Appeal 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. ED CV 14-0007-DMG (DTBx) Honorable Dolly M. Gee

APPELLANT'S CONSOLIDATED REPLY BRIEF

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AGUA CALIENTE BAND OF CAHUILLA INDIANS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Federal Cases

Federal Statutes

Federal Rules and Regulations

State Regulations

Other Authorities

Applying express statutory law and well-established legal principles, this Court has a clear path to find that the California possessory interest tax (PIT) cannot be lawfully assessed on the Agua Caliente Band of Cahuilla Indians' Indian trust lands, or on any of the bundle of rights derived from those lands. Notwithstanding the district court's plain errors and Appellees' misleading briefing, the PIT is expressly preempted by operation of 25 U.S.C. § 465. In the alternative, as a matter of federal common law, this Court should find that the PIT is preempted under the *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), balancing analysis.

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

A. Section 465 Preempts the PIT

The analysis supporting the express statutory preemption of the PIT is straightforward. Section 465 bars state and local taxation of "lands or rights" in land held in trust by the United States for the benefit of Indians. 25 U.S.C. § 465. Despite the County's fixation on "title," if a state taxes "rights" in Indian trust land, that taxation is foreclosed by § 465. County Br. at 28. The PIT is such a tax and cannot stand.

1. The PIT Taxes Use and Possession of Indian Trust Land

The district court and the County urge a false distinction between a tax on "the Indian land itself" and a tax on "the non-Indian's use and enjoyment" of that

land.[1] County Br. at 29-30. The PIT taxes rights in tax-exempt Indian trust land—particularly, the right to use and possess Indian trust land. Cal. Rev. & Tax. Code § 107(a) (defining "possessory interest" as "[p]ossession of, claim to, or right in the possession of land or improvements ...."); 18 C.C.R. § 20(a) (possessory interests "are interests in real property"). Appellees admitted below that the PIT is an ad valorem "property tax," and try as they might, their mental gymnastics cannot divorce this prohibited property tax from the land itself. ER 46 at 744-45; ER 6 at 71-72, ER 23, ER 24 at 455-58, ER 25 at 472-73, ER 35 at 556-57; ER 38 at 602; ER 47 at 818, ER 48 at 830; ER 40. That the PIT taxes the right to possess property and not the "use and enjoyment" is made plain by the fact that a lessee who never visits or makes any use of leased Reservation property pays the same PIT as a lessee who lives on the Reservation or otherwise makes daily use of it.

For taxation purposes, the County directs and trains its assessors to assess "property rights" as opposed to ownership; as applied here, a taxable "possessory interest is the interest created by a lease." Assessor's Handbook 510 at 1, 17, *available at* http://www.boe.ca.gov/proptaxes/ahcont.htm ("AH 510"). The PIT values the full bundle of rights, including those delineated to the possessor through

[1] The County goes so far as to spuriously suggest that the Tribe's § 465 argument means that "no tax on non-Indians in Indian country would be permissible." County Br. at 30. This is fear mongering, as a proper application of § 465 would never bar transaction or excise taxes wholly disconnected from the land.

the federally-approved lease. As explained by the Assessor's Handbook, the value of the possessory interest is commonly assessed by capitalizing the annual income stream in question to arrive at a current value. Here the County's assessors are taxing the value of the annual Indian trust land lease payment required to be paid to the United States under the federally approved lease in return for enjoyment of the possessory interest. AH 510 at 31, 96-97. This valuation is based on a federally-approved lease and is inextricably tied to both the Indian's possession of the trust land and the land's location. But for the existence of a federally-approved lease, there would be no possessory interest for the County to tax. Section 465, as interpreted and applied in *Mescalero*, prohibits just such a tax.

2. Section 465 Prohibits Taxes on the Use and Possession of Indian Trust Land

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." *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 158 (1973) (internal citation omitted). *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.* (citation and internal quotation marks omitted).

The right to lease and possess property is a form of property use, falling squarely within the bundle of privileges that make up property ownership. The

Eleventh Circuit recently held as much in the same context presented here, finding 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. *Seminole Indian Tribe v. Stranburg*, 799 F.3d 1324, 1331 (11th Cir. 2015) (emphasis in original). As the Eleventh Circuit held, the right to lease land is a "privilege of ownership" just like the right to use land at issue in *Mescalero*. *Id.* at 1330. Accordingly, taxes on lease payments that "secure a lessee's **possessory interest** *in the land*" are materially indistinguishable from the use taxes that the *Mescalero* Court held unlawful. *Id.* at 1331 (bold added, italics in original). As the Eleventh Circuit correctly and clearly explained, § 465 does not allow states to tax "*a right in land*." *Id.* at 1332 (emphasis in original).

B. Appellees' Arguments to the Contrary Are Unavailing

Appellees offer several unavailing arguments in an effort to avoid the result compelled by *Mescalero* and supported by *Stranburg*. First, the County argues that § 465 does not apply to the Agua Caliente Reservation at all. County Br. at 22-23; *see* DWA Br. at 13 n.6. Second, they try to distinguish the PIT from the tax in *Mescalero* and *Stranburg* and limit the holdings of those cases. County Br. 29-30; DWA Br. at 28-31. Next, they assert that the Supreme Court has foreclosed the Tribe's reading of *Mescalero* and the Eleventh Circuit's reasoning in *Stranburge* with its decision in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S.

