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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)
Judge: Hon. Dolly M. Gee

DESERT WATER AGENCY'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF AGUA CALIENTE BAND OF CAHUILLA INDIANS

Trial Date: September 15, 2017
Date: March 31, 2017, 3:00 p.m.
Action Filed: January 2, 2014

[Filed concurrently with:
1. Notice of Motion and MSJ of DWA
2. DWA Stat. of Gen. Dis. Mat. Fact and Sep. SUF
3. DWA's Evid. Objections
4. Declaration of Martin Krieger
5. Declaration of Mark S. Krause
6. Request for Judicial Notice
7. Declaration Steven G. Martin
8. [Proposed] Judgment]

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INTRODUCTION

Defendant-intervenor Desert Water Agency ("DWA") submits this brief in support of its motion for summary judgment and in opposition to the motion for summary judgment of plaintiff Agua Caliente Band of Cahuilla Indians ("Tribe"). Both motions address the issue of whether Riverside County's ("County") possessory interest tax ("PIT") is preempted by federal law as applied to non-Indian lessees on the Tribe's reservation.

In its motion to voluntarily dismiss its claims against DWA, which this Court granted, the Tribe stated that it sought dismissal only of claims against DWA for DWA's taxes and charges *not* included in the County's PIT, and that DWA would be free to argue that its taxes and charges are valid to the extent they are included in the County's PIT. Tribe's Motion for Partial Voluntary Dismissal and Memorandum in Support Thereof, at 3 (hereinafter "Tribe Mot. Vol. Dismiss") (Doc. 99) ("Because Defendant-Intervenor DWA receives a portion of PIT revenues collected from the Tribe's Indian trust lands by Riverside County, claims against DWA related to that share of the PIT would . . . remain in the case.").

Accordingly, DWA in this brief will *not* address whether the County's PIT is preempted as applied on behalf of the County and other agencies for the purpose of generating revenues for the County and the other agencies, and will address *only* whether the County's PIT is preempted as applied on behalf of DWA for the purpose of generating revenues for DWA. As this brief argues, the County's PIT is not preempted at least to that extent.

STATEMENT OF THE CASE

1. Nature of a Possessory Interest Tax

A possessory interest is defined under California law as "(a) [p]ossession 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," or "(b) [t]axable

improvements on tax-exempt land." Cal. Rev. & Tax Code § 107.

Under California law, counties may apply taxes on real property not exempt from taxation, and may also apply taxes on possessory interests of such property if the possessory interests are not exempt from taxation. Cal. Rev. & Tax Code §§ 107-107.9; *United States v. County of San Diego*, 965 F.2d 691, 694 (9th Cir. 1992); *United States v. County of Fresno*, 50 Cal.App.3d 633, 638, 123 Cal. Rptr. 548 (1975). Even though the fee interest in property may be exempt from taxation, the possessory interest in the property may not be exempt from taxation. As the Ninth Circuit has explained, "[t]he California tax on possessory interests does not purport to tax the land as such, but rather taxes the 'full cash value' of the lessee's interest in it." *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184, 1186 (9th Cir. 1971), citing *County of Riverside v. Palm-Ramon Develop. Co.*, 63 Cal.2d 534, 537, 47 Cal.Rptr. 377 (1965). A PIT enables the taxing entity to obtain revenues from the possessory interest of property on the ground that the owner of that interest "should contribute taxes to the public entity which makes its possession possible." *San Diego*, 965 F.2d at 698. Thus, a PIT is not a separate "tax" as such, but instead is a tax, such as an *ad valorem* tax, that cannot be applied to certain real property but can be applied to possessory interests in the property.

2. Riverside County's Possessory Interest Tax

Riverside County's PIT includes two main categories of taxes levied on the possessory interests of non-Indian lessees on the Tribe's reservation: (1) a flat 1% tax on the value of the possessory interest; and (2) additional taxes on the value of possessory interests that the County and certain agencies within the County are authorized by law to impose in excess of the 1% limit, which the County collects on behalf of itself and the other agencies. DWA's Statement of Genuine Disputes of Material Fact and Separate Statement of Uncontroverted Facts ("SUF") 70.

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The first category of taxes—the flat 1% tax—is levied because Proposition 13, approved by California voters in 1978, provides that the "maximum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value of such property," and that the county may collect the tax and apportion it to the districts within the county according to law. Cal. Const., Art. XIIIA, § 1(a). Thus, the County's 1% PIT is an "ad valorem tax" based on the "full cash value" of the property, and is collected by the County for itself and for the districts according to law.

The second category of taxes—the additional taxes that certain agencies are authorized by law to impose in addition to the 1% tax (hereinafter referred to as "additional taxes")—is not subject to the 1% limit imposed by Proposition 13, because Proposition 13 provides an exception from the 1% limit for certain "ad valorem taxes or special assessments," including, for example, "[i]ndebtedness approved by the voters prior to July 1, 1978," which is the effective date of Proposition 13. Cal. Const., Art. XXXIA, § 1(b)(1); *Goodman v. Riverside County*, 140 Cal.App.3d 900, 910, 190 Cal. Rptr. 7 (1983).

Both categories of taxes—*i.e.*, both the 1% tax and the additional taxes—are applied to possessory interests of non-Indian lessees on the Tribe's reservation. SUF 71.[1]

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[1] Two examples of the County's PIT contained in tax bills sent to lessees on the Tribe's reservation are set forth as Exhibits A and B to the Declaration of Dale A. Gardner, which is included in DWA's Request for Judicial Notice. Exhibit A shows a 2012 tax bill to a lessee that lists the "1 % Tax Limit Per Prop 13," which is $1,749.69, and then lists the additional taxes, including a tax for DWA of $174.96. Exhibit B shows a 2016 tax bill to a lessee in which the 1% tax and the additional taxes are lumped together as "General Purpose/Voter-Approved Debt," in the amount of $2,298.96.

