IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT

No. E070618

HEIDI L. HERPEL, ET AL.
Appellants,

v.

COUNTY OF RIVERSIDE, LARRY W. WARD, and DON KENT,
Respondents,

Riverside County Superior Court No. PSC 1404764
Honorable Craig G. Reimer

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL Fourth APPELLATE DISTRICT, DIVISION Two	COURT OF APPEAL CASE NUMBER: E070618
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APPELLANT/ PETITIONER: Heidi L. Herpel, et al RESPONDENT/ REAL PARTY IN INTEREST: County of Riverside, Larry Ward and Don Kent	
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Date: February 22, 2019

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INTRODUCTION

This case presents the question whether Riverside County can tax non-Indians on the value of their possessory interests in Agua Caliente tribal land to help fund the governmental services the County and subordinate taxing jurisdictions provide them. If the question sounds familiar, that's because it is. The Court upheld this exact tax in a preemption challenge in 1971. (*Palm Springs Spa, Inc. v. Cty. of Riverside* (1971) 18 Cal.App.3d 372.) The Ninth Circuit also upheld the tax in 1971. (*Agua Caliente Band of Mission Indians v. Riverside Cty.* (9th Cir. 1971) 442 F.2d 1184 ("*Agua Caliente I*").) The Ninth Circuit upheld the tax *again* only a few weeks ago under the doctrine of *stare decisis* after the federal district court held that the County's provision of services to the Agua Caliente Tribe and lessees fully justified the tax. (*Agua Caliente Band of Mission Indians v. Riverside Cty.* (9th Cir. 2019) 749 Fed.Appx. 650; *Agua Caliente Band of Cahuilla Indians v. Riverside Cty.* (C.D. Cal. June 15, 2017, No. ED CV-14-0007) 2017 WL 4533698 ("*Agua Caliente II*").) Every court that has considered the possessory interest tax found it is not preempted, including the Superior Court below.

Appellants are non-Indian taxpayers who lease Agua Caliente trust land. They enjoy the same governmental services their neighbors enjoy, but they do not want to pay for them. So, Appellants sued Riverside County claiming that having to pay California's possessory interest tax ("PIT") to the County infringes tribal sovereignty. The Superior Court correctly rejected Appellants' claims in orders deciding successive motions and ultimately

resolved the case by bench trial after considering all of the evidence adduced by the Tribe itself in the federal case. The Superior Court correctly held that: (1) federal law, including 25 U.S.C. § 465, 25 U.S.C. § 415, 25 C.F.R. § 162.017, do not preempt the PIT; and (2) the "panoply of local governmental services [the County and other local agencies provide] to the lessees, and to all of the sub-lessees, occupants, customers and other uses of their leasehold interests" justifies the PIT. (20AA6380.)

Appellants urge the Court to reach a conclusion contrary to the court below and that of every other court that has considered the question, but they do not offer any credible argument. Appellants limit their appeal to legal arguments, each of which the Superior Court (and the federal district court) thoroughly considered and rejected. Nothing about these rulings should be surprising. Since this Court upheld the PIT in *Palm Springs Spa* 48 years ago, the amount of Agua Caliente trust lands leased to non-Indians has grown from 16 acres to over 4,300 acres. (16AA4812 at Stipulation ("Stip.") 145.) The 2016 approximate value of the possessory interests in leased Agua Caliente land was $2.3 *billion*. (*Id*. at Stip. 146.) That is concrete evidence that the PIT has not harmed the Tribe's economic development or self-determination. Virtually every governmental service that lessees enjoy is provided by the County or a subordinate taxing jurisdiction using, in part, money collected from the PIT—the County clearly uses PIT revenues to serve the lessee/taxpayers. Based on the evidence before it, the Superior Court correctly concluded that the PIT was fully justified. This Court should affirm the decision.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Factual Background

1. Agua Caliente lands are interspersed with non-Indian lands within the boundaries of the Reservation.

The Agua Caliente Band of Cahuilla Indians is a federally recognized tribe with a reservation established by executive order in 1876 and expanded in 1877. (16AA4797-98 at Stips. 33-35.) Today, the Agua Caliente Reservation comprises over 31,000 acres of land, spread in a "checkerboard" pattern across Palm Springs, Cathedral City, and Rancho Mirage, and extending to unincorporated areas of the County. (*Id*. at Stip. 33.) Most of the land within the Reservation was allotted to individual members of the Tribe, pursuant to the Mission Indian Relief Act of 1891 (26 Stat. 712), the Act of March 2, 1917 (39 Stat. 969, 976), and the Agua Caliente Equalization Act, 25 U.S.C. § 951, *et seq*. (See *id*. at Stip. 36.) The United States holds in trust for the Tribe approximately 2,230 acres of land within the exterior boundaries of the Agua Caliente Reservation ("Tribal Trust Land"). (16AA4800 at Stip. 53.) The Tribe leases approximately 14.75 acres of Tribal Trust Land to non-Indians under four commercial leases and two residential leases. (*Id*. at Stip. 54.)

Approximately 24,000 acres of the Reservation is land that the United States holds in trust for and is allotted to individual tribal members ("Allotted Lands")[1]. (16AA4798-99 at Stips. 37, 44.) Allottees lease out approximately 4,300 acres of Allotted Lands, mostly to non-Indians, under approximately 20,000 master leases, mini-master leases, subleases, and sub-subleases. (*Id*.

[1] Together, Tribal Trust Land and Allotted Land are referred to as "trust land."

at Stips. 46-47.) The non-Indian Plaintiffs in this case—Herpel, Fabris, and the Etheringtons—lease Allotted Land, and have paid PIT on the value of their possessory interests. (16AA4792-95 at Stips. 4, 6-7, 12, 18-21.)

The Tribe does not review or approve leases of Allotted Land, does not consider such review to be its responsibility, and does not receive any portion of the revenues from those leases. (16AA4799, 4801 at Stips. 51, 49, 66-67.) The Tribe has contracted with the Bureau of Indian Affairs ("BIA") to review leases of Allotted Land for regulatory compliance and record them.[2] (16AA4799 at Stips. 50, 52.) Employees of the Tribe performing those federal functions are prohibited by law from sharing with the Tribe any information they learn by reviewing the leases of Allotted Land. (*Id*.) When an allottee leases his land to a non-Indian, the Tribe is not involved in any part of that transaction and is unaware of the identities of the lessees. (16AA4813, 4816 at Stips. 155, 176.)

The County assesses and collects PIT from non-Indian lessees of Tribal Trust and Allotted Lands. (16AA4791-92 at Stip. 3.) If a lessee fails to pay the PIT, there is no recourse against the Indian lessor. (16AA4813 at Stip. 161.) Unpaid taxes can never result in a lien or other charge upon the trust land itself, and the tribe and tribal members are never liable for unpaid PIT. (*Id*.) The leases signed by the three named Plaintiffs, as well as other leases produced by the Tribe, uniformly require lessees to pay all property taxes during the lease term and state that lessee shall protect and hold

[2] The Indian Self-Determination and Education Assistance Act of 1975, codified as amended at 25 U.S.C. §§ 450–450n, 455–458e, 458aa–458hh, 458aaa–458aaa-18, governs such arrangements.

harmless the lessor (whether the allottee or the Tribe) and the property from any such taxes. (16AA4801 at Stips. 69-70.) In sum, neither the Tribe nor its members are assessed or pay PIT or any other tax on Tribal Trust Land or Allotted Land. (16AA4800-01, 4813 at Stips. 60, 69-70, 161.)

2. The County and subordinate taxing jurisdictions provide virtually all governmental services non-Indian lessees enjoy, paid for, in part, with PIT revenues.

Non-Indian lessees rely almost exclusively on the County, Palm Springs, Rancho Mirage, Cathedral City, the Palm Springs school district, and other special districts for all essential governmental services, including fire and police protection, road maintenance, flood control, sewer, electrical service, trash, public transportation, animal control services, and vector and mosquito control. (16AA4801 at Stip. 64.) Revenues generated from the PIT help fund the governmental services that the County and other taxing jurisdictions provide to the Reservation's residents and businesses, including the lessees. (16AA4802, 4811 at Stips. 81, 138, 141.)

