No. E070618

In the Court of Appeal of the State of California

Fourth Appellate District, Division 2

Heidi L. Herpel, et al.,
Plaintiffs-Appellants

vs.

County of Riverside, et al.,
Defendants-Respondents; and

Larry W. Ward, as Assessor, etc.,
Real Party in Interest and Respondent

APPELLANTS' REPLY BRIEF

Riverside County Superior Court Case No. PSC1404764
The Honorable Craig G. Riemer and The Honorable John G. Evans

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INTRODUCTION

This case presents the question of whether federal law preempts and/or precludes the challenged taxation of interests in Indian land. Because federal law and policy preempt and/or preclude the tax at issue—a position the cases support again and again—the County[1] attempts to recast California's possessory interest tax (PIT) as something else: a tax on ordinary commercial activity that happens to take place on Indian land. But as the County attacks that straw man, it leaves many of Lessees'[2] *actual* arguments unaddressed and unrebutted.

As set forth in further detail below, federal law preempts and/or precludes the PIT in three independent ways, and the County has failed to rebut any of these arguments. *First*, 25 U.S.C. § 465 precludes the County's application of the PIT to Indian land. The County disputes that "lands do not have to be acquired under the [Indian Reorganization Act of 1934] for § 465 to apply," but promptly concedes that the Supreme Court in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), "treated the federal lands [at issue] as tantamount to land acquired under 25 U.S.C. § 465—*even though it technically was not*." County Br. 29 (emphasis added). The County further

[1] Defendants-appellees the County of Riverside, the Riverside County Assessor-County Clerk-Recorder, the County Auditor-Controller, and the County Treasurer-Tax Collector, collectively.

[2] Plaintiffs-appellants Heidi Herpel and other similarly situated holders of possessory or leasehold interests in the Subject Properties.

concedes that the Court reached this holding because "it would have been meaningless for the United States, which already had title to the [land], to convey title to itself for the use of the Tribe." *Id*. (quoting *Mescalero*, 411 U.S. at 155 n.11). The same logic applies here, where the federal government already held the land in trust for the benefit of the Agua Caliente Band of Cahuilla Indians (the "Tribe") before § 465 was enacted. And while the County argues that the PIT is not subject to § 465 because it is a tax on the *use* of land and improvements, the Supreme Court has held 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." *Mescalero*, 411 U.S. at 158.

Second, § 162.017 preempts the PIT under the doctrines of express and conflict preemption. The County agrees that this issue turns on two questions: (1) whether the Bureau of Indian Affairs (BIA) acted within its authority in enacting § 162.017; and (2) whether the BIA intended for the regulation to have preemptive effect. As explained in the opening brief, §§ 2 and 9 of Title 25 are especially broad, and give the Department of the Interior (and, by extension, the BIA) "plenary administrative authority" to "manage[] of all Indian affairs and . . . all matters arising out of Indian relations." These sections alone, which the County does not address in its response, grant the BIA sufficient authority for § 162.017. And while the County focuses on

post hoc litigation positions to undercut the BIA's intent, it does not address the preambles to the interim and final rules of § 162.017, which confirm the agency's intent to preempt.

Third, in its application of the balancing test of *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), the County does not dispute that the leasing regulations are comprehensive and pervasive, nor does it dispute that, when a regulatory scheme is pervasive, federal interests are at their "greatest." In addition, the County does not dispute that the Supreme Court has unambiguously stated that "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." *See* Lessees' Br. 42 (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 336 (1983)). Indeed, the parties appear to agree that there must be a "close relationship" between the tax and the interests or activity being taxed. But, far from being tailored to the interest and activity being taxed, the PIT is a general tax that does not fund a single service specific to the leasehold interests on Indian land and, therefore, the County has failed to present any relevant state interests. Because federal interests are at their "greatest," and the County has failed to present any relevant state interests, let alone interests "sufficient to justify

the assertion of state authority," *Mescalero Apache*, 462 U.S. at 334, the PIT is preempted as a matter of law.[3]

ARGUMENT

The Superior Court should have held that (I) the statutory bar of 25 U.S.C. § 465 precludes application of the PIT, (II) the PIT is expressly preempted by 25 C.F.R. § 162.017, and (III) the *Bracker* test, properly applied, yields the conclusion that the PIT was preempted by federal law. Nothing in the County's brief should lead this Court to conclude otherwise.

I. SECTION 465 COVERS THE SUBJECT PROPERTIES AND PRECLUDES THE PIT.

The County has failed to refute that 25 U.S.C. § 465 precludes application of the PIT here. Unable to get out from under *Mescalero Apache Tribe v. Jones* ("*Mescalero*"),[4] 411 U.S. 145 (1973), the seminal case interpreting § 465 and which favors Lessees' position, the County relies

[3] The County argues that factual questions predominate and, therefore, the Superior Court's *Bracker* decision should be reviewed under the substantial evidence standard. As reflected below, this appeal does not present any factual questions and, in any event, legal questions clearly predominate. But even if the substantial evidence applied, for the reasons summarized above and explained in further detail below, the Superior Court's decision must be overturned.

[4] The terminology used to refer to some of the key cases in the briefs can be confusing. Lessees call *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), "*Mescalero*," while the County alternates between "*Mescalero*," "*Mescalero Apache*," and "*Mescalero Apache Tribe*." *See, e.g.*, County Br. 29–30. When Lessees refer to "*Mescalero Apache*," however, they mean *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). And the "*Oklahoma Tax Commission*" case discussed in Lessees' opening brief, i.e., *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342 (1949), should not be confused with *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995), which is referred to as "*Chickasaw Nation*" in the County's brief and in this reply.

primarily on *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995)—an excise-tax case that does not even mention § 465, let alone interpret or apply it. Section 465 makes clear that covered "lands or rights shall be exempt from State and local taxation," and the Subject Properties[5] at the heart of this appeal are among them.

A. Section 465 Covers the Subject Properties.

To reach the conclusion that the Subject Properties are not covered by § 465, the County ignores and/or misconstrues the basic principles that govern how the statute operates. For example, the County disputes Lessees' characterization of § 465's long-standing tax exemption for Indian trust lands as essentially "codif[ying]" pre-existing federal policy. County Br. 28. But this dispute seems to be largely semantic, and the County's contention that "there is no authority to support that claim" is simply wrong. *See id.* (citing Lessees' Br. 57).

