No. 17-56003

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AGUA CALIENTE BAND OF CAHUILLA INDIANS,
Plaintiff/Appellant,

v.

RIVERSIDE COUNTY, *et al.*,

Defendants/Appellees, and

DESERT WATER AGENCY,

Intervenor/Defendant/Appellee.

On Appeal From United States District Court
Central District, Case No. 5:14-cv-00007-DMG-DTB,
Honorable Dolly M. Gee (213) 894-5452

BRIEF OF APPELLEE DESERT WATER AGENCY

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CORPORATE DISCLOSURE STATEMENT

Appellee Desert Water Agency is a public agency of the State of California, and is not a "nongovernmental corporate party" within the meaning of Rule 26.1 of the Federal Rules of Appellate Procedure.

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STATEMENT OF ISSUES

This brief addresses the following issues, which are raised in the appellant's brief:

1. Whether Riverside County's ("County") possessory interest tax ("PIT"), as applied to non-Indian lessees on the reservation of the Agua Caliente Band of Cahuilla Indians ("Tribe"), is preempted by principles of federal law in effect prior to enactment of 25 U.S.C. § 465 in 1934, and by § 465 itself.

2. Whether the balance of federal, state and tribal interests, as relevant under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), and other cases, weighs against preemption of the County's PIT as applied to non-Indian lessees on the Tribe's reservation.

3. Whether the County's PIT, as applied to non-Indian lessees on the Tribe's reservation, infringes on the Tribe's sovereign right to make its own laws and be governed by them.

STATEMENT OF THE CASE

1. The Tribe's Reservation

The Agua Caliente Band of Cahuilla Indians ("Tribe") occupies a reservation in Riverside County, California, in and near the City of Palm Springs. The reservation was created by an executive order issued by President Ulysses S. Grant on May 15, 1876, and expanded by an executive order issued by President

Rutherford B. Hayes on September 29, 1877. ER 712-713. The Tribe's reservation is part of a checkerboard, in which tribal lands are interspersed with non-tribal lands. *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., et al.,* 849 F.3d 1262, 1265 (2017).[1] Most of the Tribe's reservation lands (58%) have been allotted to the Tribe's members. ER 852-856. Many of the allottees have sold or leased their lands to non-Indians, who operate hotels, restaurants, golf courses, and other business establishments, or maintain residences, on the allotted lands. *Id.*

2. Riverside County's Possessory Interest Tax

Under California law, counties may apply ad valorem taxes on possessory interests in real property owned by a tax-exempt entity. Cal. Const., art. 13, § 1; Cal. Rev. & Tax Code §§ 104, 107; *United States v. San Diego County*, 965 F.2d 691, 694 (9th Cir. 1992); *United States v. Fresno County*, 50 Cal.App.3d 633, 638 (1975).[2] Generally, a possessory interest includes the right of a

[1] Prior to creation of the Tribe's reservation by the 1870s executive orders, Congress granted a fee interest to a railroad company in certain odd-numbered sections of the relevant townships as an incentive for the railroad company to build a railroad. 14 Stat. 292, 294, 299 (1866). The executive orders subsequently created the Tribe's reservation mostly on the even-numbered sections. Excerpts of Record ("ER") 712-713 (1876 order creating reservation on sections 14 and 22, and 1877 order expanding reservation to include "even-numbered sections").

[2] A possessory interest is defined 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

private individual to use government-owned tax exempt land or improvements, and this right is considered a private interest taxable by the state and its taxing agencies. *San Diego*, 965 F.2d at 694; *Fresno*, 50 Cal.App.3d at 638. Thus, even though the real property may be owned by the federal government and hence exempt from state taxation, the possessory interest of a private lessee of the land may be subject to 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. Riverside County*, 442 F.2d 1184, 1186 (9th Cir. 1971) (citing and quoting *Riverside County v. Palm-Ramon Development Co*., 63 Cal.2d 534, 537 (1965)).

Riverside County ("County") imposes a possessory interest tax ("PIT") consisting of a flat 1% tax on possessory interests within its jurisdiction, including the possessory interests of non-Indian lessees on the Tribe's reservation. Joint Supp. Excerpts of Record ("Supp. ER") 266 (¶ 70). The 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 the property," and that a county may collect the tax and apportion it to the taxing districts within the county "according to law." Cal. Const., art.

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property," or "(b) [t]axable improvements on tax-exempt land." Cal. Rev. & Tax Code § 107.

13A, § 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 on behalf of itself and local agencies that are authorized to apply their taxes according to law.[3]

3. Desert Water Agency's Share of Revenues From County's 1% Possessory Interest Tax

Appellee Desert Water Agency ("DWA"), which intervened in support of the County, is a public agency of the State of California, and was created in 1961 by the California Legislature's enactment of the Desert Water Agency Law. Cal. Wat. Code, App. §§ 100-1 *et seq*. (West 2016); Supp. ER 266 (¶ 72). DWA provides water supplies and water delivery service to business and residential

[3] In addition to the County's 1% PIT, the County imposes and collects additional taxes on behalf of certain taxing districts within the County that are not subject to the 1% limit imposed by Proposition 13. Supp. ER 266 (¶ 70). These additional taxes are not subject to the 1% limit because Proposition 13 provides an exception for certain "ad valorem taxes or special assessments," including "[[i]ndebtedness approved by the voters prior to July 1, 1978," the effective date of Proposition 13. Cal. Const., art. 13A, § 1(b)(1); *Goodman v. Riverside County*, 140 Cal.App.3d 900, 910 (1983). Both the 1% tax and the additional taxes are applied to non-Indian lessees on the Tribe's reservation. Supp. ER 266 (¶ 71). These additional taxes, to the extent applied to the non-Indian lessees, are part of the County's PIT, because the real property is owned by the federal government and hence is exempt from state taxation, and the taxes can only be applied to the possessory interests of the non-Indian lessees. These additional taxes are not at issue in this case, because the Tribe argues only that the County's 1% tax is preempted, and not that the additional taxes that exceed the 1% limit are also preempted.

customers within its area of jurisdiction, which includes the City of Palm Springs and surrounding areas. Supp. ER 267 (¶ 73). DWA's customers include the non-Indian lessees on the Tribe's reservation. *Id*. (¶ 74). DWA obtains water from the State Water Project ("SWP"), pursuant to its contract with the Department of Water Resources ("DWR"), which operates the SWP. *Id*. (¶ 75). To compensate for its costs in obtaining SWP water, DWA imposes an ad valorem tax on all property within its jurisdiction that is not exempt from taxation. *Id*. (¶ 76).

DWA receives a share of revenues from the County's 1% PIT as applied to the possessory interests of non-Indian lessees on the Tribe's reservation. Supp. ER 267 (¶ 77). DWA receives a share of the 1% PIT because DWA is authorized by law to apply its ad valorem tax in order to pay its obligations to the SWP. Cal. Water Code, App. § 100-15(12) (authorizing DWA "[t]o cause taxes to be levied . . . for the purpose of paying any obligation of the agency . . . ."); Supp. ER 267 (¶ 78).[4]

4. The Proceedings Below

In the proceedings below, the County and DWA filed a joint motion for judgment on the pleadings, arguing that the Tribe's

[4] DWA also receives a share of the additional taxes that exceed the 1% limit that the County is authorized to impose on behalf of certain taxing entities. *See* note 3, *supra*; Supp. ER 267 (¶ 79). DWA's share of these additional taxes is exempt from the 1% limit because California voters approved the SWP prior to passage of Proposition 13 in 1978. *Goodman*, 140 Cal.App.3d at 910; Supp. ER 268 (¶ 80).

action is barred by the doctrines of res judicata, collateral estoppel and stare decisis. ER 869-870 (Doc. 42). They argued that the Tribe's action was barred because the Ninth Circuit had previously held, in *Agua Caliente Band of Mission Indians v. Riverside County*, 442 F.2d 1184 (9th Cir. 1971), and *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253 (9th Cir. 1976), that county possessory interest taxes are not preempted as applied to non-Indian lessees on an Indian reservation, and, in *Agua Caliente*, had specifically held that Riverside County's PIT was not preempted as applied to non-Indian lessees on the Tribe's reservation. The district court denied the County's and DWA's motion, ER 1-23, reasoning that *Agua Caliente* and *Fort Mojave* had been "abrogated" by the Supreme Court's decision in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 139 (1980), which held that whether state laws apply to non-Indians on Indian reservations depends on the balance of federal, state and tribal interests. ER 6-11.

The parties then filed cross-motions for summary judgment. ER 24-25. The Tribe argued that the County's PIT is preempted (1) by a federal statute, 25 U.S.C. § 465, (2) under the *Bracker* balancing test, which requires a balancing of federal, state and tribal interests, and (3) because it infringes on the Tribe's sovereignty. ER 882 (Doc. 144). The County and DWA argued that the County's PIT is not preempted by § 465 or under the *Bracker* balancing test, and does not infringe on the Tribe's sovereignty. ER 883 (Doc. 150) (County); ER 883 (Doc. 149) (DWA). In addition,

the County argued that § 465 does not apply to the Tribe's reservation, because the provision applies only to lands taken into trust pursuant to § 465, which was enacted as part of the Indian Reorganization Act of 1934, or pursuant to a later 1955 enactment; the Tribe's reservation, on the other hand, had been taken into trust by the earlier presidential executive orders of 1876 and 1877. ER 883 (Doc. 150).

