the existence of the tribal possessory interest tax, standing alone, would not suffice to displace the PIT. But the tribal tax is additional weight on the *Bracker* scale, and it is entitled to due consideration.

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types of development or activity within its Reservation, all of which it could do with respect to a tribal tax. And under the current regime, Agua Caliente has no say in the expenditure of tax revenues generated within its Reservation. The assessment and collection of the PIT thus directly reduces Agua Caliente's tax revenue, interferes with its ability to regulate leasehold interests within its territory, and displaces its sovereign authority to determine how tax dollars generated from Indian trust lands within its reservation should be allocated and spent. All of these tribal interests are entitled to substantial weight in the *Bracker* analysis.

Defendants may attempt to minimize the strength of the tribal interest at stake by arguing that the lessees of Indian trust lands are responsible for paying the PIT, so the legal incidence of the tax falls on the lessees rather than the Indian lessors. While the legal incidence of the tax indeed falls on non-Indians, that in no way defeats preemption. In fact, the *Bracker* balancing test only comes into play where, as here, the legal incidence of the tax falls upon non-Indians. Where the legal incidence of a tax falls upon Indians on Indian lands, any such tax is *per se* preempted without the need to conduct the *Bracker* analysis. *See, e.g.*, *Bracker*, 448 U.S. at 144 ("When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable."); *Barona Band*, 528 F.3d at 1189-90. Any discussion of where the legal incidence of the tax falls in this case is nothing more than a red herring.

As for the economic burden of the tax, there can be no question that it falls on the Indian lessors. It goes without saying that increasing the non-rent costs of a non-Indian lessee's leasing of Indian land reduces the proceeds that the Indian lessor can obtain through the lease. The Ninth Circuit acknowledged this fact in *Agua Caliente*, where, after reviewing evidence on the economic impact of the PIT on Indian lessors, it "conclude[d] from [that evidence] what we would conclude without it, that is, a lessee can afford to pay more rent if he is not required to pay a possessory interest tax" and that the economic burden of the tax thus falls upon Indian lessors. 442 F.2d at 1186; *see also Bracker*, 448 U.S. at 151 & 151 n.15 (noting that the economic

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impact of state taxes on Indian lands ultimately falls on the Indians, and further noting that questions of economic impact are less important than the pervasiveness and comprehensiveness of federal regulation).

The undisputed material facts demonstrate a strong tribal interest that is frustrated by the County's continued imposition of the PIT on Agua Caliente Indian trust lands.

C. Defendants' general interest in revenue generation cannot overcome the strong federal and tribal interests.

In order to overcome the strong federal and tribal interests weighing in favor of preemption, Defendants would need to establish an extremely strong state interest. They cannot do so. On the contrary, Defendants concede that their interest in assessing and collecting the PIT amounts to nothing more than a generalized interest in raising revenue for the provision of general governmental services. *See* SF 27-46. These interests are not sufficient to overcome the strong tribal and federal interests at stake.

While states and local governmental entities do have an interest in raising revenue, courts repeatedly have found that a generalized interest insufficient to justify state taxation of federally regulated activity on Indian trust lands. In *Ramah Navajo*, the Supreme Court held that "a general desire to increase revenues … is insufficient to justify the additional burdens imposed" by a state tax on an on-reservation activity that is subject to a comprehensive federal regulatory scheme. 458 U.S. at 845. In *Bracker*, the Court held that where an on-reservation activity is subject to comprehensive federal regulation and the state or local taxing entities "are unable to justify these taxes except in terms of a generalized interest in raising revenue … the proposed exercise of state authority is impermissible." 448 U.S. at 151. Other cases echo these sentiments. *See, e.g.*, *Stranburg*, 799 F.3d at 1353 ("[T]he state cannot assert a generalized interest in raising revenue to support its taxes …."); *see also id.* at 1341-43; *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 661 (9th Cir. 1989) ("The

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state's general interest in revenue collection is insufficient to outweigh the specific federal and tribal interests ….").