163 (1989). DWA Br. at 16-17. Finally, the County and DWA emphasize a trio of inapplicable Ninth Circuit cases, and make an irrelevant argument regarding the general applicability of state taxes on Indian reservations. DWA Br. at 17-23; County Br. at 22 n.3, 31-32. None of these arguments change or evade *Mescalero*'s holding that § 465 expressly preempts any state or local tax that, like the PIT, taxes "the bundle of privileges that make up property or ownership" of Indian trust property. *Mescalero*, 411 U.S. at 158.

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

The County hitches its argument on appeal to the district court's erroneous ruling that § 465 does not apply to the Agua Caliente Reservation because the Reservation was established by Executive Orders prior to the 1934 enactment of § 465. ER 2 at 41; County Br. at 22-23. While it is true that the Agua Caliente Reservation was first established in the 1870s, that fact alone does not render the long-standing tax exemption codified in § 465 inapplicable. Neither the date of acquisition nor method of acquisition changes § 465's application.

When the Agua Caliente Reservation was created, the Reservation lands were immediately exempt from state and local taxation.[2] ER 46 at 797-98; ER 41 at 661, ER 43 at 712-13; *see In re Kansas Indians*, 72 U.S. 737, 758 (1866) (tribal lands held by Indians with whom the United States maintains a formal trust relationship cannot be taxed by states); *United States v. Rickert*, 188 U.S. 432, 435-37, 442 (1903). Just as federally-owned land is exempt from state taxation, land that the federal government holds in trust for tribes is likewise exempt.

The Eighth Circuit in *Chase v. McMasters*, a case wholly ignored by both Appellees, made clear 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) (emphasis added). Congress understood that the tax exemption in § 465 extended to all Indian trust land, regardless of when acquired, when it enacted § 465. In a statement from the Senate floor, Senator Thomas from Oklahoma clearly stated the understanding of lawmakers when he noted that "the bill proposes ***to extend the restrictions to all***

[2] This Court has confirmed that, as long an executive order creating a reservation remains in effect, the Indian title to the reservation lands deserves the same protection as the Indian title to reservations created by treaty or statute. *United States v. Southern Pac. Transp. Co.*, 543 F.2d 676, 687 (9th Cir. 1976) (noting "the status of executive order reservations can be summarized as follows:
the Indians have the exclusive right to possession but title to the lands remains with the United States. Congress has plenary authority to control use, grant adverse interests or extinguish the Indian title. In these respects, executive order reservations do not differ from treaty or statutory reservations.").

Indians forever. That would mean that many millions of acres of land [ ] would never become taxable." 78 Cong. Rec. 11122, 11126 (June 12, 1934) (emphasis added). Congress was not establishing a new tax exemption applicable only to future Indian land acquisitions by the Secretary. *Santa Rosa Band of Indians v. Kings Cnty.*, 532 F.2d 655, 666 (9th Cir. 1975) ("[W]hen 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" previously).

The district court and County's interpretation leaving all Indian lands acquired prior to the enactment of § 465 susceptible to state or local taxation, even when they are held in trust by the United States for the benefit of Indians, is wrong, inequitable, and unworkable as a matter of law and policy. Post-1934 land acquisitions have added roughly 8 million acres to the then-remaining 48 million acres of Indian land set aside under treaties or executive orders. *Cohen's Handbook of Federal Indian Law* §§ 1.04 at 74, 15.02 at 995 (Nell Jessup Newton ed., 2012). The district court's ruling, advocated for by the County, would insulate only a small fraction of Indian lands from state and local taxation, in direct contradiction of the intent and purpose of the statute. *Chase*, 573 F.2d at 1016. It would also create an absurd and unjust distinction between Indian trust lands based on time, punishing those tribes whose roughly 48 million acres of Indian trust

lands were set aside by treaty or executive order in the 1800s. *See, e.g., Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978) (statutes should not be read to create "absurd results"). No court prior to the district court has ever adopted such an inequitable and erroneous reading of § 465, and this Court should reject that approach now.[3]

That the United States designated the land at issue as the Agua Caliente Indian Reservation prior to 1934 has no bearing on the law applicable to, nor the outcome of, this case. *See also* 25 U.S.C. §§ 478 & 2202.[4] Agua Caliente Reservation trust lands were already tax-exempt before 1934 and continue to be pursuant to § 465 thereafter.

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[3] The County argues that the Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009) forecloses the Tribe's argument. County Br. at 26. To the contrary, *Carcieri* highlights the absurdity of the County's position. *Carcieri* held that the definition of "Indian" in the IRA unambiguously refers to those tribes that were "under federal jurisdiction" in 1934 and that the Secretary can only take new land into trust for those pre-1934 tribes. *Carcieri*, 555 U.S. at 395. The district court held a mirror to *Carcieri* by erroneously and inexplicably finding tribes with trust land pre-1934 are excluded from the continuing tax exemption under § 465.

[4] The County erroneously suggests that the Court should ignore the purely legal argument that the Indian Land Consolidation Act made § 465 applicable to all Indian trust lands. *Compare* County Br. at 25 at *with e.g., Telco Leasing v. Transwestern Title Co.,* 630 F.2d 691, 693-94 (9th Cir. 1980) (where issue is purely one of law and not affected by factual record below, appellate court has discretion to consider statute's application). The "traditional rule is that 'once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (quoting *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992)).