The district court granted the County's motion, holding that (1) § 465 applies only to lands taken into trust pursuant to § 465 or the later 1955 enactment, and therefore does not apply to the Tribe's reservation; (2) the balance of federal, state and tribal interests under *Bracker* weighs against preemption of the County's PIT; and (3) the County's PIT does not infringe on the Tribe's sovereignty. ER 57. The district court granted DWA's motion on the second and third issues, *i.e.*, the *Bracker* balancing issue and the tribal sovereignty issue, but denied DWA's motion on the issue of whether § 465 preempts the County's PIT, on grounds the issue is moot in light of the court's decision that § 465 does not apply to the Tribe's reservation. *Id*. The district court denied the Tribe's motion in its entirety. *Id.* The district court issued judgment in favor of the County and DWA, and against the Tribe. ER 59.

SUMMARY OF ARGUMENT

I

In determining whether state taxes are preempted as applied to non-Indians on Indian reservations, the Supreme Court has

adopted a balancing test that requires a "particularized inquiry" into the nature of federal, state and tribal interests. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980); *see Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989). Applying the balancing test, the Supreme Court has held that state taxes apply to the non-Indians if the legal incidence of the taxes falls on the non-Indians and the state provides services to them. *E.g., Cotton Petroleum*, 490 U.S. at 173-187; *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 481-483 (1976). "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.

The Ninth Circuit has held that county possessory interest taxes are not preempted as applied to non-Indian lessees on Indian reservations, because the legal incidence of the taxes falls on the non-Indians rather than the Indians. *Agua Caliente Band of Mission Indians v. Riverside County*, 442 F.2d 1184, 1186 (9th Cir. 1971); *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253, 1255-1256 (9th Cir. 1976); *Confederated Tribes of Chehalis Reservation v. Thurston County*, 724 F.3d 1153, 1158 n. 7 (9th Cir. 2013). Under the principle of stare decisis, the Ninth Circuit panel decisions in these cases are binding on the Ninth Circuit panel here. *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001). Therefore, Riverside County's possessory interest tax ("PIT") is not

preempted as applied to non-Indian lessees on the Agua Caliente Band of Cahuilla Indians' ("Tribe") reservation.

Contrary to the Tribe's argument, the County's PIT is not preempted by 25 U.S.C. § 465, because § 465 preempts state taxes as applied to the "lands or rights" of Indians, and the County's PIT applies to the possessory interests of non-Indian lessees and not to the "lands or rights" of the Tribe or its members. Although the Tribe argues that its § 465 preemption argument is supported by the Supreme Court's decision in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 158 (1973), the state tax that was invalidated in *Mescalero* applied to the "lands or rights" of the Indians, unlike the County's PIT, which applies to the possessory interests of non-Indian lessees.

II

The balance of federal, state and tribal interests, as applicable under *Bracker* and other cases, further supports the conclusion that the County's PIT is not preempted as applied to non-Indian lessees on the Tribe's reservation.

The state interest strongly weighs against preemption of the County's tax, because the taxing entities within the County that receive revenues from the tax—the County itself, and local municipalities and agencies within the County—provide essential services to the non-Indian lessees. These services consist of police and fire protection, road maintenance, water service, sewer service, trash collection, and pest abatement, among others. Desert Water

Agency ("DWA") provides essential water supplies and service to the non-Indian lessees, without which their leasehold interests would have little or no value. DWA obtains water from the State Water Project ("SWP"), and is required to pay a share of SWP costs in order to obtain the water; the revenues that DWA receives from the County's tax are used exclusively to compensate DWA for its costs in obtaining SWP water. If the non-Indian lessees were not required to pay the County's tax, including DWA's share of the tax, they would get a free ride at the expense of other taxpayers, because they would receive the same services as the other taxpayers but without having to pay the tax that compensates the agencies that provide the services. The balance of federal, state and tribal interests does not support the right of the non-Indian lessees to get a free ride at the expense of other taxpayers.

The tribal interest does not support preemption of the County's tax, because the legal incidence of the tax falls on the non-Indian lessees and not on the Tribe or its members. The Tribe and its members are not required to pay the tax if the non-Indian lessees fail to pay it. Although the Tribe argues that the economic burden of the County's tax falls on the Tribe because the Tribe has held its own possessory interest tax in abeyance to avoid "double taxation," the Supreme Court and Ninth Circuit have held that an indirect economic burden on an Indian tribe caused by the possible diminishment of tribal revenues is an insufficient basis for concluding that a state tax is preempted. Further, the Tribe does not

play an active role in managing the leased lands, which further weighs against the tribal interest.

The federal interest does not support preemption of the County's tax. Although the federal government has adopted regulations that regulate leasing of Indian lands, the Supreme Court and Ninth Circuit have held that federal regulation of Indian lands, including leasing of the lands, does not support the conclusion that state taxes are preempted as applied to non-Indians on the lands. Further, the federal regulations regulating leasing of Indian lands expressly provide that state taxes applicable to the non-Indian lessees' possessory interests are *not* preempted if they are not preempted by "applicable Federal law." 25 C.F.R. § 162.017(c). Since the County's tax as applied to the non-Indian lessees is not preempted by "applicable Federal law"—because the Ninth Circuit in *Agua Caliente*, *Fort Mojave* and *Chehalis* held that county possessory interest taxes are not preempted, and because the County's tax is not preempted under the *Bracker* balancing test—the federal regulations do not preempt the County's tax.

III

The County's PIT does not infringe on the Tribe's sovereignty, because it does not impair the Indians' right to "make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). In *Fort Mojave*, the Ninth Circuit expressly held that a county possessory interest tax as applied to non-Indian lessees does not infringe on tribal sovereignty. *Fort Mojave*, 543 F.2d at 1258.

ARGUMENT

I. RIVERSIDE COUNTY'S POSSESSORY INTEREST TAX IS NOT PREEMPTED BY PRINCIPLES OF FEDERAL LAW IN EFFECT PRIOR TO ENACTMENT OF 25 U.S.C. § 465, OR BY § 465 ITSELF.

The Tribe argued below that the County's PIT, as applied to non-Indian lessees on the Tribe's reservation, is preempted by 25 U.S.C. § 465, which was enacted as § 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq*. Supp. ER 274-277.[5] Section 465 authorizes the Secretary of the Interior to acquire "any interest in lands," including trust lands, and provides that "such lands or rights shall be exempt from State and local taxation." 25 U.S.C. § 465.

The district court did not decide whether § 465 preempts the County's PIT. Instead, the district court held that § 465 applies only to Indian lands taken into trust pursuant to § 465, which was enacted in 1934, or pursuant to a later 1955 enactment; therefore, the court concluded, § 465 does not apply to the Tribe's reservation lands, because the lands were taken into trust by the earlier 1870s executive orders that created the reservation. ER 38.

The Tribe argues on this appeal that longstanding principles of federal law in effect prior to § 465's enactment in 1934, as

[5] Section 465 has been recodified as 25 U.S.C. § 5108. Like the Tribe, DWA will refer to the provision as § 465. Tribe Br. 2 n. 1.

exemplified by the Supreme Court's decisions in *United States v. Rickert*, 188 U.S. 432 (1903), and *The Kansas Indians*, 72 U.S. 737 (1866), hold that state taxes are preempted as applied to Indian reservations. Tribe Br. 17-28. The Tribe also argues that these longstanding principles were "codified" by § 465. *Id*. at 24, 28. Thus, the Tribe argues that the County's tax is preempted both by longstanding pre-§ 465 principles and by § 465 itself.

In this brief, DWA will not address the issue of whether § 465 applies only to lands taken into trust pursuant to § 465 or later, as the district court held, because DWA did not address the issue below.[6] Instead, DWA will address the issues, raised in the Tribe's brief, of whether the County's tax is preempted by longstanding pre-§ 465 principles and by § 465 itself. As DWA will argue, the County's tax is preempted neither by pre-§ 465 principles nor by § 465 itself.

A. Under the Supreme Court's Modern Jurisprudence, Federal Law Does Not Preempt Nondiscriminatory State Taxes as Applied to Non-Indians on Indian Reservations.

Although the Supreme Court earlier held that Indian reservations are separate enclaves and that state laws have "no force" within the reservations, *Worcester v. Georgia*, 31 U.S. 515, 561 (1832), the Court in the modern age has "departed" from its earlier view. *White Mountain Apache Tribe v. Bracker*, 448 U.S.

[6] DWA believes, however, that the district court's analysis of the issue was well reasoned.

136, 141 (1980). Under the Court's modern view, state laws may be applied on Indian reservations unless Congress has preempted their application, or unless the state laws infringe on the right of reservation Indians to make their own laws and be ruled by them. *Bracker*, 448 U.S. at 142; *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 173-175 (1989); *Rice v. Rehner*, 463 U.S. 713, 718 (1983); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171-172 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 146 (1973); *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962). "[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; *Kake*, 369 U.S. at 75. "[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 apply on Indian reservations, the Supreme Court has adopted a balancing test that requires a "particularized inquiry" into the nature of federal, state and tribal interests. *Bracker*, 448 U.S. at 145; *see Cotton Petroleum*, 490 U.S. at 176; *Wagnon v. Prairie Band of Potawatomi Nation*, 546 U.S. 95, 110-111 (2005); *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S.