Courts have long recognized the (uncontroversial) proposition that "[§] 465 must be read against th[e] backdrop" of existing federal Indian policy, "which provides the implicit substance of what the language signifies." *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 665–66 (9th Cir. 1975). When Congress enacted § 465 as part of the Indian Reorganization Act of 1934 ("the Act"), "it understood and intended

[5] Possessory or leasehold interests in property held by Lessees and located on a tract of allotted land within the Agua Caliente Reservation.

[covered] 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." *Id.* at 666.

At that time, the most important of these decisions was *United States v. Rickert*, 188 U.S. 432 (1903), the latest in a line of Supreme Court cases establishing "the immunity of Indian use of trust property from state regulation"—the same thing § 465 does statutorily. *Santa Rosa*, 532 F.3d at 666 (citing *Rickert*); *see Confederated Tribes of Chehalis Reservation v. Thurston Cty. Bd. of Equalization*, 724 F.3d 1153, 1155 (9th Cir. 2013) (§ 465 "traces back to *United States v. Rickert*"); *see, e.g.*, *In re Kansas Indians*, 72 U.S. 737, 757–61 (1866) (in order "to preserve [lands] for the permanent homes of the Indians . . . they must be relieved from every species of levy, sale, and forfeiture-from a levy and sale for taxes"). Given this existing legal framework, the Congress that enacted § 465 "simply took it for granted that the states were without such power, . . . i.e., that the exemption [from state taxation] was implicit . . . under existing legal principles." *Santa Rosa*, 532 F.3d at 666 n.17.

Next, the County disputes that *Mescalero* holds "that lands do not have to be acquired under the [Act] for § 465 to apply"—but promptly concedes that *Mescalero* "treated the federal lands [at issue there] as tantamount to land acquired under 25 U.S.C. § 465—*even though it technically was not*." County Br. 29 (emphasis added). In other words, there

is no real dispute that, under *Mescalero*, the application of § 465 is *not* limited to land acquired under the Act.

The County even concedes that, at least in the context of *Mescalero*, it "makes perfect sense" to apply § 465 beyond lands purchased under the Act because "it would have been meaningless for the United States, which already had title to the [land], to convey title to itself for the use of the Tribe." County Br. 29–30 (quoting *Mescalero*, 411 U.S. at 155 n.11). But the same logic applies here, where the federal government already held the land in trust for the benefit of the Tribe before § 465 was enacted. *See* 10AA2401–02. And while the County attempts to distinguish *Mescalero* on the basis that it did not involve leases with non-Indians, this is a distinction without a difference because, as discussed in more detail below, "the tax exemption contained in § 465 attaches to the land and the rights in that land protected under the statute." *Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324, 1331 n.8 (11th Cir. 2015).

B. The PIT Is "So Intimately Connected with Use of the Land Itself" That It Is Barred Under § 465.

The County argues that, even if § 465 applies to the Subject Properties, it does not preclude state taxation under these circumstances because "the legal incidence of the tax is on a non-Indian." County Br. 25, 34 (citing *Chickasaw Nation*, 515 U.S. at 458–59). This argument boils down to a misreading of *Chickasaw Nation*.

The County cites *Chickasaw Nation* for the proposition that, "[i]f the legal incidence of the tax is on a non-Indian . . . '[n]o categorical bar' applies." County Br. 25. The County assumes this reference to a "categorical bar" sweeps in § 465—but it does not. *Chickasaw Nation* has nothing to do with § 465, which applies to Indian "lands or rights" in land, 25 U.S.C. § 465. Rather, *Chickasaw Nation*'s legal incidence test is a separate, independent ground for barring a state tax on on-reservation activities, which arose in the unrelated context of state excise taxes. *See Chickasaw Nation*, 515 U.S. at 457–59.

At issue in that case was a state excise tax on the sale of motor vehicle fuels at service stations located on Tribal trust land and operated by the Chickasaw Nation. *Chickasaw Nation*, 515 U.S. at 452–53. In deciding whether the fuel tax was permissible under those circumstances (it was not, *see id.* at 461–62), the Supreme Court explained, "[i]f the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization. But if the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy." *Id.* at 459 (citation omitted). This language, which merely refers back to the statement that a tax on Indians on Indian land "cannot be enforced absent clear congressional authorization," does not purport to

foreclose the possibility that *other*, unrelated bars—like § 465 (and preemption under the traditional doctrines and *Bracker*)—still applies. *See id.*

In any event, the legal incidence test has no import here, where non-Indians are being taxed on an interest they hold in real property. *See id.* at 458 (test is defined in terms of "the legal incidence *of an excise tax*" and only applies "when a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians" (emphasis added)). Nor does the legal incidence test apply to taxation of lands and property rights in general—none of the cases cited in *Chickasaw Nation* involved taxation of real property, and none of the cases the County relies on do either.[6] *See* County Br. 25, 34 (citing *Chickasaw Nation* (fuel excise tax); *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005) (same); and *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184 (9th Cir. 2008) (sales tax on construction materials to be used on Indian casino)); *Chickasaw Nation*, 515 U.S. at 458–59 (citing, e.g., *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980) (sales, cigarette, and motor

[6] The discussion of the legal incidence framework in *Chickasaw Nation* limits itself to excise taxes on goods sold on Indian land. *See* 515 U.S. at 459 ("[i]f the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country," the tax is generally unenforceable); *see also id.* at 458–59 ("[T]he inquiry proper here is whether the legal incidence of Oklahoma's fuels tax rests on the Tribe (as retailer), or on some other transactors—here, the wholesalers who sell to the Tribe or the consumers who buy from the Tribe.").

vehicle taxes); *Bryan v. Itasca County*, 426 U.S. 373 (1976) (personal property); *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976) (cigarette tax); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973) (income)).