2. The Legal Incidence of the PIT Is Immaterial for § 465

The County argues that the PIT is distinguishable from the taxes preempted in *Mescalero* and *Stranburg* because the legal incidence of PIT falls on non-Indian lessees and that the only way the PIT can be preempted is if the incidence falls on Indians. County Br. at 27, 29-30;[5] *see also* DWA Br. at 29, 31. It is correct that the legal incidence of the PIT falls on the lessee; nothing else the County offers is accurate. What matters here is that the PIT is being imposed on property interests that are tax-exempt, not that it was collected from non-Indian lessees. This is clear from *Stranburg*, which involved a tax assessed against a non-Indian lessee rather than Indian lessors and that constituted a lien on the personal property of the lessee, but was still held preempted by § 465. *Stranburg*, 799 F.3d at 1326 ("The tax is assessed against the lessee based on the total amount of rent paid."). The PIT is very similar to the preempted Florida rental tax in these regards.

Section 465 turns on the status of the property being taxed, not on the identity of the taxpayer. By its plain language, the tax exemption contained in § 465 attaches to the land and rights in the land protected under the statute. *See* 25 U.S.C. § 465 ("[S]uch lands or rights [acquired pursuant to this Act] shall be

[5] The County's reliance on *Wagnon v. Prairie Band Potawatomi*, 546 U.S. 95 (2005) and *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995), is particularly misplaced as neither case involved a federal statute that expressly preempts a tax, as § 465 does. *Wagnon* in particular has no bearing as it involved a tax on motor fuel received by non-Indians located off the reservation.

exempt from State and local taxation."). Even though the legal incidence of the PIT falls on non-Indians, the tax is expressly precluded because a tax on the right to use and possess Indian trust land is indistinguishable from an impermissible tax on the land.

Mescalero's statement that "[l]essees of otherwise exempt Indian lands are ... subject to taxation," quoted by DWA, is not to the contrary. DWA Br. at 29 (quoting *Mescalero*, 411 U.S. at 157). This section of the *Mescalero* opinion discussed the gross-receipts tax, and the case that it cites refers to the taxation of income that lessees derive from leased Indian lands. The taxability of non-Indian income from activities carried out on leased Indian lands is not at issue here. The PIT runs afoul of § 465's exemption not because it taxes non-Indian activity on Indian lands, but because it taxes the right to lease and possess Indian trust lands. *Stranburg*, 799 F.3d at 1331 n.9 (noting that the quoted language from *Mescalero* "does not have the reach [Appellee] attributes to it and stands for the now uncontroversial position that non-Indian lessees of Indian land may be subject to some state taxation").

By its own terms, § 465 applies to "surface rights to [Indian] lands." 25 U.S.C. § 465. To argue as Appellees do, that the PIT does not tax the privilege of the Tribe's ownership of Indian trust lands, divorces the tax from the reality of its application to the bundle of Tribal property rights at issue. Leasing is

unquestionably a "use" of the surface rights of Indian trust land. The Supreme Court has held that such a tax is unlawful, as "a tax upon 'use' is a tax upon the property itself." *Mescalero*, 411 U.S. at 158.

3. *Cotton Petroleum* is Not Controlling Because Congress Has Explicitly Forbidden State and Local Taxation of Indian Trust Lands or Rights in Such Lands

DWA relies on the general principle that non-discriminatory state laws apply on Indian reservations and the Supreme Court's decision in *Cotton Petroleum Corporation v. New Mexico*, 490 U.S. 163 (1989), to argue that *Mescalero* was abrogated by the Supreme Court's so-called 38 year-old "current doctrine," which allegedly allows the PIT to be imposed on non-Indians on Indian reservations. DWA Br. at 16-17. The notion that non-discriminatory state laws potentially can apply to non-Indians on Indian reservations is unremarkable and has no relevance to the question of whether a tax is preempted by an explicit federal statute such as § 465. This is obvious from *Cotton Petroleum* itself, where the Court acknowledges that "Congress does, of course, retain the power to grant such immunity." *Cotton Petroleum*, 490 U.S. at 175.[6] That is exactly what Congress did

[6] DWA's argument overlooks the fact that the Supreme Court's analysis in *Cotton Petroleum* applies to oil and gas lessees specifically, which are fundamentally different from surface land leases. *Cotton Petroleum*, 490 U.S. at 183 n.14. The Court did not address the scope of § 465's tax exemption as presented in this case.

in § 465—it affirmatively codified the tax-exempt status of land held in trust by the United States for Indians and interests in such land.

While state or local governments may tax non-Indians doing business on Indian reservations in certain circumstances, a controlling federal statute forbids them from taxing "the bundle of privileges that make up property or ownership" of Indian trust property. *Mescalero*, 411 U.S. at 158. In other words, *Mescalero* instructs the Court to review what, not who, is being taxed. Tellingly, the litany of cases offered by DWA in support of their position all involve transactions that were wholly non-Indian in character and wholly divorced from the land—and therefore never considered § 465. DWA Br. at 16 (citing cases involving state sales and excise taxes applied to non-Indians). Default rules regarding on-reservation taxation do not apply in the face of § 465's preemption of the PIT.

4. Ninth Circuit Case Law Is Not to the Contrary

Appellees next turn to a series of cases that they contend stand for the proposition that § 465 does not preclude the PIT: *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),[7] and *Confederated Tribes*

[7] DWA takes the argument one illogical step further, re-litigating positions they lost before the district court (ER 118 at 10) and did not appeal concerning the alleged stare decisis effect of these cases, as well as an alleged res judicata and collateral estoppel problem. DWA Br. at 21-24, and 24 n.7. This argument is plainly absurd and easily refuted. Stare decisis is a principle of policy and not a

of Chehalis Reservation v. Thurston County Board of Equalization, 724 F.3d 1153, 1158 n.7 (9th Cir. 2013). DWA Br. at 17-21; County Br. 29-30, 31-32. To support their flawed contention, Appellees intentionally misconstrue these cases.