3. Desert Water Agency's Share of County's PIT

DWA is a public agency of the State of California, which was created under the Desert Water Agency Law of 1961. Cal. Water Code Appendix § 100-1, *et seq.* (West 2016); SUF 72. DWA provides water supplies and water delivery service to business and residential customers within its area of jurisdiction, which includes the City of Palm Springs and surrounding areas. SUF 73. DWA's customers include non-Indian lessees on the Tribe's reservation. SUF 74.

DWA obtains water supplies by purchasing water from the State Water Project ("SWP"), pursuant to its contract with Department of Water Resources ("DWR"), which operates the SWP. SUF 75. To obtain compensation for its costs in obtaining water supplies from the SWP, DWA imposes an *ad valorem* tax on all property within its jurisdiction that is not exempt from taxation. SUF 76.

DWA receives a share of the revenues from the County's 1% tax as applied to possessory interests. SUF 77. DWA receives a share of the 1% tax because DWA is authorized by law to apply its *ad valorem* tax in order to pay its obligations to the SWP. Cal. Const., Art. XIIIA, § 1(a) (authorizing 1% tax on full cash value of property to be collected by the county and apportioned to districts within the county according to law); Desert Water Agency Law, Cal. Water Code App. § 100-15(12) (West 2016) (authorizing DWA "[t]o cause taxes to be levied . . . for the purpose of paying any obligation of the agency . . . ."); SUF 78.

DWA's *ad valorem* tax is also included in the additional taxes that are exempt from 1% limit imposed by Proposition 13. SUF 79. DWA's tax is exempt from the 1% limit because the revenues from the tax are used to pay DWA's share of the contractual indebtedness of the SWP, which was approved by California voters prior to passage of Proposition 13 in 1978. Cal. Const., Art. XIIIA, § 1(b)(1) (authorizing *ad valorem* taxes to pay for "[i]ndebtedness approved by the voters prior to July 1, 1978"); SUF 80. The California Court of Appeal has held that DWA is authorized to apply its *ad valorem* tax, and the County is authorized to

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collect it, to reimburse DWA for its share of costs of SWP contract obligations, because California voters approved the Burns-Porter Act authorizing SWP construction prior to passage of Proposition 13 in 1978. *Goodman v. Riverside County*, 140 Cal.App.3d 900, 910 (1983).

DWA's share of both taxes—the 1% tax and the additional tax—makes up the entirety of DWA's taxes that the County collects on behalf of DWA from possessory interests on the Tribe's reservation. SUF 81. DWA uses revenues from both categories of taxes to pay its costs in obtaining SWP water that DWA makes available to its customers, including non-Indian lessees on the Tribe's reservation. SUF 82.

The Tribe's action challenges only the County's 1% tax as applied to non-Indian lessees on its reservation, and does not challenge the additional taxes that are also applied to the lessees. *E.g.*, Tribe Mot. Vol. Dismiss, at 3 (Doc. 99). Since both taxes are part of the County's PIT, the Tribe, in effect, is challenging only part of the County's PIT, not the entire PIT, which suggests that the Tribe may be seeking piecemeal adjudication of the County's PIT.

Since the Tribe's action challenges only the County's 1% PIT, DWA in this brief will address only whether the County's 1% PIT is valid as applied to the non-Indian lessees, and will not address whether the County's entire PIT is valid as so applied. And, as explained earlier, DWA will address only whether the County's PIT is valid as applied on behalf of DWA for the purpose of generating revenues for DWA, and will not address whether the PIT is valid as applied on behalf of the County and the other districts for the purpose of generating revenues for the County and the other districts. As shall be explained, the County's 1% PIT is not preempted by federal law and is valid at least to the extent that the PIT is applied on behalf of DWA for the purpose of generating revenues for DWA.

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ARGUMENT

I. THE SUPREME COURT AND NINTH CIRCUIT HAVE HELD THAT STATE AND LOCAL TAXES GENERALLY ARE NOT PREEMPTED AS APPLIED TO NON-INDIANS ON INDIAN RESERVATIONS.

The Supreme Court has held that whether state laws apply on Indian reservations depends on whether Congress has preempted their application. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-143, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 174, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989); *Rice v. Rehner*, 463 U.S. 713, 718, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171-172, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 146, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973). "[E]ven on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." *Mescalero*, 411 U.S. at 148; *see Organized Village of Kake v. Egan*, 369 U.S. 60, 75, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962). "[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption," although the prior history of tribal sovereignty may serve as a "backdrop" in determining whether Congress has preempted state laws. *McClanahan*, 411 U.S. at 172; *see Cotton Petroleum*, 490 U.S. at 176.

In determining whether state laws are preempted by federal law as applied on Indian reservations, the Supreme Court in *Bracker* and other cases has adopted a "balancing test," which requires a "particularized inquiry" into the nature of the federal, state and tribal interests. *Bracker*, 448 U.S. at 145; *Cotton Petroleum*, 490 U.S. at 176; *Rice*, 463 U.S. at 720; *Wagnon v. Prairie Band of Potawatomi Nation*, 546 U.S. 95, 110-111, 126 S.Ct. 676, 163 L.Ed.2d 429 (2005); *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico,* 458 U.S. 832, 838, 102 S.Ct. 3394, 73 L.Ed.2d 1174 (1982).

The Supreme Court has held that—in the "special area of state taxation"—the balancing test does not apply, and the states may apply their taxes to an Indian tribe or its members only if Congress consents. *Mescalero,* 411 U.S. at 148; *Wagnon,* 546 U.S. at 101; *McClanahan*, 411 U.S. at 168.

