Docket No. 17-56003

In the

United States Court of Appeals

For the

Ninth Circuit

AGUA CALIENTE BAND OF CAHUILLA INDIANS,

Plaintiff-Appellant,

v.

RIVERSIDE COUNTY, et al.,

Defendants-Appellees,

DESERT WATER AGENCY,

Intervenor-Defendant-Appellee.

Appeal from a Decision of the United States District Court for the Central District of California, No. 5:14-cv-00007-DMG-DTB · Honorable Dolly M. Gee

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

Other Authorities

Rules

INTRODUCTION

This case involves the County of Riverside's ("County") imposition of the California one percent possessory interest tax ("PIT") upon the value of leasing Indian trust lands. Cal. Rev. & Tax. Code § 107.

With the approval of the United States, pursuant to a comprehensive array of federal statutes and regulations, the Agua Caliente Band of Cahuilla Indians ("Agua Caliente" or "Tribe") and its members lease certain parcels of Indian trust lands within the Agua Caliente Reservation for commercial development and other purposes. ER 742-743. There are approximately 20,000 master leases, mini-master leases, subleases, and sub-subleases for the use and occupancy of approximately 4300 acres of Agua Caliente Reservation Indian trust lands. ER 743, 744; ER 65.

Revenues from the PIT, which the County admits is a general revenue property tax, are not tied to any particular service the County provides to taxpayers on the Indian trust lands. ER 777, 783; ER 71-72; ER 458-459; ER 473; ER 521-522. PIT revenues are not used to benefit Indian lands, nor are they tied to leasing; rather, they are used to fund the County government and general governmental services that the County provides to everyone on a countywide basis. The County is roughly the size of the State of New Jersey.

The district court concluded that the PIT, as assessed and collected from Agua Caliente Indian trust lands, is not barred or preempted by federal law. The district court's conclusion is wrong as a matter of law and fact, and should be reversed.

JURISDICTIONAL STATEMENT

This is an appeal from a ruling on cross-motions for summary judgment by the U.S. District Court for the Central District of California (Gee, J.), dated June 15, 2017, which disposed of all claims from the proceeding below. ER 24-59. The district court had jurisdiction pursuant to 28 U.S.C. § 1331. The notice of appeal was timely filed and this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

This appeal presents the following issues for review:

1. Whether the long-standing tax exemption for Indian trust lands codified in 25 U.S.C. § 465[1] applies to Indian lands taken into by trust by the United States before 1934.

2. Whether, in light of the comprehensive and pervasive federal regulatory scheme for the leasing of Indian trust lands, the generalized County

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

interest in raising revenue through the PIT can defeat preemption under the U.S. Supreme Court's balancing test in *White Mountain Apache v. Bracker*, 448 U.S. 136 (1980) ("*Bracker*").

3. Whether the district court committed clear error when it defined "Trust Lands" to exclude allotted trust lands within the Agua Caliente Reservation and ignored the *parens patriae* nature of the suit, resulting in the failure to adequately account for the strong Tribal interests at stake in the litigation under the U.S. Supreme Court's *Bracker* balancing test.

4. Whether Agua Caliente's sovereign right to make its own laws and regulate its Indian trust lands independently preempts the County's assessment and collection of the PIT on Indian trust lands within the Agua Caliente Reservation.

STATEMENT OF THE CASE

Agua Caliente filed its complaint against the County on January 2, 2014, seeking declaratory and injunctive relief to preempt the County from assessing and collecting the PIT from Agua Caliente Indian trust lands. Shortly thereafter, Desert Water Agency ("DWA") was granted leave to intervene on the County's behalf. The County and DWA filed a Motion for Judgment on the Pleadings on July 28, 2014.

I. The District Court's February 8, 2016 Order

On February 8, 2016, the district court denied the County and DWA's motion for judgment on the pleadings in full. ER 1-23. In pertinent part, the district court correctly held that the reasoning of the Ninth Circuit's decisions in *Agua Caliente Band of Mission Indians v. Riverside County*, 442 F.2d 1184 (9th Cir. 1971) and *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253 (9th Cir. 1976), cases which held there was no express statutory preemption of the PIT, "has been repudiated by *Bracker* and its progeny." ER 10.

Applying *Bracker*, the district court further correctly held that the comprehensiveness of the federal regulatory scheme for the leasing of Indian trust lands and the express language of 25 C.F.R. § 162.017(c), as well as the Preamble to 25 C.F.R. Part 162, are "highly indicative of a significant federal interest that would be thwarted by the imposition of the County's tax" and that must be weighed when applying the *Bracker* balancing test. ER 20. And, the district court affirmed that neither "the County's general interest in raising revenue" nor "the general provision of services to the Tribe by the County" is sufficient to overcome such a strong federal interest as a matter of law. ER 22 (citing *Bracker*, 448 U.S. at 150 & *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 845 n. 10 (1982)) (noting "lack of connection between the services provided [by the County] and the activity being taxed."). The district court made

clear exactly what factual showing it needed to see from the County in order to defeat summary judgment in Agua Caliente's favor: "the County may attempt to demonstrate a direct connection between its tax and any services it provides to the Tribe." ER 22, n. 9.

The district court also determined that footnote 7 of the Ninth Circuit's decision in *Confederated Tribes of Chehalis Reservation v. Thurston County Board of Equalization*, 724 F.3d 1153, 1158 (9th Cir. 2013), which suggests that § 465 does not apply to a possessory interest tax, is nonbinding dicta, although the court was also careful to note that its order did not resolve the merits of Agua Caliente's argument that § 465 precludes the PIT. ER 11.

II. The District Court's June 15, 2017 Order

After a hearing on the parties' cross-motions for summary judgment and joint supplemental briefing to clarify the nature of land ownership on the Agua Caliente Reservation (ER 852-856), the district court granted summary judgment in favor of the County and DWA, and denied summary judgment to Agua Caliente on June 15, 2017. ER 24-59. By upholding the PIT against the federal preemption challenge, the district court made a 180-degree wrong turn from its

legal analysis sixteen months earlier and erroneously ignored the admitted facts in evidence.[2] ER 24-57. This appeal followed. ER 886.

STATEMENT OF FACTS

I. Indian Trust Lands on the Agua Caliente Reservation

Agua Caliente is a federally recognized sovereign Indian tribe with a reservation comprising more than 31,000 acres of land within the exterior geographic boundaries of Riverside County, California. ER 740, 771; ER 75-82. Much of the land within the Agua Caliente Reservation is held in trust by the United States for the benefit of Agua Caliente and its members. ER 772.

On May 15, 1876, President Grant issued an executive order establishing the Agua Caliente Reservation. One year later, President Hayes extended the Reservation's boundaries to cover the even-numbered sections in three townships, which totaled over 30,000 acres. On January 12, 1891, Congress passed the Mission Indian Relief Act, authorizing allotments from Reservation lands. However, more than 50 years passed before the Secretary of the Interior approved the allotment elections, which were finalized through the Equalization Act of

[2] The legal rulings and determinations in the February 2016 order represent the law of the case. "Under the law of the case doctrine, a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case" unless certain conditions are satisfied. *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) (internal quotations omitted). The district court abused its discretion when it failed to apply the law of the case doctrine. *Id*.

September 21, 1959. 25 U.S.C. § 952 (clarifying that the allotments were given "in accordance with the provisions of law existing prior to this Act"); ER 799; ER 661; ER 738. Additional, smaller parcels of trust land have been added to the Reservation since.

As of 2014, Agua Caliente Reservation land ownership was as follows: (1) allotted trust land (land owned by the United States in trust for the benefit of individual tribal members or their successors) comprised 58 percent (%) of the Reservation; (2) Tribal trust land (land owned by the United States in trust for the benefit of the Tribe) comprised 12.7% of the Reservation; (3) Tribal fee land (land privately owned by the Tribe) comprised 0.3% of the Reservation; and (4) fee land (non-Indian privately owned land) comprised 29% of the Reservation. ER 852-856. The lands subject to leasing at issue in this case comprise the first two categories – allotted trust lands and Tribal trust lands, which are collectively referred to herein as "Indian trust lands."

Agua Caliente exercises legal jurisdiction over its Reservation, including all Indian trust lands. ER 741-743; ER 70-71; ER 83-285. The Tribe provides road maintenance services to some of its Indian trust lands and provides environmental permitting services to lessees of Indian trust lands, including storm water and wastewater permitting, and code enforcement and building inspection services. ER 797; ER 661; ER 687-688; ER 818; ER 845-849. The Tribe's

Tribal Realty staff processes specific land acquisitions, manages property tax liabilities, manages the Tribe's commercial building, and oversees escrow transactions and land leases for the Tribe's three residential developments. The Tribe records and maintains records that affect titles to Indian trust lands, examines titles of Indian trust lands, and provides certified title status reports for such lands, ensuring the accuracy of submittals for leasehold assignments made by the United States.