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mechanical formula of adherence to prior cases. *Bates v. Jones*, 904 F. Supp. 1080, 1088 n. 1 (N.D. Cal. 1995). This Court has recognized that it is "bound by decisions of prior panels unless an en banc decision, Supreme Court decision, or subsequent legislation undermines those decisions." *Baker v. Delta Air Lines, Inc.*, 6 F.3d 632, 637 (9th Cir. 1993) (citations and internal quotation marks omitted). This exception to the rule of stare decisis applies as to *Agua Caliente* and *Fort Mojave* because neither case mentioned or considered § 465 at all, and the express preemption analysis in both was repudiated by *White Mountain Apache v. Bracker*, 448 U.S. 136 (1980). In *Bracker*, the Supreme Court held that the then-standard pre-emption analysis applied in *Fort Mojave* and *Agua Caliente* was inapplicable to taxes of non-Indian activities occurring on Indian reservation land. The same holds true for *United States v. County of Fresno*, 429 U.S. 452 (1977), a case that did not involve Indian land and did not address § 465. *Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993) (holding that stare decisis is not applicable unless the issue was "squarely addressed" in a prior decision). Res judicata does not apply here because this is a tax case and the Tribe's claims are clearly distinct in time, space, and origin from the 1966 litigation. *See Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948); *Pittston Co. v. United States,* 199 F.3d 694, 705 (4th Cir. 1999) (rejecting res judicata where new claim is "clearly distinct in time, space, and origin from the assessments [plaintiff] is now challenging."); *Spradling v. City of Tulsa*, 198 F.3d 1219, 1223 (10th Cir. 2000) (stating that res judicata is inapplicable in the face of an intervening change in the law or if a modification of significant facts creates new legal conditions). Likewise, there is no collateral estoppel because the instant case and the prior actions are not identical and, even if they were, an exception to collateral estoppel applies because there have been two significant changes in the law since the 1970s cases were decided—namely: *Bracker* and the promulgation of 25 C.F.R. § 162.017 (2013). *Kamilche Co. v. United States*, 53 F.3d 1059, 1062 (9th Cir. 1995). At the time the Ninth Circuit considered the PIT in *Agua Caliente* and *Fort Mojave*, 25 U.S.C. § 465 had not been made applicable to all tribes; that only took place in 1983 when Congress enacted 25 U.S.C. § 2202. Thus, the Ninth Circuit has never directly considered whether the PIT is expressly preempted by § 465.

The critical flaw in this line of argument is that, with one exception, the cases that Appellees cite do not involve § 465. The Eleventh Circuit noted this problem when confronted with similar challenges to § 465's applicability based on this Court's decades-old decisions in *Agua Caliente* and *Fort Mojave*. *See Stranburg*, 799 F.3d at 1333 ("Significantly, neither the *Agua Caliente* nor *Fort Mojave* decisions mentioned or apparently considered § 465 at all."). *Agua Caliente* was also decided before *Mescalero*. The Supreme Court's subsequent decision in *Mescalero* expressly recognized that some uses are so intimately connected with the land that a tax on those uses is essentially a tax on the land, obliterating any categorical distinction between use taxes and property taxes. *See Mescalero*, 411 U.S. at 158. To the extent *Agua Caliente* (and, therefore, *Fort Mojave*) can be construed as permitting a state tax on the leasing or other "use" of Indian land, it was overturned by *Mescalero*.

This leaves Appellees to focus on dicta from the Ninth Circuit's 2013 *Chehalis* opinion that relied without further analysis on the readily distinguishable opinions from *Agua Caliente* and *Fort Mojave*. The *Chehalis* panel's passing reference to *Agua Caliente* in a footnote—regarding a statute that was not addressed at all in the prior panel's decision—cannot be characterized as anything other than a statement made "casually and without analysis … in passing without due consideration." *United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001)

(*en banc*). Indeed, this Court agreed just last year in *DWA v. Dep't of Interior*, 849 F.3d 1250, 1256 (9th Cir. 2017), when it juxtaposed *Stranburg*'s "thorough analysis" of the relevant issues with the "dicta" in *Chehalis.* The *Chehalis* Court was not presented with the question of whether § 465 precludes the PIT.

What Appellees conveniently ignore about *Chehalis* is the fact that the Court—not in dicta—viewed the enactment of § 465 as a continuation of the existing tax exemption afforded federally-owned Indian trust lands recognized in *United States v. Rickert. Chehalis*, 724 F.3d at 1155. In so doing, 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. Doing as the district court has done—giving later-acquired trust lands greater tax preemption than pre-existing trust lands that already enjoyed tax preemption—contravenes this Court's prior analysis.

Section 465 and the long-standing immunity of federal lands (and the associated bundle of rights in those lands) from state taxation preempts the PIT as applied to Agua Caliente Indian trust lands. The district court's erroneous decision should be reversed.