On the other hand, the Supreme Court has held that nondiscriminatory state taxes are generally applicable to non-Indians on Indian reservations, because the taxes are not applied to the Indian tribe or their members. *Cotton Petroleum*, 490 U.S. at 173-187 (state taxes valid as applied to oil and gas production by non-Indian lessees on Indian reservation); *Rice,* 463 U.S. at 724-731 (state taxes valid as applied to liquor sales by non-Indian on Indian reservation); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 476-483, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976) (state tax on cigarette sales invalid as applied to sales by Indian smokeshops to Indians on a reservation, but valid as applied to sales to non-Indians); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 150-162, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980) (state tax on cigarette sales valid as applied to sales to non-Indians on an Indian reservation); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505, 512-513, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) (state sales tax invalid as applied to sales to Indians on a reservation but valid as applied to sales to non-Indians). The Supreme Court succinctly summarized this principle in *Cotton Petroleum*, stating:

> Under current doctrine, . . . a State can impose a nondiscriminatory tax on private parties with whom the United States or an Indian tribe does business, even though the financial burden of the tax may fall on the United States or tribe.

Cotton Petroleum, 490 U.S. at 175.

Consistently with *Cotton Petroleum*'s "current doctrine," the Ninth Circuit has held that state and local taxes may be applied to non-Indians on Indian reservations. *Chemehuevi Indian Tribe v. California State Board of Equalization,*

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800 F.2d 1446, 1448-1451 (9th Cir. 1986) (state tax on cigarette sales not preempted as applied to non-Indians on an Indian reservation); *Salt River Pima-Maricopa Indian Community v. State of Arizona*, 50 F.3d 734, 737 (9th Cir. 1995) (state sales tax not preempted as applied to non-Indian seller of goods to non-Indians on Indian reservation, because "legal incidence" of tax falls on non-Indian sellers); *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107, 1113 (9th Cir. 1997) (state tax on hotel rentals and food/beverage sales not preempted as applied to non-Indian lessees on Indian reservation, because "legal incidence" of tax fell on non-Indian lessees); *Gila River Indian Community v. Waddell*, 91 F.3d 1232, 1236 (9th Cir. 1996) (state tax not preempted as applied to ticket sales for entertainment on Indian reservation).[2]

Indeed, the Ninth Circuit has specifically held that a county possessory interest tax is valid as applied to non-Indian lessees on an Indian reservation. *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253 (9th Cir. 1976); *Agua Caliente Band of Mission Indians v. Riverside County*, 442 F.2d 1184 (9th Cir. 1971); accord, *Palm Springs Spa, Inc. v. County of Riverside,* 18 Cal.App.3d 372, 95 Cal.Rptr. 879 (1971). In *Confederated Tribes of Chehalis Reservation v. Thurston County*, 724 F.3d 1153, 1158 n. 7 (9th Cir. 2013), the Ninth Circuit recently reaffirmed *Agua Caliente* and *Fort Mojave*, citing *Agua Caliente* for the conclusion that a county tax on possessory interests is valid as applied to non-Indians on an Indian reservation because the tax "does not purport to tax the land as

[2] Similarly, the Second Circuit, applying the *Bracker* balancing test, recently held that a town in Connecticut was authorized to apply its personal property tax to non-Indians who leased slot machines to an Indian tribe for use on the tribe's reservation. *Mashantucket Pequot Tribe v. Town of Ledyard, et al.,* 722 F.3d 457, 472-477 (2nd Cir. 2013). The Eleventh Circuit, applying the *Bracker* balancing test, has held that Florida's cigarette sales tax was valid as applied to cigarette sales by Indians to non-Indians on a reservation. *Florida v. U.S. Dep't of Interior*, 768 F.2d 1248, 1256 n. 10 (11th Cir. 1985).

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such, . . . but rather taxes the 'full cash value' of the lessee's interest in it." *Chehalis*, 724 F.3d at 1158 n. 7, *quoting Agua Caliente*, 442 F.2d at 1186.

This Court, in denying the defendants' motion for judgment on the pleadings, held that the Ninth Circuit decisions in *Fort Mojave* and *Agua Caliente* were "repudiated" by the Supreme Court's decision in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). Order Re Defendants' Motion for Judgment on the Pleadings, pp. 9-12 (Doc. 118). The Tribe argues that this Court cannot reconsider its decision under the law of the case doctrine. Tribe Br. 5-7.

Under the law of the case doctrine, however, this Court has discretion to overturn its prior decision if the decision was "clearly erroneous." *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997). In our view, this Court's decision was clearly erroneous because *Bracker* plainly did not establish a new balancing test that "repudiates" *Fort Mojave* and *Agua Caliente*, but instead summarized and applied the balancing test that the Supreme Court itself had established in its prior decisions, some of which predated *Fort Mojave* and *Agua Caliente*. *Bracker,* 448 U.S. at 144 (stating that "we have examined" the relevant statutes and notions of tribal sovereignty and concluded that the preemption "inquiry" requires a "particularized inquiry" into federal, state and tribal interests).

Indeed, *Fort Mojave*, in support of its decision, cited and relied on many of the Supreme Court decisions that *Bracker* itself cited and relied on as the basis for the balancing test. *Compare Fort Mojave*, 543 F.2d at 1255-1258, *with Bracker*, 448 U.S. at 141-145. Specifically, both *Bracker* and *Fort Mojave* cited and relied on the Supreme Court's decisions, among others, in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973), and *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959). *Id.* The fact that *Fort Mojave* and *Bracker* cited and relied on many of the same Supreme Court decisions demonstrates that *Fort Mojave* adopted a similar mode of analysis to that required by *Bracker*, and that *Bracker* did not "repudiate" *Fort*

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Mojave.