832, 838 (1982). This brief generally will refer to this balancing test as the "*Bracker* balancing test."

In the "special area of state taxation," the *Bracker* balancing test does not apply, and a state may not apply its tax on an Indian tribe or its members unless Congress consents. *Mescalero,* 411 U.S. at 148; *see Wagnon,* 546 U.S. at 101; *McClanahan*, 411 U.S. at 168.

The *Bracker* balancing test applies, however, in determining whether state taxes apply to non-Indians on the reservations. Applying the balancing test, the Supreme Court has upheld state taxes as applied to non-Indians on Indian reservations in several cases, because the legal incidence of the taxes fell on non-Indians rather than Indians. *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); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 476-483 (1976) (state cigarette sales tax invalid as applied to sales by Indians to Indians but valid as applied to sales to non-Indians); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 150-162 (1980) (state cigarette sales tax valid as applied to sales to non-Indians on Indian reservation); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 512-513 (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 has also held, however, that a state tax may be preempted if its economic burden falls on the Indians, or if the state does not provide services

to the non-Indians that warrant the imposition of the tax. *Bracker*, 448 U.S. at 148-149; *Ramah*, 458 U.S. at 843.

In *Cotton Petroleum*, 490 U.S. at 175, the Supreme Court summarized its modern jurisprudence, 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.

Consistently with *Cotton Petroleum*'s "current doctrine," the Ninth Circuit has upheld state taxes as applied to non-Indians on Indian reservations in several cases. *Salt River Pima-Maricopa Indian Community v. Arizona,* 50 F.3d 734, 737 (9th Cir. 1995) (state sales tax valid as applied to non-Indian seller of goods to non-Indians on an Indian reservation, because "legal incidence" of tax fell 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 valid as applied to non-Indian lessees on an 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 valid as applied to ticket sales for entertainment on an Indian reservation); *Chemehuevi Indian Tribe v. California State Board of Equalization*, 800 F.2d 1446, 1448-1451 (9th Cir. 1986) (state tax on cigarette sales valid as applied to non-Indians on an Indian reservation).

Similarly, the Second Circuit has upheld a city's personal property tax as applied 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*, 722 F.3d 457, 472-477 (2d Cir. 2013).

In sum, under the Supreme Court's modern jurisprudence, a nondiscriminatory state tax may be applied to non-Indians on an Indian reservation, at least unless the economic burden of the tax falls on the Indians or the state does not provide services to the non-Indians. Subject to these limitations, non-Indians on an Indian reservation are fully subject to the state's taxing authority. The Tribe's argument that state taxes are categorically preempted by longstanding principles of federal law, including principles in effect prior to § 465's enactment, is inconsistent with the Supreme Court's modern jurisprudence.

B. The Ninth Circuit Has Held That County Possessory Interest Taxes Are Not Preempted as Applied to Non-Indian Lessees on Indian Reservations.

The Ninth Circuit has specifically held that county possessory interest taxes are valid and not preempted as applied to non-Indian lessees on Indian reservations. *Agua Caliente Band of Mission Indians v. Riverside County*, 442 F.2d 1184 (9th Cir. 1971); *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253 (9th Cir. 1976); *Confederated Tribes of Chehalis Reservation v. Thurston County*, 724 F.3d 1153, 1158 n. 7 (9th Cir. 2013).

In *Agua Caliente*, the Ninth Circuit held that Riverside County's PIT was valid as applied to non-Indian lessees on the Agua Caliente Tribe's reservation, because the PIT applies to the possessory interests of the non-Indian lessees and not to the reservation lands. The Court stated that the County's PIT "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 (citing and quoting *Riverside County v. Palm-Ramon Development Co.,* 63 Cal.2d 534, 537 (1965)). The Court also cited the Supreme Court's decision in *United States v. City of Detroit*, 355 U.S. 466 (1958), as holding that "a tax similar to the California Possessory Interest tax could be levied upon a lessee holding land under a lease from the federal government even though the burden of the tax fell directly on the United States." *Agua Caliente*, 442 F.2d at 1186.

In *Fort Mojave*, the Ninth Circuit reaffirmed its decision in *Agua Caliente* and held that San Bernardino County's possessory interest tax was valid as applied to non-Indian lessees on the Indian reservation in that case. *Fort Mojave*, 543 F.2d at 1255-1256. The Court described the analytical framework for determining whether state and local taxes may be applied on Indian reservations, stating:

> The Supreme Court recently has outlined the general framework by which Indian jurisdiction and taxation cases are to be analyzed. In *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 . . . (1973), the Court states that "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and towards reliance on federal preemption." Although the Indian sovereignty

> doctrine is still relevant, "because it provides a backdrop against which the applicable treaties and statutes must be read," it is no longer the proper focus of analysis. *McClanahan*, *supra* at 172. . . . Instead we must carefully analyze the applicable federal statutes to determine whether the state action has been preempted. If not, the state statute need only satisfy the test laid down in *Williams v. Lee*, 358 U.S. 217 . . . (1958), *viz.* that it not infringe on the rights of reservation Indians to make their own laws and be ruled by them.

Fort Mojave, 543 F.2d at 1255-1256. Applying this analytical framework, the *Fort Mojave* Court upheld the county possessory interest tax in that case, stating:

> While the imposition of a possessory interest tax on the leasehold interest will have an economic effect on the Indian lessors, and perhaps, although not certainly, will reduce the amount of rent they will be able to collect, the legal incidence of the tax clearly falls on the lessee. The lessor will never be personally liable for any delinquent taxes arising under this taxing statute. [Citations.] Under these circumstances, there cannot be a direct encumbrance on the lessor's reversionary interest.

Id. at 1256. The Court also held that the county's tax was not preempted by the Indian Reorganization Act of 1934, which as noted above included § 465. The Court stated that its decision was "buttressed" by the Supreme Court's decision in *Mescalero*, "because the [Supreme] [C]ourt [in *Mescalero*] would not imply tax exemptions absent clear statutory guidelines." *Id.* The Court then considered whether the tax violated the tribe's sovereign right "to

make [its] own laws and be ruled by them," and concluded that the tax did not violate the tribe's sovereign right. *Id*. at 1257-1258.

In *Chehalis*, the Ninth Circuit recently reaffirmed its decisions in *Agua Caliente* and *Fort Mojave*, and stated that a county possessory interest tax is not preempted as applied to non-Indian lessees because the tax "does not purport to tax the land as such . . . but rather taxes the 'full cash value' of the lessee's interest in it." *Chehalis*, 724 F.3d at 1158 n. 7 (citing and quoting *Agua Caliente*, 442 F.2d at 1186).

Similarly, the California Court of Appeal has upheld Riverside County's PIT as applied to non-Indian lessees on the Agua Caliente reservation. *Palm Springs Spa, Inc. v. County of Riverside,* 18 Cal.App.3d 372, 375-380 (1971). The Court stated that the County's PIT is not preempted because it does not apply to "the underlying fee interest held in trust by the United States" and thus "cannot form an encumbrance on the underlying fee interest of the United States." *Id.* at 375-376.

These decisions—*Agua Caliente*, *Fort Mojave, Chehalis* and *Palm Springs Spa*—are consistent with and supported by the U.S. Supreme Court's decision in *United States v. Fresno County*, 429 U.S. 452 (1977), which held that California could tax the possessory interests of federal employees in housing that the federal government owned and provided to the employees as part of their compensation. The Supreme Court stated:

> The "legal incidence" of the tax involved in this case falls neither on the Federal Government nor on federal property. The tax is imposed solely on private citizens who work for the Federal Government. The tax threatens to interfere with federal laws relating to the functions of the Forest Service only insofar as it may impose an economic burden on the Forest Service causing it to reimburse its employees for the taxes legally owed by them . . . . The tax can be invalidated, then, only if it discriminates against the Forest Service or other federal employees, which it does not do.

Fresno, 429 U.S. at 464.

In sum, ample authority supports the conclusion that county possessory interest taxes are not preempted as applied to non-Indian lessees on Indian reservations—the Ninth Circuit's decisions in *Agua Caliente*, *Fort Mojave* and *Chehalis*; the California Court of Appeal's decision in *Palm Springs Spa*; and the U.S. Supreme Court's decision in *Fresno*. These decisions make clear that the County's PIT is not preempted as applied to the non-Indian lessees on the Tribe's reservation here.

C. Under the Principle of Stare Decisis, the Ninth Circuit Panel Decisions Holding That County Possessory Interest Taxes Are Not Preempted Are Binding on the Ninth Circuit Panel Here.

Under the principle of stare decisis, a Ninth Circuit panel decision can be overturned only by the Supreme Court or the Ninth Circuit *en banc*, and cannot be overturned by another Ninth Circuit panel. *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) ("Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself

sitting en banc, or by the Supreme Court"); P. Kannan, "The Precedential Force of Panel Law," 76 Marquette L. Rev. 755, 755-776 (1993). Thus, the Ninth Circuit panel decisions in *Agua Caliente*, *Fort Mojave* and *Chehalis*, which hold that county possessory taxes are not preempted as applied to non-Indian lessees on Indian reservations, are binding on the Ninth Circuit panel here.

