UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 16-cv-62775-Middlebrooks/Brannon

SEMINOLE TRIBE OF FLORIDA,
a Federally recognized Indian Tribe,

Plaintiff,

v.

LEON BIEGALSKI, AS EXECUTIVE DIRECTOR
OF THE DEPARTMENT OF REVENUE,
STATE OF FLORIDA,

Defendant.
____/

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiff, SEMINOLE TRIBE OF FLORIDA (the "Tribe"), a Federally recognized Indian Tribe, files this Memorandum in Opposition to Defendant's, LEON BIEGALSKI, Motion to Dismiss the Tribe's Complaint with prejudice.

I. BACKGROUND

A. The Current Case

In this case, the Tribe seeks prospective declaratory relief to determine the constitutionality of a State tax on utilities services (specifically electricity) it uses to conduct fourteen specifically enumerated activities on its Tribal Land (i.e., its reservation land and any

other land held by the United States in trust for the Indian tribe's benefit) that it claims to be exclusively and pervasively regulated by Federal law. [1]

Federal law preempts any State tax that is imposed on a non-Indian if it burdens an activity conducted by an Indian tribe on Tribal Land that is exclusively and pervasively regulated by Federal law, except where the tax serves some legitimate regulatory interest or is narrowly tailored to compensate the State for services it specifically provides in connection with the particular taxed activity to those who bear the tax. *See, e.g., White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980); *Cental Machinery Company v. Arizona*, 448 U.S. 160 (1980); *Ramah Navajo School Board, Inc v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982); *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 334 (1983).[2] The prospective declaratory relief the Tribe seeks relates to the tax imposed on utilities services by section 206.01, Fla. Stat. ("Utilities Tax"), which is a tax of general application that funds off-reservation services to State

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[1] The Tribe is prohibited by the Eleventh Amendment to the United States Constitution from suing the State for a retrospective refund of the Utilities Tax that it paid in violation of its Federal rights. However, under the *Young* doctrine, the Tribe is permitted to sue the State official, rather than the State, in Federal court provided that it seeks only prospective declaratory and injunctive relief. *Ex Parte Young*, 209 U.S. 123 (1908). Any suit for refund of Utilities Tax that this Court determines to be prohibited by Federal law will have to be brought in State court.

[2] "State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law unless the State interests at stake are sufficient to justify the assertion of State authority." *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 334 (1983). "Where, as here, the Federal Government has undertaken comprehensive regulation of the [activity] . . . and where [the State is] unable to justify the taxes except in terms of a generalized interest in raising revenue, we believe that the proposed exercise of State authority is impermissible." *Bracker,* 448 U.S. at 151. Where the federal regulation of the activity is comprehensive, a State tax that burdens that activity can be justified only if it serves a "legitimate regulatory interest" or compensates the State for "the governmental functions it performs for those on whom the taxes fall." *Bracker*, 448 U.S. at 150. *See also, e.g.*, *Crow Tribe of Indians v. Mont.,* 819 F. 2d 895, 900 (9th Cir. 1987); *Hoopa Valley Tribe v. Nevins,* 881 F. 2d 657 (9th Cir. 1989). "To be valid, the tax must bear some relationship to the activity being taxed." *Id.* at 661, citing *Crow Tribe*, 819 F. 2d at 900. "Showing that the tax serves legitimate State interests, such as raising revenues for services used by tribal residents and others, is not enough." *Id.* at 661.

residents in general. It is clearly not the type of tax that could qualify under that limited exception. Consequently, the Utilities Tax is preempted to the extent that it is applied to utilities services that the Tribe uses to conduct an activity on Tribal Land that is exclusively and pervasively regulated by Federal law. The parties disagree on the the scope of the Federal regulation of these specific activities.

In addition to the Federal preemption of taxes that burden Federally regulated activities, Federal law prohibits any State tax on a non-Indian that interferes with the Tribe's exercise of its sovereign functions. *Bracker,* 448 U.S. at 142-143; *Ramah,* 458 U.S. at 837.