The Ninth Circuit has held in several recent decisions that the mode of analysis applied in *Agua Caliente* and *Fort Mojave* is consistent with *Bracker*, thus making clear that *Agua Caliente* and *Fort Mojave* are still good law. *Chehalis*, 724 F.3d at 1158 (citing *Fort Mojave* for conclusion that "[e]ven prior to Bracker, we applied a similar mode of analysis in holding that possessory interest taxes on 'non-Indian lessees of property held in trust by the United States Government for reservation Indians are not per se preempted"); *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1049 (9th Cir. 2000) (citing *Agua Caliente* as showing "long tradition of federal courts exercising jurisdiction over tribal challenges to state taxation"); *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274, 1282 (9th Cir. 1981) (affirming *Fort Mojave*).

Therefore, the law of the case doctrine does not preclude this Court from reconsidering its decision that *Bracker* repudiated *Fort Mojave* and *Agua Caliente*.

II. RIVERSIDE COUNTY'S POSSESSORY INTEREST TAX IS NOT PREEMPTED BY 25 U.S.C. § 465.

A. Section 465

The Tribe argues that the County's PIT is expressly preempted by section 465 of Title 25 of the U.S. Code. Tribe Br. 7-10. Section 465 authorizes the Secretary of the Interior to acquire "any interest in lands," including trust lands, for Indian tribes and their members, and provides that "such *lands or rights* shall be exempt from State and local taxation." (Emphasis added.)

Section 465 does not preempt the County's PIT because the County's PIT is not applied to the "lands or rights" of the Tribe, but instead is applied to the possessory interests of non-Indian lessees on the Tribe's reservation. As the Ninth Circuit has explained, a possessory interest tax "does not purport to tax the land as such, but rather taxes the 'full cash value' of the lessee's interest in it." *Agua Caliente*, 442 F.2d at 1186. Since the County's PIT applies to the possessory

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interests of non-Indian lessees, section 465 does not preempt the County's PIT.

In *Chehalis*, the Ninth Circuit recently stated that section 465 does not preempt a county possessory interest tax as applied to non-Indians on an Indian reservation, because the tax "does not purport to tax the land as such, which would be barred by § 465, but rather taxes the full cash value of the lessee's interest in it, which is not covered by § 465." *Chehalis*, 724 F.3d at 1158 n. 7, *citing and quoting Agua Caliente*, 442 F.2d at 1186 (internal quotation marks omitted). Thus, the Ninth Circuit distinguished a tax on possessory interests from a tax on the land, and held that while the latter tax is preempted by section 465, the former tax is not.

B. *Mescalero Apache Tribe v. Jones*

The Tribe argues that its section 465 preemption argument is supported by the Supreme Court's decision in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). Tribe Br. 7-8. There, New Mexico imposed (1) a gross receipt tax on a ski resort operated by an Indian tribe on lands leased from the federal government, and (2) a use tax on ski lifts at the resort.

The Supreme Court in *Mescalero* held that section 465 did *not* preempt New Mexico's gross receipt tax on the ski resort, because section 465 "exempts lands and rights in land, not income derived from its use." *Mescalero*, 411 U.S. at 155. The Court stated that it "has repeatedly said that tax exemptions are not granted by implication," and that "it has applied that rule to taxing acts affecting Indians as to all others." *Id.* at 156, *quoting Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 606-607, 63 S.Ct. 1284, 87 L.Ed. 1612 (1943) (internal quotation marks omitted). The Court stated that it has upheld state taxes on an Indian's share of income from exploitation of mineral resources on an Indian reservation. *Id.* at 156-157, *citing Leahy v. State Treasurer*, 297 U.S. 420, 56 S.Ct. 507, 80 L.Ed. 771 (1936). Thus, *Mescalero* distinguished a tax on land from a tax on income from the land, and held that section 465 preempts the former tax but not the latter tax.

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Mescalero also held that New Mexico's use tax on the ski lifts was preempted, because the ski lifts have been "permanently attached" to the realty and thus the tax on the use of the ski lifts was in reality a tax on the tribe's lands and preempted by section 465. *Id.* at 157-158. Since *Mescalero* held that section 465 only preempts state taxes as applied to "lands and rights" of Indian tribes, and since the County's PIT applies to possessory interests and not the Tribe's "lands and rights," *Mescalero* does not support the Tribe's argument that section 465 preempts the County's PIT.

The Tribe—citing *Mescalero*'s statement that the "use" of property is part of the "bundle of privileges that make up property or the ownership of property," *Mescalero*, 411 U.S. at 158—argues that "a tax upon 'use' is a tax upon the property itself." Tribe Br. 8. *Mescalero*'s reference to the "use" of property, however, was to the Indian tribe's *own* use of its property, *i.e.*, the ski lifts that the tribe owned and operated, and not to the possessory interests of non-Indian lessees. *Mescalero*, 411 U.S. at 158. Indeed, *Mescalero* specifically stated that "[l]essees of otherwise exempt Indian lands are . . . subject to state taxation." *Id.* at 157, *citing Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342, 69 S.Ct. 561, 93 L.Ed. 721 (1949). Thus, *Mescalero* squarely held that lessees on Indian reservations are subject to state taxation, making clear that its reference to "use" applied to the Indian tribe's use and not the lessees' use.

The Tribe's analysis of *Mescalero* is also contradicted by the Ninth Circuit's recent decision in *Chehalis*. There, the Ninth Circuit stated that *Mescalero* did not preempt a county tax on possessory interests because the tax is not applied to the "lands or rights" of an Indian tribe. *Chehalis*, 724 F.3d at 1158 n. 7. The Ninth Circuit stated that "taxes imposed on non-Indian lessees' rights of possession (as in *Agua Caliente* and *Fort Mojave*)" are different from "property taxes imposed on improvements owned by non-Indians (as in *Mescalero*)," and that while the Court would be "bound by § 465 and *Mescalero* to invalidate" the latter taxes, "[t]his is

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not so . . . when state or local governments impose taxes on interests other than the 'lands or rights' covered by § 465." *Id.* Thus, *Chehalis* squarely rejected the *Mescalero* argument made by the Tribe here.