The district court below, in denying the County's and DWA's motion for judgment on the pleadings in an earlier phase of the case, held that it was "not bound" by the Ninth Circuit decisions in *Fort Mojave* and *Agua Caliente*, because those decisions had been "abrogated" and "repudiated" by the Supreme Court's decision in *Bracker*, and thus the "legal landscape has changed" since the Ninth Circuit decisions were issued. ER 7-11.

In fact, *Bracker* did not repudiate *Fort Mojave* and *Agua Caliente*, and the "legal landscape" has not changed. Rather, *Bracker* summarized and applied the balancing test that the Supreme Court had applied in prior decisions concerning the applicability of state taxes to non-Indians on Indian reservations. *Bracker* stated that, in cases where "a State asserts authority over the conduct of non-Indians engaging in activity on the reservation," "*we have examined* the language of the relevant treaties and statutes," and this "inquiry . . . has called for a particularized inquiry into the nature of the state, federal and tribal interests at stake." *Bracker*, 448 U.S. at 144 (emphasis added). Thus, *Bracke*r did not establish a new balancing test, but instead summarized and applied the balancing test that the Court had applied in past cases.

Bracker cited several prior Supreme Court decisions as the basis for the balancing test, some of which were issued prior to the Ninth Circuit's decision in *Fort Mojave*, such as the Supreme Court's decisions in *Mescalero*, *McClanahan* and *Moe*. *See Bracker*, 448 U.S. at 142-144. Indeed, some of the Supreme Court decisions were issued even prior to the Ninth Circuit's decision in *Agua Caliente*, such as *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685 (1965), *Williams v. Lee*, 358 U.S. 217 (1959), and *Thomas v. Gay*, 169 U.S. 264 (1898). *See Bracker*, 448 U.S. at 142-144. In fact, *Fort Mojave* cited many of the same decisions cited by *Bracker* as the basis for its conclusion that county possessory interest taxes are not preempted, such as the Supreme Court decisions in *Mescalero*, *McClanahan*, *Moe* and *Williams*. *Compare Fort Mojave*, 543 F.2d at 1255-1258, *with Bracker*, 448 U.S. at 141-145. Thus, the legal principles described in *Bracker* were in place prior to *Fort Mojave* and *Agua Caliente*, and *Fort Mojave* relied on many of the same decisions cited in *Bracker*. This further demonstrates that *Bracker* did not "abrogate" *Fort Mojave* and *Agua Caliente*, and that the latter decisions are still good law.

The Ninth Circuit has held that the mode of analysis applied in *Agua Caliente* and *Fort Mojave* is consistent with *Bracker*, which further demonstrates that *Agua Caliente* and *Fort Mojave* are still good law. *Chehalis*, 724 F.3d at 1158 (citing *Fort Mojave* and *Agua Caliente* 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"); *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274, 1282 (9th Cir. 1981) (post-*Bracker* decision reaffirming *Fort Mojave* as holding that "nondiscriminatory state taxes on the activities of non-Indians on reservations are valid").

Certainly *Bracker* did not repudiate *Agua Caliente*'s and *Chehalis*' conclusion that a possessory interest tax applies to the "full cash value" of the lessee's interest, because no issue was raised in *Bracker* concerning possessory interest taxes. Since a possessory interest tax applies to the "full cash value" of the lessee's interest, as the Ninth Circuit has held, the County's PIT does not apply to the Tribe or its members and thus is not preempted under the Supreme Court's modern jurisprudence, as established in *Bracker*, *Cotton Petroleum* and other decisions.[7]

[7] The Tribe's action against the County is barred not only by the principle of stare decisis but also by the doctrines of res judicata and collateral estoppel. In *Agua Caliente*, the Agua Caliente Tribe brought an action against Riverside County asserting the same claim that the Tribe asserts here—that the County's PIT is preempted as applied to non-Indian lessees on the Tribe's reservation—and the Tribe's action resulted in a final judgment rejecting the Tribe's claim that was affirmed by this Court. Under the res judicata and collateral estoppel doctrines, a plaintiff is barred from asserting the same claim that the plaintiff asserted in a prior action against the defendant, if the prior action resulted in a final judgment rejecting the plaintiff's claim on the merits. *Stratosphere Litigation LLC v. Grand Casinos, Inc.,* 298 F.3d 1137, 1142 n. 3 (9th Cir. 2002) (res judicata applies if (1) identity of

D. Riverside County's Possessory Interest Tax Is Not Preempted by § 465.

1. Section 465

The Tribe argued in its opening brief that 25 U.S.C. § 465 "codifies" the longstanding principle of federal law that state taxes are preempted as applied on Indian reservations, and thus that § 465 preempts the County's PIT. Tribe Br. 17-28. 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." 25 U.S.C. § 465.

Contrary to the Tribe's argument, § 465 does not preempt the County's tax. Section 465 preempts state taxes as applied to the "lands or rights" of Indian tribes or their members, and the County's tax does not apply to the "lands or rights" of the Tribe or its members but instead applies to the possessory interests of non-Indian lessees. As the Ninth Circuit held in *Agua Caliente* and *Chehalis*, a possessory interest tax "does not purport to tax the land

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claims, (2) final judgment on merits, and (3) privity between parties); *Turtle Island Restoration Network v. U.S. Dep't of State*, 673 F.3d 914, 917 (9th Cir. 2012) (same). Although the County and DWA raised the res judicata and collateral estoppel arguments in their motions for judgment on the pleadings in the proceeding below, the district court denied the motion on grounds that *Agua Caliente*, as well as *Fort Mojave*, had been "repudiated" by the Supreme Court's decision in *Bracker*. ER 6-11. As argued in the text above, *Bracker* did not repudiate *Agua Caliente* and *Fort Mojave*.

as such, but rather taxes the 'full cash value' of the lessee's interest in it." *Agua Caliente*, 442 F.2d at 1186; *Chehalis*, 724 F.3d at 1158 n. 7 (quoting *Agua Caliente*, 442 F.2d at 1186). *Agua Caliente* cited the California Supreme Court's decision in *Riverside County v. Palm-Ramon Development Co*., 63 Cal.2d 534, 537 (1965), which held that Riverside County's PIT taxes the "full cash value" of the non-Indian lessee's possessory interest. Since the Ninth Circuit and the California Supreme Court have held that a county possessory interest tax applies to the possessory interests of non-Indians, the County's tax does not apply to the "lands or rights" of the Tribe or its members, and is not preempted by § 465.

The Tribe argues that its § 465 preemption argument is supported by the California Court of Appeal's decision in *California State Teachers' Retirement Sys. v. County of Los Angeles*, 216 Cal.App.4th 41 (2013) ("*CSTRS*"), which the Tribe states held that "possessory interests are a right in tax-exempt land." Tribe Br. 21. *CSTRS* held that—when a possessory interest is created—the fee simple interest is divided between a "possessory interest" and a "nonpossessory interest." *CSTRS*, 216 Cal.App.4th at 55. Even though the possessory and nonpossessory interests are divided, the County's PIT does not apply to any property interests of the Tribe or its members, possessory or otherwise, and instead applies to the possessory interests of non-Indian lessees. Since the County's tax does not apply to the Tribe's property interests, the tax is not preempted by § 465 or otherwise.

The Tribe argues that its § 465 preemption argument is supported by the Ninth Circuit's decisions in *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975), and *Chehalis*, because these decisions held that the immunity of Indian trust lands from state taxation is "based on the notion that trust lands are a Federal instrumentality" and that such lands cannot be "burdened or interfered with by the state." *Santa Rosa Band,* 532 F.2d at 666; *Chehalis*, 724 F.3d at 1155; Tribe Br. 25-26. The County's PIT does not apply to, burden or interfere with the Tribe's trust lands, and instead applies to the possessory interests of non-Indian lessees. Indeed, *Chehalis* expressly held that a county PIT taxes the "full cash value" of the lessee's interest in the lands, and thus is not preempted by § 465. *Chehalis*, 724 F.3d at 1158 n. 7.[8]

[8] The Tribe also argues that its § 465 preemption argument is supported by two statutes, Public Law 81-322, 63 Stat. 705 (1949), and 25 U.S.C. § 2202. Tribe Br. 27-28. Public Law 81-322 provides that the State of California's "civil and criminal" laws apply to "all lands" of the Tribe's reservation, but also provides that such authorization does not include state "taxation" of the lands. The fact that the statute does not authorize state taxation of the Tribe's lands does not mean or imply that state taxes are preempted as applied to the possessory interests of non-Indian lessees. Section 2202 provides that § 465 applies "to all tribes" and that § 2202 does not "supersede" any provision of federal law that authorizes acquisition of lands for Indians. The fact that § 465 applies to "all tribes" and that § 2202 does not supersede other laws relating to acquisition of tribal lands has no relevance to whether a county possessory interest tax is preempted as applied to non-Indian lessees on Indian reservations.