Finally, Federal law prohibits any State tax that burdens an Indian tribe's "use" of its Tribal Land because "use" is among the bundle of privileges that makes up property ownership. Any State tax on the "use" of Tribal Land is regarded as a tax on the Tribal Land itself that is expressly prohibited by 25 U.S.C. §465. *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973); *Seminole Tribe of Florida v. Stranburg*, 799 F. 3d 1324, 1329-1330 (11th Cir. 2015); *Seminole Tribe of Florida v. Florida,* 49 F. Supp. 1095, 1098 (S.D. Fla. 2014).

The Defendant imposes and collects the Utilitites Tax on utilities services that the Tribe uses to conduct activities on Tribal Land that it contends to be exclusively and pervasively regulated by Federal law and/or to constitute the exercise of its sovereign functions or the "use" of its Tribal Land, all in violation of the Tribe's Federal rights. Accordingly, the Tribe brought this action for a declaration to prospectively resolve the legal issues of whether Federal regulation of any or all of the following specific activities in which the Tribe uses utilities services is exclusive and pervasive:

- Law enforcement activities (Count I);
- Education activities (Count II);

- Medical, health and fire rescure activities (Count III);
- Family and youth counseling activities (Count IV);
- Water and sewer management activities (Count V);
- Road construction and maintainence activities (Count VI);
- Housing activities (Count VII);
- Cultural preservation activities (Count VIII);
- Leasing activities (Count IX);
- Forestry and wildlife management activities (Count X);
- Agriculture and livestock grazing activities (Count XI);
- Rock mining activiites (Count XII);
- Indian gaming activities (Count XIII); and
- Gaming-related economic activities (Count XIV).[3]

The Federal regulation of some of these activities has already been determined to be exclusive and pervasive. For example, in *Bracker*, the Federal regulation of Indian forestry activities was held to be exclusive and pervasive. In *Ramah*, the Federal regulation of Indian education was held to be exclusive and pervasive. In *Seminole Tribe of Florida v. Stranburg*, 799 F. 3d 1324 (11th Cir. 2015), the Eleventh Circuit held that the Federal regulation of the leasing of Indian land is exclusive and pervasive. "[T]he pervasive Federal scheme for regulating Indian land leasing preempts Florida's Rental Tax just as the Federal schemes regulating timber and education preempted the State taxes in *Bracker* and *Ramah." Id.* at 1341-1343.

[3] The Defendant erroneously portrays the Tribe's position in this case as being that the Utilities Tax on all utilities serving the Tribe's reservation is preempted. [DE 12, ¶1]. The Tribe's position is that the Utilities Tax is preempted to the extent it is applied to utilities services that the Tribe uses to conduct specific activities that are exclusively and pervasively regulated by Federal law.

In the event the Court in this case determines that the Federal regulation of any of these activities is not exclusive and pervasive, the Tribe's complaint asks the Court to determine whether such activity constitutes the exercise of the Tribe's sovereign functions or the "use" of its Tribal Land, as these are alternate grounds for holding that the application of the Utilities Tax to such activity is prohibited by Federal law.

The Defendant moved to dismiss the Tribe's Complaint on the grounds that it is barred by the doctrine of res judicata. As discussed below, there is no merit to that argument.

B. The Prior Case

On October 30, 2012, in *Seminole Tribe of Florida v. State of Florida*, 49 F. Supp. 3d 1095 (S.D. Fla. 2014), the Tribe sued the then Executive Director of the Florida Department of Revenue for a prospective declaration that the application of the Utilities Tax to utilities services used by the Tribe on Tribal Land is a direct tax on the Tribe and therefore categorically barred by the Indian Commerce Clause, regardless of the purposes for which the utilities services are used. The Tribe alleged in the alternative that, if the legal incidence of the tax were determined to rest with the service provider, rather than the Tribe, the Utilities Tax is preempted to the extent it is applied to utilities services that the Tribe uses to conduct activities that are exclusively and pervasively regulated by Federal law.