Among other things, Agua Caliente has enacted a number of statutes and ordinances regulating the use and possession of Indian trust lands, including a comprehensive land use ordinance, a building and safety code, environmental laws, and a tax code, the last of which contains a Tribal possessory interest tax. ER 70; ER 86-144. The Agua Caliente Tribal Council made the sovereign decision to hold the Tribal possessory interest tax in abeyance to avoid double taxation. ER 747-748; ER 70-71; ER 112; ER 490. The Tribe has also enacted a Tribal leasing ordinance, which applies to the leasing of Indian trust land. ER 70; ER 118-136.

With the approval of the United States, Agua Caliente and its members lease certain parcels of Indian trust lands within the Agua Caliente Reservation to commercial developers and for other purposes. ER 743, 774. There are approximately 20,000 master leases, mini-master leases, subleases, and sub-

subleases for the use and occupancy of approximately 4300 acres of Agua Caliente Reservation Indian trust lands. ER 774; ER 65. All of the developed and leased parcels of Indian trust lands include permanent improvements that are either owned outright by the Indian lessor or in which the Indian lessor holds a reversionary interest that will vest upon expiration or termination of the lease. ER 775-776; ER 661; ER 668, 677-678; ER 818; ER 840-844; ER 65. Income generated from the leasing of Indian trust lands and associated improvements benefits the Indian landowners, and helps fund Agua Caliente's government and its provision of governmental services. ER 776; ER 65.

II. Leasing of Indian Trust Lands Is Governed by the United States

Indian trust lands are subject to an array of federal statutes and regulations governing their use. ER 741, 773; ER 71; ER 286-371. This specifically includes, but is not limited to, statutes and regulations governing the surface leasing of Indian trust lands. ER 742, 773; ER 71; ER 286-371. These statutes and regulations require federal approval of any lease of Agua Caliente Reservation Indian trust lands, limit the duration of such leases, and govern many other aspects of such leases. ER 742, 773; ER 71; ER 372-433. Among other things, the leasing regulations are clear that they apply with equal force to all "Indian trust lands," "including any tract in which an individual Indian or Indian tribe owns an interest in trust or restricted status." 25 C.F.R. § 162.004(a)

The Preamble to the federal leasing regulations identifies 28 separate areas of Indian leasing that are regulated by federal law, including how to obtain a lease, lease duration, mandatory lease provisions, valuations, documentation required in approving, administering, and enforcing leases, which laws apply to leases, rental reviews or adjustments, and investigation of compliance with a lease, among others. 77 Fed. Reg. 72440-01(Dec. 5, 2012). The County plays no role in the process of leasing Indian trust lands.

"In the case of leasing on Indian lands, the Federal and tribal interests are very strong," and federal regulations "cover all aspects of leasing." *See* 77 Fed. Reg. 72440, 72447-48. With respect to local taxes like the PIT, the Preamble explains: "Assessment of State and local taxes would obstruct Federal policies supporting tribal economic development, self-determination, and strong tribal governments." *Id*. at 72447.

III. The PIT Is a General Revenue Tax Disconnected From Services Provided to the Agua Caliente Reservation

The County first began assessing the PIT from Agua Caliente Indian trust lands in the tax year 1960-61. *Agua Caliente Band of Mission Indians v. Riverside County*, 306 F.Supp. 279, 281 (C.D. Ca. 1969). The PIT is a general revenue generating state ad valorem property tax assessed by the County on its property tax bill. ER 744-745; ER 71-72; ER 434-449; ER 455-458; ER 472-473; ER 556-557; ER 602; ER 818, ER 830; ER 639-658. The PIT is based upon the value of

the taxpayer's "(a) Possession of, claim to, or right to the possession of land or improvements that is independent, durable, and exclusive of rights held by others in the property, except when coupled with ownership of the land or improvements in the same person; and (b) Taxable improvements on tax-exempt land." Cal. Rev. & Tax. Code § 107; ER 745, 778; ER 71; ER 434-449. The PIT is, therefore, based on the value of the Indian trust lands and permanent improvements erected on those lands. ER 785; ER 71; ER 434-449. The lessee of Indian trust lands is responsible for paying the PIT; the failure to pay results in a lien on the lessee. ER 785; ER 71; ER 473, 483. The economic burden of the tax, however, falls on the Indian lessor. ER 745-746; ER 70, 72; ER 112, ER 488-497; ER 505.

The County's share of revenues from the collection of the PIT on Agua Caliente Reservation Indian trust lands goes directly into the County's discretionary general fund. ER 781; ER 71; ER 455-456; ER 479. The County does not track PIT revenues separately from other property tax revenues, and it does not specifically track how or where PIT revenues are spent, either on or off the Agua Caliente Reservation. ER 782-783; ER 71-72; ER 455-456, 460-462; ER 476, 484; ER 511. PIT revenues are not tied to any particular service that the County provides to taxpayers. ER 783, 786; ER 71-72; ER 459; ER 473; ER 521-522; ER 523-526. Rather, PIT revenues fund the County government and

general governmental services that the County provides on a countywide basis.[3] ER 783; ER 71; ER 464-465; ER 473. Services funded in part by the PIT benefit all County residents regardless of whether there is leasing; they are not provided specifically to the Agua Caliente Reservation or to taxpayers who pay the PIT. ER 784-785; ER 71-72; ER 460-462, ER 521. Lessees of Indian trust lands within the Agua Caliente Reservation are obligated to pay the PIT regardless of whether they use any of the services that it helps fund. ER 785; ER 71; ER 473, 483.

The County's total annual budget is approximately $5 billion. ER 787; ER 71; ER 456. The County's total annual property tax collections are approximately $3 billion. ER 787; ER 71; ER 474-475. Total annual revenues from the collection of the PIT on Indian trust lands on the Agua Caliente Reservation are approximately $22.8 million. ER 787; ER 71; ER 477-478. The County's annual

[3] DWA's share of revenues from the collection of the PIT on Agua Caliente Reservation Indian trust lands goes directly into DWA's general fund. ER 757; ER 72; ER 535. For the 2015/16 FY, DWA received approximately $160,000 from the County's collection of the PIT on Agua Caliente Reservation Indian trust lands. ER 760-761; ER 72; ER 541; ER 562. DWA's share of the PIT is not tied to services provided to the Agua Caliente Reservation, and the revenues are used to benefit all customers within its service area, not just those taxpayers who pay the PIT. ER 758; ER 72; ER 534. DWA's services, including those funded in part by the PIT, are identical on and off Indian trust lands. ER 758; ER 72; ER 555-556, 559-560.

share of revenues from the collection of the PIT on Indian trust lands is approximately $3 million. ER 787; ER 71; ER 456; ER 479.

If the County did not assess and collect the PIT on Indian trust lands, it is undisputed that more residences and businesses could seek to locate themselves on such lands. ER 780. Additionally, because Agua Caliente's own lawfully enacted possessory interest tax is held in abeyance as long as the County assesses and collects the PIT on Indian trust lands within the Agua Caliente Reservation, the County's collection of the PIT directly impedes the Tribe's sovereign right to regulate its lands and reduces Agua Caliente's own tax revenues.

SUMMARY OF ARGUMENT

The PIT cannot be lawfully assessed on Agua Caliente Indian trust lands for three independent reasons. First, the PIT violates 25 U.S.C. § 465's express prohibition of state and local taxation of "lands [or] interests in lands" held in trust by the United States for the benefit of Indians. Second, the PIT is preempted under the common law balancing analysis adopted by the Supreme Court in *Bracker* because the strong federal and tribal interests implicated by the leasing of Indian trust lands outweigh the County's interest in generating revenue for the provision of generalized governmental services. Third, the PIT is unlawful because it interferes with the right and ability of Agua Caliente to have its land

governed by laws of its own making and to enforce those laws free of state interference.

Federal law expressly provides that land and interests in land held in trust by the United States for the benefit of Indians is exempt from state and local taxation. The Supreme Court has held that this tax exemption encompasses taxes on Indian trust lands, as well as taxes on the possession of such lands and permanent improvements thereon because "use is among the bundle of privileges that make up property or ownership of property." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 158 (1973) (internal punctuation omitted). The rights to lease and possess property are forms of use that are among the "bundle of privileges" comprising property ownership, and taxation of such rights is forbidden under *Mescalero*. Importantly, while *Mescalero* applied the tax exemption codified in § 465, the property at issue was not taken into trust by the United States for the benefit of Indians "pursuant to" § 465. 411 U.S. at 155 n.11.

The district court inexplicably deviated from this Supreme Court precedent in several ways. It first erred by holding that the common law tax exemption codified in § 465 applies only to lands taken unto trust after 1934. Then, applying this unprecedented interpretation of § 465, it committed two additional errors. First, it held that § 465 does not apply in this case because the court erroneously believed that all Indian trust land on the Agua Caliente Reservation was taken

into trust prior to 1934. This error was directly related to the court's erroneous understanding of what lands constitute "Trust Lands". Second, and more egregiously, the district court erred by ignoring the fact that § 465 codifies well-settled law that land held in trust by the United States for tribes or Indians under treaty, executive order, or statute is exempt from local taxes like the PIT. Because the PIT taxes the right to possess or use Indian trust land and permanent improvements thereon, and because the rights of possession and use are at the very foundation of property and property ownership, federal law expressly preempts the PIT as applied to Agua Caliente Indian trust lands regardless of whether those lands were taken into trust pursuant to § 465 or some other exercise of federal authority.