2. *Mescalero*

The Tribe argues that its § 465 preemption argument is supported by the Supreme Court's decision in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), which the Tribe states is the "seminal Supreme Court case applying § 465." Tribe Br. 18-23.

In *Mescalero*, the Supreme Court held, first, that § 465 did *not* preempt New Mexico's gross receipts tax as applied to an off-reservation ski resort owned by an Indian tribe. *Mescalero,* 411 U.S. at 155-158. The Court stated that § 465 "exempts lands and rights in land, not income derived from its use." *Id.* at 155. The Court stated that it "has repeatedly said that tax exemptions are not granted by implication," and "has applied that rule to taxing acts affecting Indians as to all others." *Id*. at 156 (internal quote marks omitted) (quoting *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 606-607 (1943)). The Court stated, for example, that it has upheld state taxes on an Indian's share of income from a tribe's restricted mineral resources. *Id*. at 157 (citing *Leahy v. State Treasurer*, 297 U.S. 420 (1936)). Thus, *Mescalero* held that § 465 preempts state taxes as applied to the Indians' *land* but not their *income* from the land.

Mescalero also held, however, that New Mexico's use tax as applied to the ski lifts was preempted by § 465, because the ski lifts have been "permanently attached" to the land, and thus a tax on the ski lifts was in reality a tax on the land. *Mescalero*, 411 U.S. at 158. The Court stated that the "use" of property is among the "bundle of privileges that make up property or ownership of

property," and that "a tax upon use is a tax upon the property itself." *Id*. (citations and internal quotation marks omitted).

The Tribe argues that *Mescalero* supports its preemption argument because the County's PIT is a tax on the Tribe's "use" of its property, and that the Tribe's "use" of its property is among the "bundle of privileges" that make up the Tribe's property ownership. Tribe Br. 18-19, 20-21, 22-23. On the contrary, the County's PIT is a tax on the possessory interests of non-Indian lessees, as the Ninth Circuit has held, *Agua Caliente*, 442 F.2d at 1186, and is not a tax on the Tribe's property or its use of the property, as in *Mescalero*. *Mescalero*—in holding that the state tax was preempted as applied to the "use" of property, and that the "use" of property is part of the "bundle of privileges" of property—was referring to the Indian tribe's *own* use of its *own* property, namely the ski lifts, and was not referring to the interests, possessory or otherwise, of non-Indian lessees. *Mescalero*, 411 U.S. at 158. Indeed, *Mescalero* 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 (1949)), thus making clear that—even though an Indian tribe's use of its own lands is exempt from state taxation—the exemption does not extend to the possessory interests of non-Indian lessees. *Mescalero* also stated that it "has repeatedly said that tax exemptions are not granted by implication," *Mescalero*, 411 U.S. at 156, which further indicates that § 465's exemption from state taxation does not extend to non-Indian lessees.

The Ninth Circuit's recent decision in *Chehalis* directly refutes the Tribe's argument that *Mescalero* supports its preemption claim. In *Chehalis*, the Ninth Circuit differentiated between the use tax on the tribe's lands invalidated in *Mescalero* and a possessory interest tax applied to non-Indians, and held that § 465, as interpreted in *Mescalero*, preempts the former tax but not the latter tax. *Chehalis* stated:

> Where a state or local government assesses a tax on land or improvements covered by § 465, we are bound by § 465 and *Mescalero* to invalidate such taxes. [Citation.] This is not so, however, when state or local governments impose taxes on interests other than the "lands or rights" covered by § 465. In *Agua Caliente*, for example, we stressed that "[t]he California tax on possessory interests 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. 442 F.2d at 1186.

Chehalis, 724 F.3d at 1158 n. 7.

3. *Seminole*

The Tribe argues that its § 465 preemption argument is supported by the Eleventh Circuit's decision in *Seminole Tribe v. Stranburg*, 799 F.3d 1324 (11th Cir. 2015). Tribe Br. 21, 34-35, 48. There, the Eleventh Circuit held that Florida's rental tax, as applied to lessees on an Indian reservation, applied to the "privilege of ownership," *Seminole*, 799 F.3d at 1330; that the ability to lease property is a "fundamental privilege of property ownership," *id.*;

and therefore the rental tax as applied to the lessees was preempted by § 465 as interpreted in *Mescalero*. *Id.* at 1328-1345.[9]

Seminole is plainly distinguishable here. The Florida tax applied to the rental payments made by the lessees to the lessor tribe, and thus was levied on income received by the tribe. *Seminole*, 799 F.3d at 1328. Further, the tribe was responsible for collecting the tax and remitting it to the state, and the tribe was liable if the lessees failed to pay the tax. *Id.* at 1326. Here, by contrast, the County's PIT applies to the non-Indian lessees' possessory interests and is not levied on income received by the Tribe. Further, the Tribe is not responsible for collecting and remitting the tax, and the Tribe is not liable for the tax if the lessees fail to pay it. Supp. ER 272 (¶ 101). Thus, while the Florida tax was levied on the tribe's "privilege of ownership," the County's tax here is not levied on the Tribe's "privilege of ownership."

Apart from the fact that *Seminole* is distinguishable, much of *Seminole*'s analysis is inconsistent with the Supreme Court's modern jurisprudence concerning the applicability of state taxes to non-Indians on Indian reservations. As the Supreme Court stated in *Cotton Petroleum*, "[u]nder 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

[9] *Seminole* also held, however, that Florida's gross receipt utility tax as applied to the lessees was not preempted. *Seminole*, 799 F.3d at 1345-1353.

burden of the tax may fall on the United States or the tribe." *Cotton Petroleum*, 490 U.S. at 175. *Seminole* dismissed *Cotton Petroleum*'s "current doctrine" statement on grounds that it pertains only to state taxes that, as in *Cotton Petroleum*, are applied to mineral leasing on Indian reservations under the Indian Mineral Leasing Act of 1938 ("IMLA"), 25 U.S.C. § 396a. *Seminole*, 799 F.3d at 1332-1333. On the contrary, the Supreme Court and Ninth Circuit have upheld state taxes as applied to non-Indians on Indian reservations in numerous cases that did not involve mineral leasing under IMLA. *E.g., Moe,* 425 U.S. at 476-483; *Colville*, 447 U.S. at 150-162; *Salt River,* 50 F.3d at 737; *Yavapai-Prescott*, 117 F.3d at 1113; *Gila River*, 91 F.3d at 1236; *Chemehuevi*, 800 F.2d at 1448-1451; *see* pages 15-16, *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.[10]

Notably, the Eleventh Circuit in *Seminole* expressly disagreed with and declined to follow the Ninth Circuit's decisions in *Agua*

[10] *Cotton Petroleum*'s "current doctrine" statement appeared in Part II of the decision, which discussed general principles of preemption that apply to state taxes on Indian reservations, *Cotton Petroleum*, 490 U.S. at 173-176, and did not appear in Part III of the decision, which separately discussed the preemptive effect of IMLA. *Id.* at 176-183. This further indicates that *Cotton Petroleum*'s "current doctrine" statement describes general principles of preemption, and is not limited to cases involving mineral leasing under IMLA.

Caliente, *Fort Mojave* and *Chehalis*, finding them not to be "persuasive." *Seminole*, 799 F.3d at 1334-1335. Under the principle of stare decisis, however, the Ninth Circuit panel here, unlike the Eleventh Circuit in *Seminole*, is bound by the Ninth Circuit's decisions in *Agua Caliente*, *Fort Mojave* and *Chehalis*. *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001); *see* pages 21-24, *supra*.

II. THE BALANCE OF FEDERAL, STATE AND TRIBAL INTERESTS SUPPORTS THE CONCLUSION THAT RIVERSIDE COUNTY'S POSSESSORY INTEREST TAX IS NOT PREEMPTED.

As noted earlier, the Supreme Court in *Bracker* and other cases, in determining whether state taxes apply to non-Indians on Indian reservations, has applied a balancing test that requires a particularized inquiry into the nature of federal, state and tribal interests. *E.g., Bracker*, 448 U.S. at 145; *Cotton Petroleum*, 490 U.S. at 173-187; *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 476-483 (1976); *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 838 (1982); *see* pages 13-16, *supra*. The Ninth Circuit, applying the balancing test, has upheld state taxes as applied to non-Indians in several cases. *Salt River Pima-Maricopa Indian Community v. 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); *Chemehuevi Indian Tribe v. California State Board of Equalization*, 800 F.2d 1446, 1448-1451 (9th Cir. 1986); *see* page 16, *supra*.

The Tribe argues that the balance of interests under *Bracker* and other cases supports the conclusion that the County's tax is preempted as applied to non-Indian lessees on the Tribe's reservation. Tribe Br. 29-51.

As we now argue, the balance of interests supports the opposite conclusion, namely that the County's tax is not preempted, as the district court held. ER 42-54. This conclusion further supports the Ninth Circuit's decisions in *Agua Caliente*, *Fort Mojave* and *Chehalis* holding that a county possessory interest tax is valid as applied to non-Indian lessees on an Indian reservation.