Only one of the other cases the County cites in its discussion of the legal incidence framework involves a tax on land or property rights or even mentions § 465: *Seminole Tribe*—where, under circumstances analogous to this case, the Eleventh Circuit expressly rejected the very argument the County advances. *Compare* County Br. 34, *with Seminole Tribe*, 799 F.3d at 1331 n.8. In *Seminole Tribe*, the state taxing authority argued that § 465 did not bar Florida's tax on commercial rent payments as applied to properties located on the Tribe's lands because "the legal incidence of the Rental Tax . . . [fell] on the payments by the non-Indian lessees rather than on the Tribe's income." *Id.* at 1331 n.8. Accepting for the purpose of argument that this was so, the court's conclusion that § 465 precluded the Rental Tax "d[id] not change." *Id.* It reasoned that "the tax exemption contained in § 465 attaches to the land and the rights in that land protected under the statute. So, even if the legal incidence of the Rental Tax falls on the [non-Indian lessees], the tax itself is expressly precluded because a tax on the payment of rent is indistinguishable from an impermissible tax on the land." *Id.* (citation omitted).

The Eleventh Circuit thus correctly recognized that state taxes implicating interests in Indian land are properly analyzed under a different standard found in an entirely different line of cases. The seminal case is *Mescalero*, which makes clear that the focus of the § 465 analysis is whether the challenged tax is a tax on the land—or, more precisely, whether it essentially functions as one. *Mescalero* involved a "compensating use tax imposed on the personalty" permanently attached to Tribal land for the purpose of building a ski resort. 411 U.S. at 146, 158. In concluding that § 465 precluded that tax, the Court reasoned 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.* at 158 (emphasis added).

Notably, the County does not address this standard. Instead, it repackages its legal incidence argument in a different form, arguing that Lessees "conflate[] taxation of Indians on their ownership of property and taxation of non-Indians on their possession and use of Indian land." County Br. 32–33. But neither § 465 nor *Mescalero* draws a distinction between "possession and use" by Indians or non-Indians. What matters is whether the taxed property interest "is so intimately connected with use of the [Indian] land" that it can be fairly equated with a tax on the land itself. *Mescalero*, 411 U.S. at 158 ("It has long been recognized that 'use' is among the 'bundle

of privileges that make up property or ownership' of property and, in this sense, at least, a tax upon 'use' is a tax upon the property itself." (quoting *Henneford v. Silas Mason Co.*, 300 U.S. 577, 582 (1937))); *see also* 25 U.S.C. § 465 (exempting "such lands or rights" in land).

Although the "so intimately connected" standard of *Mescalero* acts as a limiting principle, ensuring that not just any activity that happens to take place on Indian land is tax-exempt, the County's last-ditch slippery-slope argument again ignores this language. According to the County, under Lessees' view of § 465, a state is per se barred by § 465 from taxing any use of trust land. *See* County Br. 34–35. This characterization artificially expands the scope of Lessees' argument, as *Mescalero* makes clear that not *all* uses of property (or other property rights) are tax-exempt—only those "so intimately connected with use of the land itself" as to warrant the same tax treatment. 411 U.S. at 158. The permanent improvements in *Mescalero* and the possessory interest tax here both fit within this defined category.

The activities at issue in the cases the County relies on, by contrast, do not.[7] *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 166

[7] As for the lone exception, *Confederated Tribes of Chehalis Reservation v. Thurston County Board of Equalization*, the Eleventh Circuit has aptly concluded that "the Ninth Circuit's bare statement in [a] footnote that § 465 does not apply to taxes on [possessory] interests" is unpersuasive. *Seminole Tribe*, 799 F.3d at 1334 (citing *Chehalis*, 724 F.3d at 1155 n.7). The court in *Seminole Trib*e observed that the two earlier cases the Ninth Circuit relied on in *Chehalis* did not, as that court seemed to assume in the footnote, "analyze[] the applicability of § 465 to the possessory interests being taxed"; in fact, the land at issue in those cases may not have "f[allen] within the ambit of § 465 at all." *Id.* at 1334 & n.10.

(1989) (oil and gas severance tax); *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107, 1109 (9th Cir. 1997) (hotel "business transaction privilege taxes"); *Gila River Indian Cmty. v. Waddell*, 91 F.3d 1232, 1235 (9th Cir. 1996) ("transaction privilege tax" on "amusements, including concerts and races"); *Salt River Pima-Maricopa Indian Cmty. v. Arizona*, 50 F.3d 734, 735 (9th Cir. 1995) (tax on retailing).

Tellingly, none of those cases even mentions, let alone analyzes, § 465. This is likely because the taxed activities or interests were not "so intimately connected with use of the land itself" as to be tantamount to a tax on Indian land. *See Mescalero*, 411 U.S. at 158. The PIT, on the other hand, is exactly the type of tax the *Mescalero* Court contemplated: a tax on "use" and "permanent improvements upon land" that are "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." *See id.*

Accordingly, § 465 bars the application of the PIT to the Subject Properties. *See* Lessees' Br. 57–61. None of the County's arguments to the contrary should lead this Court to conclude otherwise.

II. SECTION 162.017 PREEMPTS THE PIT.

Although Lessees argued in their opening brief that 25 C.F.R. § 162.017 preempts the application of the PIT on Indian land under the traditional doctrines of express *and* conflict preemption, Lessees' Br. 49–50,

the County ignores the latter entirely, instead hanging its hat on a single argument in response to both: that "the regulation has 'no legal effect.'" County Br. 36–37 (quoting 15AA4785–86 and *Desert Water Agency v. U.S. Dep 't of Interior*, 849 F.3d 1250, 1254 (9th Cir. 2017)). As explained below, this is not the case.

The County concedes that Lessees "got the standard right": "in order to demonstrate that a federal regulation preempts a state law, the court must examine whether an agency intended the regulation to preempt state law; and if so, whether that action is within the Agency's authority, as delegated by Congress." County Br. 37 n.9 (citing *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982)). But the parties part ways as to how these two prongs should be applied.

A. The Preambles and Plain Text of § 162.017 Establish the BIA's Intent To Preempt State Taxes Like the PIT.

As Lessees explained in their opening brief, the BIA made its intent to preempt the PIT under these circumstances clear in § 162.017's text and preambles. *See* 25 C.F.R. § 162.017(a), (c) (providing that leaseholds, possessory interests, and permanent improvements on leased land are ". . . not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State"); Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72440-01, 72447–48 (Dec. 5, 2012) (preamble to Final Rule) (regulations "*occupy and*

preempt the field of Indian leasing" (emphasis added)); Residential, Business, and Wind and Solar Resource Leases on Indian Land, 76 Fed. Reg. 73784-01, 73785 (Nov. 29, 2011) (preamble to Notice of Proposed Rulemaking) (rule is "*intended to preempt* the field of leasing of Indian lands" (emphasis added)).