During fiscal year 2013-14, the County collected approximately $22.8 million in PIT revenue from lessees of trust land. (16AA4803-04, 4808-09 at Stips 88, 124.) Pursuant to state law, specifically Assembly Bill 8 ("AB 8") (Chapter 282, Statutes of 1979), the County is allocated approximately $3.3 million of that PIT revenue. (16AA4802, 4804, 4809 at Stips. 74, 94, 125.) The County used PIT revenues to help fund fire protection, health and sanitation, road district services, and emergency services, all of which were available to non-Indian lessees of trust land and the Tribe itself. (16AA4804, 4809, 4812 at Stips. 89, 125, 144.) For instance, from 2011-2015, the County

Fire Department responded to a total of 2,392 incidents on the Reservation, with an average of 478 incidents per year. (16AA4805 at Stip. 99.) The Tribe does not provide any fire emergency services to trust land. (*Id*. at Stip. 100.)

The County also used PIT revenues to pay, in part, for the Sheriff's Office, corrections services, the district attorney, health and mental health services, the public defender, probation services, code enforcement services, animal services, the County Counsel's Office, the County's executive office, the Board of Supervisors, the tax assessor, the tax collector, County information technology, law enforcement, jails, and health clinics. (16AA4809, 4814-15 at Stips. 127, 168.) All of these services were available to the non-Indian lessees and the Tribe itself. (16AA4811-12 at Stips. 138, 141, 144.) If the PIT collected from these lessees was invalidated, the County would have approximately a $3.3 million shortfall in its budget to provide these services. (16AA4809 at Stip. 125.)

Pursuant to AB 8, Palm Springs, Cathedral City, and Rancho Mirage received approximately $4.1 million in PIT revenues in fiscal year 2013-2014. (16AA4805-06 at Stips. 106-108.) Palm Springs, where approximately 5,427 non-Indian lessees of trust land are located, used PIT revenues to fund police, fire, street maintenance and lighting, building and safety, railroad station, park maintenance, recreation and library services, and to maintain its convention center. (*Id*. at Stip. 106.) Rancho Mirage, where approximately 1,085 non-Indian lessees of trust land are located, used PIT revenues to provide for public safety and police and fire protection, general government functions, as well as engineering and other services (like the public library).

(*Id*. at Stip. 107.) Cathedral City, where approximately 3,093 non-Indian lessees of trust land are located, used PIT revenues to fund, in part, the fire department, for general purposes, and for the provision of general government and community services. (*Id*. at Stip. 108.) All of the services provided by the three cities were available to non-Indian lessees of trust land, as well as the Tribe. (16AA4805-06, 4812 at Stips. 106-108, 144.) If the PIT collected from these lessees were invalidated, these cities would have approximately a $4.1 million shortfall in their budgets to provide these services. (16AA4805-06, 4812 at Stips. 106-108, 126.)

Also pursuant to AB 8, the County allocated to districts with specific functions approximately $2.1 million in PIT revenues collected in fiscal year 2013-2014. (16AA4804, 4806-08 at Stips. 90, 109-113, 116; 8AA2680 at ¶ 29; 9AA2952-53.) These special districts are the agencies that provide water (like Desert Water Agency and Coachella Valley Water District), the Riverside County Flood Control and Conservation District ("Flood Control District"), the Desert Regional Medical Center, the Palm Springs Cemetery District, the Coachella Valley Mosquito and Vector Control District ("Vector Control District"), and the Riverside County Regional Park & Open Space District. (16AA4806, 4811-12 at Stips. 109, 143; 9AA2952-53.) The services provided by these districts benefit Agua Caliente Reservation lands, and they were available to non-Indian lessees of trust land, as well as the Tribe. (16AA4807, 4812 at Stips. 114, 144.)

For instance, the Flood Control District used PIT revenues to pay for storm sewer systems and maintenance and construction of facilities like

dams, open channels, and storm drains that cover the district zone where trust land is located, and thus control flooding of trust land, benefiting non-Indian lessees and the Tribe alike. (16AA4808 at Stips. 117-119.) As another example, the Vector Control District provided services including mosquito and vector control and disease prevention, surveillance and monitoring of health risks, applied research, and public education. (*Id*. at Stip. 122.) Vector control services are not provided by the Tribe or the federal government, and they benefit property owners, guests, employees, and tenants including those living on trust land, who enjoy a more habitable, safer, and more desirable place to live, work, or visit. (*Id*. at Stip. 123.) If the PIT revenues collected from non-Indian lessees of trust land were invalidated, these special districts would have approximately a $2.1 million shortfall in their budgets to provide these services. (16AA4804, 4806-08 at Stips. 90, 109-113, 116, 120.)

Under AB 8, the greatest portion of PIT revenues collected from lessees of trust land is allocated to education services. (16AA4802, 4805 at Stips. 74, 103.) In fiscal year 2013-2014, approximately $13.1 million in PIT revenues were allocated to two school districts in Palm Springs, the Desert Community College, the County Office of Education, and the Education Revenue Augmentation Fund (which is used to alleviate statewide education funding obligations and received approximately $4.3 million in allocated PIT revenue). (16AA4805, 4815 at Stips. 102, 169-170.) The education-related services provided by these entities are available to all non-Indian lessees of trust land, as well as the Tribe. (16AA4812 at Stip. 144.) The Tribe itself does not provide public education services to non-Indian lessees of trust land.

(16AA4805 at Stip. 104.) If the PIT collected from these lessees were invalidated, these educational entities would have approximately $13.1 a million shortfall in their budgets. (*Id*. at Stip. 102.)

Similar amounts to those described above for FY 2013-14 were collected, used, and allocated by the County, the three cities, and special districts in FYs 2014-2015 and 2015-2016. (16AA4808-09 at Stip. 124; 8AA2680 at ¶¶ 30, 31; 9AA2954-59.)

3. The Tribe provides virtually no governmental services to non-Indian lessees or to trust land.

Services the Tribe provides to *Tribal Trust Lands* are limited to: (1) road maintenance services on the South Palm Canyon Road right-of-way; (2) flood protection services in portions of Indian Canyons and Tahquitz Canyon (although the County also provides such flood protection services); (3) delivery of potable water to the Trading Post at Indian Canyons; (4) environmental permitting review services where there is not a land use agreement with a local jurisdiction and for which the Tribe collects fees to cover its provision of those services;[3] (5) building code enforcement services where there is not a land use agreement with a local jurisdiction, and for which the Tribe collects fees to cover its provision of those services; (6) occupational and safety code enforcement services; (7) food safety code enforcement services; and (8) in conjunction with the EPA, storm water

[3] The Tribe has executed land use agreements with the County, Palm Springs, Cathedral City and Rancho Mirage to ensure that the local land use laws apply to the development of trust land by the non-Indian lessees. (See 20AA6217.)

permitting services and waste water permitting services. (16AA4800-01 at Stips. 61-63.)

The only services the Tribe provides to lessees of *Allotted Land*—environmental review and building code enforcement services for a fee—is limited to five parcels in unincorporated Riverside County not covered by a land use agreement. (*Id*.)

B. Procedural History

On September 5, 2014, Appellants Heidi Herpel, Judith Fabris, and Barbara and Roger Etherington (collectively, Lessees) filed suit on behalf of a putative class, seeking: (1) a refund of the taxes Ms. Herpel paid from 2001 (First Cause of Action); (2) a declaration that the County must issue notices of past overpayment of taxes to all lessees of tribal land (Second Cause of Action); (3) a writ of mandate directing Riverside County to send notices of overpayment of taxes paid to all lessees of tribal land (Third Cause of Action); (4) an order compelling the County to issue notices of past overpayment of taxes to all lessees of tribal land (Fourth Cause of Action); (5) a declaration that the County must issue notices of future overpayment of taxes to all lessees of tribal land (Fifth Cause of Action); and (6) an order compelling the County to issue notices of future overpayment of taxes to all lessees of tribal land (Sixth Cause of Action). (See 1AA0036-81.) The County demurred, and the Superior Court sustained the County's demurrer with respect to the fifth and sixth causes of action on February 2, 2015. (1AA0082-100; 1AA0101; 20AA6373.)

The three issues that Appellants have appealed were decided in three separate orders: (1) an April 18, 2016 ruling that 25 U.S.C. § 465 does not preempt the PIT (4AA1328-332); (2) a June 2, 2017 ruling that 25 C.F.R. § 162.017 does not preempt the PIT (15AA4783); and (3) an April 2, 2018 judgment after trial, upholding the PIT under the *Bracker* balancing test[4] (20AA6372-80.)