Federal common law provides a separate and independent basis for preempting the PIT. When states or local governments seek to tax non-Indians on Indian lands, courts use a fact-specific balancing approach to determine whether such taxes are preempted by federal law. This approach, frequently referred to as the *Bracker* balancing analysis, weighs federal and tribal interests in avoiding state regulation of on-reservation activity against the state's interest in collecting its tax. Where, as here, the activity being taxed is comprehensively and pervasively regulated by federal and tribal law, the subject of the tax touches tribal rights of self-governance, and the tax in question is a general revenue tax

not directly tied to any specific services provided to taxpayers on Indian trust lands, the *Bracker* balancing analysis tips heavily in favor of preemption. The district court's analysis – from denying that the PIT is a property tax despite admissions to that effect and its clearly falling within *Mescalero*'s definition of that term, to allowing generalized County services that are only funded in small part by the PIT to outweigh the admitted comprehensive federal interests in the leasing of Indian trust land – is erroneous in every way.

Finally, the PIT is preempted because it impermissibly interferes with Agua Caliente's sovereignty and its rights of self-governance in its territory. The district court minimized the effect of the County's imposition of the PIT on the Tribe's ability to self-govern, in part because of its clearly erroneous definition of "Trust Lands" that mistakenly limited Agua Caliente's interest to a mere 100 of the approximately 20,000 leases subject to the PIT within its Reservation.

The district court's decision should be reversed.

STANDARD OF REVIEW

A grant of summary judgment is reviewed de novo. *Furnace v. Sullivan*, 705 F.3d 1021, 1026 (9th Cir. 2013). In reviewing a district court's ruling on cross-motions for summary judgment, this Court "evaluate[s] each motion separately, giving the nonmoving party in each instance the benefit of all reasonable inferences." *American Civil Liberties Union of Nevada v. City of Las*

Vegas, 333 F.3d 1092, 1097 (9th Cir. 2003). In other words, this Court "must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Id.* Where, as here, neither side contends there are any genuine disputed issues of material fact, this Court's "task is to determine whether the district court correctly applied the relevant substantive law." *Arakaki v. Hawaii*, 314 F.3d 1091, 1094 (9th Cir. 2002).

ARGUMENT

I. Agua Caliente Indian Trust Lands Are Exempt from the PIT

More than a century ago, the Supreme Court held that reservation land held in trust for Indians by the United States, including permanent improvements that were "part of the land," was not taxable by a county. *United States v. Rickert*, 188 U.S. 432, 435-37, 442 (1903). The Court explained that just as federally-owned land is exempt from state taxation, land that the federal government held in trust for Indian tribes was likewise exempt. *Id*. at 438-39, 442 ("[T]heir use by the Indians is necessary to effectuate the policy of the United States.").[4]

[4] Although courts have ceased applying the "federal instrumentality" doctrine in the context of tribes, *Rickert* provides the legal context within which Congress enacted § 465. *See Mescalero,* 411 U.S. at 150.

Rickert remained the law of the land three decades later, when Congress enacted the Indian Reorganization Act of 1934. *See* 48 Stat. 984, as amended, 25 U.S.C. § 461 *et seq.* Section 5 of that Act, later codified as 25 U.S.C. § 465, provides that title to "lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation." *Id.*

Mescalero is the seminal Supreme Court case applying § 465. There, the Court considered the legality of state taxes imposed on a tribally-owned ski resort located on federal land outside the boundaries of the tribe's reservation—*i.e.*, land that was ***not*** held in trust for the tribe pursuant to § 465. *Mescalero,* 411 U.S. at 146, 155 n.11. Applying § 465 to a use tax imposed on ski lifts at the resort, the Court stated: "In view of § 465, these permanent improvements on the Tribe's tax-exempt land would certainly be immune from the State's ad valorem property tax. *See United States v. Rickert*, 188 U.S. 432, 441-443 (1903). We think the same immunity extends to the compensating use tax on the property." *Mescalero*, 411 U.S. at 158. Such a tax, the Court held, was barred by § 465, despite the fact that the land at issue was never taken into trust for the benefit of Indians "pursuant to" that provision. *Id.* at 155 n.11.

With respect to the land ownership issue, the Court reasoned that "it would have been meaningless for the United States, which already held title to the [land], to convey title to itself for the use of the Tribe." *Id.* Of course, this logic applies with even more force where, as here, the United States already held the land in question in trust for the benefit of the Tribe before the enactment of § 465. ER 797; ER 661; ER 712. A transfer of title from the United States, in trust for the benefit of Agua Caliente, to the United States, in trust for the benefit of Agua Caliente *pursuant to* 25 U.S.C. § 465 would be the height of meaningless formality.

Despite *Mescalero*'s holding and logic, the district court adopted a novel and erroneous interpretation of § 465 as limiting the tax-exempt status of Indian trust lands to only those lands "acquired pursuant to" § 465 after 1934. ER 40-41. If allowed to stand, under this interpretation, all Indian lands acquired pursuant to treaties, executive orders, or other statutes prior to 1934 would be susceptible to state or local taxation even though they are held in trust by the United States for the benefit of Indians. This turns decades of well-settled law on its head. The district court's reading of § 465 is inequitable and unworkable, and it has been squarely rejected by other courts. Land owned by the United States in trust for the benefit of Indians, no matter when or how taken into trust, has long been

exempt from state or local taxation. Under U.S. Supreme Court precedent and § 465, the PIT's taxation of the privilege to use Indian trust land is unlawful.

a. Property Taxes on Leases of Indian Trust Lands Are Tax Exempt

The *Mescalero* Court reasoned that "it has long been recognized that 'use' is among the 'bundle of privileges that make up property or ownership' and, in this sense, at least, a tax upon 'use' is a tax upon the property itself." 411 U.S. at 158 (internal citation omitted). The Court noted that "[t]his is not to say that use taxes are for all purposes to be deemed simple ad valorem property taxes," but rather that "use of permanent improvements upon land is so intimately connected with use of the land itself that an explicit provision relieving the latter of state tax burdens must be construed to encompass an exemption for the former." *Id.* In support of its conclusion, the Court reasoned that "[o]n its face, the statute exempts land and rights in land" from state taxation. *Id.* at 155. *Mescalero* thus stands for the proposition that § 465 preempts state taxation of any of the "bundle of privileges that make up property or ownership of property." *Id*. at 158 (citation and internal quotation marks omitted).

The rights to lease and possess property are both forms of property use, falling squarely within the bundle of privileges that make up property ownership. *See, e.g., Terrace v. Thompson*, 263 U.S. 197, 215 (1923) (noting that "essential attributes of property" include "the right to use, lease, and dispose of it for lawful

purposes"). The Eleventh Circuit recently held as much in the same context presented here, finding in *Seminole Indian Tribe v. Stranburg* that a Florida tax on payments made to "secure a lessee's possessory interest *in the land*" taxed a privilege of ownership, and was thus unlawful under *Mescalero*'s interpretation of § 465. 799 F.3d 1324, 1331 (11th Cir. 2015) (emphasis in original). As the Eleventh Circuit correctly explained, § 465 does not allow states to tax "*a right in land*." *Id.* at 1332 (emphasis in original).

California law recognizes that possessory interests are a right in tax-exempt land. *See Cal. State Teachers' Retirement Sys. v. County of Los Angeles*, 216 Cal. App. 4th 41 (Cal. Ct. App. 2013) ("*STRS*"); *see also* California Const., art. XIII, sec. 1 (all property is taxable unless otherwise provided by the California Constitution or federal law). Within the property tax sections of California's Revenue and Taxation Code, the term "property" includes real property, personal property, and "the possession of, claim to, ownership of, or right to possession of land." Cal. Rev. & Tax. Code § 104(a). California courts recognize that a possessory interest consists of the right of possession of land for a period less than perpetuity by one party while another party (the fee simple owner) retains the right to regain possession at a future date. *STRS*, 216 Cal. App. 4th at 55.

The PIT taxes rights in land. Such taxation runs afoul of both § 465 and federal common law that was well-established at the time of § 465's enactment.

b. The Tax Exemption Applies to All Indian Trust Lands, Regardless of the Date of Acquisition

The district court held § 465 inapplicable to Indian trust lands on the Agua Caliente Reservation because the Reservation was established in 1876, before Congress enacted § 465, and therefore was not "acquired [in trust] pursuant to § 465." ER 41. This conclusion is erroneous and, if adopted by this Court, would create dangerous precedent in express contradiction of settled federal law and U.S. Supreme Court precedent.