Judge Scola held that the legal incidence of the Utilities Tax rests with the Tribe as the consumer and, accordingly, held that Federal law categorically bars the application of the tax to any utility services used by the Tribe on Tribal Land, regardless of the purpose or activity for which they are used. 49 F. Supp. 3d at 1107. This holding obviated the need to address the Tribe's alternative argument that the Utilities Tax is preempted, since preemption applies only when the legal incidence of the tax rests with a non-Indian. Judge Scola explained that "[s]ince

the Court has concluded that Florida's Utility Tax is an impermissible direct tax upon the Seminole Tribe on its reservation, the Court need not address the Tribe's alternative arguments that the tax is impermissible under a *Bracker* preemption analysis . . ." 49 F. Supp. 3d at 1108.

The Defendant appealed the district court's decision to the Eleventh Circuit who determined that the legal incidence of the Utilities Tax rests with the service provider, rather than Tribe, reversing Judge Scola on this issue.[4] The Tribe filed a petition for certiorari with the Supreme Court to review that decision, but it was denied. 135 S. Ct. 947 (2015).

In its opinion, the Eleventh Circuit specifically acknowledged that, under *Bracker* and its progeny, Federal law preempts any State tax that burdens an activity conducted by the Tribe on Tribal Land that is exclusively and pervasively regulated by Federal law, except where the tax is narrowly tailored to compensate the State for services it specifically provides in connection with the taxed activity to those who bear the tax. *See,* 779 F. 3d at 1339 (relating to the application of State tax to leases of Indian land). Significantly, however, the Eleventh Circuit interpreted the Tribe's complaint as seeking two separate declarations: (i) that Federal law generally preempts the Utilities Tax on all utility services delivered to and used by the Tribe on Tribal Land as a matter of law if any of those services are used to conduct activities that are exclusively and pervasively regulated by Federal law; and (ii) alternatively, that Federal law preempts the Utilities Tax on utilities services to the extent that those services are used to conduct specific activities that are exclusively and pervasively regulated by Federal law.

Based on this interpretation of the Tribe's cause of action in the prior case, the Eleventh Circuit rejected the notion that utility "use" on Tribal Land, in and of itself, is a Federally

[4] In his Motion to Dismiss, the Defendant erroneously portrays Judge Scola's opinion as holding that the Utilities Tax is preempted, and claims that the Eleventh Circuit reversed that holding. [DE 12, ¶3].

regulated activity. It said "we discern here no pervasive Federal interest or comprehensive regulatory scheme covering on-reservation utility delivery and use sufficient to demonstrate a congressional intent to preempt State taxation of a utility provider's receipts derived from on-reservation utility service." (Emphasis added) 799 F. 3d at 1352. "[T]he Tribe has not introduced evidence of a substantial Federal interest in regulating Indians' utility use specifically." (Emphasis added) *Id*. at 1353. The Eleventh Circuit also rejected the notion that Federal law generally preempts State taxation of all utility services used on Tribal Land as a matter of law if any of those services are used to conduct activities that are exclusively and pervasively regulated by Federal law. It explained: "The Tribe essentially expresses a generalized desire to avoid the Utility Tax. . . . [T]he Tribe cannot demonstrate congressional intent to preempt a specific state tax by bundling up an assortment of unrelated Federal and tribal interests tied together by the common thread of electricity use. Because the Tribe does not develop further argument with respect to electricity use in specifically regulated on-reservation activities, we conclude that it has not established that Florida's Utility Tax is generally preempted as a matter of law in this case." (Emphasis added) 799 F.3d at 1353. "On this record, the Tribe has not demonstrated that the Utility Tax is generally preempted by Federal law." *Id.*

C. Summary of the Argument.

The doctrine of res judicata, or claim preclusion, is not applicable in this case because the prior and current cases do not involve the same claim or cause of action. To be the same claim or cause of action, they must arise from the same nucleus of operative fact or factual predicate. To arise from the same nucleus of operative fact or factual predicate, they must arise from the same transaction, event or contract. Here, the Tribe requested only declaratory relief to prospectively resolve purely legal issues, such as the scope of the Federal regulation of the activities in which