1. The Court's April 18, 2016 Ruling

On April 18, 2016, the court dismissed the first cause of action. It held that there was no evidence that the Allotted Land that Appellants lease to non-Indians was acquired pursuant to Section 465, "and thus no showing that the section applies to that property." (4AA1330.) The court also held that the decision in *Palm Springs Spa* controlled the question of PIT preemption from 1971 to 2013 (*id*.), although the court later held the opposite. As described below, the relevance of *Palm Springs Spa* was rendered moot by the court's judgment after trial.

2. The Court's June 2, 2017 Ruling

On June 2, 2017, the Superior Court held that 25 C.F.R. § 162.017 does not expressly preempt or conflict with the PIT. (15AA4786.) The Superior Court agreed with the analysis set forth by the Ninth Circuit in *Desert Water Agency v. U.S. Dep't of the Interior*, which held—based on the interpretation of the Secretary of the Interior and its own analysis of the regulations—that Section 162.017 of the federal lease regulations did not have preemptive effect. (15AA4785-86; *Desert Water Agency v. U.S. Dep't*

[4] *White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136.

of the Interior (9th Cir. 2017) 849 F.3d 1250.) The Superior Court adopted the Ninth Circuit's reasoning in its June 2, 2017 order.[5] (15AA4785-86.)

3. The Court's April 2, 2018 Judgment After Trial

On March 16, 2018, the court issued a tentative ruling that it later adopted as its judgment in the County's favor after trial. (20AA6372-80.) In the April 2, 2018 judgment, the court ruled that the *Bracker* test, when applied to the facts in this case, does not preempt the PIT. (See 20AA6378.)

LEGAL BACKGROUND

A. California Property Taxation

The California Constitution mandates that "all property is taxable," excluding specifically enumerated exceptions. (Cal. Const., art. XIII, § 1; *id*. § 3 [listing constitutionally authorized exemptions].) "Property" includes both real and personal property, and "real property" includes the "possession of, claim to, ownership of, or right to the possession of land" and "improvements." (Rev. & Tax Code §§ 103, 104.) A "possessory interest" is the possession of, or the right to possess, tax-exempt real property by a non-exempt person or entity. (*Id*. § 107(a).)

In 1978, the California electorate approved "Proposition 13," amending the California Constitution to reduce property taxes. (*City of Scotts Valley v. County of Santa Cruz* (2011) 201 Cal.App.4th 1, 7-8; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22

[5] In its June 2, 2017 order, the court also opined that *Palm Springs Spa* was not controlling of PIT preemption prior to 2013, contrary to its position in the April 16, 2016 order. (15AA4785.) However, that issue was rendered irrelevant by the court's April 2, 2018 judgment, in which the court upheld the PIT after applying the *Bracker* balancing test. (20AA6378.).

Cal.3d 208, 220.) Proposition 13 capped the rate at which real property can be taxed to one percent of assessed value and increases in annual assessments to two percent. (Cal. Const. art. XIIIA, §§ 1(a), 2(a).)

A year later, the Legislature adopted AB 8, which dictates how property tax revenues are allocated to taxing jurisdictions within each county. (Chapter 282, Statutes of 1979.) Counties are required to collect property taxes on behalf of all taxing jurisdictions within their borders and allocate tax revenues among those jurisdictions pursuant to the formula established by AB 8, as amended. (See Cal. Const., art. XIII A, § 1, subd. (a).)

B. Federal Laws Related to Agua Caliente Lands and Leasing

The Indian Reorganization Act of 1934 ("IRA") authorizes the Secretary of the Department of the Interior "to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands . . . for the purpose of providing lands for Indians." (25 U.S.C. § 465 [now renumbered as 25 U.S.C. § 5108].) Section 465 also states that "[t]itle to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation." (*Id.*)

In 1955, Congress enacted Public Law 255 to authorize tribes and individual Indians to lease trust lands, subject to the approval of the Secretary of the Interior. (Pub. L. 255, ch. 615, § 1, 69 Stat. 539 (Aug. 9, 1955) [now codified at 25 U.S.C. § 415].) Congress amended Public Law 255 in 1959 to authorize the Secretary to approve leases of Agua Caliente Reservation lands

for up to 99 years. (Pub. L. 86–326, 73 Stat. 597 (Sept. 21, 1959).) Between 1959 and 2012, Congress amended Public Law 255 44 times, but it has never prohibited state taxation of non-Indians leasing trust lands. (See 25 U.S.C. § 415 notes.)

In 1971, the Secretary promulgated regulations to implement 25 U.S.C. § 415. 25 C.F.R. §§ 131.5, 131.8, 131.12 (1971). The regulations were amended in 2001 (66 Fed. Reg. 7068, 7089 (Jan. 22, 2001), and then revised on December 5, 2012. (See 77 Fed. Reg. 72439 (Dec. 5, 2012) [codified at 25 C.F.R. Part 162].) The most recent revision includes Section 162.017, which states that permanent improvements on leased lands, activities conducted on leased premises, and leasehold or possessory interests are not subject to State or local taxes, "[s]ubject only to applicable Federal law." (77 Fed. Reg. at p. 72448.) The rule went into effect on January 4, 2013. (*Id*. at p. 72440.)

STANDARD OF REVIEW

In reviewing a judgment based upon a decision following a bench trial, this Court reviews questions of law de novo. (*Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 765.) With respect to the trial court's findings of fact, the Court applies the substantial evidence standard of review. (*Niko v. Foreman* (2006) 144 Cal.App.4th 344, 364.) The substantial evidence standard is deferential; a court is to liberally construe findings of fact to support the judgment and to consider the evidence in the light most favorable to the prevailing party, drawing all reasonable inferences in support of the findings. (*Citizens Business Bank v. Gevorgian* (2013) 218

Cal.App.4th 602, 613.) The substantial evidence standard also applies to mixed questions of fact and law, where the factual questions predominate. *Crocker Nat'l Bank v. City and Cty. of San Francisco* (1989) 49 Cal.3d 881, 889.

Appellants have represented that their appeal raises only pure questions of law. (See Appellant Br. at p. 13 [describing this Court's role as reviewing "pure question[s] of law" under de novo review].) The County agrees that the Superior Court's determination that federal statutes and federal regulations do not preempt the PIT are questions of law to be reviewed de novo. However, *Bracker* balancing is "a flexible pre-emption analysis sensitive to the particular facts and legislation involved"—i.e., a mixed question of law and fact which turns almost entirely on factual questions. (*Cotton Petroleum Corp. v. New Mexico* (1989) 490 U.S. 163, 176.) As a result, the Superior Court's *Bracker* analysis should be reviewed under the substantial evidence standard.

Ultimately, this Court should affirm the Superior Court's rulings regardless of what standard of review is applied.

ARGUMENT

The Superior Court correctly held that federal law does not preempt assessment and collection of California's PIT from non-Indian lessees of Agua Caliente lands, based on a thorough consideration of the relevant federal authorities and the extensive fact record under the correct interpretative framework. In this appeal, Appellants raise three arguments. First, Appellants argue that the PIT is preempted under Section 465 of the

IRA. Second, they claim that a federal regulation—25 C.F.R. § 162.017—preempts the PIT. Third, they claim that the Superior Court erroneously balanced the federal, tribal, and state interests under the *Bracker* test. All three arguments fail, and the Court should affirm the Superior Court's judgment.

A. The Superior Court correctly concluded that the PIT is not preempted under any of the authorities Appellants cite or Bracker balancing.

The U.S. Supreme Court has explained that when resolving preemption claims such as Appellants', courts must first determine—by reference to the state law involved—who "bears the legal incidence of [the] tax." (*Oklahoma Tax. Comm'n v. Chickasaw Nation* (1995) 515 U.S. 450, 458; *Wagnon v. Prairie Band Potawatomi Nation* (2005) 546 U.S. 95, 101 [stating that "under our Indian tax immunity cases, the 'who' and the 'where' of the challenged tax have significant consequences"].) This initial step is critical because states cannot tax tribes or their members, "absent clear congressional authorization." (*Chickasaw Nation*, 515 U.S. at p. 459.) If the legal incidence of the tax is on a non-Indian, however, "[n]o categorical bar" applies. (*Id*.)