This Court need look no further than the Supreme Court's decision in *Mescalero* to reject the district court's unduly narrow reading of § 465. In the course of holding New Mexico's use tax preempted by § 465, the Supreme Court noted that the land in question "was not technically 'acquired' 'in trust for the Indian tribe'" under § 465. *Mescalero*, 411 U.S. at 155 n.11. Indeed, the land at issue in *Mescalero* was not even held in trust for the benefit of the tribe; it was federally owned land that the tribe leased from the United States Forest Service. *See id*. at 146. Yet, the Supreme Court had no difficulty finding that "arrangement . . . sufficient to bring the Tribe's interest in the land within the immunity afforded by § 465." *Id*. at 155, n.11.

Nevertheless, the district court read *Mescalero* as foreclosing the tax exemption for Agua Caliente Indian trust lands because "the *Mescalero* land, before its designation as tribal-leased property, was already tax exempt land that

belonged to the United States," whereas the Agua Caliente Indian trust lands were created by "two executive orders that long predate the IRA." ER 37. This is a distinction without difference. The *Mescalero* holding was based upon *Rickert*, which held that a state could not tax lands held in trust by the United States for the benefit of Indians. *See id.* at 158 (citing *Rickert*, 188 U.S. at 441-43). Accordingly, just like the land in *Mescalero*, Agua Caliente Indian trust lands were already tax-exempt lands titled to the United States when Congress enacted § 465. The district court's holding reflects a lack of understanding of the law of land ownership on Indian reservations and the tax implications of that law.[5]

Given *Mescalero*'s application of § 465's tax exemption to federally owned land that was not even held in trust for the benefit of Indians, it cannot be seriously contended that land actually held in trust by the United States as title holder for the exclusive benefit of a tribe or its members is not covered by § 465 merely because the land was designated as an Indian reservation before the statute's enactment. The district court's holding is unworkable and nonsensical.

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[5] The district court's confusion is further evinced by its statement that it would render § 465 "unnecessary, as far as an exemption from taxation is concerned, if we held that tax exempt status automatically attaches when a tribe acquires reservation land." ER 41. Agua Caliente never made this argument, because the lands at issue are – and always have been – held by the United States in trust for the Tribe and its members. ER 797-798; ER 661; ER 712-713; ER 714-727. This is not a case, like *Cass Cty., Minn. v. Leech Lake Band of Chippewa Indians,* 524 U.S. 103, 113-14 (1998), where a tribe simply reacquired non-trust land within its reservation in fee and unsuccessfully argued for tax preemption on that basis.

c. Agua Caliente's Indian Trust Lands Have Been Tax-Exempt Since the Reservation Was Created

The history of federal trusteeship over Indian lands supports the conclusion that Indian trust lands have always been exempt from state and local taxation, notwithstanding the codification of that exemption in § 465.

The Supreme Court long ago determined that tribal lands held by Indians with whom the United States maintains a formal trust relationship cannot be taxed by states. *See In re Kansas Indians*, 72 U.S. 737 (1866). Since then, the Supreme Court has repeatedly said that while land owned by a tribe in fee remains subject to state and local taxes, those taxes are preempted once the United States takes land into trust. *See, e.g., Cass Cty.*, 524 U.S. at 110-14.

The Eighth Circuit discussed the history and rationale of this rule in *Chase v. McMasters*, explaining that long before Congress enacted § 465, "judicial decisions had established that lands held in trust by the United States for Indians were exempt from local taxation …." 573 F.2d 1011, 1018 (8th Cir. 1978).[6] Rather than establishing a new tax exemption applicable only to future Indian land acquisitions by the Secretary, Congress intended for § 465 to codify "the

[6] Congress understood as much when it enacted § 465, creating an administrative process to take lands into trust. Well before 1934, Congress recognized that the "restrictions as to . . . taxation" of trust lands existed and were inherent in the holding of those lands in trust by the United States. *See Goudy v. Meath,* 203 U. S. 146 (1906) (holding that state tax was permissible once allotted trust land becomes freely alienable).

legal condition in which land acquired for Indians would be held[;] it doubtless understood that the Indians for whom the land was acquired would be able to use the land … free from taxation." *Id*. at 1018. "The policy of leaving Indians free from state jurisdiction and control" is one that "is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945).

This Court agreed in both *Santa Rosa Band of Indians v. Kings County* and *Chehalis Reservation v. Thurston County*. In *Santa Rosa,* this Court made clear that "the immunity of Indian use of trust property from state regulation [is] based on the notion that trust lands are a Federal instrumentality held to effect the Federal policy of Indian advancement and may not therefore be burdened or interfered with by the state, is a product of judicial decision." 532 F.2d 655, 666 (9th Cir. 1975) (*citing Rickert).* The panel correctly noted that "[e]ach of these judicially defined characteristics of Indian trust property remained implicit in subsequent congressional enactments dealing with trust property," and it further observed that "[t]he language used in § 465 must be read against this backdrop, which provides the implicit substance of what the language signifies." *Id*. As a result, this Court was "confident that when Congress in 1934 authorized the Secretary to purchase and hold title to lands for the purpose of providing land for Indians, it understood and intended such lands to be held in the legal manner and

condition in which trust lands were held under the applicable court decisions free of state regulation."[7] *Id*.

So too in *Chehalis*. Even though that case involved land that was acquired in trust pursuant to § 465, the Court did not view the enactment of § 465 as changing the playing field. "The law relevant to this appeal traces back to *United States v. Rickert*, 188 U.S. 432 (1903), a case that precedes the enactment of § 465 by over thirty years." *Chehalis*, 724 F.3d at 1155. Noting that "*Rickert* first held that state and local governments had no power to tax the land itself because it was owned by the federal government," this Court made clear that the Supreme Court in *Mescalero* was "[r]elying on *Rickert* and § 465" to apply the tax exemption. *Id*. at 1156. Had this Court not viewed § 465 as a continuation of the existing tax exemption afforded federally-owned Indian trust lands, the Court would not have engaged in this discussion. Simply put, § 465 did little more than ensure a uniform approach to taxation of Indian trust lands. Doing as the district court has done – giving later-acquired trust lands greater tax preemption than pre-

[7] The district court strained to distinguish *Santa Rosa*, relying on language in footnote 19 of the opinion stating that "[w]e need not decide the validity of the regulation as applied to lands not acquired pursuant to § 465 because the lands involved here were so acquired." ER 39. This footnote in no way discredits the reasoning that § 465 acknowledges Indian trust property's long standing immunity from state taxation. Moreover, the Court's reference to "the regulation" relates to 25 C.F.R. § 1.4, which is not at issue in this case. *Santa Rosa*, 532 F.2d at 665.

existing trust lands that already enjoyed tax preemption – makes no sense; indeed, it directly contravenes the intent of Congress.

d. Other Federal Statues Confirm that Agua Caliente Indian Trust Lands Are Not Subject to the PIT

The district court's analysis ignores the effect of other federal statutes that exempt Agua Caliente Indian trust lands from state and local taxation. In 1949, Congress enacted a statute which, while extending California civil and criminal jurisdiction over Agua Caliente Reservation lands, expressly states that "nothing contained in this section shall be construed to authorize the . . . taxation . . of the lands of the reservation . . . whether tribally or individually owned, so long as title to such lands is held in trust by the United States, unless such . . . taxation is specially authorized by the United States." Pub. L. No. 81-322, Act of Oct. 5, 1949, 63 Stat. 705, ch. 604 § 1. Congress has never authorized application of the PIT, or any other state or local property tax, to Agua Caliente Indian trust lands.

The district court also failed to appreciate that the Equalization Act of 1950, enacted sixteen years after § 465, finalized the issuance of patents for Agua Caliente allotted trust lands. 25 U.S.C. § 552. These allotments could be tax-exempt even under the district court's erroneous and cramped interpretation of § 465, but they were not recognized as such. Finally, removing any remaining doubt as to the non-taxability of Agua Caliente Indian trust lands, the 1983 Indian Land Consolidation Act, Pub. L. 97-459 (96 Stat. 2517) (1983), codified at 25

U.S.C. § 2202, makes clear that "The provisions of section 465 of this title shall apply to all tribes . . ." including those, like Agua Caliente, that initially elected not to accept the application of the Indian Reorganization Act of 1934. *See* 25 U.S.C. §§ 478 & 2202. Section 2202 restored eligibility for all tribes to benefit from land-into-trust decisions if they would have been eligible when the IRA was enacted in 1934, regardless of any past opt-out election. In other words, Congress wanted a tribe's past decision to opt out of the IRA to be completely irrelevant to the applicability of § 465, making all of the IRA, including the tax exemption, applicable to all Indian trust lands.

There can be no credible dispute that, when the Agua Caliente Reservation was created through executive order, the Reservation lands were exempt from state and local taxation.[8] ER 797-798; ER 661; ER 712-713. Properly understood, § 465 codified the long-standing immunity of federal lands from state taxation that preempts the PIT as applied to Agua Caliente Indian trust lands. The district court's opinion is in direct conflict with multiple lines of authority, and it must be reversed.