The parties seem to agree that the BIA is entitled to some degree of deference with respect to § 162.017. *See* Lessees' Br. 51–52 & n.5, 33; County Br. 37. Still, a clarification is in order. Lessees maintain that the Superior Court should have deferred to the Secretary's position, as stated in 2011–2012 in the preambles to the interim and final rules, that § 162.017 "preempt[s]" state taxes on leaseholds, possessory interests, and permanent improvements on leased Indian land. *See* Lessees' Br. 51–54 & nn.5–6, 33 (citing *Seminole Tribe*, 799 F.3d at 1338 ("[A]n agency's analysis of the regulatory scheme it administers deserves some weight." (citing *Wyeth v. Levine*, 555 U.S. 555, 576–77 (2009)))). The County does not respond to the agency's statements in the preambles and instead argues that this Court should defer solely to a litigation position the BIA subsequently took in *Desert Water Agency v. United States Department of the Interior* ("*DWA*"), 849 F.3d 1250, 1254 (9th Cir. 2017). County Br. 36–38.

Lessees do not, as the County charges, "ignore the savings clause, *Auer* deference, and contrary language in the rule itself," as discussed in *DWA*. *Compare* County Br. 37, *with* Lessees' Br. 52 n.6 (addressing each of

these issues). They simply disagree, and a closer look at *Auer v. Robbins*, 519 U.S. 452 (1997), supports Lessees' position. In *Auer*, the Supreme Court explained that there are exceptions to the rule that a court should give deference to an agency's interpretation of its own regulations. Specifically, *Auer* explained, such an interpretation is "controlling *unless* plainly erroneous or inconsistent with the regulation." 519 U.S. at 461 (emphasis added) (internal quotation marks and citation omitted). In addition, Justice Scalia made clear that deference was warranted "in the circumstances of [*Auer*]" only because the agency's "position [was] in no sense a post hoc rationalizatio[n] advanced by an agency seeking to defend past agency action against attack." *Id.* at 462 (third alteration in original) (internal quotation marks and citation omitted).

This case falls squarely within these exceptions. For the proposition that "§ 162.017 has no legal effect at all" and "does not purport to preempt any specific state taxes," the County relies upon statements the BIA made after the regulation was enacted, when the agency was faced with litigation in *DWA*. County Br. 36 (quoting *DWA*, 849 F.3d at 1254). Under such circumstances, a "post hoc rationalization" for the agency's apparent change of heart with respect to the preemption issue was certainly possible. *See Auer*, 519 U.S. at 462. In addition, the BIA's position in *DWA* is "inconsistent" (and, in fact, irreconcilable) with § 162.017 and the interpretations stated in its preambles, which expressly refer to preemption.

See Auer, 519 U.S. at 461–62. The cursory analysis of *Auer* deference that the court offered in *DWA* failed to acknowledge and confront these facts. *See DWA*, 849 F.3d at 1255.

As Lessees explained in their opening brief, the *DWA* court made other errors as well. Lessees' Br. 52–53 n.6. Most importantly, it followed a BIA brief, which misread the prefatory language in § 162.017(a) and (c) reading, "Subject only to applicable Federal law," as "a sort of savings clause" that merely references the *Bracker* test and has "no legal effect" of its own. *DWA*, 849 F.3d at 1254. The County simply nods toward *DWA*, without further analysis that might convince this Court to adopt the same erroneous reading. *See* County Br. 37.

Even the Ninth Circuit in *DWA* acknowledged the weakness of its own position, describing this issue as "a close call" and acknowledging that, "[t]o be sure, there is other language—mostly in the preamble to the final rule—that arguably supports [Lessees'] interpretation." 849 F.3d at 1255. In that preamble, after setting forth the *Bracker* test and applying it to state and local taxation of leaseholds, possessory interests, and permanent improvements on leased Indian lands—exactly what the PIT does—the BIA declared that, because "[i]n the case of leasing on Indian lands, the Federal and tribal interests are very strong," federal statutes and regulations "occupy and preempt the field of Indian leasing." 77 Fed. Reg. at 72447. The phrase "Subject only to applicable federal law" does not undermine this express

statement of preemptive intent. Rather, this language "foresees—it does not foreclose—the possibility" of preemption. *Cf. Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 870 (2000).

As a last-ditch effort to avoid these conclusions, the County introduces a new argument for the first time on appeal.[8] It argues that, "under Executive Order 13132 on Federalism. . . . [t]he final leasing rule states that the rule 'does not affect the relationship between the Federal Government and States or among the various levels of government.'" County Br. 38 (alteration in original) (quoting 77 Fed. Reg. at 72464). But this is neither here nor there, as the BIA reached that conclusion because the "land is subject to tribal law and Federal law, only, except in limited circumstances and areas where Congress or a Federal court has made State law applicable." 77 Fed. Reg. at 72464.

The Final Rule's citation to the executive order thus stands for the uncontroversial proposition that § 162.017 "d[id] not affect the relationship" between federal and state law in this instance, because—as the BIA makes clear in the preamble to the Final Rule—state taxes like the PIT *were already preempted* under *Bracker*. *See* 77 Fed. Reg. at 72447 (pmbl. § 162.017) ("The Federal statutes and regulations governing leasing on Indian lands . . . occupy and preempt the field of Indian leasing. The Federal statutory scheme

[8] The County also advances a constitutional avoidance argument that has no application in what is undisputedly a preemption case.

for Indian leasing is comprehensive, and accordingly precludes State taxation. In addition, the Federal regulatory scheme is pervasive and leaves no room for State law.").

In sum, the text of § 162.017 and its preambles make the BIA's intent to preempt taxes like the PIT clear.

B. The BIA Had Authority To Promulgate § 162.017 Under the Broad, Sweeping Delegation of Authority in 25 U.S.C. §§ 2 and 9.

The analysis of the second *de la Cuesta* prong—"whether [the preemptive] action is within the scope of the [BIA]'s delegated authority," *see* 458 U.S. at 154—is more straightforward. The County argues that "Section 162.017 cannot limit the authority of states to exercise their taxing authority because the statute pursuant to which it was promulgated, 25 U.S.C. § 415, does not give the Secretary the authority to regulate states." County Br. 38–39. This argument is off the mark for two reasons.