Tribe uses utilities services. The Tribe's requests do not arise from any discrete transaction, event or contract. They seek to resolve a legal issue that will affect many purchases and uses of utilities services. They do not depend on any specific facts. The Court did not determine any facts in the prior case and the Tribe did not ask the Court in the current case to determine any facts. The only fact common to both the prior and current case is that the Tribe uses utilities services on Tribal Land. That fact, in and of itself, does not give rise to a cause of action. In the future the Tribe would have a cause of action for the refund of Utilities Tax that was illegally imposed, but this case does not include a request for refund. The Tribe's right to a refund in the future would depend on the specific activities in which it used the utilities services during the particular period for which the refund was requested. Each period, and each refund claim, would be a separate cause of action. Res judicata cannot apply to a request for only prospective declaratory relief because the relevant facts (i.e., the activities in which the utilities were used) have not yet occurred. In such circumstances, the only preclusion doctrine that potentially applies is collateral estoppel, or issue preclusion. Collateral estoppel bars re-litigation of the same issue that affects different claims or causes of action. It can apply to cases requesting declaratory relief, but only where the issue in the current case is identical to an issue that was actually decided in the prior case. That is not the case here.

The legal issues that the Tribe asks the Court to resolve in the current case are entirely different from the questions that were actually decided in the prior case. In the prior case, the Eleventh Circuit held that Federal law does not generally preempt the Utilities Tax on all utilities services used on Tribal Land as a matter of law simply because some of the services are used to conduct activities that are exclusively and pervasively regulated by Federal law. That holding is not an issue in the current case. In the current case, the Tribe asked the Court to determine

whether the Federal regulation of any or all of fourteen specifically enumerated activities is exclusive and pervasive, such that Federal law preempts the Utilities Tax on utilities services used to conduct those activities. The Tribe also asked the Court to determine whether the any or all of those fourteen specifically enumerated activities constitute the exercise of the Tribe's sovereign functions or the "use" of Tribal Land. Neither court in the prior case addressed any of these legal issues.

II. STANDARD OF REVIEW

A motion to dismiss is appropriate only when it is demonstrated "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). For the purpose of the motion to dismiss, the Complaint is construed in the light most favorable to the plaintiff, and all facts alleged by the plaintiff are accepted as true. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Moreover, questions of law are to be resolved "liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (citing *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164 (1973); *Choate v. Trapp,* 224 U.S. 665 (1912)).

As a preclusion doctrine, res judicata is an affirmative defense. "Preclusion is not a jurisdictional matter." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 282 (2005) (citing Fed. Rule Civ. Proc. 8(c)). "Generally, res judicata 'is an affirmative defense that should be raised under Rule 8(c),' but 'a party may raise a res judicata defense by motion rather than by answer where the defense's existence can be judged on the face of the complaint.'" *L&M Companies, Inc. v. Navilio*, Case No. 9:15-cv-81006-Rosenberg/Brannon (S.D. Fla. 2016), citing *Concordia v. Bendekovic*, 693 F. d 1073, 1075 (11th Cir. 1982). Here, the Tribe's complaint

alleges that no court has ever adjudicated the claims pending in this case. [DE 1. ¶¶9-14] It alleges that neither the district court nor the appellate court resolved the legal issues involved here of whether the fourteen specifically enumerated activities (i) are exclusively and pervasively regulated by Federal law; (ii) constitute the exercise of its sovereign functions; and/or (iii) constitute the "use" of its Tribal Land. [DE 1. ¶¶9-14] If those allegations are accepted as true, as they must be, res judicata clearly does not apply. For this reason alone, the Defendant's motion to dismiss based on res judicata must be denied.[5]

III. ARGUMENT

Res Judicata Does Not Apply Because the Prior And Present Causes of Action Are Not The Same.

In *Citibank, N.A. v. Data Lease Fin. Corp.,* 904 F.2d 1498, 1501 (11th Cir. 1990), the Eleventh Circuit held that res judicata bars a subsequent action only if: (1) the prior decision was rendered by a court of competent jurisdiction; (2) there was a final judgment on the merits; (3) the parties were identical in both suits; and (4) the prior and present causes of action are the same. *See, also, Israel Discount Bank Ltd. v. Entin,* 951 F. 2d 311, 314 (11th Cir. 1992). The Defendant bears the burden of proving that each of these requirements has been satisfied. *Lozman v. City of Riviera Beach*, 713 F. 3d 1066, 1076 (11th Cir. 2013). "If even one of these elements is missing, res judicata it inapplicable." *Kaiser Aerospace and Electronics Corp. v. Teledyne Industries, Inc.,* 244 F.3d 1289, 1296 (11th Cir. 2001). In the instant case, Defendant cannot satisfy the fourth element, because the causes of action in the prior action and in the instant case are not the same.