[8] The district court simply assumed, incorrectly and without analysis, that all Agua Caliente Reservation Indian trust-lands pre-dated 1934. ER 41. If the Court agrees with the post-1934 analysis of the district court, a remand is necessary for the district court to make a fact finding with respect to preemption of the PIT on lands acquired "pursuant to" § 465.

II. *Bracker* Balancing Analysis Preempts the PIT

Notwithstanding § 465, the PIT is also preempted under the *Bracker* balancing analysis. The district court misapplied *Bracker* because, despite paying lip service to the fact there is "comprehensive or pervasive" federal regulation of the leases at issue, it erroneously weighted the County's generalized interest in raising revenues to bar preemption in contravention of Supreme Court and Ninth Circuit case law to the contrary. ER 42-43. Properly applied, *Bracker* preempts the PIT.

a. *Bracker* and Its Progeny Require a Close Connection Between the PIT and Services Provided

There is no dispute that the legal incidence of the PIT falls upon the non-Indian lessee of Agua Caliente Indian trust lands. Therefore, the Court must apply the *Bracker* balancing test to determine if the PIT is permissible.[9]

[9] This Court has repeatedly used *Bracker* to decide whether a state may tax non-Indian lessees operating shopping malls, hotels, and amphitheaters, and doing extensive business with non-Indians on tribal trust lands, without any doubt as to *Bracker*'s applicability in those scenarios. *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997); *Gila River Indian Cmty. v. Waddell*, 91 F.3d 1232 (9th Cir. 1996); *Salt River Pima-Maricopa Indian Cmty. v. Arizona,* 50 F.3d 734 (9th Cir. 1995); *Gila River Indian Cmty. v. Waddell,* 967 F.2d 1404 (9th Cir. 1992). *Bracker* balancing is unnecessary where the legal incidence of a tax falls directly on Indians doing business on Indian trust lands because state and local taxes are *per se* preempted in such cases. *Oklahoma Tax Com'n v. Chickasaw Nation,* 515 U.S. 450, 459 (1995).

"In a number of cases [the Supreme Court] held that state authority over non-Indians acting on tribal reservations is pre-empted even though Congress has offered no explicit statement on the subject." *Bracker*, 448 U.S. at 151; *see also Ramah*, 458 U.S. 832 (striking down a state tax on the gross receipts that a non-Indian construction company received from the tribal school board for the construction of a school for Indian children on the reservation); *Indian Country, U.S.A. Inc. v. Oklahoma*, 829 F.2d 967 (10th Cir. 1987) (striking down State's bingo regulations and taxation of certain bingo and bingo-related activities on reservation); *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 659 (9th Cir. 1989) (holding that federal law preempts the imposition of the California timber yield tax on the harvest by non-Indian purchasers of timber owned by the tribe). Under *Bracker*, preemption analysis requires a "particularized inquiry into the nature of the state, federal and tribal interests at stake . . . to determine whether, in the specific context, the exercise of state authority would violate federal law." 488 U.S. at 145 (citations omitted). "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) (citations omitted).

"Federal interests" to be considered include enhancing tribal sovereignty and economic development, self-government, and self-sufficiency, and in exclusively regulating areas of tribal activity that are subject to a comprehensive regulatory scheme.[10] *See Bracker*, 448 U.S. at 141, 143-49; *Ramah*, 458 U.S. 837-42. "Tribal interests" are tribal sovereignty, self-government, self-sufficiency, and economic development. *Bracker*, 448 U.S. at 141-43, 152; *Mescalero*, 462 U.S. at 344; *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 217 (1987) (noting that tribes' interests of self-determination and economic development "obviously parallel the federal interests"); *see also Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685, 690 (1965) (holding that comprehensive regulations and statutes are "in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in

[10] In *Bracker*, the Court reviewed 25 U.S.C. §§ 405-407, and the regulations promulgated thereunder (25 C.F.R. §§ 141.3 –141.29, and 25 C.F.R., pt. 162 (1979)), to hold that Congress intended for the federal regulation of Indian timber harvesting to preempt and preclude state taxation of fuel used by a non-Indian logging company to transport timber on the reservation. In *Ramah*, the Court determined that Congress intended for the federal regulation of the construction and financing of Indian educational institutions, including the Indian Self-Determination and Education Assistance Act (25 U.S.C. §§ 450 *et seq*.), regulations promulgated thereunder (25 C.F.R. §§ 274.1 *et seq.*), and the Indian Financing Act of 1974 (25 U.S.C. §§1451 *et seq.*), to preempt and preclude state taxation of materials used by a non-Indian construction company to build on-reservation schools.

hand that no room remains for state laws imposing additional burdens upon traders.").

The County must show its interests in collecting the tax outweigh the competing federal and tribal interests. Particularly where strong federal and tribal interests are present, "the State [must] demonstrate a close relationship between the tax imposed on the on-reservation activity and the state interest asserted to justify the tax." *Cabazon Band of Mission Indians v. California*, 37 F.3d 430, 433-35 (9th Cir. 1994). Critically, the Supreme Court held that, "[t]he exercise of State authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the State in connection with the on-reservation activity." *Mescalero*, 462 U.S. at 336 (citing *Ramah*, 458 U.S. at 844 and n.7; *Bracker* 448 U.S. at 148-49). "Thus, a State seeking to impose a tax on a transaction between a Tribe and nonmembers must point to more than its general interest in raising revenues." *Id*.

Courts disfavor taxation when "the State had nothing to do with the on-reservation activity, save tax it." *Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 186 (1989).[11] Indeed, a substantial body of case law holds – at least

[11] *See also Ramah*, 458 U.S. at 843, 845 ("In this case, the State does not seek to assess its tax in return for the governmental functions it provides to those who must bear the burden of paying the tax"); *id.* ("The State's ultimate justification for imposing this tax amounts to nothing more than a general desire to increase revenues"); *see also Bracker,* 448 U.S. at 150 (the State "refer[s] to a general

where, as here, the United States has extensively regulated an activity on Indian lands – the state tax must have a nexus to the activity being taxed in order to avoid preemption.[12] *See, e.g., Seminole*, 799 F.3d at 1342 ("Both *Bracker* and *Ramah* note that the state tax must be ***sufficiently connected*** to the particular activity taxed to amount to more than just a generalized interest in raising revenue.") (emphasis added); *Cabazon*, 37 F.3d at 435 ("[T]his court has required that the State demonstrate a ***close relationship*** between the taxed imposed on the on-reservation activity and the state interest asserted to justify such tax.") (emphasis added); *Hoopa*, 881 F.2d at 661 ("To be valid, the California tax must bear ***some relationship*** to the activity being taxed.") (emphasis added); see also *Crow Tribe of Indians v. Montana*, 819 F.2d 895, 901 (9th Cir. 1987) ("Even if Montana's interests are sufficiently legitimate … the coal taxes are not ***narrowly tailored*** to support them.") (emphasis added).

Despite this clear guidance, the district court upended the balancing analysis by allowing the County to avoid demonstrating a connection (or nexus)

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desire to raise revenue, but we are unable to discern a responsibility or service that justifies the assertion of taxes imposed for on-reservation operations"); *Indian Country*, 829 F.2d at 987 ("The State has a general interest in raising revenue. That interest alone, however, is insufficient to justify taxing this tribal activity.").

[12] And, while the Supreme Court has cautioned that the state's interest in raising revenue must not involve a weighing of the amount of state tax in comparison to tribal revenues, that is a separate issue from the question of some nexus between the interest or activity being taxed and the services funded by the tax. *Bracker*, 448 U.S. at 150; *Ramah*, 458 U.S. at 842 n. 5.

between the PIT and the services its funds. The district court allowed the County to avoid preemption because "by and large" taxpayers were receiving general services that the PIT "helps" fund. ER 51. This is the very definition of generalized governmental services, and it is not the correct application of *Bracker*. As explained below, the circumstances of this case are analogous to those in *Bracker*, *Ramah* and *Seminole*, compelling the conclusion that the PIT is preempted.

b. This Case is on All Fours with *Seminole*

In addition to addressing § 465, the Eleventh Circuit's recent *Seminole* decision also assessed *Bracker* balancing in the legally indistinguishable context of a Florida tax on the "privilege [of engaging] in the business of renting, leasing, letting, or granting a license for the use of any real property" in the state. *Seminole*, 799 F.3d at 1337.

The Eleventh Circuit found that the Preamble to 25 C.F.R. pt. 162 provided "substantial evidence of the extensive federal regulation of Indian land leasing to inform the *Bracker* balancing inquiry," but by itself could not "substitute for the particularized inquiry required by *Bracker*." *Seminole*, 799 F.3d at 1337-39. Proceeding to conduct that "particularized inquiry," the court held that "the extensive and exclusive federal regulation of Indian leasing—as evidenced by federal law and regulations—precludes the imposition of state taxes on that

activity." *Id.* at 1339. The court buttressed its conclusion by noting the State's failure to show that that the rental tax was designed to compensate for any state services or regulations related to the act of renting of commercial property on Indian land; rather, the interests the State advanced were more akin to raising revenue for providing statewide services generally. *Id.* at 1341-43.