First, it loses sight of precisely which exercise of authority the *de la Cuesta* test was intended to examine. In the Supreme Court's words, the test is "whether the [agency] meant to pre-empt [the state law at issue], and, if so, whether that action is within the scope of the [agency]'s delegated authority." *de la Cuesta*, 458 U.S. at 154. "[T]hat action" refers not to the agency's power to preempt or "to regulate states," County Br. 38–39, but to its "power to promulgate [the challenged] regulations" generally. *See de la Cuesta*, 458 U.S. at 167.

Were the County correct, the two prongs of the test would be all but redundant; indeed, the County repeatedly conflates the authority prong with the preemptive-intent prong. For example, the County argues that the purported source of statutory authority "must clearly indicate [Congress's] intent to preempt state law." County Br. 39. Not only is preemptive intent irrelevant to the second prong of the test, this statement is prima facie contrary to *de la Cuesta*, which makes clear that a regulation's preemptive force "*does not* depend on express congressional authorization to displace state law." 458 U.S. at 154 (emphasis added).

What matters is whether the BIA had the authority to promulgate § 162.017 in the first place. *See id.* at 167. This was where the County made its second mistake: it misattributed—and dramatically narrowed—the statutory source of the BIA's authority to promulgate regulations governing all aspects of Indian affairs. Without citation, the County points only to 25 U.S.C. § 415 ("Leases of restricted lands") as the purported source of statutory authority for § 162.017, while ignoring the additional authority cited in Lessees' opening brief.

Most notably, Sections 2 and 9 of Title 25 are especially broad, and give the Department of the Interior and the BIA "plenary administrative authority" to "manage[] of all Indian affairs and . . . all matters arising out of

Indian relations."[9] Lessees' Br. 54–55; *United States v. Eberhardt*, 789 F.2d 1354, 1359 & n.7 (1986) (quoting 25 U.S.C. § 2); *see also* 25 U.S.C. § 9 (through the BIA, "[t]he President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs"). The County does not (and cannot) seriously contend that § 162.017 was outside the broad, sweeping scope of the BIA's regulatory authority.

Because "Congress delegated to the [BIA] ample authority to regulate" in this area, and the plain language of § 162.017 and its preambles establish the requisite intent to preempt, the PIT is expressly preempted. *See de la Cuesta*, 458 U.S. at 159, 166. And as the County has not challenged Lessees' conflict preemption arguments specifically, Lessees maintain for the reasons stated in their opening brief that § 162.017 also preempts the PIT under the doctrine of conflict preemption. *See* Lessees' Br. 55–56.

III. FEDERAL LAW PREEMPTS THE PIT UNDER THE *BRACKER* TEST.

A. Federal Interests Are "Greatest" When, as Is Undisputed Here, Government Regulations Are Comprehensive and Pervasive.

The parties agree that under *Bracker*, "a state tax 'is preempted . . . 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

[9] Section 162.017 cites more than 30 sources of statutory authority, including (in addition to § 415) 25 U.S.C. §§ 2, 9, 380, 393, 394, 395, 402, 402a, 403, 403a, 403b, 415a, and 3715. *See* 25 C.F.R. § 162.017.

assertion of State authority.'" County Br. 46 (quoting *New Mexico v. Mescalero Apache Tribe* ("*Mescalero Apache*"), 462 U.S. 324, 334 (1983)).[10] And the County does not dispute that "[f]ederal interests are greatest when the government's regulation of a given sphere is 'comprehensive and pervasive.'" *See* Lessees' Br. 31–32 (quoting *Barona Band*, 528 F.3d at 1192 (in turn quoting *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 839 (1982))). Nor does the County contest the conclusion reached by the BIA and other courts that the federal regulatory scheme governing leasing on Indian lands is indeed comprehensive and pervasive.[11] *See* Lessees' Br. 33 (citing 77 Fed. Reg. at 72447 (pmbl. § 162.017); *Agua Caliente Band of Cahuilla Indians v. Riverside County* ("*Agua Caliente II*"),[12] 181 F. Supp. 3d 725, 743 (9th Cir.

[10] As explained in Lessees' opening brief, *Bracker* created a new test for preemption and abrogated earlier cases, including *Palm Springs Spa, Inc. v. County of Riverside*, 18 Cal. App. 3d 372 (1971). The County expressly acknowledged this argument but did not refute it. *See* County Br. 40–42.

[11] While the County does not contest the conclusions of courts and the BIA that the post-2013 regulations are comprehensive, it nevertheless opines that the level of federal oversight over leasing decreased in 2013. County Br. 43. In support of this argument, the County provides a non-exclusive list of topics the regulations addressed "[p]rior to 2013," and characterizes the 2013 revisions as simply "delete[ing][sic] regulatory burdens." County Br. 43–44. But, (1) the preamble to the 2013 regulations leaves no doubt that the revisions include the "add[ition] of new regulations that address residential . . . leases on Indian land" (*see Agua Caliente II*, 181 F. Supp. 3d at 743 (citing 77 Fed. Reg. 72440)); and (2) the current (post-2013) regulations continue to cover nearly all of the subjects the County lists as being covered "prior to 2013" (e.g., 25 C.F.R. §§ 162.311, 162.322, 162.435, 166.1).

[12] After Lessees filed their opening brief, the Ninth Circuit issued an opinion in the appeal of *Agua Caliente Band of Cahuilla Indians v. Riverside County*, 749 F. App'x 650 (9th Cir. 2019). There is no dispute that this opinion is not binding on this Court. Indeed, the County mentions it only once and does

2016), *aff'd*, 749 F. App'x 650 (9th Cir. 2019); *Seminole Tribe*, 799 F.3d at 1341; and *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1392 (9th Cir. 1987)); *see also* County Br. 42 (citing, with apparent approval, the Superior Court's conclusion that federal and Tribal interests in Tribal leasing are "significant" and "strong," and framing the question as whether the leasing regulations are "as comprehensive" as those in *Bracker*).

Instead, like the Superior Court, the County focuses on the differences in nature and scope between the comprehensive timber regulations in *Bracker* and the comprehensive leasing regulations at issue here. *See* County Br. 42 (emphasis added) (framing the issue as whether "the leasing regulations are . . . *as comprehensive* as the timber regulations"); *see also id.* at 42–45 (challenging whether the leasing regulations are comparable to those in *Bracker*, specifically with respect to control of purpose and daily supervision). This focus is misplaced for several reasons.