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[5] The Defendant can assert res judicata as an affirmative defense in his answer and argue it in a motion for summary judgment if he deems it appropriate to do so.

The causes of action in the current case ask for a declaration to prospectively resolve the purely legal issues of whether any or all of the fourteen specifically enumerated activities (i) are exclusively and pervasively regulated by Federal law; (ii) constitute the exercise of the Tribe's sovereign functions; and/or (iii) constitute the Tribe's "use" of its Tribal Land.

The cause of action in the prior action, by contrast, was for a declaration to resolve the issue of whether the legal incidence of the Utilities Tax rests with the Tribe, as the consumer, such that its application to utilities services used by the Tribe on Tribal Land is categorically barred, regardless of the purpose or activity for which those services are used. After the Eleventh Circuit determined that the legal incidence of the Utilities Tax rests with the service provider, and therefore that the tax was not categorically barred, it addressed preemption. Based on its interpretation of the Tribe's complaint, the Eleventh Circuit determined that (i) the "use" of utilities services on Tribal Land, in and of itself, is not an activity that is exclusively and pervasively regulated by Federal law; and (ii) Federal law does not generally preempt Utilities Tax on all utility services that the Tribe uses on Tribal Land as a matter of law simply because some of those that services are used to conduct activities that are exclusively and pervasively regulated by Federal Law. The Eleventh Circuit explained:

> Significantly, the Tribe has not introduced evidence of a substantial federal interest in regulating Indians' utility use specifically. The Tribe essentially expresses a generalized desire to avoid the Utility Tax. Just as the state cannot assert a generalized interest in raising revenue to support its taxes, the Tribe cannot demonstrate congressional intent to preempt a specific state tax by bundling up an assortment of unrelated federal and tribal interests tied together by the common thread of electricity use. Because the Tribe does not develop further argument with respect to electricity use in specifically regulated on-reservation activities, we conclude that ***it has not established that Florida's Utility Tax is generally preempted as a matter of law in this case***. (Emphasis added) 799 F. 3d at 1353.

The Eleventh Circuit held that the Utilities Tax is not generally preempted, but it

expressly left unresolved the Tribe's claim that Federal law preempts the Utilities Tax to the extent it is applied to utilities services used to conduct specific activities on Tribal Land. The Court explained:

> The Tribe's brief contains a non-exhaustive list of activities it asserts are “exclusively and pervasively regulated by federal law,” including police and fire protection, land leasing, and gaming, along with references to associated federal statutes. But the Tribe has failed to demonstrate that the existence of these statutes represents an exclusive or pervasive federal regulation of those activities. ***Accordingly, we are not in a position to conduct particularized inquiry with respect to each specific activity listed. But we offer no opinion on whether, if properly framed, the Tribe may be able to demonstrate that the Utility Tax is preempted with respect to some or all of the specific activities it has listed.*** (Emphasis added) 799 F.3d 1324, n. 22.

In the current case, the Tribe does not quarrel with the Eleventh Circuit's holding that the Utilities Tax is not generally preempted as a matter of law as applied to all utilities services that the Tribe uses on Tribal Land simply because some of those services are used to conduct Federally regulated activities. Its complaint requests a separate declaration with respect to the scope of the Federal regulation of each of fourteen separate and specifically enumerated activities. The Eleventh Circuit specifically refrained from addressing the scope of the Federal regulation of any of these activities. Similarly, it did not address the issues of whether any of these activities constitute the exercise of the Tribe's sovereign functions and/or constitute the "use" of Tribal Land.