This Court recently described the *Seminole* decision as containing a "thorough analysis" of the relevant issues, and there is every reason for this Court to apply the reasoning and analysis of *Seminole* to this case. *DWA v. Dep't of Interior*, 849 F.3d 1250, 1256 (9th Cir. 2017). The PIT is very similar to the preempted Florida rental tax. Both are assessed on the value of the taxpayer's "[p]ossession of, claim to, or right to the possession of land or improvements that is independent, durable, and exclusive of rights held by others in the property, except when coupled with ownership of the land or improvements in the same person; and [t]axable improvements on tax-exempt land." Cal. Rev. & Tax. Code § 107. The lessee of Indian trust lands is responsible for paying both taxes. ER 778; ER 71; ER 473; ER 485-487. And, both taxes constitute a lien on the personal -property of the lessee. *Palm Springs Spa, Inc. v. County of Riverside*, 18 Cal. App. 3d 372, 376, 95 Cal. Rptr. 879 (1971) (discussing enforcement of PIT).

Moreover, the County's use of PIT funds is nearly identical to the State's use of the Florida rental tax proceeds. As explained below, like in *Seminole*, there is no evidence that the County uses the PIT for anything related to the act of leasing and using and possessing Indian trust lands, which is the activity being taxed. There is no County regulation of the leasing of Indian land or regulation of the activities occurring under the lease – that is almost exclusively the domain of the federal government. As the Eleventh Circuit held in finding the Florida rental tax to be preempted on balance, "none of the services cited by Stranburg is critically connected to the business of commercial land leasing on Indian property—the activity taxed by the Rental Tax." *Seminole*, 799 F.3d at 1342.

Although largely ignored by the district court, *Seminole* provides this Court with the appropriate roadmap with which to analyze the PIT.

c. The Federal Interests in Leasing of Indian Trust Lands Are Strong and Pervasive

It is well-settled that comprehensive or pervasive federal regulation of a particular type of activity on Indian land weighs heavily in favor of preemption of state or local taxation of that activity. *See, e.g., Bracker*, 448 U.S. at 151 (holding a state tax preempted where the federal government "has undertaken comprehensive regulation" of the activity to be taxed); *Ramah*, 458 U.S. at 838-39, 841 (citing the "detailed federal regulatory scheme" governing the subject activity as grounds for finding preemption of a state tax); *Barona Band of Mission*

Indians v. Yee, 528 F.3d 1184, 1192 (9th Cir. 2008) ("Federal interests are greatest when the government's regulation of a given sphere is 'comprehensive and pervasive.'" (*quoting Ramah*, 458 U.S. at 839)). Federal regulation of Indian trust land leasing is a quintessential example of a comprehensive and pervasive regulatory scheme.

"[T]he federal government administers an extensive, exclusive, comprehensive, and pervasive regulatory framework governing the leasing of Indian land." *Seminole*, 799 F.3d at 1341. Federal law provides that Indian trust lands can only be leased with the approval of the Secretary of the Interior. 25 U.S.C. § 415. There is a detailed scheme of federal regulations for determining how and when the Secretary will grant approval. *See generally* 25 C.F.R. Part 162. In fact, the Preamble published with Part 162 explicitly states that "[t]he Federal statutory scheme for Indian leasing is comprehensive … [and] pervasive and leaves no room for State law. Federal regulations cover all aspects of leasing." 77 Fed. Reg. 72440-01, 72447 (Dec. 5, 2012) (Preamble); *see also Seminole*, 799 F.3d at 1342-43 ("Federal statutes, regulations, and even the analysis conducted in the Secretary's Preamble demonstrate the pervasive and comprehensive federal regulation of the leasing of Indian land."); 77 Fed. Reg. 72440-01 (discussing 28 aspects of leasing governed by federal law). The federal government's own statement of its interests regarding the leasing of Indian lands

is entitled to substantial weight. *See, e.g.,* ER 12-20; *Seminole*, 799 F.3d at 1338-39 (noting that the Secretary's analysis of the federal interest in the Preamble, while not dispositive, must be given appropriate weight in the *Bracker* balancing). If the regulation means anything, it is that federal interests strongly support preemption of state possessory interest taxes under a *Bracker* analysis. 25 C.F.R. § 162.017.

This Court's opinion in *Segundo v. City of Rancho Mirage*, 813 F.2d 1387 (9th Cir. 1987), speaks directly to this issue. In *Segundo*, Agua Caliente allottees challenged the application of local rent control ordinances to a mobile home park constructed on leased Indian trust lands within the Agua Caliente Reservation. *Id.* at 1388-89. This Court conducted a detailed review of the federal statutes and regulations governing the leasing of Indian lands, specifically including 25 U.S.C. § 415(a) and 25 C.F.R Part 162, noting that "the statutory and regulatory scheme present in this case is substantially similar to those involved in [*Bracker*], Ramah Navajo, and Mescalero Apache." *Segundo*, 813 F.2d at 1391, 1393. This "comprehensive regulatory scheme governing leases of Indian land" weighed heavily in the Court's preemption holding. *Id.* at 1393. If anything, the pervasive federal interest in the leasing of Indian trust lands is even clearer now, in light of the Preamble to Part 162, and the 2012 revisions to the regulations, than it was when this Court decided *Segundo*. 77 Fed. Reg. at 72447 ("Assessment of State

and local taxes would obstruct Federal policies supporting tribal economic development, self-determination, and strong tribal governments."); *see also* ER 60-63.

The facts of this case are squarely in line with *Bracker* and *Ramah*, both of which held that federal interests outweighed state interests. The Supreme Court concluded in *Bracker* that "the Federal Government's regulation of the harvesting of Indian timber is comprehensive." 448 U.S. at 145. Similarly, in *Ramah*, which involved excise taxes imposed on a subcontractor building a school on an Indian reservation, the construction took place pursuant to federal legislation that authorized the Secretary to promulgate "detailed and comprehensive regulations respecting 'school construction for previously private schools now controlled and operated by tribes or tribally approved Indian organizations.'" 458 U.S. at 840-41 (quoting 25 C.F.R. § 274.1). Under the regulations as issued, "the BIA [had] wide-ranging authority to monitor and review the subcontracting agreements between the Indian organization . . . and the non-Indian firm that actually constructs the facilities." *Id*. at 841. And, importantly, like here with respect to the leasing of Indian trust lands, in both *Bracker* and *Ramah* the United States reviewed and approved the actual transaction that was subject to the tax. *Bracker*, 448 U.S. at 147; *Ramah*, 458 U.S. at 835.

Simply put, the comprehensiveness and pervasiveness of federal regulation of leasing is substantively indistinguishable from that in other cases where the courts have found no room for state regulation. As the Eleventh Circuit explained in *Seminole*, the analysis set forth in the Preamble is "thorough, consistent, and persuasive," and, in conjunction with the regulations and statutes that it discusses, it provides "substantial evidence of the extensive federal regulation of Indian land leasing to inform the *Bracker* balancing inquiry." 799 F.3d at 1338-39. This scheme is sufficient to bring the federal interests within the scope of *Bracker* and *Ramah*, where "the federal regulatory scheme is so pervasive as to preclude the additional burdens sought to be imposed" by the state. *Bracker*, 448 U.S. at 148; *Ramah*, 458 U.S. at 845. Accordingly, the strong federal interest in governing leasing of Indian trust lands justifies preemption of the PIT on Agua Caliente Indian trust lands.

Indeed, the court below expressly recognized that "the federal interests here, like those at stake in *Bracker* and *Ramah*, are pervasive enough to preclude the burdens of a tax . . .." ER 45-46. Despite this correct acknowledgment, the court then erred by placing insufficient weight on the comprehensive federal scheme when balancing it against the putative state interests in collecting the PIT. In fact, the district court appears to be the first court to ever hold that a federal comprehensive regulatory scheme, which it acknowledges is "pervasive," can be

outweighed, on balance, by nothing more than generalized county taxing interests.

d. Agua Caliente's Interests in Leasing Are Also Strong

Tribal interests are also adversely impacted by the PIT. The leasing interests which the County desires to tax would not exist but for the significant federal and Indian investment of money and oversight specifically intended to foster tribal self-determination.

The PIT imposes an economic burden on the beneficial owners of Indian trust lands that impedes tribal self-sufficiency, as well as an indirect burden on the federal government.[13] This Court has twice recognized as much with respect to the PIT. *See Fort Mojave*, 543 F.2d at 1256 ("[T]he imposition of a [PIT] 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 . . . ."); *Agua Caliente*, 442 F.2d at 1186 ("[A] lessee can afford to pay more rent if he is not required to pay a possessory interest tax. If an Indian's land is not subject to that tax he enjoys a better bargaining position than he otherwise would, and hence that the tax has an adverse economic effect upon him.");

[13] As in *Seminole*, and as in *Bracker* and *Ramah*, the Tribe is not relying solely on adverse economic impact here; the extensive and exclusive federal regulation of Indian land leasing provides the "special factor" absent in *Cotton Petroleum* to find preemption. *Seminole*, 799 F.3d at 1340-41.