First, as noted above, the County does not dispute that under *Bracker* and its progeny, "[f]ederal interests are greatest" when a regulatory scheme is "comprehensive and pervasive." *Barona Band*, 528 F.3d at 1192 (quoting *Ramah*, 458 U.S. at 839). And the County does not cite any authority for the proposition that such weight applies only to regulatory schemes that are comprehensive in the same *manner* as *Bracker*. Nor would such a standard

not return to it, *see* County Br. 10, likely because it was decided on stare decisis grounds specific to Ninth Circuit case law. *Id.* at 651–52.

make sense, given that different regulatory areas call for different types of regulations. Indeed, while the County faults the leasing regulations for not "requir[ing] the level of daily oversight found in the timber regulations," it does not argue that such "daily oversight" would be appropriate in the context of leasing private property. *See* County Br. 43.

The Supreme Court case of *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico* is instructive. *Ramah* involved a *Bracker* challenge to a gross receipts tax imposed on a non-Tribal construction company that was building a school for Indian students on an Indian reservation. 458 U.S. at 834. The *Bracker* analysis focused on "federal regulation of the construction and financing of Indian educational institutions." *Id.* at 839. Under those regulations, the BIA (1) had authority to monitor and review subcontracting agreements; (2) conducted preliminary on-site inspections and prepared cost estimates in cooperation with the Tribal organization; (3) approved architectural and engineering agreements; and (4) required all subcontracting agreements to contain certain terms, ranging from clauses related to bonding and pay scales to preferential treatment for Indian workers. *Id.* at 840–41. In addition, the regulations required the Tribal organization to maintain records for the Secretary's inspection. *Id.* at 841.

Then-Justice Rehnquist, who dissented, attempted to distinguish these regulations from those in *Bracker* in a manner that mirrors the County's

arguments here: "[T]he regulations on which the Court relies do not regulate school construction, which is the activity being taxed. They merely detail procedures by which tribes may apply for federal funds in order to carry out school construction. . . . [The BIA] played *no role* in the selection of the contractor and it played *no role* in regulating or supervising the actual construction of the school." *Id.* at 851–52 (Rehnquist, J., dissenting) (emphasis in original). But the (binding) majority opinion rejected this view, concluding that "[t]he case is *indistinguishable in all relevant respects* from [*Bracker*]. Federal regulation of the construction and financing of Indian educational institutions is both comprehensive and pervasive." *Id.* at 839 (majority opinion) (emphasis added); *see also id.* at 841–42 (the "direction and supervision provided by the Federal government . . . leaves no room for the additional burden sought to be imposed by the State through" the gross revenue tax).

The leasing regulations mirror the regulations the Court analyzed in *Ramah*. Like the educational construction regulations, under the leasing regulations, the BIA (1) has authority to monitor and review lease agreements (25 C.F.R. §§ 162.338–41); (2) may enter the premises to ensure lease compliance and determine fair market value at the request of the Tribe (25 C.F.R. §§ 162.322, 162.364); (3) ensures compliance with applicable ordinances (*see id.* §§ 162.340(a), 162.440(a)) such as the Agua Caliente Land Use Ordinance, which restricts land uses in certain zoning districts and

calls for BIA approval of permit applications to confirm that any "proposed development project does not violate the requirements of the property lease and/or sublease" (*see* 20AA6083–85, 20AA6119–20); and (4) requires all lease agreements to contain numerous terms (25 C.F.R. § 162.313). In addition, the leasing regulations require leases to be recorded. 25 C.F.R. §§ 162.343, 162.443.

If anything, these leasing regulations call for *more* oversight than those in *Ramah*. For example, while the BIA played "no role in regulating or supervising the actual construction of the school," as discussed below, the leasing regulations give the BIA numerous ongoing regulatory and supervisory responsibilities. *Compare Ramah*, 458 U.S. at 852, *with* Lessees' Br. 36–37. Thus, while the leasing regulations are not identical to the timber regulations in *Bracker*, like the regulations in *Ramah*, they are "indistinguishable in all relevant respects from" those regulations, and "leave no room for the additional burden sought to be imposed by the State through" the PIT. *See Ramah*, 458 U.S. at 839, 841–42.

As reflected above, nothing in *Bracker* or its progeny requires the federal regulatory scheme to "control the . . . purpose" of leaseholds (a term that does not appear anywhere in *Bracker* or *Ramah*), or calls for "continuous" supervision. 15AA3983–84; *see also* County Br. 44–45. Nevertheless, the federal government *does* have control over the purpose of

leaseholds, and the leasing regulations *do* call for continuous BIA supervision.

As explained in Lessees' opening brief, federal law exerts control over the purpose of leases by (1) imposing a general prohibition on conveying Indian lands, subject to only a few limited exceptions (Lessees' Br. 32, 34 (citing 25 U.S.C. §§ 177, 391–416j; *Brown v. United States*, 86 F.3d 1554, 1562 (Fed. Cir. 1996) ("[A]llottees [of Indian lands] must choose either (a) to lease at the pleasure of the Secretary [of the BIA], according to the regulations, and on his or her terms, or (b) not to lease at all.")); (2) setting forth the permitted purposes of such leaseholds (*id.* (citing 25 U.S.C. § 415)); and (3) granting the BIA control over the review, approval, and enforcement of all such lease terms, including terms that set forth the lease's purpose and the lessee's authorized uses (*id.* at 34–35 (citing, e.g., 25 C.F.R. §§ 162.021(d), 162.313, 162.338(a), 162.340(a), 162.413, 162.438(a), 162.440(a))).

The County responds in a cursory manner, simply asserting that Lessees omitted certain purposes permitted under 25 U.S.C. § 415, when, in fact, the (purportedly) additional uses it describes are just examples of the "business purposes" Lessees noted in their brief. *See* Lessees' Br. 34 (acknowledging that § 415 permits "business purposes"); *see also* 25 U.S.C. § 415 (referring to "business purposes, *including* the development or utilization of natural resources in connection with operations under such

leases, for grazing purposes, and for those farming purposes" (emphasis added)). The County simply does not respond to Lessees' arguments regarding the general federal prohibition on conveyances of Indian land. *See* Lessees' Br. 32, 34. And while the County baldly asserts that the leasing regulations "do not control the activities lessees can engage in," County Br. 45, the leasing regulations clearly give the BIA control over lease terms setting forth the lease's purpose and the lessee's authorized use. *See* Lessees' Br. 34–35.