C. *Seminole Tribe v. Stranburg*

The Tribe argues that its section 465 preemption argument is supported by the Eleventh Circuit's decision in *Seminole Tribe v. Stranburg*, 799 F.3d 1324 (11 Cir. 2015). Tribe Br. 7-10. There, the Eleventh Circuit held that section 465 preempted Florida's rental tax as applied to lessees who provided food service to tribal casinos on an Indian reservation. *Stranburg*, 799 F.3d at 1328-1345.

Stranburg is distinguishable on its facts. The Florida rental tax in *Stranburg* was imposed on the "privilege" of engaging in the business or renting, leasing or granting a license. *Id.* at 1326. A rental tax on the "privilege" of engaging in a leasing activity that is based on payment of rent is entirely different from a tax on the value of a non-Indian's possessory interests. Also, since the "landlord," *i.e.*, the Indian tribe, was responsible for collecting and remitting Florida's rental tax and was "liable" if the lessee failed to pay the tax, *id.* at 1326, the Florida rental tax is further distinguishable from the County's PIT here, because the Tribe in the instant case is not responsible for collecting and remitting the PIT and is not liable if the lessees fail to pay the tax.

More importantly here, *Stranburg* disregarded the Ninth Circuit's decisions in *Agua Caliente* and *Fort Mojave* on grounds that they were not "persuasive." *Stranburg*, 799 F.3d at 1334. Unlike the Eleventh Circuit in *Stranburg*, this Court is bound by the Ninth Circuit's decisions regardless of whether the Court finds them persuasive.

Even more importantly, *Stranburg*'s analysis is inconsistent with the Supreme Court's modern jurisprudence concerning whether state taxes apply to non-Indians on Indian reservations. As the Supreme Court stated in *Cotton Petroleum*, "[u]nder current doctrine, . . . a State can impose a nondiscriminatory

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tax on private parties with whom the United States or an Indian tribe does business, even though the financial burden of the tax may fall on the United States or tribe." *Cotton Petroleum*, 490 U.S. at 175. *Stranburg* dismissed *Cotton Petroleum*'s "current doctrine" statement on grounds that it applies only to state taxes that, as in *Cotton Petroleum*, apply to mineral leasing on Indian reservations under the Indian Mineral Leasing Act of 1938 ("IMLA"), 25 U.S.C. § 396a. *Stranburg*, 799 F.3d at 1332-1333. On the contrary, the Supreme Court and Ninth Circuit have upheld the applicability of state taxes as applied to non-Indians on an Indian reservation in numerous cases that did *not* involve mineral leasing under IMLA. *Rice v. Rehner*, 463 U.S. 713, 724-731 (1983); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 476-483 (1976); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 150-162 (1980); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505, 512-513 (1991); *Chemehuevi Indian Tribe v. California State Board of Equalization,* 800 F.2d 1446, 1448-1451 (9th Cir. 1986); *Salt River Pima-Maricopa Indian Community v. State of Arizona*, 50 F.3d 734, 737 (9th Cir. 1995); *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107, 1113 (9th Cir. 1997); *Gila River Indian Community v. Waddell*, 91 F.3d 1232, 1236 (9th Cir. 1996); *see* pages 7-8, *supra*. Thus, *Cotton Petroleum*'s "current doctrine" statement summarizes the Supreme Court's modern jurisprudence concerning the applicability of state taxes to non-Indians on Indian reservations, and is not limited to cases involving mineral leasing under IMLA.

III. RIVERSIDE COUNTY'S POSSESSORY INTEREST TAX—TO THE EXTENT APPLIED ON BEHALF OF DESERT WATER AGENCY TO GENERATE REVENUES FOR THE AGENCY—IS NOT PREEMPTED UNDER THE *BRACKER* BALANCING TEST.

The Tribe argues that the County's PIT is preempted under the *Bracker* balancing test, which requires a "particularized inquiry" into the nature of federal state and tribal interests. *Bracker*, 448 U.S. at 145; Tribe Br. 10-19. On the

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contrary, and as we now argue, the County's PIT is not preempted under the *Bracker* balancing test, to the extent that the PIT is applied on behalf of DWA for the purpose of generating revenues for DWA.

A. The State Interest Weighs Against Preemption of the County's Possessory Interest Tax as Applied on Behalf of Desert Water Agency, Because the Tax Compensates the Agency for its Costs in Providing Water Supplies for Non-Indian Lessees on the Tribe's Reservation.

Under the *Bracker* balancing test, it is highly relevant whether state or local governments provide services to non-Indians on Indian reservations that might justify the application of state or local taxes to the non-Indians. *Cotton Petroleum*, 490 U.S. at 175; *Bracker*, 448 U.S. at 148-150; *Gila River Indian Community v. Waddell*, 91 F.3d 1232, 1238-1239 (9th Cir. 1996); *Chemehuevi Indian Tribe v. California State Board of Equalization,* 800 F.2d 1446, 1449-1450 (9th Cir. 1986). In *Bracker*, the Supreme Court held that state taxes were preempted as applied to non-Indian timber harvesting operations on an Indian reservation, because the state was "unable to identify any regulatory function or service performed by the State that would justify the assessment of taxes for activities on Bureau and tribal roads within the reservation." *Bracker,* 448 U.S. at 148-149. In *Cotton Petroleum*, on the other hand, the Supreme Court held that a New Mexico tax was *not* preempted as applied to non-Indian oil and gas production on an Indian reservation, because New Mexico provided "substantial services" to both the Tribe and the non-Indian lessees. *Cotton Petroleum*, 490 U.S. at 185. As the Court stated, "[t]his is not a case in which the State has had nothing to do with the on-reservation activity, save tax it." *Id.* at 186. Similarly, in *Chemehuevi,* the Ninth Circuit held that state taxes were not preempted as applied to non-Indian sellers on a reservation because of "the state's legitimate interest in raising revenue to provide substantial services both on and off the reservation . . . ." *Chemehuevi,* 800 F.2d at 1449-1450.