Courts conducting *Bracker* balancing also have emphasized that state interests are at their weakest when tax revenues are used to fund general governmental services and there is no nexus between the activity being taxed and some particular service provided by the state. From the outset, the Supreme Court has expressed skepticism of state taxes on Indian trust lands that are not directly tied to governmental functions provided to the taxpayer. *See Bracker*, 448 U.S. at 150; *Ramah Navajo*, 458 U.S. at 843 ("In this case, the State does not seek to assess its tax in return for the governmental functions it provides to those who must bear the burden of paying this tax."); *see also Stranburg*, 799 F.3d at 1342 ("Both *Bracker* and *Ramah* note that the state tax must be sufficiently connected to the particular activity being taxed to amount to more than just a generalized interest in raising revenue.").

Subsequent decisions have been even more explicit in requiring a nexus between the tax and specific state services in order to find a strong state interest. In *Hoopa Valley*, the Ninth Circuit held that a state timber yield tax was preempted under *Bracker*, explaining that:

> The state's general interest in revenue collection is insufficient to outweigh the specific federal and tribal interests with which the timber yield tax interferes. The services provided by the state and county are provided to all residents. The road, law enforcement, welfare, and health care services provided by the state and county benefit both tribal and non-tribal members. California admits that there is no direct connection between revenues from the timber yield tax and the provision of services to tribal members or area residents generally.

881 F.2d at 661; *see also Crow Tribe of Indians v. Montana*, 819 F.2d 895, 901-902 (9th Cir. 1987) (finding a state coal severance tax preempted because the services funded by the tax were not "narrowly tailored to support" the "coal-related services" provided by the state); *Marty Indian Sch. Bd. v. South Dakota*, 824 F.2d 684, 688 (8th

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Cir. 1987) (holding that state's expenditure of funds for road construction and maintenance did not justify imposition of state fuel tax on an Indian school). The funding of general governmental services, like the general raising of revenue, is not a strong state interest for purposes of *Bracker* balancing.

The evidence here leaves no room for dispute regarding the nature of the PIT or the services that it funds. Riverside County describes the PIT as a "general revenue tax." SF 19. PIT revenues are deposited in Riverside County's "discretionary general fund … which means that [the County] can spend it as the board chooses." SF 29. The County does not track how PIT revenues are spent, and testified that it would be "quite difficult" to do so. SF 31-32. The PIT explicitly is "not tied to any particular service that is provided by the County to taxpayers." SF 34. Instead, PIT revenues are used to fund countywide services that "benefit all residents of the County." SF 36-37. This includes such general governmental expenses as the County counsel's office, the County executive office, the board of supervisors, the tax assessor, the tax collector, County information technology, and various other items that "are not specific to a service provided directly to the public." SF 43. Other countywide services funded in part by PIT revenues, but in no way directly linked to the leasing of Indian trust lands, include law enforcement, jails, and health clinics. SF 45. A significant percentage of PIT revenues are spread even more broadly, going to defray school expenses that would otherwise be paid by the State of California. *See* SF 51-54. And taxpayers are required to pay the PIT regardless of whether they use any of the services that it funds. SF39-42. The PIT is the very definition of a general revenue tax that is used to fund general governmental services.

Testimony from DWA is little different. While DWA is at least able to identify how it spends its share of PIT revenues – they go toward DWA's expenses for its SWP contract – DWA concedes that the benefits and services funded in part by the PIT are provided equally to all customers within the DWA service area. *See* SF 55-60. And because the PIT is based on the value of the non-Indian lessee's possessory

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interest in Indian trust land rather than the lessee's use of water or other DWA services, there is no direct nexus between the tax and the services provided to the lessee by DWA. SF 21, 61.

While Agua Caliente in no way means to denigrate the services that Riverside County and DWA provide in their respective jurisdictions, the fact remains that those services are generalized governmental services that are funded, in small part, by the general revenue PIT. Defendants simply cannot show any "direct connection between its tax and any services that it provides to the Tribe." Doc. 118 at 22 n.9. Under *Bracker*, *Ramah*, *Hoopa Valley*, *Crow Tribe*, and other case law, the Defendants' generalized interest in raising revenue to provide general governmental services is not enough to overcome the strong federal and tribal interests implicated by the leasing of Indian trust land. For these reasons, the Court should grant summary judgment in Agua Caliente's favor holding that the County's PIT on non-Indian lessees of the Agua Caliente Reservation is preempted under the *Bracker* balancing test.