California courts and the U.S. Supreme Court have definitively held that the PIT "assessment is against the private citizen, and *it is the private citizen's usufructuary interest in the government land and improvements alone that is being taxed*." (*United States v. Cty. of Fresno*, (1975) 50 Cal.App.3d 633 638, 640 [emphasis added], aff'd (1977) 429 U.S. 452.) Thus, the Superior Court evaluated Appellants' claims through successive

motions for conflict preemption and under *Bracker* balancing. First, the court determined that the Appellants failed to establish that the PIT was preempted under 25 U.S.C. §§ 415 and 465. (4AA1330.). With respect to Section 465, the court concluded that "there is no evidence that the subject property was acquired pursuant to that statutory authority, and thus no showing that the section applies to that property." (*Id*.) Appellants did not produce evidence that Section 465 applied to the leased land at any point during the proceedings, and they could not. The Agua Caliente Reservation was established by Executive Orders decades before Congress enacted Section 465, and reservation lands were allotted to individual members pursuant to a statute enacted in 1959. (16AA4797-98 at Stips. 34-37.)

With respect to the leasing regulations at Section 162.017, the court ultimately held that 25 C.F.R. § 162.017 of the leasing regulations "does not itself preempt the PIT," based on the reasoning of the Ninth Circuit's decision in *Desert Water Agency*, 849 F.3d 1250. (15AA4785-86.) As explained further below, in *Desert Water Agency*, the Ninth Circuit construed § 162.017 and accepted the Department's interpretation of the regulation, holding, "[w]e agree with Interior that § 162.017(c) does not itself operate to preempt . . . ." (*Desert Water Agency*, 849 F.3d at p. 1258.) The Superior Court was correct to rely on the Ninth Circuit's interpretation, and it should be upheld.

Having concluded that none of the authorities Appellants cited directly preempted the PIT, the court conducted the "particularized inquiry into the nature of the state, federal, and tribal interests at stake" required

under *Bracker*. (*Bracker*, 448 U.S. at p. 145; see also 20AA6377-78.) Using "a flexible pre-emption analysis sensitive to the particular facts and legislation involved," *Cotton Petroleum*, 490 U.S. at p. 176, the court concluded that the "regulatory scheme [governing Indian leases] clearly demonstrates a strong federal and tribal interest in the issuance of leases," but that the economic impact of the PIT on rents was "marginal" and did not disproportionately impact the Agua Caliente leasing market. (20AA6378-79.) As to the State interest in the PIT, the court cited the myriad services that the County provides, the fact that the checkerboard pattern of the reservation would make it impossible to withhold services from lessees, and the nearly complete lack of tribal services as evidence of the state's interests. (20AA6379.) As the court observed, "The county and other local agencies are providing a panoply of local governmental services to the lessees, and to all of the sub-lessees, occupants, customers and other users of their leasehold interests"—facts that justify the imposition of the PIT. (20AA6380.) This ruling too should be affirmed.

B. Appellants' legal challenges to the Superior Court's decision have no merit.

1. Section 465 of the IRA does not preempt the PIT.

The Superior Court held that § 465 does not apply because the land that Appellants lease was not acquired under the IRA, as required by the plain language of the Act. (4AA1330.). That holding is factually and legally correct.

a. Section 465 has no application to the lands Appellants lease.

Congress passed the IRA in 1934. Section 465 of the Act authorizes the Secretary "to acquire, . . . any interest in lands, water rights, or surface rights to lands . . . for the purpose of providing land for Indians," and provides that "[t]itle to any lands or rights *acquired pursuant to this Act* . . . and such lands or rights shall be exempt from State and local taxation." (25 U.S.C. § 465 [emphasis added].) The Agua Caliente Reservation, however, was established by Executive Order in 1876 and expanded by another Executive Order in 1877, almost five decades before Congress enacted the IRA. (16AA4797-98 at Stips 34, 35; see also 20AA6215.) Because the Reservation was not "acquired pursuant to this Act," the statutory exemption does not apply.

The Superior Court quite correctly stated that "Section 465 was enacted in 1934 to authorize the Secretary of the Interior to acquire real property for Indians." (4AA1330.) And it stated that "there is no evidence that the subject property was acquired pursuant to that statutory authority, and thus no showing that the section applies to that property." (*Id.*) Appellants then claimed that it was the County's burden to prove that the Reservation was not acquired under the IRA, but the court properly rejected that argument too. (*Id.*)

Appellants argue that the court was incorrect. First, Appellants argue [Br. at p. 57] that the IRA codified common law represented by the holding of *United States v. Rickert* (1903) 188 U.S. 432. But there is no authority to support that claim. The question the Court confronted in *Rickert* was whether

improvements on allotted lands were taxable while the land remained in trust status and the Court concluded that they were not and cited the federal instrumentality doctrine.[6] (*United States v. Rickert*, 188 U.S. at pp. 441-43.) That result is not surprising, since the common law rule has consistently been that states cannot tax tribal lands. (*Chickasaw Nation*, 515 U.S. 450.) But Section 465 did not codify this rule. Section 465 authorized the Secretary to take fee title to land that had passed into private ownership under state and local jurisdiction and hold it in trust for Indians. (25 U.S.C. § 465.) The tax exemption protected the land against forfeiture.

Appellants then argue [Br. at p. 58] that the Supreme Court's decision in *Mescalero Apache Tribe v. Jones* (1973) 411 U.S. 145 means that lands do not have to be acquired under the IRA for § 465 to apply. But that is not what the Supreme Court held. In *Mescalero*, the incidence of the state tax fell on the Mescalero Tribe, which had leased federal forest lands from the United States to build a ski resort. (*Mescalero Apache Tribe*, 411 U.S. at p. 146.) The resort was developed "under the auspices of the Indian Reorganization Act of 1934" with money loaned to the tribe by the United States under § 10 of the Act. (*Id.*) The Court treated the federal lands as tantamount to land acquired under 25 U.S.C. § 465—even though it technically was not—because "'it would have been meaningless for the United States, *which already had title to the forest*, to convey title to itself for the use of the Tribe.'" (*Id.* at p. 155 n.11 [internal quotation marks

[6] The Court has since overruled the federal instrumentality doctrine in *Helvering v. Mountain Producers Corp.* (1938) 303 U.S. 376; see also *Cotton Petroleum*, 490 U.S. at p. 174 (intergovernmental tax immunity doctrine "has now been 'thoroughly repudiated' by modern case law").

omitted] [emphasis added].) That result makes perfect sense, given that the purpose of Section 465 is to authorize the Secretary to acquire *title* to lands.

The facts in this case are nothing like those in *Mescalero Apache*. The Agua Caliente Tribe is not leasing federal land *from* the United States; its members are leasing trust land *to* private parties. The Tribe and its members are not developing leased land with loans issued by the United States under the IRA; the lessees are developing the lands *they* lease, presumably using private funds. These activities do not occur under the "auspices" of the IRA. The Court in *Mescalero Apache* treated the leased Forest Service's lands as § 465 lands because the Mescalero Tribe, a Tribe organized under § 16 of the IRA, developed the ski resort under Section 10 of the Act. (*See id*. at p. 157 n.13.) *Mescalero Apache* cannot be read to stand for the proposition that all trust land, whenever or however acquired, is to be treated as lands acquired under § 465.[7]

b. The PIT is not a tax on Indians or Indian land.

Even if the leased lands had been acquired under § 465, that provision would not preempt the PIT. The authority set forth in § 465 is quite specific. First, it provides that "[t]he Secretary of the Interior is authorized . . . to acquire . . . any interest in lands, water rights, or surface rights to lands . . . for the purpose of providing land for Indians." (25 U.S.C. § 465.)

[7] Appellants argue [Br. at p. 58 n.8] that if the law is not as they claim, there would be an "absurd result that lands acquired after 1934 receive more favorable tax treatment than those acquired earlier." That is nonsense. *Chickasaw Nation* assures that Indians and Indian land are exempt *per se* from state taxation, but neither that case, nor 25 U.S.C. § 465, has any bearing on whether non-Indians, like Appellants, can be taxed for their use of leased land.

It then states that the "[t]itle to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation." (*Id.*) To trigger the tax exemption, a tax must actually be imposed on a *right* the *Secretary* acquired *title* to and holds in trust.