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The County's PIT—to the extent applied on behalf of DWA in order to generate revenues for DWA—compensates DWA for its costs in providing water supply availability for residents within its area of jurisdiction, which include non-Indian lessees on the Tribe's reservation. SUF 83. The water demands by the residents, including the non-Indian lessees, exceed natural recharge to the groundwater basin. SUF 84. To prevent depletion of the basin, DWA purchases water from the State Water Project (SWP), pursuant to its contract with the Department of Water Resources (DWR), SUF 85, and imports the water into the groundwater basin in order to recharge the basin and meet the needs of the residents. SUF 86.[3] Under its DWR contract, DWA is required to pay its share of DWR's costs in constructing, operating and maintaining the SWP. SUF 87. If DWA did not pay its share of DWR's costs, DWA would be unable to obtain SWP water and thus unable to meet the needs of the residents, including the non-Indian lessees. SUF 88. DWA uses the revenues from the County's PIT to compensate DWA for its costs in obtaining the SWP water. SUF 89. The residents, including the non-Indian lessees, benefit from DWA's acquisition and importation of the water, because DWA's acquisition and importation ensures that water supplies are available for their current and future uses. SUF 90.

Since DWA's share of revenues from the County's PIT compensates DWA for its costs in obtaining SWP water that DWA makes available for non-Indian lessees on the Tribe's reservation, the County's PIT—to the extent it generates

[3] Since SWP facilities do not extend to DWA's service area, SUF 91, DWA has entered into an exchange contract with another SWP customer, the Metropolitan Water District of Southern California ("MWD"), under which MWD delivers a portion of its Colorado River water supply to DWA's service area, in return for which MWD receives DWA's share of SWP water. SUF 92. DWA spreads the imported water into the ground through DWA's recharge facilities, and the water is available for later extraction as necessary to meet the needs of DWA's customers. SUF 93.

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revenues for DWA for this purpose—applies to the non-Indian lessees under the Supreme Court's decisions in *Cotton Petroleum* and *Bracker* and the Ninth Circuit's decisions in *Gila River* and *Chemehuevi*, among other decisions. Similarly to the state taxes upheld in *Cotton Petroleum* and *Chemehuevi*, the revenues compensate DWA for "substantial services" that DWA provides to the lessees. *Cotton Petroleum*, 490 U.S. at 185; *Chemehuevi*, 800 F.2d at 1449-1450. This is not a case in which DWA "has had nothing to do with the on-reservation activity, save tax it." *Cotton Petroleum*, 490 U.S. at 186. Unlike *Bracker*, DWA is able "to identify . . . [a] regulatory function" that "would justify the assessment of taxes." *Bracker*, 448 U.S. at 148-149.

Indeed, if the non-Indian lessees did not pay the County's PIT to the extent it generates revenues for DWA, they would get a free ride at the expense of DWA's other customers, by gaining availability of water supplies provided by DWA without paying their fair share of DWA's costs that other customers are required to pay. The balance of federal, state and tribal interests does not support the right of non-Indian lessees to get a free ride at the expense of others who are required to pay DWA's costs in providing water supplies.

The Tribe mischaracterizes DWA's share of the County's PIT in several ways. First, the Tribe asserts that the "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." Tribe Br. 16. DWA has made no such concession. On the contrary, DWA's share of the County's PIT compensates DWA for its costs in obtaining SWP water that DWA makes available to the residents, including non-Indian lessees on the Tribe's reservation. SUF 94. Thus, DWA's *ad valorem* tax is not used to provide for general governmental services.

The Tribe asserts that DWA's share of revenues from the PIT "goes directly into DWA's general fund," thus implying that DWA's share of PIT revenues is

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used to pay DWA's general costs of government. Tribe Br. 4. Although DWA's share of revenues from the County's PIT are deposited into DWA's general fund, DWA's general fund is used exclusively to pay its share of SWP costs, and is not used to pay costs for operation and maintenance or for general government services. SUF 95.

The Tribe asserts that "DWA's payment of its SWP obligations benefits all customers within its service area, not just those taxpayers who pay the PIT," Tribe Br. 5, and that "DWA concedes that the benefits and services funded in part by the PIT are provided equally to all customers within the DWA service area," Tribe Br. 18. In fact, all residents within DWA's service area benefit from DWA's purchase of SWP water, because DWA's purchase of the water ensures that water is available for the residents' current and future uses, and this benefit accrues to the non-Indian lessees as well as to other residents. SUF 96. The fact that other residents who pay DWA's tax receive the benefit provides no basis for exempting the non-Indian lessees from paying the tax, because they also receive the benefit. Otherwise, the non-Indian lessees would receive a free ride at the expense of others.

The Tribe asserts that there is "no direct nexus" between DWA's tax and the services that DWA provides to the non-Indian lessees, because the PIT is based on the value of the lessee's possessory interest and not the lessee's use of water. Tribe Br. 18-19.[4] The Supreme Court and Ninth Circuit have held, however, that if a state is authorized to apply its taxes to non-Indians on an Indian reservation because it provides services to them, it is immaterial whether the state taxes are proportionate to the services provided. *Cotton Petroleum*, 490 U.S. at 189-190;

[4] DWA imposes a separate water delivery charge for providing water deliveries to the residents, including the non-Indian lessees, which is based on the amount of water that is delivered. SUF 97. DWA's share of the County's PIT is used for the different purpose of enabling DWA to purchase and import SWP water that DWA makes available for the current and future uses of the residents, including the non-Indian lessees. SUF 98.