The Defendant's motion to dismiss relies entirely upon one phrase from the Eleventh Circuit's opinion; "we hold that the Utility Tax does not violate Federal law", *Id.* at 1352. However, when the Eleventh Circuit made that statement, it was clearly responding to the notion that Utilities Tax on all utilities services is generally preempted as a matter of law if any of those

services are used to conduct Federally regulated activities.[6] The Defendant asks this Court to ignore the context in which that statement was made and to interpret it as a holding that Utilities Tax is never preempted, regardless of the specific activity or purpose for which the utilities services are used. That interpretation would directly violate the Court's clearly expressed holdings in *Bracker* and its progeny, as well as the Eleventh Circuit's own holding that the State rental tax is preempted because the Federal regulation of leasing of Tribal Land is exclusive and pervasive.

After the Eleventh Circuit issued its opinion, the Tribe asked the district court to determine on remand whether the Federal regulation of various specific activities in which the Tribe uses utilities services is exclusive and pervasive. In asking the district court to reject the Tribe's request, the Defendant specifically agreed that the Eleventh Circuit, "le[ft] open the possibility of future challenges in future cases." (Civil Action No. 12-62140-Civ-Scola (S.D. Fla.), DE 107, p. 3) The district court agreed and characterized Footnote 22 of the Eleventh Circuit's opinion as "a minor limitation on the reach of the Eleventh Circuit's holding if . . . the Seminole Tribe brought suit in the future." (Civil Action No. 12-62140-Civ-Scola (S.D. Fla.), DE 110, p. 6).

The prior and current cases do not involve the same cause of action unless they involve the same facts. They do not involve the same facts unless they arise from the same nucleus of operative fact or factual predicate. "Res judicata does not apply unless the second case arises out

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[6] The Eleventh Circuit made it clear that it was responding to the notion that Federal law generally preempts the tax on all of the Tribe's utilities services if any of those services are used to conduct federally regulated activities when it distinguished that notion from the holding in *Bracker*. "The fuel tax was preempted in *Bracker* as applied to the timber company because of the extensive Federal regulation of Indian timber harvesting. *Bracker* did not invalidate (or even discuss) the application of Arizona's fuel tax to other on-reservation activities." *Id.* at 1352-1353.

of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action." *Citibank*, 904 F. 2d at 1503; *Davila v. Delta Air Lines, Inc.,* 326 F. 3d 1183, 1187 (11th Cir. 2003). The nucleus of operative fact or factual predicate is the same in each case only if they arise from the same discrete transaction, event or contract and involve the same facts and evidence. "The test for determining sameness of claims requires that the same transaction, evidence, and factual issues be involved". *Kaiser Aerospace and Electronics Corp. v. Teledyne Industries, Inc. (In re: Piper Aircraft Corp.),* 229 B.R. 860 (S.D. Fla. 1999), *aff'd.* 244 F. 3d 1289 (11th Cir. 2001), citing *Sure-Snap Corp. v. State Street Bank & Trust Co.,* 948 F. 2d 869, 874 (2d Cir. 1991). In deciding whether the cases involve the same cause of action, courts consider whether substantially the same evidence is presented, whether the same right is claimed, and whether the two suits arise out of the same "transactional nucleus of facts". *Id.* at 875, citing *United States v. Athlone Indus., Inc.*, 746 F. 2d 977, 983-84 (3d Cir. 1984). A court "must look to the factual issues to be resolved [in the second cause of action], and compare them with the issues explored in the first cause of action." *Citibank, N.A. v. Data Lease Financial Corp.*, 904 F. 2d 1498, 1503 (11th Cir. 1990), citing *S.E.L. Maduro v. M/V Antonio De Gastaneta*, 833 F. 2d 1477, 1482 (11th Cir. 1987), *See also, Ragsdale v. Rubbermaid, Inc.,* 193 F. 3d 1235, 1239 (11th Cir. 1999). "[T]he test for 'common nucleus of operative fact' as defined for purposes of res judicata is not simply one of whether the two claims are related to or may materially impact one another. The underlying core of facts must be the same in both proceedings. . . . The issue is . . . whether the same facts are involved in both cases. . . ". *In re Piper*, 244 F. 3d 1289, 1301 (quoting *In re Baudoin*, 981 F. 2d 736, 743 (5th Cir. 1993)). "The determining factor in deciding whether the cause of action is the same is whether the facts or evidence necessary to maintain the

suit are the same in both actions." *Palmer v. Miami-Dade County*, Case No. 10-23478-Civ-COOKE/TURNOFF (S.D. Fla. 2011) (internal citations omitted).