The PIT does none of these things. It is a tax on a non-Indian possessory interest, not a tax on any right the Secretary acquired title to or holds in trust. Title is ownership, but not necessarily the right of possession. Title and ownership are often transferred separately from possession. (*See, e.g., Morrison v. Barham* (1960) 184 Cal. App. 2d 267, 274-75 [describing a homestead assigned for life, the "holder of the underlying title has no right of possession or enjoyment while the homestead exists"].)

Furthermore, the interests that lessees possess are not acquired under § 465. Lessees acquire rights to possess trust land by entering into private leases with tribes or allottees. The Secretary is authorized to approve such leases, but under a different statutory scheme—25 U.S.C. § 415. Thus, possessory interests are not rights acquired by the Secretary; they are rights created by Indian lessors and *approved* by the Secretary. There is no way to construe 25 U.S.C. § 465 as covering the lessee's possessory interest, and, for that reason, the PIT is not the sort of state tax exempted by the IRA.

In addition, construction of the PIT shows that the taxable event, the subject of the tax, is private possession of tax-exempt land. As the Court directed in *Wagnon*, construction of state law starts with a "fair interpretation

of the taxing statute as written and applied." (*Wagnon*, 546 U.S. at p. 102-03.) The uniform construction is that the PIT "assessment is against the private citizen, and it is the private citizen's usufructuary interest in the government land and improvements alone that is being taxed." (*Cty. of Fresno*, 50 Cal. App. 3d at p. 640; *Cty. of Fresno*, 429 U.S. at 456 [stating that the "tax on such possessory interests is not a tax on the Federal Government, on Government property, or on a 'federal function.'"].)

Appellants persist in conflating taxation of Indians on their ownership of property and taxation of non-Indians on their possession and use of Indian land. But as the Ninth Circuit explained in *Confederated Tribes of the Chehalis Reservation*, the distinction between a possessory interest tax and a tax on land or improvements covered by 25 U.S.C. § 465 is critical: "In *Agua Caliente*, for example, we stressed that '[t]he California tax on possessory interests does not purport to tax the land as such,' which would be barred by § 465, 'but rather taxes the full cash value of the lessee's interest in it,' which is not covered by § 465." (*Confederated Tribes of the Chehalis Reservation v. Thurston Cty. Bd. of Equalization* (2013) 724 F.3d 1153, 1158 n.7 [quoting *Agua Caliente I*, 442 F.2d at p. 1186].)

The definitive interpretation of the PIT holds that the incidence falls on non-Indian lessees, and the taxable event is possession and use of the land under lease, not ownership of land by Indians. Accordingly, the tax exemption in 25 U.S.C. § 465 has no application, wholly apart from the fact that the lands were not acquired under the IRA.

Nonetheless, Appellants assert [Br. at pp. 59-60] that the PIT must be preempted because "the right to lease land is among the 'bundle' of property rights § 465 protects." They appear to reason that because Indian use was an aspect of Indian property rights in *Mescalero*, the possessory use taxed in this case must be an aspect of Indian beneficial ownership of land. (*See* Appellant Br. at p. 60 [citing *Terrace v. Thompson* (1923) 263 U.S. 197, 215 for the proposition that the "essential attributes of property" include "the right to use, lease, and dispose of it for lawful purposes"].)

But California does not tax any of the rights in the Tribe's "bundle," including the "right to lease land." California taxes the right of a non-Indian to the possessory interest he purchased. For that reason, Appellants' reliance [Br. at p. 60] on *Mescalero* is again misplaced. In *Mescalero*, the lessor was the United States; here, the lessor is a member of the Agua Caliente Tribe. In *Mescalero,* the lessee was an Indian tribe that was taxed; here, the lessee is a non-Indian who is taxed. In *Mescalero,* the "taxed use" was a right of the tribe under its lease of tax-exempt land; here, the "taxed use" is a right of the non-Indian lessee who was sold that right by the Indian lessor, who no longer has any right of use or possession under the lease. *Mescalero* really has nothing to do with this case.

Nor does *Seminole Tribe* support Appellants' argument. In *Seminole Tribe*, the Eleventh Circuit concluded that a state law imposing a tax on the right to lease land was preempted. (*Seminole Tribe of Florida v. Stranburg* (2015) 799 F.3d 1324, 1341-42.) Appellants rely heavily on that case, but the Florida statute involved there is easily distinguishable. That statute taxed the

"privilege [of engaging] in the business of renting, leasing . . . any real property" and that "[f]or the exercise of such privilege, a tax is levied at a rate of 5.7 percent of and on the total rent or license fee charged for such real property *by the person charging or collecting the rental or license fee*." (Fla. Stat. § 212.031 [emphasis added].) Florida's Rental Tax is explicitly a direct tax *on the Tribe* as lessor of trust lands—a tax that federal law prohibits wholly apart from § 465. (*Chickasaw Nation,* 515 U.S. at p. 459 ["If the legal incidence . . . rests on a tribe . . . the tax cannot be enforced"].) [8] The fact that a lease provision shifted the economic burden to pay the tax from the lessor to the lessee confirms that the legal incidence fell on the tribe. (*Seminole Tribe,* 799 F.3d at p. 1326.) But a contract or lease provision cannot change the legal incidence of a tax as that is a matter of state law. (*Barona Band of Mission Indians v. Yee* (9th Cir. 2008) 528 F.3d 1184, 1189 [citation omitted].) The Florida Rental Tax in *Seminole Tribe* is very different from the PIT. Florida taxes the business of the lessor based on the amount of the rent paid to the lessor. In contrast, the PIT taxes the lessee on the value of the lessee's possessory interest, and the tribe and tribal members are never liable for the PIT.

Although the court below was correct that § 465 does not cover lands acquired before the Act's passage, there are more fundamental reasons why

[8] In *Seminole Tribe,* the Eleventh Circuit inexplicably stated that "We assume for this opinion that *Stranburg* is correct that the legal incidence of Florida's Rental Tax falls on the non-Indian lessees." (*Seminole Tribe*, 799 F.3d at p. 1331, n.8.) It is inexplicable because the plain language of the act, as quoted and explained in the opinion, shows that the legal incidence is on the operator of a leasing business—the Seminole Tribe.

that provision does not apply in this case. If Appellants' claim that taxation of a lessee's use of trust land is the same as taxing trust land were correct, virtually all taxation of non-Indians leasing Indian land would be impermissible. But that is not the law. Many cases uphold state taxes where a non-Indian taxpayer engaged in taxable activity in Indian country under a lease. (See, e.g., *Cotton Petroleum,* 490 U.S. at p. 163 [affirming severance taxes on reservation oil and gas]; *Yavapai-Prescott Indian Tribe v. Scott* (9th Cir. 1997) 117 F.3d 1107 [affirming business transaction tax on hotel operation]; *Gila River Indian Cmty. v. Waddell* (9th Cir. 1996) 91 F.3d 1232 [finding transaction privilege taxes on sporting and cultural events permissible]; *Salt River Pima-Maricopa Indian Cmty. v. Arizona* (9th Cir. 1995) 50 F.3d 734 [sales and rental taxes on retail establishments not preempted].) Some leases of Agua Caliente trust land are used for dwellings, while others support the operation of businesses, but all make taxable use of trust land, like so many other non-Indian lessees who are validly assessed taxes pursuant to leaseholds in Indian Country.

For these reasons, as well as the reason the Superior Court held dispositive, 25 U.S.C. § 465 of the IRA does not exempt taxation of non-Indians.

2. Section 162.017 does not preempt the PIT.

Appellants argue [Br. at pp. 49-50] that federal law preempts the PIT both expressly and implicitly because 25 C.F.R. § 162.017 "expressly preempts state taxes on possessory interests in permanent improvements on Indian land." They also assert [*id*. at p. 50] that even if 25 C.F.R. § 162.017

does not expressly preempt the PIT, it preempts the PIT under "the doctrine of conflict preemption because California law requires the County to collect the PIT, while federal law prohibits the County from doing so." Not even the Secretary of the Interior—the author of the regulation—agrees with Appellants' position.