Accord Palm Springs Spa, Inc., 18 Cal.App.3d at 376 ("[T]he imposition of the possessory interest tax . . . lowers the rental fee the owner can charge on a leasehold."). The district court erroneously ignored these prior holdings of this Court as to the impact of this tax.[14] *See generally*, ER 24-57. The PIT is an indirect method of taxing Indian lands that cannot be taxed directly.

The district court furthered its error by erroneously understating the PIT's impact on Agua Caliente when it found that "even assuming that the PIT has some ill effect on the Tribe, that adverse effect arises from only 100 leases that contribute to the reduction of tribal revenues – as opposed to approximately 19,900 leases on allotted land that generate rental income to which the Tribe can lay no claim." ER 53. This analysis is factually erroneous, likely due to the district court's failure to understand "Indian trust lands." Agua Caliente,

[14] The district court also ignored the Preamble to the leasing regulations. As stated by the United States, the "Assessment of State and local taxes would obstruct Federal policies supporting tribal economic development, self-determination, and strong tribal governments. State and local taxation also threatens substantial tribal interests in effective tribal government, economic self-sufficiency, and territorial autonomy." 77 Fed. Reg. 72447. "State and local taxation of lessee-owned improvements, activities conducted by the lessee, and the leasehold interest also has the potential to increase project costs for the lessee and decrease the funds available to the lessee to make rental payments to the Indian landowner." *Id.* at 72448. "[T]he very possibility of an additional State or local tax has a chilling effect on potential lessees as well as the tribe that as a result might refrain from exercising its own sovereign right to impose a tribal tax to support its infrastructure needs. Such dual taxation can make some projects less economically attractive, further discouraging development in Indian country." *Id.*

appearing in this case on its own behalf and as *parens patriae* on behalf of all its members, is representing interests related to both the Tribe's leases as well as the 19,900 leases of Tribal member allottee Indian trust land. ER 2; *see Delorme v. United States*, 354 F.3d 810 (8th Cir. 2004) (holding that a tribe can have standing to sue to protect its own interests or, in appropriate situations, the interests of its members through a *parens patriae* action). Despite the district court's own made-up definition of "Trust Lands" that erroneously and arbitrarily excluded allotted trust lands, the pervasive federal regulatory scheme applies to both tribal trust and allotted trust lands equally, bringing all 20,000 leases into play. Thus, the interest represented by the Tribe in this case includes ***all*** Agua Caliente Indian trust lands subject to leasing, not just the relatively small part of the Reservation that is both held in trust by the United States for the Tribe and is subject to leasing.

Even if Agua Caliente had not brought suit in its *parens patriae* capacity, beneficial ownership of trust land should not affect the legal analysis in this case; all the Indian trust land is owned by the United States as title owner to the exclusive benefit of Indians, and all of it is subject to the pervasive and comprehensive regulatory leasing scheme. *See, e.g.*, 25 C.F.R. § 162.004(a). The clearly erroneous decision to parse this issue and limit the Tribe's substantial

interests in leasing to a mere 0.5% of the leases at stake in this case undermines the district court's preemption analysis and warrants reversal.

e. Generalized County Interests and Services Cannot Overcome the Pervasive Federal Regulatory Scheme

Against these strong federal and tribal interests, the County must show a "specific, legitimate regulatory interest to justify the imposition of its . . . tax." *Ramah*, 458 U.S. at 843; *Bracker*, 448 U.S. at 150. This requires a showing of a direct nexus between the activity taxed and the services provided by the County. *Mescalero*, 462 U.S. at 336 ("The exercise of State authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the State in connection with the on-reservation activity." (citations omitted)). A "State seeking to impose a tax on a transaction between a Tribe and nonmembers must point to more than its general interest in raising revenues." *Id*. (citations omitted). As put recently by a federal court in Washington, "When the transaction is comprehensively regulated by the federal government … the State may be required to demonstrate that its services maintain a ***close nexus*** with the taxed transaction itself." *Tulalip Tribes v. Washington*, 2017 WL 58836 at *8 (W.D. Wash. Jan. 5, 2017) (emphasis added).

Here, the County can show little more than a general desire to raise money from leasing on Agua Caliente Indian trust lands. The County did not and cannot establish any relationship, much less a "close nexus," between the leasing of

Indian reservation lands and the general governmental services it provides throughout the County that are funded in some small, unknown part through PIT revenues.

i. *The PIT is a Tax on Property, Not the Lessee's Use and Enjoyment of the Land*

As a threshold matter, the Court must identify the activity being taxed. The district court erred when it construed the PIT as a use tax rather than a property tax. ER 47-48, n. 17. The County is not taxing the conduct of non-Indians; rather, the County is taxing interests in Indian trust property.

The district court's conclusion ignored the undisputed material fact that the PIT is a real "property tax." ER 744-745; ER 71-72, ER 434-449; ER 455-458; ER 472-473; ER 556-557; ER 602; ER 818, ER 830; ER 639-658. It also ignored California law, which unmistakably treats the PIT as a property tax. Cal. Rev. & Tax. Code § 107; *id*. § 104 ("[R]eal property' includes: . . . (a) The possession of, claim to, ownership of, or right to the possession of land."); *id*. § 2187 (providing that "[e]very tax on real property is a lien against the property assessed"). The PIT is collected on the property tax bill. ER 818; ER 834-836. In contrast, a "use tax" in California is imposed on consumers of merchandise (tangible personal property) that is used, consumed, or stored in the state, such as vehicles, vessels, and aircraft. Cal. Rev. & Tax. Code § 6201.

The district court's erroneous holding that the PIT was a "use" tax is significant, as it allowed the district court to consider a broad sweep of County services that otherwise bear no connection to the business of leasing or possessing residential or commercial property on Indian trust lands as part of the balancing analysis. ER 49-51. These other services, which are funded in large part by other County taxes, should never have been considered as part of the balancing analysis on PIT.

The district court compounded this initial error by then accepting the County's misleading argument that the County's interest in providing general services – including, libraries, parks, and roads – partially funded by the PIT to everyone, everywhere in the County somehow justifies the tax on leasing. ER 49. Providing generalized governmental services throughout a county the size of New Jersey provides an insufficient nexus to the taxed activity. There is no correlation between the leasing and possession of Indian trust land and the use of services in far-flung parts of the County; even if the leasing did not take place, the County would still need to provide such services. Such services cannot credibly provide the required "close nexus" to the leasing of Indian trust lands.

Moreover, the district court failed to consider the limited role that the PIT plays in funding the County's general governmental services. *Compare* ER 46-51 *with* ER 748-755; ER 71-72; ER 455-456, 459-462, 464-466; ER 473, 476, 479,

483-484; ER 512; ER 521-522; ER 523-526; ER 534-535. The County provided no evidence showing what percentage of the services listed by the County are actually funded in any part by the PIT. *Id.* This is because the PIT is not tracked, and is simply dumped into the County's general fund for disbursement. ER 748-750; ER 71-72; ER 455-456, 460-462; ER 476, 479, 484; ER 512. There is no nexus whatsoever between the leasing of Agua Caliente Indian trust lands and the general governmental services provided to all persons in the County supported in some small part by PIT tax revenues.

Affirming the district court would effectively render *Bracker* balancing a nullity, as all taxes that contribute to the funding of any governmental service arguably provide some tangential benefit in relation to the property or activity being taxed. What is missing here is the critical link between the PIT and any County services related to the act of leasing commercial and residential property on Indian trust land.

ii. *The County Admits It Has Only a Generalized Interest in Raising Revenue*

On its side of the *Bracker* scale, the County can offer only a general interest in raising revenue to support a broad array of governmental services provided to all people throughout the County.[15] *See* ER 633-636 (describing the

[15] Put in perspective, the PIT is collected from 4300 acres of Agua Caliente Indian trust lands and is spent throughout the 4,673,920 acres of Riverside County.

numerous services funded in part by the PIT that "benefit everyone living in Riverside County"); ER 590-594 (detailing how DWA uses PIT revenues to defray its costs of importing water for the benefit of its entire service area).

As courts have repeatedly recognized, such an interest, while legitimate, is not enough to justify state taxation in the face of comprehensive federal regulation of a particular activity or when the value being taxed is substantially derived from the reservation. *See, e.g., Seminole*, 799 F.3d at 1341-43; *Cabazon*, 37 F.3d at 435; *Hoopa*, 881 F.2d at 659-61 (finding a timber tax preempted when the state services that it funded were "provided to all residents" and "benefit[ted] both tribal and non-tribal members"); *Crow*, 819 F.2d at 900-01. It certainly is not enough here, when both comprehensive federal regulation and reservation-derived value are present. None of the services highlighted by the County are tied to the actual business of renting residential and commercial property on Indian land, nor are they directly linked to the right to possess Indian trust land. ER 749-751, 753-755; ER 71-72; ER 459-462, 464-466; ER 473; ER 521-522, ER 523-526.