Finally, while *Ramah* confirms that "continuous" supervision is not required, Lessees' opening brief lists more than 15 regulations that illustrate the BIA's ongoing responsibilities in administering and enforcing the lease. Lessees' Br. 36–37. The County addresses only one of those regulations, 25 C.F.R. § 162.022, which it uses to imply that BIA will only assist lessors "upon their request." County Br. 45. But continuing supervision in response to a lessor request is continuing supervision nevertheless. And in any event, § 162.022 also grants the BIA authority to engage in continuing supervision *without* any such request, by taking "emergency action as needed to preserve the value of the land." 25 C.F.R. § 162.022; *see also id.* § 162.024. More importantly, the County completely ignores the remainder of the laundry list of regulations Lessees cited in support of their argument that there *is*, in fact, ongoing supervision—the majority of which also permit BIA action without

a request from the lessor. 25 C.F.R. §§ 162.023, 162.024, 162.316, 162.364, 162.366, 162.367, 162.371, 162.416, 162.471, 162.467.

In sum, the relevant federal statutes and regulations confirm, as a matter of law, that the federal regulatory scheme governing the leasing of Indian land is comprehensive and pervasive and, therefore, the federal interests here are at their "greatest."

B. The Superior Court Committed Legal Error by Misapplying Supreme Court Precedent Regarding Tribal Interests.

The County misstates Lessees' arguments regarding Tribal interests. Lessees maintain that the Superior Court correctly concluded that "the PIT presumably reduces the rents to some degree, and thus to some degree interferes with the goal of obtaining the highest economic return on the leased property," 20AA6378—a conclusion that the County has not challenged. Lessees' Br. 40. Lessees do not argue, however, that this Tribal interest alone mandates preemption, nor do they argue that this Court should "ignore[] binding U.S. Supreme Court precedent, in favor of an Eleventh Circuit decision." County Br. 47–50. Rather, Lessees maintain that the Superior Court erred as a matter of law by misapplying Supreme Court precedent, which is illustrated by the Eleventh Circuit's proper analysis of that precedent.

For example, in its judgment, the Superior Court cited the Supreme Court's decision in *Cotton Petroleum Corp. v. New Mexico* for the

proposition that the economic effect on a tribe "'is simply too indirect and too insubstantial' to support [a] claim of preemption." 15AA3983–84 (quoting *Cotton Petroleum*, 490 U.S. at 186–87). But, as Lessees' opening brief explained—and the County does not appear to dispute—*Cotton Petroleum*'s holding is more nuanced than the Superior Court let on. Lessees' Br. 40–41. Specifically, the Supreme Court held in *Cotton Petroleum* that marginal economic effects on a tribe are insufficient to justify preemption "absent some special factor such as those present in *Bracker* and *Ramah*." 490 U.S. at 187. As the Eleventh Circuit explained in *Seminole Tribe*, the "special factor" in *Bracker* and *Ramah* was "necessarily . . . the extensive and exclusive federal regulation of the activities at issue in those two cases." *Seminole Tribe*, 799 F.3d at 1340. The court went on to conclude that "[a]s in *Bracker* and *Ramah*,"—and as in this case—the non-Indian lessees were "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*." *Id.* at 1340–41.

Here, the Superior Court erred as a matter of law when it disregarded *Cotton Petroleum*'s acknowledgement that even a marginal economic burden on a Tribe is sufficient under *Bracker* when combined with "some special factor such as those present in *Bracker* and *Ramah*." 490 U.S. at 187. As in *Seminole Tribe*, the comprehensive and pervasive leasing regulations provide the requisite "special factor."

C. The County's General Interest in Raising Revenue Cannot Overcome the Strong Federal and Tribal Interests Reflected in Federal Law.

As discussed above, the County does not dispute that the leasing regulations are comprehensive, nor does it dispute that "when the government's regulation of a given sphere is 'comprehensive and pervasive," federal interests are "greatest." *See* Lessees' Br. 31–32 (quoting *Barona Band*, 528 F.3d at 1192 (in turn quoting *Ramah*, 458 U.S. at 839)). And case law makes clear that, in the face of the strong federal interests reflected by a comprehensive network of federal statutes and regulations, such as those governing the leasing of Indian land, "absent a state interest of sufficient weight—and raising revenue for providing statewide services generally lacks that heft—[a tax] is preempted." *Seminole*, 799 F.3d at 1341.

The County does not directly dispute this statement of law. Instead, it argues that "[a]ll taxes reflect a generalized interest in raising revenue." County Br. 51 (internal quotation marks omitted). The County supports this proposition with a citation to *Barona Band of Mission Indians v. Yee*, which does not even address this assertion, but instead stands for the uncontroversial proposition that "[r]aising revenue to provide general government services is a legitimate state interest." County Br. 51 (quoting *Barona Band*, 528 F.3d at 1192–93). Identifying a legitimate interest, however, does not end the inquiry. As Lessees explained in their opening brief, and the County does not dispute, under *Bracker*, "[s]howing that the

tax serves legitimate state interests, such as raising revenues for services used by tribal residents and others, is not enough." Lessees' Br. 41–42 (quoting *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 661 (9th Cir.1989)); *see also Bracker*, 448 U.S. at 150.

California law further debunks the County's argument that "[a]ll taxes reflect a generalized interest in raising revenue," *see* County Br. 51 (internal quotation marks omitted), by drawing a distinction between "general taxes," which are "placed in the general fund to be utilized for general governmental purposes," and "special taxes," which are imposed for "specific purposes." Cal. Const. art. XIIIC, §§ 1 cmt. 8, 1(a), (d), 2(a). Unsurprisingly, courts have repeatedly ruled that California's basic *ad valorem* property tax, which includes the PIT (16AA4791), is a "general tax." *Solvang Mun. Improvement Dist. v. Bd. of Supervisors*, 112 Cal. App. 3d 545, 552 (1980). Indeed, those cases describe "general taxes" in a manner that mirrors the undisputed record evidence regarding the PIT. *Id.* (describing a general tax as a tax "levied by a county to pay for general expenditures, such as fire and police protection and for general improvements . . . which are deemed to benefit all property owners within the taxing district, whether or not they make use of or enjoy any direct benefit from such expenditures or improvements").