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Gila River, 91 F.3d at 1239; *Salt River Pima-Maricopa Indian Community v. State of Arizona*, 50 F.3d 734, 737 (9th Cir. 1995). As the Supreme Court stated in *Cotton Petroleum*, in upholding state taxes as applied to non-Indian lessees on an Indian reservation, "there is no constitutional requirement that the benefits received from the taxing authority by an ordinary commercial taxpayer . . . must equal the amount of its tax obligations." *Cotton Petroleum*, 490 U.S. at 190. Since DWA's share of the County's PIT enables DWA to provide benefits to non-Indian lessees by making water available to them, it is immaterial whether DWA's share of the PIT is proportionate to the benefits provided to the non-Indian lessees.

The Tribe asserts that DWA's general fund revenues, which DWA uses to pay its SWP obligations, exceed its SWP obligations, thus implying that DWA's general fund revenues are unrelated to its SWP obligations. Tribe Br. 5. In fact, DWA's general fund revenues in some years exceed its SWP obligations, in which case DWA deposits the funds in a reserve account, and in other years are insufficient to meet its SWP obligations, in which case DWA withdraws moneys from the reserve fund in order to meet its SWP obligations. SUF 99. Thus, DWA's general fund revenues are used to pay its SWP obligations over a period of years.

B. The Tribal Interest Does Not Weigh in Favor of Preemption, Because the "Legal Incidence" of the County's Tax as Applied on Behalf of Desert Water Agency Falls on the Non-Indian Lessees and Not on the Tribe or Its Members.

The Supreme Court and Ninth Circuit have held that the "initial and frequently dispositive question" concerning whether state taxes apply on Indian reservations is whether the "legal incidence" of the tax falls on the Indian tribe or its members or instead falls on non-Indians. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101 (2005) (internal quotations and emphasis omitted); *see Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458-459, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995); *Washington v. Confederated Tribes of the Colville*

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Indian Reservation, 447 U.S. 134, 151 (1980); *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107, 1113 (9th Cir. 1997); *Salt River Pima-Maricopa Indian Community v. State of Arizona*, 50 F.3d 734, 737 (9th Cir. 1995); *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253, 1256 (9th Cir. 1976). In *Chickasaw*, for example, the Supreme Court held that a state motor fuel tax was preempted as applied to sales by Indians to non-Indians on a reservation, because the "legal incidence" of the tax fell on the Indians. *Chickasaw*, 515 U.S. at 458-459, 461-462. In *Colville,* on the other hand, the Supreme Court held that a state tax was *not* preempted as applied to sales by an Indian tribe to non-Indians on a reservation, "because its [the tax's] legal incidence fell on the non-Indian purchaser." *Colville*, 447 U.S. at 151. Similarly, in *Salt River*, the Ninth Circuit held that a state sales tax was not preempted applied to non-Indian sellers on a reservation because the "legal incidence" of tax fell on non-Indian sellers. *Salt River*, 50 F.3d at 737.

The legal incidence of DWA's tax, to the extent included in the County's PIT, falls on the non-Indian lessees and does not fall on the Tribe or its members. The tax applies only to the non-Indian lessees and not to the Tribe or its members. SUF 100. If a non-Indian lessee does not pay the tax, the Tribe and its members are not liable for payment of the tax, and the unpaid tax does not become a lien or other charge upon the Indian land or any other property belonging to the Tribe or its members. SUF 101. Since the legal incidence of the tax falls on the non-Indian lessees and not on the Tribe or its members, the tax is not preempted by federal law.

The Tribe argues that its interest weighs in favor of preemption because the Tribe has adopted a possessory interest tax but has held its tax in abeyance because of the County's PIT, and therefore the County's PIT precludes the Tribe from applying its own possessory tax and obtaining revenues necessary for economic development. Tribe Br. 14-16. Contrary to the Tribe's argument, the Supreme Court and Ninth Circuit have held in numerous cases that it is immaterial for

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preemption purposes whether state taxes applied to non-Indians on Indian reservations have the effect of reducing revenues that the Indian tribe might otherwise obtain from the non-Indians. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156 (1980) (Washington "does not infringe on the right of reservation Indians to 'make their own laws and be ruled by them' [citation] merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they are currently receiving."); *Squaxin Island Tribe v. Washington*, 781 F.2d 715, 720 (9th Cir. 1986) ("[A] state tax or regulation is not invalid merely because it erodes a tribe's revenues, even if the tax substantially impairs the tribal government's ability to sustain itself and its programs."); *Crow Tribe v. Montana*, 650 F.2d 1104, 1116 (9th Cir. 1991) ("It is clear that a state tax is not invalid merely because it erodes a tribe's revenues, even when the tax substantially impairs the tribal government's ability to sustain itself and its programs."); *White Mountain Apache Tribe v. Arizona,* 649 F.2d 1274, 1282 (9th Cir. 1981) ("The tribal interest in obtaining such revenues weighs only lightly in the preemption scales, for the Tribes have no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all."); *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253, 1258 (9th Cir. 1987) ("Such an indirect economic burden cannot be said to threaten the self-governing ability of the tribe"); *Chemehuevi Indian Tribe v. California State Board of Equalization,* 800 F.2d 1446, 1449 (9th Cir. 1986) (contrary to Indian tribe's argument that imposition of state tax on non-Indians "will deprive it [the tribe] of badly needed income," "we have repeatedly held, as has the Supreme Court, that reduction of tribal revenues does not invalidate a state tax."). As the Supreme Court stated in *Cotton Petroleum*, the fact that a state tax may have a "marginal effect" on the ability of an Indian tribe to "increase its tax rate" is "simply too indirect and too insubstantial" to support a preemption claim. *Cotton Petroleum*, 490 U.S. at 186-187.