Rather than looking for a nexus between the PIT and the services it funds as instructed by *Bracker* and *Ramah*, the district court instead diverted to *Barona Band*, which allowed a lesser state interest to carry the day on balance. ER 51. However, this case is not *Barona Band*. There, "sophisticated parties contracted

to create a taxable event on Indian territory which otherwise would occur on non-Indian territory." *Barona Band*, 528 F.3d at 1191. This is the factual distinction between the present case and the multitude of cases where courts have analyzed state taxation on non-Indians performing work on Indian land. This Court correctly refused find a state tax preempted "where the Tribe has invited commercial activity onto its territory for the purpose of marketing a sales tax exemption to non-Indian businesses who would otherwise be liable for the state tax under laws of general applicability." *Id*. at 1193-94. Unlike *Barona Band*, this is not a transaction that is non-Indian in character and could take place anywhere but for creative conduct aimed at tax avoidance. This is a case involving the taxation of Indian land leasing which must, by its nature, be closely tied to "Indian territory." *Barona Band*'s departure from the accepted requirement that a state entity show a close relationship between the tax and the state interest asserted to justify such tax, while perhaps justified under the facts of that case, is not appropriate here. The district court's reliance on this factually unique case to import a lesser burden for the County to avoid preemption of the PIT was clear error.

Moreover, and contrary to the district court's finding, it is simply not true that there is an "intimate relationship between both the lessees' enjoyment of the Trust Land and the tax assessed, and the PIT revenues and the services rendered

to the tax-paying lessees." ER 49. The district court cited to no evidence in the record for this proposition – because there is none. *See generally*, ER 739-816. What the district court did was *sua sponte* consider services funded by other taxes (such as sales and use taxes, tobacco tax and documentary transfer tax to name a few) to weigh against preemption of the PIT. ER 49-50. The district court's error is plain when placed alongside the County's admission that it cannot identify how much of the PIT went to provide any service that it provides on a countywide basis to the benefit of all residents of the County, regardless of whether that resident pays the PIT or levies in an area from which PIT is collected. ER 783-786; ER 71-72; ER 459-462, 464-466; ER 473, 483-484; ER 521-522. The County does not track PIT revenues separately from other tax revenues. ER 782; ER 71-72; ER 455-456; ER 476; ER 512. It does not specifically track how PIT revenues are spent, and it admits that it would be "quite difficult" to do so. ER 782; ER 71-72; ER 484; ER 512. Thus, as the County admits, the PIT revenues are "not tied to any particular service that is provided by the County to the taxpayers." ER 783; ER 71-72; ER 473; ER 459; ER 31 at 521-522. The district court's conclusion to the contrary – seemingly drawn from whole cloth and divorced from the admitted facts – is erroneous. In fact, the PIT funds County expenses that "are not specific to a service provided directly to the public." ER 786; ER 72; ER 523-526.

These admitted, undisputed facts – ignored by the district court – make plain that the PIT is a quintessential example of a "general revenue tax" found preempted by the Supreme Court in *Bracker* and *Ramah* and by this Court in *Hoopa.* Contrary to the district court's suggestion, the PIT cannot be justified by the fact that the PIT helps fund "road maintenance and animal pest control services, to larger undertakings such as public safety, law enforcement and education." ER 49. This Court rejected a similar argument in *Hoopa*, which struck down a tax on timber harvested from an Indian reservation, holding:

> [t]he state's general interest in revenue collection is insufficient to outweigh the specific federal interests with which the timber yield tax interferes. The services provided by the state and county are provided to all residents. The road, law enforcement, welfare, and health care services provided by the state and county benefit both tribal and non-tribal members.

Hoopa, 881 F.2d at 661. The district court admits that it is the same situation here, stating "These services directly benefit all Reservation residents and visitors." ER 50. That these services are made available for all in the County, not specifically Indian trust lands on the Agua Caliente Reservation undercuts the putative State interest and mandates reversal of the district court's erroneous decision. ER 46 ("Although California points to a variety of services that it provides to residents of the reservation and the surrounding area, none of those services is connected with the timber activities directly affected by the tax. To be valid, the California tax must bear some relationship to the activity being taxed").

III. The PIT Is Also Unlawful Because It Infringes on Agua Caliente's Sovereignty

State and local governments cannot infringe on the right of tribes to make their own laws on their reservations and be ruled by them. *Bracker*, 448 U.S. at 142 (citing *Williams v. Lee*, 358 U.S. 217, 220 (1959)). Here, the County's exercise of its own sovereign power through imposition of the PIT within the Reservation interferes with the Tribe's concurrent sovereign authority over its territory. This is an additional and independent basis for preemption aside from § 465 and *Bracker* balancing. *Tulalip*, 2017 WL 58836 at *6. The district court's bare conclusion that there "is no evidence that [the PIT] actually impairs Agua Caliente's ability to self-govern" is wrong. ER 56.

Indian tribes have plenary and exclusive power over their territory, subject only to limitations imposed by federal law. *Worcester v. Georgia*, 31 U.S. 515, 520 (1832) (absent tribal or federal approval, "the Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force.") Thus, the Supreme Court has recognized that tribal sovereignty serves as an independent barrier to the exercise of a state's authority if the challenged action "unlawfully infringe[s] 'on the right of reservation Indians to make their own laws and be ruled by them.'" *Bracker*, 448 U.S. at 142 (citing *Williams*, 358 U.S. at 220). Here, the PIT infringes on the Tribe's sovereignty in several significant ways, and the district

court erred in failing to appropriately consider the impact of the PIT on the Tribe's sovereignty.

The PIT usurps the Tribe's authority to determine what taxes can and should be imposed on transactions occurring on its Indian trust lands. As noted by the district court, the Agua Caliente Tribal Council has made a deliberate decision not to impose its own Tribal PIT tax on leasing of its Indian trust lands, thereby avoiding double taxing the lessees. ER 30. Contrary to the district court's analysis, that the Tribe chose to make this decision does not diminish the sovereign impact. ER 52, 56.[16] The collection of the PIT usurps Agua Caliente's sovereign authority to determine what taxes to impose arising from Reservation activity.

[16] The district court adds: "The Tribe has submitted no evidence from which the Court can draw a reasonable inference that it would have the infrastructure and wherewithal to provide the types of public services currently provided by the County if it were only given the chance." ER 52. This tone-deaf conclusion portrays a lack of understanding of tribal sovereignty and a severe disrespect for tribal governments. The district court's analysis puts the Tribe in a Catch-22 not faced by other governments, where it must impose its tax and risk the economic consequences to pay for the additional services it would need to provide to support preemption or not impose the tax and be accused of acting as a lesser sovereign as a result. The district court's conclusion that "the Tribe is free to impose its own tax that would also generate funds for its development should it choose to do so" views the issue of double taxation in a vacuum wholly divorced from the reality recognized by this Court 40 years ago. ER 52. It does not take an economics expert to demonstrate that 100% increase in tax rate could have a significant impact on leasing by the Tribe and its Tribal member allottee lessors.

There can be no greater infringement on sovereign authority than another government imposing a tax on the Tribe's Indian trust lands. The power to make decisions about taxation on the reservation is "[c]hief among the powers of, sovereignty recognized as pertaining to an Indian tribe" and "this power may be exercised over members of the tribe and over nonmembers." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153 (1980). The County's collection of the PIT impedes Agua Caliente's right to make its own governmental decisions about taxation within its jurisdiction, including the decision whether to impose the Tribal tax. In this way, the PIT imposed by the County interferes with Agua Caliente's sovereignty because it impedes Tribal self-government "[b]y taking revenue that would otherwise go towards supporting the Tribe and its programs." *Crow*, 819 F.2d at 902. Given that the PIT generates more than $22 million in annual revenues, ER 787; ER 71; ER 477-478, and that those revenues would go to Agua Caliente under its Tribal tax if the PIT were no longer collected, the PIT absolutely has a substantial sovereign and economic impact on the Tribe. *See Cabazon*, 37 F.3d at 434 (holding that the economic burden of a state fee fell on the tribe where the outcome of the litigation would determine whether the tribe or the state received the fee revenue).

The County's collection and assessment of the PIT on Agua Caliente Indian trust lands for its own benefit infringes on the Tribe's sovereign authority to regulate those same lands within its Reservation.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the district court and find that the PIT is preempted as to Agua Caliente Indian trust lands as a matter of federal law.

DATED: December 21, 2017.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Appellant here certifies that, to Appellant's knowledge, there are no cases or appeals pending before this Court related to the present appeal.

Dated this 21st day of December, 2017.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,650 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 and is 14-point font, Times New Roman.

Dated this 21st day of December, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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.

s/ Kirstin Largent