The County does not dispute Lessees' argument that the Superior Court erred in concluding that Supreme Court precedent "reveals no" rule

that a state's "generalized interest in raising revenue is insufficient." *See* Lessees' Br. 42 (quoting 15AA3985). Nor could it, as *Mescalero Apache* unambiguously states that "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." *See* Lessees' Br. 42 (quoting *Mescalero Apache*, 462 U.S. at 336); *see also Ramah*, 458 U.S. at 845 ("general desire to increase revenues" was "insufficient to justify the additional burdens imposed by the tax on the comprehensive federal scheme" and related policies).

Nevertheless, the County attempts to dismiss this issue as one of "semantics," County Br. 51, somehow disconnected from what the Supreme Court has declared is the critical question: whether there is a sufficient nexus between the tax and the activity being taxed. *See Mescalero Apache*, 462 U.S. at 336 (state tax burdening Tribal interests must "be justified by functions or services performed by the State *in connection with the on-reservation activity*" (emphasis added)). Because the PIT is a general tax—a label supported by both the law and the undisputed record—it lacks the nexus required to overcome the strong federal interests here.

Lessees and the County cite many of the same cases for the proposition that "there must be a 'close relationship between the tax and the interests" or activity being taxed.[13] *See* County Br. 51 (citing *Cabazon Band*

[13] While the County correctly notes that certain cases involve a "complete abdication or noninvolvement of the State" in on-reservation activities,

of Mission Indians v. Wilson, 37 F.3d 430, 435 (9th Cir. 1994); *Hoopa Valley*, 881 F.2d at 661; and *Crow Tribe of Indians v. Montana*, 819 F.2d 895, 901 (9th Cir. 1987)). But, as both California law and the Statement of Undisputed Facts reflect, far from being tailored to the interest and activity being taxed, the PIT is a general tax, which (1) is applied to general funds that are not segregated from other revenues (Lessees' Br. 44); (2) is used to fund a portion of all County services for all citizens, including those who have no connection to Indian land (Lessees' Br. 45–46); and (3) does not fund any services specifically for non-Indian lessees of Indian land (*id.*). In other words, the undisputed facts confirm that the PIT does not fund a single service specific to the leasehold interests on Indian land.[14]

County Br. 46, 50, 51, it does not argue that this is the relevant standard. Indeed, the County does not contest that the Superior Court erred in concluding that *Mescalero Apache* stands for the proposition that a state tax is insufficient only if it yields "no services to those on whom the tax falls." *See* Lessees' Br. 42 (quoting 15AA3985). To the contrary, the County agrees that *Mescalero Apache* holds 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*," i.e., the activity being taxed. *See* County Br. 51 (quoting 462 U.S. at 336 (emphasis added)).

[14] The County argues that because the PIT is a tax on a person's possessory or "usufructuary interest," it is not a tax on Indian leasing of land. County Br. 52. But the "usufructuary interest" the County refers to is synonymous with the non-Indian lessee's "leasehold interest." *See Vanguard Car Rental USA, Inc. v. County of San Mateo*, 181 Cal. App. 4th 1316, 1325 (2010) ("[A] leasehold estate is expressly recognized by the regulation as a form of possessory interest."); *Palm Springs Spa*, 18 Cal. App. 3d at 374–75 (describing the PIT as "a tax against plaintiff's leasehold possessory interest in the tax exempt property" and a "possessory interest tax upon plaintiff's leasehold").

The County attempts to turn the "close relationship" standard on its head by arguing that the PIT funds such a general and wide-ranging set of services, such as "police protection [and] road maintenance," that it must be sufficient to justify the tax. But, as explained in Lessees' opening brief, *Hoopa Valley* rejected this very argument, holding that the state's interest in funding general services like "road, law enforcement, welfare, and health care services" benefiting "both tribal and non-tribal members," was insufficient because none of those services was sufficiently connected to the timber activities being taxed. 881 F.2d at 661.

And in the closely analogous case of *Seminole Tribe*, the Eleventh Circuit held that general services provided to all taxpayers—including law enforcement, criminal prosecution, and health services—lacked the requisite nexus to the renting of Indian land required to overcome the strong interests reflected in the same leasing regulations at issue here. 799 F.3d at 1341–42. As the court explained, "[a]lthough the presence of law enforcement or off-reservation roads in some sense makes leasing on-reservation property more attractive, none of the services . . . is critically connected to the business of commercial land leasing on Indian property—the activity taxed by the Rental Tax—"in a manner sufficient to justify it. *Id.* at 1342.

Like the State of Florida in *Seminole Tribe*, the County "has offered no evidence that [it] is involved in any way with a non-Indian's leasing of commercial property from an Indian tribe on Indian land except taxing it."

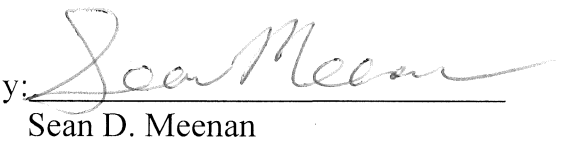
Id. And even if the state services make leasing Agua Caliente land more attractive, none of these services is sufficiently connected to the value of the leasehold possessory interest being taxed to be given any weight under a *Bracker* analysis. Because the PIT "interferes or is incompatible with federal and tribal interests reflected in federal law," which are at their "greatest" in this context, and the County has failed to present any relevant interests, let alone interests "sufficient to justify the assertion of State authority," the PIT is preempted under *Bracker*. *See Mescalero Apache*, 462 U.S. at 334.

CONCLUSION

For the foregoing reasons, Lessees request that this Court reverse the decision below and remand to the Superior Court for resolution consistent with applicable law and additional appropriate orders.

Dated: March 14, 2019

WINSTON & STRAWN LLP

By: 

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WINSTON & STRAWN LLP

By: 

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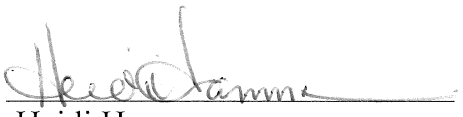

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