Section 162.017 states that state and local taxes do not apply to "permanent improvements on the leased land" or "the leasehold or possessory interest." (25 C.F.R. § 162.017(a), (c).) Each subsection, however, is prefaced with the caveat, "[s]ubject only to applicable Federal law." As the Secretary explained in *Desert Water Agency*, that caveat is meaningful. (*Desert Water Agency*, 849 F.3d at p. 1254.) According to the Secretary, "so far as preemption is concerned, *§ 162.017 has no legal effect at all*: it does not purport to preempt any specific state taxes . . . or to alter the judge-made and judge-administered balancing test that has governed Indian preemption cases since at least 1980, when the Supreme Court decided *Bracker*." (*Id*. [emphasis added].)

The Ninth Circuit agreed with the Secretary that § 162.017 does not purport to preempt any taxes because: (1) the caveat in § 162.017 works as a savings clause; (2) the court was required to defer to the Secretary under *Auer v. Robbins* (1997) 519 U.S. 452, 461-62; and (3) that reading is consistent with interpretations in *Seminole Tribe,* 799 F.3d at p. 1324, and *Confederated Tribes of Chehalis Reservation*, 724 F.3d at p. 1157 n.6. (*Desert Water Agency*, 849 F.3d at pp. 1254-57.) Section 162.017 does not change the law and does not conflict with the PIT. Lessees are subject to only one

command—that set forth in the California Constitution making all property taxable. That is also true for the County, which is also constitutionally obligated to assess and collect the PIT. The Superior Court correctly found, consistent with the Ninth Circuit, that 162.017 does not change the law—according to the Ninth Circuit, the regulation has "no legal effect." (15AA4785-86; *Desert Water Agency*, 849 F.3d at p. 1254.) Without any legal effect, Section 162.017 cannot compel the County to do anything; it certainly does not (and cannot) create a conflict with State law that requires the County to collect the PIT.

Nonetheless, Appellants press that the Superior Court, the Ninth Circuit, the Eleventh Circuit, and the Secretary are all wrong because, in their view [Br. at p. 50], "[t]his unambiguous prohibition on state-imposed taxation of possessory interests in and permanent improvements on Indian land is a textbook example of express preemption." That is incorrect. Section 162.017 is ambiguous, by virtue of the savings clause. If a regulation is ambiguous, courts are to defer to the agency's interpretation. (*Auer*, 519 U.S. at pp. 461-62.)[9]

[9] Appellants seem to be arguing that they know better than the Secretary whether the agency intended to preempt the PIT. (Appellant's Br. at p. 51 [citing *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta* (1982) 458 U.S. 141, 153, for the proposition that 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].) Appellants got the standard right, but are simply unable to square the fact that the Secretary made clear—and the Ninth Circuit agreed—that § 162.017 "does not purport to preempt any specific state taxes." (*Desert Water Agency*, 849 F.3d at p. 1254.)

Appellants offer [Br. at pp. 53-54] their interpretation of the rule, but ignore the savings clause, *Auer* deference, and contrary language in the rule itself. As the Secretary explained, the Department cannot construe any regulation "to preempt State law *unless there is some other clear evidence that Congress intended preemption*." (See 1AA0093.) That is correct. Before promulgating the final rule, the agency was required to and did consider the rule under Executive Order 13132 on Federalism. (77 Fed. Reg. at p. 72464.) The Executive Order states that, in the absence of an express preemption provision in a statute, Federal agencies shall not construe regulations to preempt State law unless there is some other clear evidence that Congress intended preemption, or the exercise of State authority conflicts with the exercise of Federal authority under the statute. (64 Fed. Reg. 43255 § 1(a) (Aug. 10, 1999).) The 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." (77 Fed. Reg. at p. 72464.)

The Ninth Circuit and the Superior Court were correct to adopt the Secretary's interpretation for another reason—courts are to avoid interpretations that raise constitutional questions. (See *People v. Chandler* (2014) 60 Cal.4th 508, 524 ["a statute must be construed, if reasonably possible, in a manner that avoids a serious constitutional question"] [internal quotations omitted].) Appellants urge the Court to interpret § 162.017 in a manner that is not only contrary to the Secretary's interpretation, but also raises serious constitutional questions about the Secretary's authority. 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.

As the Superior Court correctly held, the leasing statute "merely authorizes Indian tribes and individual Indians to lease Indian land, and sets restrictions on the maximum length of the lease terms." (4AA1330.) That interpretation is sound, as § 415 is not ambiguous in any respect. Congress must clearly indicate its intent to preempt state law. (See *Gregory v. Ashcroft* (1991) 501 U.S. 452 and *Garcia v. San Antonio Metropolitan Transit Authority* (1985) 469 U.S. 528, 546 [requiring Congress to state clearly its intent to upset the usual balance of power between states and the federal government].) The leasing statute provides *no* evidence that Congress intended to preempt California's PIT. To the contrary, the evidence suggests that Congress did *not* want to preempt these state and local taxes; Congress has amended 25 U.S.C. § 415 more than 30 times since *Palm Springs Spa* and *Agua Caliente* were decided and left the decisions untouched. (See *General Dynamics Land Systems, Inc. v. Cline* (2004) 540 U.S. 581, 594 [noting that "congressional silence after years of judicial interpretation supports adherence to the traditional view"].)

In any case, agencies are creatures of statute and they cannot exceed the authority granted them by Congress. (See *Food & Drug Admin. v. Brown & Williamson Tobacco Corp*. (2000) 529 U.S. 120, 133 [invalidating agency regulation of tobacco products because the determination exceeded agency's statutory authority].) Congress has not authorized the Secretary to restrict how states exercise their taxing authority over non-Indians. Because

§ 162.017 does not interpret 25 U.S.C. § 415, which is not ambiguous in any case, it cannot be read to restrict state authority without ascribing to the Secretary an unconstitutional arrogation of power.

3. The Superior Court correctly concluded that the PIT is not preempted under *Bracker*.

Appellants raise two objections to the Superior Court's *Bracker* analysis. They claim that: (1) *Bracker* created a new test for preemption and abrogated earlier cases [Br. at pp. 25-31]; (2) the PIT is preempted under *Bracker* because the federal and tribal interests in leasing Indian land outweigh the County's generalized interest in raising revenue [Br. at pp. 31-49]. Both arguments fail.

a. It does not matter whether *Bracker* abrogated *Palm Springs Spa* because the court concluded that the PIT is not preempted under the reasoning of either.

The Superior Court ruled that the PIT was not preempted after analyzing the law and the evidence under the framework set forth in *Bracker*. Yet Appellants complain [Br. at p. 27] that the court improperly relied on *Palm Springs Spa*, *Agua Caliente I*, and *Fort Mojave Tribe* in its 2016 ruling to conclude that the PIT was not preempted prior to 2013. That objection is meritless.

First, Appellants mischaracterize the court's 2016 ruling. The court concluded that the PIT was not preempted prior to 2013 substantially because Appellants had "not even addressed the extent of the federal regulations governing non-Indian leases of Indian land prior to 2013."[10] (4AA1331.) The

[10] The court ruled, "The plaintiffs' motion is dependent upon their success in establishing that the enforcement of the [PIT] was preempted prior to 2013.

court acknowledged that *Palm Springs Spa* was not controlling if it was distinguishable and that the Appellants were relying on a different federal statute and regulation than those raised in *Palm Springs Spa*. (4AA1330.) It simply did not find Appellants' arguments at all persuasive regarding the statute (25 U.S.C. § 415) and regulations (25 C.F.R. Part 162). (*Id.*)

Second, it does not matter whether the court rejected Appellants pre-2013 preemption claim under *Palm Springs Spa, Agua Caliente I,* or *Fort Mojave Tribe* because the court also evaluated Appellants' preemption claims under *Bracker* and reached the same conclusion. Indeed, the court in its June 2, 2017 order opined that *Palm Springs Spa* was not controlling. But that issue was rendered irrelevant by the court's upholding the PIT, after trial, under the *Bracker* balancing test.