C. The Federal Interest Does Not Weigh in Favor of Preemption.

The Tribe argues that the federal interest weighs in favor of preemption because the federal government has adopted regulations that comprehensively regulate the leasing of Indian lands, and also because the federal government has an interest in tribal economic development. Tribe Br. 11-14.

First, the fact that the federal government comprehensively regulates leasing of Indian lands and has an interest in tribal economic development does not support the conclusion that non-Indian lessees on the Tribe's reservation are exempt from a tax on possessory interests that compensates DWA for its costs in obtaining water supplies for the benefit of the non-Indian lessees. *See Gila River Indian Community v. Waddell*, 91 F.3d 1232, 1237 (9th Cir. 1996) ("[T]he Tribe's argument that the mere existence of federal oversight over leasing of Indian lands preempts a state tax is without support."); *Cotton Petroleum*, 490 U.S. at 186 (noting that although federal and tribal regulations were "extensive," they were not "exclusive"). There is no federal interest in the non-Indian lessees getting a free ride at the expense of others who receive the benefit of the water supplies and are required to pay DWA's tax. As a matter of justice and fairness, the non-Indian lessees should be required to pay the tax that others are required to pay who receive the same benefit. No federal interest suggests otherwise.

Second, where Congress has addressed the subject of applicability of state taxes on Indian reservations and has preempted their application under prescribed circumstances—as Congress did in enacting 25 U.S.C. § 465—the federal interest lies in administering and enforcing the federal laws that preempt the application of the state taxes, but not in independently preempting state taxes that are not preempted by the federal laws. As explained earlier, the Supreme Court and Ninth Circuit have held that section 465, which preempts state taxes applicable to "lands or rights" of Indian tribes or their members, does not preempt state taxes applicable

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to possessory interests of non-Indian lessees on Indian reservations, because the state taxes do not apply to the "lands or rights" of the Indian tribe or its members. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 157 (1973) ("Lessees of otherwise exempt Indian lands are . . . subject to state taxation," notwithstanding section 465); *Confederated Tribes of the Chehalis Reservation v. Thurston County Board of Equalization*, 724 F.3d 1153, 1158 n. 7 (9th Cir. 2013) (section 465 does not preempt a county PIT, because the PIT "does not purport to tax the land as such, which would be barred by § 465, but rather taxes the full cash value of the lessee's interest in its, which is not covered by § 465") (citation and internal quotations marks omitted); *see* pages 11-12, *supra*. Since section 465 does not preempt the County's PIT to the extent applied on behalf of DWA for the purpose of generating revenues for DWA, there is no federal interest that independently supports preemption of the County's PIT to that extent.

Third, the Tribe argues that the Secretary of the Interior's recent regulation, which provides that that "the leasehold or possessory interest is not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State," 25 C.F.R. § 162.017(c), supports its preemption argument. On the contrary, the regulation—if construed as preempting the County's PIT to the extent applied on behalf of DWA for the purpose of generating revenues for DWA—would exceed the Secretary's authority under federal law and be invalid.[5] The Secretary is not authorized under federal law to preempt a state or local tax under circumstances where the applicable federal statute does not preempt the tax

[5] In fact, the regulation might be construed as not preempting the County's PIT, because the caveat of the regulation states that its application is "[s]ubject only to applicable Federal law." 25 U.S.C. § 162.017(c). "[A]pplicable Federal law," consisting of section 465, does not preempt a state possessory interest tax as applied to non-Indian lessees on an Indian reservation, as the Supreme Court stated in *Mescalero*, 411 U.S. at 157, and the Ninth Circuit stated in *Chehalis*, 724 F.3d at 1157 n. 6. *See* pages 11-12, *supra*.

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or authorize its preemption. *Gonzales v. Oregon*, 546 U.S. 243, 258, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006) (a federal regulation "must be promulgated pursuant to authority Congress has delegated to" the federal agency); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986) (a federal agency has authority to preempt state law "only when and if it is acting within the scope of its congressionally delegated authority"). Since section 465 and the general federal leasing statute, 25 U.S.C. § 415, do not preempt the County's PIT to the extent applied on behalf of DWA for the purpose of generating revenues for DWA, the federal regulation would be invalid if it were construed as preempting the County's PIT to that extent.

IV. RIVERSIDE COUNTY'S POSSESSORY INTEREST TAX, TO THE EXTENT APPLIED ON BEHALF OF DESERT WATER AGENCY, DOES NOT IMPERMISSIBLY INFRINGE ON TRIBAL SOVEREIGNTY.

The Tribe argues that the County's PIT is preempted because it "impermissibly interferes" with the Tribe's "sovereignty and its rights of self-government in its territory." Tribe. Br. 19-21.

The County's PIT, to the extent applied on behalf of DWA to generate revenues for DWA, does not infringe on the Tribe's sovereignty. The Tribe has no sovereign interest in shielding its non-Indian lessees from a tax that compensates DWA for its costs in obtaining water supplies for their benefit. The fact that the lessees are required to pay DWA's tax that enables DWA to obtain the water supplies does not "infringe" on the Tribe's right to "make [its] own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 157 (1980). Thus, the Tribe's sovereignty does not preempt the County's tax as applied on behalf of DWA in order to generate revenues for DWA.

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CONCLUSION

For the foregoing reasons, Desert Water Agency's motion for summary judgment should granted and the Agua Caliente Band of Cahuilla Indians' motion for summary judgment should be denied.

Dated: December 15, 2016

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