Where, as here, the requested relief is limited to a declaration to resolve purely legal issues, res judicata cannot apply because there is no nucleus of operative fact arising from the same discrete transaction, event or contract upon which both the prior and current cases can be based. Neither the prior case nor the current case involved a single issue of fact. No facts were determined in the prior case and none will be determined in the current case. The only fact they have in common is that the Tribe uses utilities services on Tribal Land. That fact is not sufficient to treat all separate and unrelated uses of utilities services as part of the same transaction and cause of action.

Once the Court determines which, if any, of the fourteen specifically enumerated activities are exclusively and pervasively regulated by Federal law, or constitute the exercise of the Tribe's sovereign functions or the "use" of its Tribal Land, the parties will know which of the Tribe's activities are subject to the Utilities Tax and which are not. However, the amount of Utilities Tax the State is legally permitted to impose, or the amount of refund to which the Tribe is entitled, with respect to any particular (future) period[7] will depend on facts that are unique to that particular period (i.e., how much electricity the Tribe used during that period and for what activities). If those facts are disputed by the parties, they will have to be litigated in a separate proceeding in State court based on evidence that uniquely relates to the specific period involved. A cause of action for the refund of Utilities Tax with respect to any particular (future) period

[7] For Utilities Tax purposes, each month is a separate "tax period". Each month the Utilities Tax is imposed on the utilities services that the Tribe used during the preceding month. Each month, the Tribe remits the Utilities Tax to the service provider on the utilities services it used during the preceding month. Each month the service provider remits to the State the Utilities Tax it collected from the Tribe the preceding month.

does not accrue until the Defendant imposes Utilities Tax on utilities services in violation of Federal law. As the United States Supreme Court explained in *Comm'r v. Sunnen,* 333 U.S. 591 (1948), for res judicata purposes, each tax period constitutes a separate cause of action.

> Each [tax period] is the origin of a new liability and of a separate cause of action. Thus if a claim . . . relating to a particular [tax period] is litigated, a judgment on the merits is res judicata as to any subsequent proceeding involving the same claim and the same [tax period]. But if the later proceeding is concerned with . . . a different [tax period], the prior judgment acts as a collateral estoppel only as to those matters in the second proceeding which were actually presented and determined in the first suit.

Id. at 598.[8]

The Defendant's claim that both the prior and current cases involve the same cause of action, depends on his claim that they both involve this same issue of fact:

> [W]hether Federal laws pervasively regulate the Tribe to the extent that imposition of the tax on the utilities companies is preempted.

[DE 12, p. 7] This is obviously an issue of law, not fact.

Claims for prospective declarations to resolve purely legal issues can never arise out of the same nucleus of operative fact, or be based upon the same factual predicate, because they never involve facts.[9] See, *In re Piper*, 244 F.3d at 1295 ("It is well settled that res judicata turns primarily on the commonality of *facts* of the prior and subsequent actions – emphasis in original). The relevant facts have not yet occurred. Claims for declarations to prospectively resolve purely legal issues are governed by collateral estoppel, or issue preclusion, not res

[8] *Sunnen* involved a Federal income tax case. The tax "period" involved in that case was the taxable year.

[9] In the Eleventh Circuit, even retrospective declarations are generally without preclusive effect. *See Empire Fire & Marine Ins. Co. v. J. Transp., Inc.,* 880 F. 2d 1291, 1296 (11th Cir. 1989).

judicata.[10] See generally, *I.A. Durbin, Inc. v. Jefferson National Bank*, 793 F.2d 1541, 1549 (11th Cir. 1986); *Citibank*, 904 F.2d at 1501. Collateral estoppel applies when the cases involve the identical legal issue, but different causes of action. It bars re-litigation of the same legal issue between the same parties. Collateral estoppel applies only when the court is asked to resolve a legal issue that is identical to one that was actually litigated and decided in the prior case. See, *Durbin*, 793 F.2d at 1549.