III. The PIT impermissibly infringes on Agua Caliente's sovereignty.

As a sovereign Indian tribal nation, Agua Caliente has an inherent and federally recognized right to govern its territory, to make its own laws, and to be ruled by those laws. Where, as here, a state effort to regulate conduct on Indian lands interferes with those rights of self-governance, there is a separate and independent basis for a court to enjoin the state regulation. *See, e.g.*, *Crow Tribe*, 819 F.2d at 902 ("The self-government doctrine differs from the preemption analysis and is an independent barrier to state regulation."); *see also Bracker*, 448 U.S. at 142-43 ("The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation ….").

The Ninth Circuit's opinion in *Crow Tribe* is instructive. There, the Court considered the validity of state severance and gross proceeds taxes on coal mined from the Crow Reservation. *See id.* at 897. As in this case, the legal incidence of the tax fell on the non-Indian lessee, and the state tax effectively displaced a tribal tax on

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the same activity. *See id.* (explaining that the Crow Tribe gave its lessee a credit for severance taxes paid to the state, which resulted in no tax payments to the Tribe). After concluding that the state taxes were preempted under the *Bracker* balancing analysis, the Ninth Circuit proceeded to the separate question of whether the taxes also unlawfully infringed on tribal self-governance. The Court observed that the power to tax in "an essential attribute of self-government." *Id.*at 902. It further noted that tribal sovereignty "contains a significant geographical component," with tribes having "the power to manage the use of their territory and resources by both members and nonmembers." *Id.* Finally, the Ninth Circuit recognized that the state's taxes, which were effectively imposed on the reservation land itself, limited both the Tribe's revenue from its own severance tax and its ability to regulate the development of its coal resources. *Id.* at 902-03. In so doing, "the state tax[es] threaten[ed] Congress' overriding objective of encouraging tribal self-government and economic development." *Id.* at 903. While conceding that some interference with tribal economic development could be permissible if the state's interests were sufficiently strong, the Ninth Circuit concluded that erosion of the Crow Tribe's sovereignty could not be justified by taxes that were not "narrowly tailored" to "legitimate" state interests. *Id.*

This case is similar to *Crow Tribe* in all operative respects. The County is assessing and collecting a general, untailored tax on a fundamental aspect of tribal sovereignty – the right to possess and use Indian land. In so doing, it is displacing a lawfully enacted tribal tax and limiting both Agua Caliente's ability to generate revenue to support tribal governmental services and its ability to regulate land leasing within its Reservation, as discussed above. *E.g.,* SF 24-26. While Agua Caliente does not contend that tribal interests in self-governance will always displace any state tax on non-Indian activity on Indian lands, the specific tribal interests at issue in this case, when contrasted with the very general, untailored state interests served by the PIT, establish that this particular tax impermissibly interferes with Agua Caliente's right of

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self-governance. This provides a third, wholly independent grounds for finding the assessment and collection of the PIT unlawful on Indian trust lands within the Agua Caliente Reservation.

CONCLUSION

Federal law provides multiple grounds for finding state taxation of on-reservation conduct unlawful. At least three of those grounds are present in this case. For all of the foregoing reasons, the Court should hold that federal law bars the County's assessment and collection of the PIT on Indian trust lands within the Agua Caliente Reservation, and it should grant Agua Caliente's motion for summary judgment.

Respectfully Submitted,

DATED: October 31, 2016.

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PROOF OF SERVICE

I, Rebecca Horst, declare:

I am a citizen of the United States and employed in King County, Washington. I am over the age of eighteen years and not a party to the within-titled action. My business address is 1420 Fifth Avenue, Suite 3700, Seattle, Washington 98101. On October 31, 2016, I served a copy of the within document(s):

AGUA CALIENTE BAND OF CAHUILLA INDIANS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Seattle, Washington, addressed as set forth below.

☐ by placing the document(s) listed above in a sealed United Parcel (UPS) envelope and affixing a prepaid air bill, and causing the envelope to be delivered to a UPS agent for delivery.

☐ by transmitting via electronic transmission the document(s) listed above to the person(s) at the email address(es) set forth below

x by transmitting via electronic transmission the document(s) listed above to the person(s) at the email address(es) set forth below by way of filing the document(s) with the U.S. District Court, Central District of California. Fed. R.Civ. P. §5(b)(2)(E); L.R. 5-3.2.1

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I declare that I am employed in the office of a member admitted *pro hac vice* of the bar of this court at whose direction the service was made.

Executed on October 31, 2016, at Seattle, Washington.

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