A. The State Interest Supports Non-Preemption of Riverside County's Possessory Interest Tax.

The primary factor that applies in determining the state interest under the *Bracker* balancing test is whether a state or local government provides services or functions to non-Indians on an Indian reservation that may justify the application of a state or local tax to the non-Indians. *See, e.g., Bracker*, 448 U.S. at 148-150; *Cotton Petroleum*, 490 U.S. at 175, 183-187; *Ramah*, 458 U.S. at 843; *Gila River*, 91 F.3d at 1238-1239; *Chemehuevi*, 800 F.2d at 1449-1450. In *Bracker*, the Supreme Court held that Arizona's taxes were preempted as applied to non-Indian timber harvesting operations on an Indian reservation, because Arizona was "unable to identify any regulatory function or service performed by the State that would justify the assessment of taxes for activities on Bureau [of Indian Affairs] 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 oil and gas production by non-Indians on an Indian reservation, because New Mexico provided "substantial services" to the non-Indians. *Cotton Petroleum*, 490 U.S. at 185. The Court stated that "[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 California's sales 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.

The district court below found that the local taxing entities that receive revenues from the County's tax—the County itself and local agencies within the County—provide numerous essential services to non-Indian lessees on the Tribe's reservation. ER 31. These services include fire protection, police protection, road maintenance, water service, sewer service, trash collection, public transportation, property assessment, animal control, pest abatement, and electrical services, among others. *Id.* The district court also found that the cities of Palm Springs, Cathedral City and Rancho Mirage, which also receive revenues from the County's tax, provide essential governmental services to the non-Indian lessees. ER 33. Thus, the County, and local municipalities and agencies within the County, provide essential services to the non-Indian lessees, and the County's tax generates revenues that compensate these taxing entities for providing the services.

DWA also receives revenues from the County's tax, and provides essential services to the non-Indian lessees in the form of water deliveries and water service. ER 31; Supp. ER 267 (¶¶ 73, 74). DWA obtains water from the State Water Project ("SWP"), pursuant to its contract with the Department of Water Resources ("DWR"), which operates the SWP. *Id*. (¶ 75). DWA imports SWP water into the groundwater basin in order to recharge the basin and meet the needs of its customers. *Id.* at 269 (¶ 86).[11] DWA uses the revenues from the County's PIT to compensate DWA for its costs in obtaining SWP water, *id*. (¶ 89), and does not use the revenues for any other purpose. *Id*. at 270 (¶ 95). Under its DWR contract, DWA is required to pay a share of DWR's costs in constructing, operating and maintaining the SWP. *Id*. at 269 (¶ 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 its customers, including the non-Indian lessees. *Id*. (¶ 88). DWA's acquisition and importation of SWP water ensures that water is available to meet the lessees' current and future needs. *Id*. (¶ 90).

[11] Since SWP facilities do not extend to DWA's service area, Supp. ER 269 (¶ 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. *Id*. at 270 (¶ 92). DWA spreads the imported water into the ground through its recharge facilities, and the water is available for later extraction as necessary to meet the needs of DWA's customers. *Id.* (¶ 93).

Since the local taxing entities that receive revenues from the County's tax, including DWA, provide essential services to the non-Indian lessees, the state interest under the *Bracker* balancing test weighs heavily against preemption of the County's tax. This is not a case, as described in *Cotton Petroleum*, where the taxing entity "has had nothing to do with the on-reservation activity, save tax it." *Cotton Petroleum*, 490 U.S. at 186. Rather, the taxing entities here, unlike in *Bracker*, perform a "regulatory function or service" that warrants assessment of the tax. *Bracker*, 448 U.S. at 148-149.

A state tax that is otherwise valid as applied to non-Indians on an Indian reservation is not rendered invalid simply because the revenues from the tax are not proportionate to the services provided to the non-Indians. *Cotton Petroleum*, 490 U.S. at 190 (stating there is "no constitutional requirement that the benefits received from a taxing authority by an ordinary commercial taxpayer . . . must equal the amount of its tax obligations"); *Gila River*, 91 F.3d at 1239 (rejecting argument that there must be a "direct connection between the state sales tax revenues and the services provided to" Indians); *Salt River,* 50 F.3d at 737 (9th Cir. 1995) (rejecting argument that "a tax imposed on reservation activities must be proportionate to the services provided" to Indians). On the other hand, a state tax may be preempted if the tax does not bear at least *some* "relationship" or "nexus" to the activities being taxed. *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 661 (9th. Cir. 1989) (state tax "must bear some relationship to the activity being taxed"); *Cabazon*

Band of Mission Indians v. Wilson, 37 F.3d 430, 433-435 (9th Cir. 1994); *Crow Tribe v. Montana*, 819 F.2d 895, 901-902 (9th Cir. 1987).

Citing the latter cases, the Tribe argues that there is an insufficient "relationship" or "nexus" between the County's tax and the taxed activity, Tribe Br. 33-34, and thus the County's tax is simply a "general revenue tax," *id.* at 51, and the County has "only a generalized interest in raising revenue." *Id*. at 47.

Contrary to the Tribe's argument, there is a substantial relationship between the County's tax and the taxed activities, and the County's tax is not simply a "general revenue tax" that serves a "generalized interest in raising revenue." As described above, the County and other taxing entities that receive revenues from the County's tax provide essential services to the non-Indian lessees, such as fire protection, police protection, public road maintenance, sewer, trash and other services. ER 31. DWA, for example, provides necessary water supplies and service to the non-Indian lessees, and the lessees would have no access to water supplies and service if they were not provided by DWA. Supp. ER 267 (¶¶ 73, 74). The non-Indian lessees need water regardless of whether they operate a gaming casino, a hotel, a restaurant, or maintain a residence, and their leasehold interests would have little or no value if they did not have access to water. Since there is a substantial relationship between the County's tax and the services provided, including services provided by DWA, the Tribe's argument that there is an insufficient linkage between the two is without merit.

The Tribe argues that there is an insufficient nexus between the County's tax and the taxed activity because the County does not "track" PIT revenues by segregating them from other revenues, and that the PIT revenues are not "tied" to particular services provided to the non-Indian lessees. Tribe Br. 50. If a state provides essential services to non-Indians, however, the state has a substantial interest in applying its tax and the tax applies, and its applicability does not depend on whether the revenues from the tax are segregated from other tax revenues, or whether the revenues are "tied" to particular services. In *Cotton Petroleum* and *Bracker*, for example, the Supreme Court did not suggest that the applicability of the state taxes depended on whether the tax revenues were segregated from other tax revenues, or were "tied" to particular services. For its part, DWA places its revenues from the County's PIT into a general fund that is used exclusively to pay its share of SWP costs, but DWA does not segregate the PIT revenues from other revenues placed in the fund that are also used to pay its share of SWP costs. Supp. ER 270 (¶ 95). Since DWA uses the PIT revenues exclusively to pay its share of SWP costs, it is immaterial that DWA does not segregate the PIT revenues from other revenues that are used for the same purpose.

The Tribe argues that there is an insufficient nexus between the County's tax and the taxed activity because the County provides the same services to others outside the Tribe's reservation that it provides to non-Indian lessees on the reservation. Tribe Br. 46-47. If the state provides essential services to non-Indian lessees that are

the basis of a state tax, however, it is immaterial that the state provides the same services to others off the reservation. No principle of federal law holds that a state tax—otherwise valid as applied to non-Indians on an Indian reservation—is rendered invalid simply because the state provides the same services to others off the reservation. The Supreme Court and Ninth Circuit have often upheld state taxes as applied to non-Indians because the state provided essential services to the non-Indians, without considering whether the state provided the same services to others off the reservation. *E.g.*, *Cotton Petroleum*, 490 U.S. at 183-187; *Moe*, 425 U.S. at 481-483; *Chemehuevi*, 800 F.2d at 1450 (holding that the state has "legitimate interest" in raising revenues from non-Indians to provide substantial services "both on and off the reservation"). Indeed, the state commonly provides the same essential services to others outside an Indian reservation that it provides to non-Indians on the reservation, for the simple reason that both groups presumably need the same essential services, such as the water supplies provided by DWA. If the state were preempted from obtaining revenues from the non-Indians simply because it provides the same services to other taxpayers, the non-Indians would get a free ride at the expense of the other taxpayers, because the non-Indians would get the same services as the other taxpayers without having to pay the tax that generates revenues for the agencies that provide the services. The balance of federal, state and tribal interests does not support the right of non-Indians to get a free ride at the expense of other taxpayers.

B. The Tribal Interest Does Not Support Preemption of Riverside County's Possessory Interest Tax.

The primary factor that applies in determining the tribal interest under the *Bracker* balancing test is whether the legal incidence of the state tax falls on non-Indians rather than Indians. *Oklahoma Tax Comm'n v. Chickasaw Nation* ("*Chickasaw*"), 515 U.S. 450, 458 (1995); *Washington v. Confederated Tribes of the Colville Reservation ("Colville")*, 447 U.S. 134, 150-151 (1980); *Wagnon v. Prairie Band of Potawatomi Nation*, 546 U.S. 95, 102 (2005); *Yavapai-Prescott,* 117 F.3d at 1113; *Salt River,* 50 F.3d at 737; *Crow Tribe v. Montana* ("*Crow Tribe I*"), 650 F.2d 1104, 1110 (9th Cir. 1981); *Fort Mojave,* 543 F.2d at 1256. As the Supreme Court has stated, the "initial and frequently dispositive question" in Indian tax cases is "who bears the legal incidence of a tax." *Chickasaw*, 515 U.S. at 458. In *Chickasaw*, 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. *Id*. at 458-459, 461-462. In *Colville,* on the other hand, the Supreme Court held that a state sales tax was *not* preempted as applied to sales by Indians to non-Indians purchasers 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 as applied to non-Indian sellers on a reservation because the "legal incidence" of the tax fell on the non-Indian sellers. *Salt River*, 50 F.3d at 737.