II. Federal Law Preempts the PIT Under *Bracker* Balancing Analysis

Federal law also preempts the PIT under the balancing test developed in *Bracker* and its progeny. *See generally* Opening Br. at 10-13 & 29-51. The strong federal interest in carrying out the federal trustee function through the

comprehensive regulation of Indian land leasing, as well as the shared federal and tribal interests in strong tribal governments and tribal economic self-sufficiency, outweigh the County's interest in assessing and collecting the PIT, a tax that raises revenues for the provision of a broad array of general governmental services not directly tied to the leasing of Indian trust lands.

Appellees' discussion of the *Bracker* test misses the mark in several ways. It mischaracterizes the nature of the activity taxed, relies heavily on distinguishable opinions while largely ignoring more analogous ones, and misconstrues governing legal principles. As a result, like the direct court below, Appellees understate the federal and tribal interests that support preemption of the PIT while overweighting the state interests in collecting the tax.

A. Appellees Grossly Understate the Federal and Tribal Interests at Issue

As set forth in Agua Caliente's principal brief, the federal interests at stake in this case are very strong. Opening Br. at 36-41. The United States broadly, comprehensively, and pervasively regulates leasing of the interests in Indian trust lands that the PIT taxes. *See, e.g.*, 25 U.S.C. §§ 415-415d; 25 C.F.R. Part 162 (Part 162 Regulations); Preamble to Part 162 Regulations (Preamble), 77 Fed. Reg. 72440-01, *et seq.* (Dec. 5, 2012). Courts have repeatedly held that the federal government's comprehensive and pervasive regulation of an activity—specifically including the leasing of Indian lands—establishes a strong federal interest for

purposes of *Bracker* balancing.[8] *See Stranburg*, 799 F.3d at 1341 ("[T]he federal government administers an extensive, exclusive, comprehensive, and pervasive regulatory framework governing the leasing of Indian land" that is sufficient to preempt state taxation "absent a state interest of sufficient weight."); *id.* at 1339 ("[T]he Preamble analysis and the actual statutes and regulations themselves provide … substantial evidence of the extensive federal regulation of Indian leasing to inform the *Bracker* inquiry."); *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 Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 839 (1982)); *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1392 (9th Cir. 1987).

In addition to the specific and particularized federal interest in the leasing of Indian trust lands, the United States and Agua Caliente have shared interests in promoting strong tribal governments and Indian economic self-sufficiency. As the Secretary of the Interior declared in the Preamble, "[a]ssessment of State and local

[8] DWA's argument that the Part 162 Regulations "do not independently preempt" the PIT, DWA Br. at 47, misstates the Tribe's position. Agua Caliente does not assert that promulgation of the Regulations preempted the PIT. Rather, the Regulations—along with relevant statutes and the Preamble—evince a strong federal interest to be weighed under "existing federal law," namely, the *Bracker* test.

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 [and] economic self-sufficiency…." 77 Fed. Reg. at 72447; *see also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) ("We have stressed that Congress' objective of furthering tribal self-government … includes Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development.'" (quoting *Bracker*, 448 U.S. at 143)); *Bracker*, 448 U.S. at 143 (referring to "a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development"). In order to overcome these strong federal and tribal interests, Appellees would have to demonstrate an overwhelming state interest in collecting the PIT. *Stranburg*, 799 F.3d at 1341; *Crow Tribe of Indians v. Montana*, 819 F.2d 895, 901 (9th Cir. 1987). As discussed below and in Agua Caliente's principal brief, Opening Br. at 47-51, Appellees cannot do so.

1. Appellees Erroneously Try to Diminish the Federal Interests at Stake by Mischaracterizing to What the PIT Applies

Likely recognizing that they cannot overcome the federal interests at stake when they are properly framed, Appellees instead argue that the federal government does not regulate the activity being taxed and thus has little interest in it. To do so, Appellees mischaracterize to what the PIT applies. They attempt to

spin the PIT as a tax on lessees' "use and enjoyment" of Indian trust lands rather than their property right in such lands, arguing that the federal government "do[es] not regulate lessees or the economic activity in which lessees may engage" and that its interests are thus entitled to little weight in the *Bracker* analysis. County Br. at 49, 52. The facts belie this argument.

While the County contends, albeit erroneously, that the federal government does not regulate the economic activity in which lessees may engage on leased Indian lands, *see id.*,[9] the PIT likewise does not tax lessees' economic activity. Instead, it taxes their leasehold interest in Indian trust lands.[10] By way of illustration, a lessee who never visited or made any use of leased reservation property would pay the same PIT as the lessee of an identical property who lived on the leasehold or otherwise made daily use of it. This simple example shows that the PIT taxes not the "use and enjoyment" of property, but the right to possess the property interest itself. Far from being completely unrelated, as Appellees contend, the federally-regulated and state-taxed interests are one and the same. Accordingly, the property right taxed by the PIT squarely implicates the federal interests in Indian trust land leasing as well as the broader tribal and federal interests in Indian economic development and self-sufficiency.

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[9] *See* 25 C.F.R. § 162.017(b).

[10] Indeed, the amount of the lease payment is one of the bases used by the County assessor for determining the amount of tax owed. *See supra* § I.A.1.

The County attempts to evade this reality by citing this Court's prior determination that the PIT "'does not purport to tax the land as such, but rather taxes the full cash value of the lessee's interest in it.'" County Br. at 41 (quoting *Agua Caliente*, 442 F.2d at 1186 (internal quotation omitted)). The County's reliance is misplaced. To the extent that the PIT taxes Indian trust lands "as such," it is expressly preempted by federal law absent express congressional authorization, and *Bracker* balancing is unnecessary. *See Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458-59 (1995); *Coeur d'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 681 (9th Cir. 2004) ("Stated simply, if the state's tax incidence falls on the Indians, it is unlawful absent a clear congressional authorization to the contrary." (internal quotation omitted)); *see also* Part I, *supra*.