Moreover, the parties' respective interests that the court ultimately analyzed under *Bracker* were the same as the parties' interests before 2013. That is, the federal interest in tribal leasing and the tribal interest in economic self-sufficiency were not stronger before 2013 than they were after 2013, and the state interest in funding governmental services that it provides to County residents on and off the Reservation was not weaker before 2013 than it was after 2013. If anything, Appellants' heavy reliance on Section 162.017—which the court held has no legal effect—is consistent with the view that the federal interest was *weaker* prior to the 2013 regulations. (See Appellants' Br. at pp. 31-37). In any event, *Bracker* balancing both before and after 2013 is the same—as the Superior Court held, state interests outweigh federal and

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Having failed in that regard, for the reasons described above, the plaintiffs' motion for summary adjudication is denied." (4AA1332.)

tribal interests and the PIT is not preempted. For this reason, this Court need not determine if *Palm Springs Spa* remains unaffected by the *Bracker* balancing test or is superseded by it.

b. The court correctly concluded the State's interests justify the PIT.

Appellants argue [Br. at pp. 31-49] that the Superior Court's *Bracker* analysis was defective because the court: (1) did not conclude that the federal leasing regulations were comprehensive; (2) did not give enough weight to the tribal interests involved; and (3) improperly concluded that the PIT was permissible because it is a general-purpose tax. The Superior Court committed no error. What Appellants really object to is that the court concluded that the facts weigh heavily in favor of upholding the PIT. This Court should affirm.

i. The PIT does not meaningfully interfere with federal interests.

Appellants' objection to the Superior Court's assessment of the federal interests at stake is not that the court refused to conclude that the federal interests in tribal leasing are significant, because it did. The court found "[t]hat regulatory scheme clearly demonstrates a strong federal and tribal interest in the issuance of the leases." (20AA6378.) Appellants' real objection is that the court refused to conclude that the federal interest in tribal leasing are as strong as the federal interests in timber management were found to be in *Bracker.* Appellants' argument fails for two reasons.

First, the court was right: the leasing regulations are not as comprehensive as the timber regulations. The Supreme Court held that the

statutes and regulations governing timber management "clearly give the Federal Government full responsibility to manage Indian resources and land for the Indians' benefit." (See *United States v. Mitchell* (1983) 463 U.S. 206.) Beginning in 1911, the Secretary promulgated regulations that "addressed virtually every aspect of forest management, including the size of sales, contract procedures, advertisements and methods of billing, deposits and bonding requirements, administrative fee deductions, procedures for sales by minors, allowable heights of stumps, tree marking and scaling rules, base and top diameters of trees for cutting, and the percentage of trees to be left as a seed source." (*Id.* at p. 220.) Congress passed increasingly strict forest management requirements such that "[v]irtually every stage of the process is under federal control." (*Id.* at pp. 221-22; see also *Bracker*, 448 U.S. at p. 147 [stating that BIA "exercises literally daily supervision over the harvesting and management of tribal timber"].)

The leasing statute is not comparable. Congress amended Section 415 more than 30 times since 1971, but only to authorize 99-year leases for specific tribes or to allow *tribes* to assume leasing responsibility from the Secretary. (See 25 U.S.C. § 415 notes.) The implementing regulations never required the level of daily oversight found in the timber regulations, and the level of oversight has decreased. Prior to 2013, the leasing regulations addressed process issues like lease duration, fair market value, surety bonds, the estimated cost of improvements, grazing leases, and liability insurance,

but no regulation imposed any requirements directly on lessees.[11] (25 C.F.R. §§ 131.5, 131.8, 131.12 (1971).) When the Secretary revised the regulations in 2013, the purpose was to *reduce* federal oversight, which the Secretary achieved by "delete[ing] regulatory burdens" and "limit[ing] BIA's involvement in substantive lease contents." (See 77 Fed. Reg. at pp. 72440-442, 450-51.)

Appellants argue [Br. at 34] that "federal law closely controls how the leases may be used," as evidenced by the limitation of uses in Section 415 to "'public, religious, educational, recreational, residential, or business purposes.'" Appellants omit Section 415's authorization of other uses "including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops . . . ," 25 C.F.R. § 415(a), but even without that language, Section 415 cannot be read as closely controlling permissible lease uses. To the contrary, the uses identified in Section 415 constitute a broad authorization, not "close control."

Nor do any of the regulations Appellants cite [Br. at pp. 34-35] in Part 162 impose the sort of daily supervision requirements found in the *Bracker* timber regulations. The leasing regulations require leases to include such unremarkable terms as lease purpose, the land being leased, the names of the parties, the term, etc. (See, e.g., 25 C.F.R. § 162.313].) They prohibit some

[11] The 2001 revisions retained the 1971 regulations with respect to business and residential leases. (See 66 Fed. Reg. 7068 (Jan. 22, 2001) [recodified at 25 C.F.R. Part 162].)

uses, such as "unlawful conduct, creation of a nuisance, illegal activity, or negligent use or waste of the leased premises." (*Id.*) And they require leases to inform lessees that BIA can enforce lease terms on behalf of the lessor. (*Id.*) But they do not control the activities lessees can engage in or directly regulate the lessees.

Based on the regulations Appellants cited, and the complete lack of evidence indicating otherwise, the Superior Court concluded that the leasing regulations are less rigorous than the regulations in *Bracker*. Appellants concede [Br. at p. 36] that "leasehold interests, whether on or off Indian land, simply do not lend themselves to the type of daily supervision discussed in *Bracker*," but they nonetheless claim that "the BIA has ongoing 'responsibilities in administering and enforcing [the] lease[].'" The regulation Appellants cite, however, only compels BIA action "[u]pon written notification from an Indian landowner that the lessee has failed to comply with the terms and conditions of the lease." (25 C.F.R. § 162.022.) In other words, BIA will assist lessors upon their request.

Second, it does not matter whether the Superior Court determined that the regulatory regime is pervasive and comprehensive or simply "strong," as Appellants argue. (Appellants' Br. at p, 34.). The analysis in *Bracker* makes clear that robust state interests can outweigh either. The *Bracker* Court observed, "[a]t the outset . . . [,] that the Federal Government's regulation of the harvesting of Indian timber is comprehensive." (*Bracker*, 448 U.S. at p. 145.) But the Court still considered the specific facts of the case regarding the taxpayer's activities and the challenged tax before finding the tax

preempted. (*Id.* at p. 148.) Here, the lease regulations do not regulate the activities of the lessee/taxpayers. The *Bracker* Court observed that it was "equally important" to its decision that "respondents have been unable to identify any regulatory function or service performed by the State that would justify the assessment of taxes for activities on Bureau and tribal roads within the reservation." (*Id.* at pp. 148-49; see also *Ramah Navajo Sch. Bd., Inc. v. Bureau of revenue of N.M.* (1982) 458 U.S. 832, 843 [finding state tax preempted because "the State does not seek to assess its tax in return for the governmental functions it provides to those who must bear the burden of paying this tax"].) Here, virtually all governmental services enjoyed by the lessee/taxpayers are provided by the State and its agencies.

Three years after *Bracker*, the U.S. Supreme Court reiterated the importance of the state interests by clarifying that 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 assertion of State authority*." (*New Mexico v. Mescalero Apache Tribe* (1983) 462 U.S. 324, 334 [emphasis added] [citing *Bracker*, 448 U.S. at p. 145].) And in *Cotton Petroleum*, the Supreme Court explained that the taxes in *Ramah* and *Bracker* were preempted because "both cases involved complete abdication or noninvolvement of the State in the on-reservation activity." (490 U.S. at p. 185; see also *Agua Caliente II*, 2017 WL 4533698, at *12 [noting that "the federal interests here, like those at stake in *Bracker* and *Ramah*, are pervasive enough to preclude the burdens of a tax, *absent sufficient state interests*"] [emphasis added]; see also *Agua Caliente II*, 749

Fed.Appx. 650, 2019 WL 351204, at *2 (Watford, J. concurring) [observing that "pervasive regulation does not always require preemption"] [citing *Cotton Petroleum*, 490 U.S. at p. 186].)

Thus, it makes no difference if the regulatory regime is the same as those in *Bracker* or *Ramah* or simply "strong." The relevant question is whether the State's interests justify the PIT despite the federal regulatory regime. The court properly found compelling evidence that the State's interests here do justify the PIT.

ii. The PIT does not interfere with strong tribal interests.