Even though the legal incidence of a state tax falls on non-Indians, the tax may be preempted if its "economic burden" falls on Indians. *Ramah*, 458 U.S. at 853-854; *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 434 (9th Cir. 1994); *Crow Tribe v. Montana* ("*Crow Tribe II*"), 819 F.2d 895, 899 (9th Cir. 1987). The tax is not preempted, however, unless the tax's economic burden on the Indians is "substantial" and not merely "indirect" or "marginal." *Cotton Petroleum*, 490 U.S. at 186-187.

Here, the legal incidence of the County's PIT falls on the non-Indian lessees and its economic burden does not fall on the Tribe or its members. First, the tax's legal incidence falls on the non-Indian lessees, because the tax applies to the "full cash value" of the non-Indian lessees' possessory interests, and the tax does not apply to the Tribe or its members. *Agua Caliente*, 442 F.2d at 1186; *Chehalis*, 724 F.3d at 1158 n. 7; Supp. ER 272 (¶ 100). The Tribe acknowledges that "the legal incidence of the tax indeed falls on non-Indians." ER 54. Second, the tax's economic burden does not fall on the Tribe or its members, because the Tribe and its members are not liable for paying the tax if the non-Indian lessee fails to pay it, and the unpaid tax does not become a lien or other charge on the Tribe's lands or other property. Supp. ER 272 (¶ 101). Since the legal incidence of the tax falls on the non-Indian lessees and its economic burden does not fall on the Tribe or its members, the tribal interest does not support preemption of the County's tax.

The Tribe argues that the County's tax imposes an economic burden on the Tribe because the Tribe has adopted its own possessory interest tax but held it in abeyance to avoid the prospect of "double taxation." Tribe Br. 14-16. The Supreme Court and Ninth Circuit have held, however, that state taxes applicable to non-Indians on Indian reservations are not preempted simply because they may have the indirect effect of reducing revenues that the Indian tribes might otherwise obtain from the non-Indians. *Cotton Petroleum*, 490 U.S. at 186-187 (fact that state tax may have "marginal effect" on tribe's ability to "increase its tax rate" is "simply too indirect and too insubstantial" to support preemption claim); *Colville*, 447 U.S. at 156 (state does not infringe on tribal sovereignty by imposing taxes that "deprive the Tribes of revenues which they are currently receiving"); *Squaxin Island Tribe v. Washington*, 781 F.2d 715, 720 (9th Cir. 1986) (state tax or regulation is not invalid "merely because it erodes a tribe's revenues," even though the tax "substantially impairs the tribal government's ability to sustain itself and its programs"); *Crow Tribe I*, 650 F.2d at 1116 (same); *White Mountain Apache Tribe v. Arizona,* 649 F.2d 1274, 1282 (9th Cir. 1981) (tribal interest in obtaining 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*, 543 F.2d at 1258 ("Such an indirect economic burden cannot be said to threaten the self-governing ability of the tribe"); *Chemehuevi*, 800 F.2d at 1449 (rejecting tribe's argument that imposition of state tax on non-Indians "will deprive it [the tribe] of badly needed income,"

because "we have repeatedly held, as has the Supreme Court, that reduction of tribal revenues does not invalidate a state tax"). Thus, it is immaterial for preemption purposes that the Tribe has decided not to apply its own possessory interest tax in order to avoid "double taxation." As the district court held, the Tribe is not precluded from applying its tax and has simply chosen not to do so. ER 52.

The Tribe argues that the tribal interest supports its preemption claim because of the large number of leases—about 20,000—on the Tribe's reservation. Tribe Br. 42-43. The Tribe has produced no evidence, however, showing that it plays an active role in managing the leased lands, and has made no contention in its brief that it plays an active role. The Ninth Circuit has held that the fact that an Indian tribe does not play an active role in managing the activities on leased lands weighs heavily against preemption of a state tax as applied to lessees of the lands. *Gila River*, 91 F.3d at 1238; *Yavapai-Prescott*, 117 F.3d at 1112. In *Gila River*, the Court rejected an Indian tribe's argument that a state sales tax was preempted as applied to entertainment activities on leased reservation lands, and stated that there was "no evidence" that the tribe had an "active role in generating activities of value on the reservation." *Gila River*, 91 F.3d at 1238. In *Yavapai-Prescott*, the Court held that "[t]he burden of proof was on the plaintiff Tribe" to demonstrate that it actively participated in the taxed activity, and that the tribe had failed to sustain its burden because it produced no evidence showing that it actively managed the taxed activity.

Yavapai-Prescott, 117 F.3d at 1112. Indeed, virtually all of the leases on the Agua Caliente Tribe's reservation—about 19,900—are on allotted lands, and the Tribe receives no rental income from the allotted lands, ER 52, and is even unaware of the identities of the lessees of the allotted lands. ER 28. Since the Tribe plays no active role in managing the activities on the leased lands and has produced no evidence showing that it plays an active role, and is even unaware of who the lessees are, the tribal interest weighs against preemption of the County's tax.

C. The Federal Interest Does Not Support Preemption of Riverside County's Possessory Interest Tax.

The Tribe argues that the federal interest under the *Bracker* balancing test supports preemption of the County's tax because the federal government has adopted "comprehensive and pervasive" regulations that regulate leasing of Indian lands. Tribe Br. 36-41. The federal regulations, found in 25 C.F.R. §§ 162.001 *et seq*., provide that the lands can be leased only with approval of the Secretary of the Interior, *id*. at § 415, and establish criteria that the Secretary must apply in deciding whether to grant approval. The Tribe argues that the instant case is indistinguishable from the Supreme Court's decisions in *Ramah* and *Bracker*, which held that state taxes in those cases were preempted because the federal government had adopted "comprehensive" regulations that regulated the activities that were the subject of the state taxes. *Ramah*, 458 U.S. at 839; *Bracker*, 448 U.S. at 145-146; Tribe Br. 36-37, 39.

The Tribe's argument is inconsistent with the Supreme Court's decision in *Cotton Petroleum*, which upheld a state tax as applied to a non-Indian contractor who produced oil on an Indian reservation even though a federal statute, the Indian Mineral Leasing Act, comprehensively regulated oil production on Indian reservations. *Cotton Petroleum*, 490 U.S. at 173-178. The Court distinguished *Bracker* on grounds that, in *Bracker*, the state had not performed "any regulatory function or service" that justified the state tax, and the "economic burden" of the tax fell on the Indian tribe. *Id*. at 184. The Court distinguished *Ramah* on similar grounds, stating that the "economic burden" of the tax in *Ramah* fell on the Indian tribe, and the state had "declined to take any responsibility" for the education of Indian children and thus could not impose an "additional burden" by applying its tax. *Id*. at 184-185. *Cotton Petroleum* demonstrates that—since the County and the local taxing entities provide essential services to non-Indian lessees and the economic burden of the County's tax does not fall on the Tribe or its members—the fact that the Secretary of the Interior has adopted regulations regulating leasing of Indian lands does not support the conclusion that the County's tax is preempted as applied to the non-Indian lessees.

The Tribe's argument is also inconsistent with the Ninth Circuit's decisions in *Gila River* and *Yavapai-Prescott*. In *Gila River*, the Ninth Circuit rejected the Indian tribe's argument that "regulations governing such leasing [of Indian lands] constitute a comprehensive regulatory scheme with preemptive effect on state

laws," and stated that the tribe's argument that "the mere existence of federal oversight over leasing of Indian lands preempts a state tax is without support." *Gila River*, 91 F.3d at 1237. In *Yavapai-Prescott*, the Ninth Circuit rejected the same argument by another Indian tribe, stating that "the regulation of the leases by the Secretary of the Interior . . . [was] not enough to outweigh" the factors favoring permitting the state taxes. *Yavapai-Prescott*, 117 F.3d at 1112. *Gila River* and *Yavapai-Prescott* demonstrate that state taxes as applied to non-Indian lessees are not preempted simply because the federal government has adopted regulations regulating leasing of Indian lands.