Bracker balancing, which was not conducted in *Agua Caliente* or any of the other pre-*Bracker* cases cited in this section of the County's brief, comes into play only when the legal incidence of the challenged tax falls on non-Indians.[11] *See Chickasaw*, 515 U.S. at 455 & 455 n.5; *Ramah Navajo*, 458 U.S. at 844 n.8. When *Bracker* balancing is needed, it calls not for a formalistic assessment of what the challenged tax "purport[s] to tax," *Agua Caliente*, 442 F.2d at 1186, but rather for

[11] This refutes DWA's half-hearted and quickly abandoned argument that the legal incidence of the PIT is dispositive of the *Bracker* analysis here. *See* DWA Br. at 41-42. The legal incidence is only dispositive of a tax's validity when it falls on Indians or Indian lands and the tax is *per se* preempted. State taxation of non-Indians on Indian lands triggers *Bracker* analysis rather than deciding it.

"a particularized inquiry into the nature of the state, federal, and tribal interests" implicated by the tax. *Bracker*, 448 U.S. at 145. In this case, that particularized inquiry reveals strong federal and tribal interests that support the preemption of the PIT assessed on non-Indians' leased property right in Indian trust lands regardless of the fact that the PIT "purports to tax" a lessees' leased property right in those lands rather than the lands themselves.

2. Compounding Their Mischaracterization of the Activity Being Taxed, Appellees Rely on Inapposite Case Law

Building on their mischaracterization of the interest taxed by the PIT, Appellees rely on readily distinguishable case law to support their position. In particular, they cite a number of cases involving taxation not of property interests in Indian lands, but of non-Indian economic activity on such lands. *See Barona Band*, 528 F.3d at 1192 (upholding "a neutral sales tax on non-Indians' purchases which—but for contractual creativity—would have occurred on non-Indian land"); *Gila River Indian Cmty. v. Waddell*, 91 F.3d 1232, 1237 (9th Cir. 1996) (upholding a "state tax … imposed on receipts from non-Indian, off-Reservation residents who pay to see performers and racers … from off-Reservation"); *Salt River Pima-Maricopa Indian Cmty. v. Arizona*, 50 F.3d 734, 736 (9th Cir. 1995) (upholding "state taxes on the sale of non-Indian goods to a non-Indian by a non-Indian business on a reservation").

It is unsurprising that courts, in conducting the particularized inquiry mandated by *Bracker*, give little weight to federal and tribal interests when a state taxes purely non-Indian activity that is unconnected to Indian land and takes place there only as a matter of convenience or the result of active attempts to avoid taxation. *See id.* Federal and tribal interests are at their nadir in such cases. *See, e.g.*, *Barona Band*, 528 F.3d at 1190-91; *Salt River*, 50 F.3d at 738.

But this is not such a case. The object of taxation here is not a transaction between non-Indians moved onto a reservation for tax avoidance or even convenience. The object of the taxation here is a real property right in reservation land that is held by the United States in trust for the exclusive benefit of the Tribe or the Indian landowner and leased from the Tribe or Indian landowner. The right taxed is necessarily tied to and derives its value from the Reservation—it is the right to possess the Reservation itself. The tribal and federal interests are thus at their zenith, much stronger than in cases like those cited by Appellees, where non-Indians sold non-Indian merchandise to non-Indians in venues that happened to be on Indian land. *See Crow*, 819 F.2d at 899 (distinguishing cases where the tribe "market[s] a product generated on the reservation," and thus has a strong interest, from those where a product is "imported for resale to non-Indians"); *Tulalip Tribes v. Washington*, 2017 WL 58836 at *8 (W.D. Wash. Jan. 5, 2017) (federal and

tribal interest are stronger "when the value of the taxed resources is derived almost exclusively on the reservation"). The latter cases are largely irrelevant.

3. Appellees Fail to Meaningfully Distinguish *Stranburg*

It is telling that, in contrast to their lengthy discussion of inapposite precedent, Appellees spend little time addressing the Eleventh Circuit's recent, highly relevant *Stranburg* opinion.[12] This is likely because there is no principled basis for distinguishing *Stranburg*, which held that federal law preempts a state tax assessed against lessees based on the rent paid to lease "the use of … real property," from the case at bar. *Stranburg*, 799 F.3d at 1326 (internal quotation omitted).

Like Appellees, Stranburg tried to justify the state tax by downplaying the federal and tribal interests that it implicated. *Id.* at 1335. The Eleventh Circuit rejected this effort. First, it noted that the Part 162 Regulations and Preamble constitute "an extensive, exclusive, comprehensive and pervasive regulatory framework governing the leasing of Indian land … 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." *Id.* at 1341 (internal quotation omitted); *see also Segundo*, 813 F.2d

[12] The *Bracker* section of the County's brief devotes a single, short footnote to *Stranburg*. *See* County Br. at 52 n.5. The corresponding section of DWA's brief does not address it at all.

at 1392 (rejecting the contention that the Part 162 Regulations "do not constitute a comprehensive regulatory scheme with preemptive effect on state and local laws"). It further recognized that "Indian economic well-being is one of the many federal interests embodied in the extensive federal regulation of leasing activity, and it is a valid interest weighing in favor of preemption in the final balance." *Stranburg*, 799 F.3d at 1340. In light of these strong, pervasive, and comprehensive federal interests, the court explained, the state rental tax must be preempted "absent a state interest of sufficient weight." *Id.* No such interest existed in *Stranburg*, nor, as discussed below and in Agua Caliente's principal brief, Opening Br. at 44-51, does one exist here.[13]