In this case, the Tribe asked the court to determine whether the Federal regulation of any or all of fourteen specifically enumerated activities in which the Tribe uses utilities services on Tribal Land is exclusive and pervasive. It cannot be disputed that this issue was not actually adjudicated in the prior action. As such, collateral estoppel cannot apply. Similarly, collateral estoppel does not apply to bar the Tribe's claims that the activities in which the Tribe uses utilities services constitute the exercise of Tribe's sovereign functions or the "use" of its Tribal Land, because neither court in the prior case adjudicated those legal issues.

Because it cannot be disputed that neither the district court nor the appellate court adjudicated the legal issues involved in this case, the Defendant has elected not to rely on collateral estoppel. Instead, the Defendant relies upon res judicata in an attempt to invoke a rule under which res judicata is applied "not only as to what was actually pleaded [in the prior case], but also as to what could have been pleaded." *In re Teltronics Services, Inc.,* 762 F. 2d 185, 193 (2d Cir. 1985). *See, also, Federated Dept. Stores v. Moitie*, 452 U.S. 394, 398 (1981); *InterState Pipe Maintenance, Inc. v. F.M.C. Corp.*, 775 F. 2d 1495, 1497 (11th Cir. 1985). This rule does

[10] Some courts have referred to collateral estoppel as a form of res judicata that applies when the two cases involve an identical issue but different claims or causes of action. They distinguish this type of res judicata from "true res judicata" that the Defendant relies on in this case. It applies to prevent re-litigation of only those issues that were actually adjudicated in the prior case. *Kaspar Wire Works, Inc. v. Leco Engineering and Machine, Inc*. 575 F.2d 530, 535 (5th Cir. 1978).

not apply to collateral estoppel. Collateral estoppel bars re-litigation of only the issues that were actually adjudicated in the prior case. *Durbin*, 793 F.2d at 1549. In any event, this rule does not apply to claims which were pleaded in the prior case but which the court declined to resolve.

Finally, even if the prior and current cases involved the same cause of action (they do not), res judicata does not apply where its application would result in "manifest injustice." *Garner v. Giarrusso*, 571 F. 2d 1330 (5th Cir. 1978). Its application in these circumstances, where no Court has ever determined whether the specific activities listed in the complaint are exclusively and pervasively regulated by Federal law and would therefore preempt State taxation, would clearly result in manifest injustice. Such a holding would result in the State collecting the Utilities Tax for all time into the future, and depriving the Tribe of the right to have its fundamental constitutional right determined on the merits.

CONCLUSION

Res judicata is not applicable in this case because the current and prior actions do not involve the same causes of action. This case involves declarations to prospectively resolve purely legal issues that were not decided in the prior case. Res judicata never applies to bar prospective declarations of purely legal issues since they can never arise from the same transaction or nucleus of operative fact. Res judicata can never apply to any tax period other than the particular tax period involved in the prior case because each tax period constitutes a separate cause of action.

In this case, the Defendant has attempted to obscure the holding of the Eleventh Circuit as a holding that Federal law never preempts the Utilities Tax regardless of the purpose for which it is used and to apply res judicata to deprive the Tribe of its right to litigate legal issues that have never been adjudicated. If his application of res judicata were sustained, the Tribe

would be forever deprived of its right to enforce the constitutional prohibition against State taxation of activities that are exclusively and pervasively regulated by Federal law, including those activities that the Tribe did not conduct at the time it commenced the prior case.[11] Applying res judicata in these circumstances would also infringe on the rights of the United States by obstructing the goals of the Federal policies underlying the regulation of these activities. It would constitute an egregious violation of the Tribe's right to due process. Accordingly, the Tribe respectfully submits that Defendant's Motion to Dismiss should be denied.

DATED this 27th day of January, 2017.

Respectfully Submitted,

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[11] In the Defendant's view, res judicata bars the Tribe from ever challenging the application of Utilities Tax to utility services used in any activity that was not pleaded in the prior case. He does not recognize an exception for activities that were first conducted after the prior case was commenced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 27th, 2017, a true and correct copy of the foregoing was electronically uploaded and filed with the Court through the CM/ECF system, which will send a notice of electronic filing to:

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