Perhaps more importantly, the federal leasing regulations themselves provide that they do not independently preempt state possessory interest taxes, and that such taxes are preempted only if they are preempted under other federal laws. The relevant regulation prohibits "any State or political subdivision of a State" from imposing any "tax" on the "leasehold or possessory interest," but the regulation contains a caveat stating that the prohibition is subject to "applicable Federal law." 25 C.F.R. § 162.017(c). The Ninth Circuit recently held that, because of the "applicable Federal law" caveat, "[t]he regulation does not purport to change existing law." *Desert Water Agency v. U.S. Dep't of Interior*, 849 F.3d 1250, 1254 (9th Cir. 2017). Similarly, the Ninth Circuit had earlier held that, because of the caveat, the federal regulation "merely clarifies and confirms what § 465 already conveys." *Chehalis*, 724 F.3d at 1157 n. 6. Thus, the federal regulation by its express terms

does not preempt state possessory interest taxes that are not preempted by "applicable Federal law." The County's PIT is not preempted by "applicable Federal law," because, as we have argued, the Ninth Circuit decisions in *Agua Caliente*, *Fort Mojave* and *Chehalis* hold that county possessory interest taxes are not preempted, *see* pages 17-21, *supra*, and because the balance of interests in *Bracker* and other cases weighs against preemption of the County's tax. *See* pages 34-45, *supra*. Therefore, the federal regulations by their own terms do not preempt the County's tax.[12]

The Tribe argues that its preemption argument is supported by the Ninth Circuit's decision in *Segundo v. City of Rancho Mirage*, 813 F.2d 1387 (9th Cir. 1987), which held that, since federal regulations comprehensively regulate the leasing of Indian lands, a city's rent control ordinance was preempted as applied to a mobile home park operated by a non-Indian lessees on the Agua Caliente reservation. Tribe Br. 38-39. The city's rent control ordinance purported to regulate the use of the reservation lands by the non-Indian lessee, and did not involve a state or local tax as applied to the possessory interest of the lessee. Although comprehensive federal regulation of Indian lands may indicate an intent to preempt state regulatory laws as applied to the use of the

[12] The district court below held that "the federal interest here, like those at stake in *Bracker* and *Ramah*, are pervasive enough to preclude the burdens of the tax, absent sufficient state interests," ER 45-46, but that "the state interests outweigh the federal interests in this case." ER 51.

lands, as in *Segundo*, comprehensive federal regulation has little probative value in determining whether state taxes are preempted as applied to non-Indian possessory interests on the lands, because such state taxes do not purport to regulate the use of the lands. This conclusion is particularly appropriate where, as here, the state provides essential services to the non-Indians and the legal incidence of the state tax falls on the non-Indians. Thus, *Segundo* does not support the Tribe's preemption argument.[13]

D. Amicus National Congress of American Indians' Arguments Are Without Merit.

Amicus National Congress of American Indians ("NCAI") argues that the Territory Clause, or Property Clause, of the Constitution, art. IV, § 3, cl. 2,[14] and statutes enacted pursuant thereto,[15] categorically preempt state taxes as applied on Indian

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[13] The United States has not filed an amicus brief in this Court supporting the Tribe's argument that the federal interest weighs in favor of preemption of the County's PIT, which further undermines the Tribe's argument that the alleged federal interest supports its preemption argument.

[14] Although NCAI refers to the constitutional provision as the "Territory Clause," the Supreme Court generally refers to the provision as the "Property Clause." *See, e.g., Kleppe v. New Mexico*, 426 U.S. 529, 535 (1976*); Cappaert v. United States*, 426 U.S. 128, 138 (1976). This brief will refer to the provision as the Property Clause.

[15] The statutes cited by NCAI are the Mission Indian Relief Act of 1891, 26 Stat. 388, and the General Allotment Act of 1887, 24 Stat. 388. NCAI Br. 14-18.

trust lands, NCAI Br. 2-3, 12-22, and therefore that the *Bracker* balancing test does not apply in determining whether state taxes are preempted as applied to such lands. *Id*. at 24. NCAI's argument that state taxes are categorically preempted under the Property Clause is consistent with the Supreme Court's early jurisprudence, *e.g., Worcester v. Georgia*, 31 U.S. 515 (1832), which held that state laws have "no force" on Indian reservations, *id*. at 561; the Supreme Court has departed from its early jurisprudence, however, and now holds that whether state taxes apply on Indian reservations depends on whether Congress has preempted their application, which in turn depends on the balance on the balance of federal, state and tribal interests. *Cotton Petroleum*, 490 U.S. at 176; *Bracker*, 448 U.S. at 145; *McClanahan*, 411 U.S. at 172. Thus, the Property Clause does not categorically preempt state taxes as applied to non-Indians on Indian reservations. Rather, whether the state taxes are preempted depends on the balance of federal, state and tribal interests. NCAI's argument to the contrary is misplaced.

NCAI distinguishes between a state tax on an "interest in property" and a state tax on the "use of property," and argues that the County's PIT applies to the Tribe's "property" and "use" of property and therefore is categorically preempted under the Property Clause. NCAI Br. 23-24. The issue, as NCAI frames it, is not "who pays the tax?" but instead "what is being taxed?" *Id*. at 24. Again, NCAI's argument is misplaced. First, contrary to NCAI's argument that "who pays" the tax is irrelevant, it is highly relevant whether the legal incidence of the tax falls on non-Indians

or instead on Indians, because the Supreme Court has held that the "initial and frequently dispositive question" is "who bears the legal incidence of the tax." *Chickasaw*, 515 U.S. at 458; *see Colville*, 447 U.S. at 151; *Salt River*, 50 F.3d at 737. Specifically, if the legal incidence of the tax falls on Indians, the tax is preempted unless Congress consents, *Mescalero*, 411 U.S. at 148, but if the legal incidence falls on non-Indians, the tax may be applied depending on the balance of interests. *Bracker*, 448 U.S. at 145; *Cotton Petroleum*, 490 U.S. at 176. Second, in terms of "what" is being taxed, the County's tax applies to the possessory interests of the non-Indian lessees, and does not apply to the Tribe or its property. *See Agua Caliente*, 442 F.2d at 1186; *Chehalis*, 724 F.3d at 1158 n. 7; *accord*, *Riverside County v. Palm-Ramon Development Co*., 63 Cal.2d 534, 537 (1965). Thus, the County's tax does not apply to the Tribe's "property" or "interest in property" or "use" of property, contrary to NCAI's argument, and the County's tax is not preempted.

III. RIVERSIDE COUNTY'S POSSESSORY INTEREST TAX DOES NOT INFRINGE ON TRIBAL SOVEREIGNTY.

The Tribe and amicus NCAI argue that the County's tax infringes on the Tribe's sovereignty, because the tax "usurps" the Tribe's authority to determine what taxes should be applied on its lands and "impedes" the Tribe's ability to make its own decisions about taxation within its jurisdiction. Tribe Br. 52-55; NCAI Br. 28-33. The district court rejected the Tribe's argument, holding

that the County's PIT does not infringe on the Tribe's sovereignty. ER 54-57.

Under the principle of tribal sovereignty, a state action infringes on tribal sovereignty if the action impairs the right of Indians "to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959); *see Bracker*, 448 U.S. at 142; *Colville*, 447 U.S. at 156; *Crow Tribe I*, 650 F.2d at 1109, 1115; *Fort Mojave*, 543 F.2d at 1257-1258. Here, the County's tax does not infringe on the Tribe's sovereign right to make its own laws and be ruled by them, because the Tribe is free to decide whether to apply its own tax to the non-Indians' possessory interests and has simply chosen not to do so. As the district court noted, the Tribe has presented no evidence showing that the County's tax has actually obstructed the Tribe's right to govern itself. ER 56.

The Tribe and amicus NCAI argue that the Tribe's sovereignty is impaired because the Tribe has withheld imposing its own possessory interest in order to avoid the prospect of "double taxation." Tribe Br. 53; NCAI Br. 32. In *Fort Mojave*, the Ninth Circuit flatly rejected the same argument made by the Indian tribe in that case, stating:

> The only effect of the tax on the Indians will be the indirect one of perhaps reducing the revenues they will receive from the leases as a result of their inability to market a tax exemption. Such an indirect economic burden cannot be said to threaten the self-governing ability of the tribe. [¶] The assertion that "double taxation," resulting from the imposition of a tax both

> by the county and the tribe, impairs the ability of the tribe to levy its tax is not persuasive. There is no improper double taxation here at all, for the taxes are being imposed by two different and distinct taxing authorities. The tribe faces the same problem as other taxing agencies confront when they seek to impose a tax in an area already taxed by another entity having taxing power. We hold that the uncertain economic burden here imposed on the tribe's ability to levy a tax does not interfere with their right of self-government.

Fort Mojave, 543 F.2d at 1258.

CONCLUSION

This Court should affirm the judgment of the district court below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Rule 32 of the Federal Rules of Appellate Procedure, which establishes the form of appellate briefs, I hereby certify that the foregoing brief was produced on a computer, is proportionately spaced, has a typeface of 14 points or more, and, according to the word count function on the word processing program used, contains 13,929 words.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 23, 2018, at Walnut Creek, California.

/S/Roderick E. Walston
Roderick E. Walston

STATEMENT OF RELATED CASES

Appellee Desert Water Agency certifies that, to its knowledge, there are no cases or appeals pending before this Court that are related to the instant appeal.

Dated: March 23, 2018

/S/Roderick E. Walston
Roderick E. Walston

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed **BRIEF OF APPELLEE DESERT WATER AGENCY** with the Clerk of the Court for the United States Court of Appeal for the Ninth Circuit by using the appellate CM/ECF System on March 23, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed on March 23, 2018 at Walnut Creek, California.

/S/ Irene Islas
Irene Islas