The County tries to distinguish *Stranburg* by arguing that the Eleventh Circuit erred in finding that the legal incidence of the Florida tax fell on the lessee. *See* County Br. at 52, n.5. It contends that the legal incidence of the tax actually fell on the tribe, making *Bracker* balancing unnecessary and the Eleventh Circuit's discussion of the test *dicta*. *Id.* But the rental tax in *Stranburg* was assessed against the lessee, and while the lessor was charged with collecting and remitting the tax and was ostensibly liable to pay the tax if it failed to do so, any unpaid tax

[13] The Eleventh Circuit's holding accords with the finding below that the federal interests at stake here are strong enough to justify preemption under *Bracker*. ER at 45-46. The district court was correct on this point; it then erred by finding that state interests here outweigh the strong federal and tribal interests. *Id.* at 51.

constituted a lien on the personal property of the lessee rather than the lessor. *Stranburg*, 799 F.3d at 1326. The PIT is likewise assessed against the lessee and constitutes a lien on the lessee's property if unpaid. *See* County Br. at 55. The legal incidence of both taxes ultimately rests on the lessee. *See Chickasaw*, 515 U.S. at 459-62 (where state law required fuel distributor to collect and remit fuel taxes on behalf of retailers who were obligated to pay them, the taxes' legal incidence fell on the retailers). The County's effort to distinguish *Stranburg* fails.

4. Appellees Underestimate Tribal Interests

Appellees understate the tribal interests at stake as well, contending that the PIT's economic effects on the Tribe are too indirect or insubstantial to matter and questioning whether such effects even exist. Neither argument is availing.

The PIT unquestionably imposes indirect economic burdens on the Tribe and its members by decreasing the potential revenues from leasing Indian lands. *See* Opening Br. at 41-42 (citing cases). Appellees argue that this burden is irrelevant to the preemption analysis, claiming that *Cotton Petroleum* and similar cases establish that "state taxes applicable to non-Indians on Indian reservations are not preempted simply because they may have the indirect effect of reducing revenues" for Indians. DWA Br. at 43; *see* County Br. at 52-53. *Cotton Petroleum* does hold that indirect economic effects are insufficient to justify preemption of an otherwise valid state tax "***absent some special factor*** such as those present in

Bracker and *Ramah* ….” 490 U.S. at 187 (emphasis added). But a special factor exists here in the form of the comprehensive and pervasive federal regulation of Indian land leasing. The indirect economic burden that the PIT places on Agua Caliente does not independently preempt the tax, but the Tribe does not argue otherwise. The burden simply adds weight on the side of preemption along with the strong federal interests. *Stranburg*, 799 F.3d at 1340-41.

Appellees also question the very existence of an economic burden, arguing that the PIT does not affect Indians because (1) they are not responsible for paying the tax and (2) an unpaid tax does not create a lien on Indian trust lands. DWA Br. at 42; County Br. at 55-56. These facts only reestablish that the *legal* incidence of the PIT falls on the lessees; they do not address the tax’s economic burden. *See Coeur d’Alene*, 384 F.3d at 681, 685-88 (a tax’s legal incidence falls on the party legally responsible for paying it, and the entities bearing the legal and economic burdens are not necessarily the same). Arguments about the PIT’s legal incidence do nothing to inform the *Bracker* analysis. They certainly do not establish that the PIT implicates no tribal interests or is necessarily valid.

The County also argues that Agua Caliente failed to produce evidence establishing a substantial indirect economic burden, particularly with respect to tribal member allottees, whose interests the County tries to remove from consideration. While the district court may have taken this bait, *see* ER 2 at 53,

this Court should not. Agua Caliente is litigating its own interests as well as those of its members in its *parens patriae* capacity. *See* Opening Br. at 42-43. Economic effects on allottee lessors are thus relevant regardless of whether they affect tribal coffers. As for the allegation that Agua Caliente failed to adduce specific evidence of the PIT's economic impact, it is irrelevant in light of repeated acknowledgement from this Court that indirect economic effects of taxation are self-evident. *See* Opening Br. at 41-42; *see also Stranburg*, 799 F.3d at 1341 (lack of specific evidence of economic impact "cannot alter the results of th[e *Bracker*] analysis" when the tribal economic interest is considered in tandem with the strong federal interest in Indian land leasing).[14]

B. Appellees Overstate the County's Interests in Collecting the PIT

Appellees contend that the County's interest in raising revenues to support the provision of what they describe as "essential" governmental services "that directly benefit lessees" outweighs the federal and tribal interests implicated by the PIT. DWA Br. at 37; County Br. at 38. They are incorrect.

[14] Indeed, the economic effects of the tax on the Tribe dovetail with the PIT's interference with Agua Caliente's concurrent sovereign authority over its territory, which provides an additional and independent basis for preemption. *Tulalip*, 2017 WL 58836 at 6. 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" notwithstanding the PIT is divorced from economic reality, and should be reversed. ER 2 at 59.

As the Supreme Court has held, "[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 (emphasis added). "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.*; *see also Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 435 (9th Cir. 1994); *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 661 (9th Cir. 1989) ("Showing that the tax serves legitimate state interests, such as raising revenues for services used by tribal residents and others, is not enough." (citing *Crow*, 819 F.2d at 901)). The PIT is the very definition of a general revenue tax, and the services that it only partially funds, which are provided by 350 governmental entities and run the gamut from law enforcement to education to stormwater management to park maintenance to mosquito control, *see* County Br. at 39-40 & 46-47, are the very definition of general governmental services. Whatever benefit derived,[15] the services provided

[15] Agua Caliente never argues, as the County misleadingly asserts, that "PIT revenues do not benefit lessees." County Br. at 48. The issue is not that services funded in part by PIT revenues provide no benefit to lessees. The issue for the Court is that revenues from the taxation of rights in Indian trust lands go to fund a broad array of governmental services that have no direct connection to the taxpayer's leasing of a property right in Indian land, which is what the PIT taxes.

by Appellees lack the nexus with the taxed activity necessary to overcome the strong federal and tribal interests at stake.

Appellees incorrectly assert that there is no need to establish a nexus between the PIT, the activity it taxes, and the services it supports in order for the state interests to prevail under *Bracker*. *See* DWA Br. at 38-40; County Br. at 44-48. They support this argument with citations to cases such as *Cotton Petroleum*, *Barona Band*, *Salt River*, and *Gila River*. *See* County Br. at 45; DWA Br. at 37-39. These citations are just as unavailing here as they were in the context of Appellees' attack on the federal and tribal interests. *Cotton Petroleum* upheld a tax where the state, in addition to asserting an interest in generating revenue and providing services that benefited the reservation, played an active role in regulating the on-reservation oil and gas production that it sought to tax. 490 U.S. at 185-86 ("[T]he State regulates the spacing and mechanical integrity of wells located on the reservation."). Because the federal and tribal regulation of the taxed activity was "extensive [but] … not exclusive," the Court distinguished cases like *Ramah* and *Bracker*, where the state played no role in regulating the activity that it sought to tax. *Id.* at 186. Here, Appellees have not demonstrated, or even alleged, that they play any role in the regulation of Indian land leasing, thus *Cotton Petroleum* is distinguishable. *See Stranburg*, 799 F.3d at 1339.

The trio of Ninth Circuit cases that Appellees cite are similarly inapposite. All three addressed situations where purely non-Indian economic activity happened to occur on Indian lands, and federal and tribal interests were relatively weak. *See supra* § II.A.2. In such cases, the state's legitimate interest in raising revenue for the provision of general governmental services can tip the *Bracker* balancing against preemption. That is not so where, as here, the state tax implicates strong federal and tribal interests. *See Stranburg*, 799 F.3d at 1339-40 (distinguishing the sales tax on non-Indian events in *Gila River* from the PIT-like state rental tax); *Hoopa*, 881 F.2d at 661; *Tulalip*, 2017 WL 58836 at *8. If the state can ever tax an exclusively federally-regulated interest or activity that is inextricably linked to Indian land—an uncertain proposition—it can do so only where there is "a close relationship between the tax imposed … and the state interest asserted to justify such tax." *Hoopa*, 881 F.2d at 661. No such close relationship exists with respect to the PIT.

Appellees alternatively argue that, if a nexus is necessary, it exists in this case because "the entities that receive revenues from the [PIT] … provide essential services to the non-Indian lessees," DWA Br. at 37, and PIT revenues ostensibly are tied to specific services and communities. County Br. at 46-48. These arguments misunderstand the pertinent inquiry, which is whether revenues from

the PIT fund services that are tied to the taxed, federally-regulated activity—*i.e.*, the leasing of Indian trust lands.

In *Cabazon*, for example, this Court found a state licensing fee for on-reservation gaming facilities preempted because the fees went into the state's general fund rather than being used "to fund services related to the regulation of offtrack betting." 37 F.3d at 435. In *Crow*, a state tax on on-reservation coal extraction that went predominantly into a permanent trust fund and the state's general fund—both legitimate state interests—was preempted as insufficiently connected to the activity taxed. 819 F.2d at 901-02. In *Hoopa*, a timber tax that funded "road, law enforcement, welfare, and health care services"—exactly the sort of general governmental services funded in part by the PIT here—was preempted due to the lack of a "direct connection" between the tax "and the provision of services to tribal members or area residents generally." 881 F.2d at 661. And in *Stranburg*, the most analogous appellate decision available, the state's provision of on-reservation law enforcement, criminal prosecution, and health services, as well as the "intangible" benefits derived from off-reservation infrastructure, failed the nexus requirement because the services were not "tied to the business of renting commercial property on Indian land." 799 F.3d at 1341-42. As these cases demonstrate, the generalized state interest in raising revenue for the provision of governmental services, while

legitimate, simply does not outweigh the federal and tribal interests implicated by the PIT.[16]

Federal law preempts the PIT under *Bracker* balancing analysis. The district court's erroneous decision should be reversed.

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.

Respectfully submitted this 13th day of April, 2018.

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[16] In a last, desperate attempt to justify the PIT, DWA argues that the Supreme Court has disavowed any requirement that services provided by a government be proportional to taxes assessed. DWA at 37-38. But Agua Caliente has never argued that the dollar value of services provided by Appellees must equal or be proportional to on-reservation PIT revenues. DWA's argument is a completely irrelevant red herring, and it should be disregarded.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Cir. R. 32-2(b) because this consolidated reply brief contains 8,367 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 13th day of April, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2018, 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/ Rebecca Horst
Rebecca Horst