Appellants also argue [Br. at pp. 37-38] that the PIT interferes with strong tribal interests. They argue: (1) that the PIT should be preempted because the Tribe has suspended imposition of its own tribal PIT; (2) the PIT is an economic burden on the Tribe; and (3) the court erred by relying on the Supreme Court's decision in *Cotton Petroleum* because it should have relied on an Eleventh Circuit decision instead. (Appellants' Br. at pp. 38-41.) The Superior Court considered each of these arguments and properly rejected them.

a. The argument [Br. at pp. 38-39] that the State PIT should be preempted because it prevents the Tribe from imposing its own possessory interest tax has been rejected as a matter of law. In *Washington v. Confederated Tribes of the Colville Indian Reservation* (1980) 447 U.S. 134, 158, the Supreme Court upheld state taxes on cigarettes over claims that the state taxes prevented tribal taxation, explaining "[t]here is no direct conflict

between the state and tribal schemes, since each government is free to impose its taxes without ousting the other." Indeed, the U.S. Supreme Court has repeatedly upheld concurrent taxation. (See *Wagnon*, 546 U.S. at pp. 114-115 ["Nor is the Nation entitled to interest balancing by virtue of its claim that the Kansas motor fuel tax interferes with its own motor fuel tax."]; *Cotton Petroleum*, 490 U.S. at pp. 188-89 ["since [Congress] has not exercised that power [to prohibit state taxes], concurrent taxing jurisdiction over all of Cotton's on-reservation leases exists"].)

Not only is there no legal reason the Tribe cannot impose its own tax, but there was no evidence that the Tribe ever tried to collect its own tax—instead, it passed an ordinance allowing it to assess and collect a tribal PIT but immediately suspended that assessment and collection. (16AA4812 at Stips. 150, 151.) Even if the Tribe had not suspended the tribal PIT, it is not at all clear that the tribal PIT could be collected from lessees of Allotted Land, because the lessees have not contracted with or submitted to the jurisdiction of the Tribe and the Tribe does not know who the lessees are. (16AA4799 at Stips. 50, 51.)

b. Appellants' apparent contention that the court ignored the economic burden on the Tribe when evaluating tribal interests cannot stand. (Appellant's Br. at 39 ["the Tribe considers the PIT 'a disincentive to have [members'] property marketed and purchased and/or leased. . . .'"].) Notably, this is a factual question, which Appellants claim not to challenge in this appeal. And in any event, the court did consider this issue: it concluded that "there is no evidence that the PIT has any disproportionate

impact on the tribe's leasing efforts. . ." (20AA6379.) This Court must liberally construe the Superior Court's findings, which is not difficult in this case. (*Delbon v. Brazil* (1955) 134 Cal.App.2d 461, 465.) As the County established in the proceedings below, the Tribe "did not do any quantification or any unique technical studies on" any alleged burden that the PIT has on allottees or Allotted Land. (20AA6229 [citing 16AA4802 at Stip. 72].) Since 1969, the amount of land Agua Caliente Indians lease to non-Indians has grown exponentially—from 16 to approximately 4,300 acres. (16AA4812 at Stip. 145.) The value of the possessory interests in those lands and improvements is approximately $2.28 billion, which means that the value to the Indian owner is likely greater. (*Id*. at Stip. 146.) The Superior Court's conclusion that "there is no evidence that the PIT has any disproportionate impact on the tribe's leasing efforts or otherwise places the tribe at an economic disadvantage vis-à-vis non-Indian lessors in the area" is clearly supported by the evidence in the record. (20AA6379.)

c. This court should reject Appellants' argument that the Superior Court erred as a matter of law by relying on the Supreme Court's decision in *Cotton Petroleum* for the proposition that the impact of the PIT on the Tribe "'is simply too indirect and too insubstantial' to support a claim of pre-emption." (Appellants' Br. at 4041 [citing 20AA6378-79 and quoting *Cotton Petroleum*, 490 U.S. at pp. 186–87].) Appellants argue that the court should have ignored binding U.S. Supreme Court precedent, in favor of an Eleventh Circuit decision, which is not binding. That argument has no merit.

Cotton Petroleum stands for the well-established principle that federal interests in Indian economic development alone are insufficient to preempt state taxes. Promoting tribal economic development is an important federal interest, but it is not an overriding force that preempts an otherwise valid state tax on non-Indians. (*Cotton Petroleum*, 490 U.S. at p. 187 [rejecting an invitation that it return to the "long-discarded and thoroughly repudiated doctrine" of invalidating every state tax that has "[a]ny adverse effect on the Tribe's finances caused by the taxation of a private party contracting with the Tribe"].)

The Eleventh Circuit's decision in *Seminole Tribe* does not (and cannot) alter the Supreme Court's directive in *Cotton Petroleum*. In any case, Appellants misrepresent the Eleventh Circuit's discussion of *Cotton Petroleum*. The Eleventh Circuit recognized that the Supreme Court contrasted the situation in *Cotton Petroleum* with *Bracker* and *Ramah* by observing "that those two cases 'involved complete abdication or noninvolvement of the State in the on-reservation activity,' while in *Cotton Petroleum*, New Mexico provided 'substantial services' to Cotton Petroleum and the tribe." (*Seminole Tribe*, 799 F.3d at pp. 1336-37 [citing *Cotton Petroleum*, 490 U.S. at p. 185].) The Eleventh Circuit certainly did not hold that *Cotton Petroleum* only applies when there is no exclusive federal regulation of activities at issue. (Appellant's Br. at p. 41.) And in any event, the "complete abdication" that *Seminole Tribe* discusses is not present here.

iii. The State's interest in funding governmental services fully justify the PIT.

Appellants next argue [Br. at p. 41] that the PIT is a general-purpose tax that can never be justified. But that is not the law. All taxes reflect a "generalized interest in raising revenue." (Cf. *Barona*, 528 F.3d at pp. 1192-93 ["Raising revenue to provide general government services is a legitimate state interest."].) Appellants play semantics by conflating a "generalized interest" with a "general-purpose tax," but the cases establish that what is necessary to justify a tax is some nexus between the tax and the activity being taxed.

The U.S. Supreme Court stated in *Mescalero Apache* that "[t]he exercise of State authority which imposes additional burdens on a tribal enterprise *must ordinarily be justified by functions or services performed by the State in connection with the on-reservation activity*." (*Mescalero Apache*, 462 U.S. at 336 [emphasis added] [citations omitted].) The Ninth Circuit has similarly explained that there must be "a close relationship between the tax and the interests" and the "tax must bear some relationship to the activity being taxed." (*Cabazon Band of Mission Indians v. Wilson* (9th Cir. 1994) 37 F.3d 430, 435; *Hoopa Valley Tribe v. Nevins* (9th Cir. 1989) 881 F.2d 657, 661; *Crow Tribe of Indians v. Montana* (9th Cir. 1987) 819 F.2d 895, 901.) The Court's objection to the tax in *Bracker* was because the taxpayer received no benefit or services from the state. *Cotton Petroleum* clarified that point by explaining that the taxes in *Ramah* and *Bracker* were preempted because "both cases involved complete abdication or noninvolvement of the State in the on-reservation activity." (*Cotton Petroleum*, 490 U.S. at p. 185.)

Appellants argue [Br. at p. 45] that there is no nexus between County services and "PIT taxpayers in connection with leasing Indian land." But the PIT is not a tax on Indian *leasing* of land. It is a tax on "the private citizen's usufructuary interest in [tax-exempt] land and improvements." (*Cty. of Fresno*, 50 Cal. App. 3d at pp. 638, 640). When framed properly, the nexus between government services and the activity being taxed—the usufructuary or possessory interest—is unmistakable.

Specifically, the court found that "the county and local jurisdictions and special districts within it, which are funded in part by the PIT, provide fire protection, police protection, road maintenance, flood control, sewage services, electrical service, trash collection, public transportation, animal control services, and mosquito abatement services directly to allotted lands, includ[ing] those occupied by non-Indian lessees. In addition, the county and other local public agencies provide general services to the occupants of the allotted lands, such as the lessees [sic], including corrections, district attorney, probation, public defender, health, mental health, libraries, and parks and recreation." (20AA6379.)

These governmental services the County provides directly to lessees who pay the PIT are more than sufficient to demonstrate a nexus between the taxes and the services provided to lessees and fully support the Superior Court's conclusion that "virtually all governmental services enjoyed by the lessees are provided by the agencies funded by the PIT." (20AA6380.) The Superior Court correctly concluded that the PIT is permissible. The Court should affirm the Superior Court's decision.

CONCLUSION

The judgment in Respondents' favor should be affirmed.

DATED: February 22, 2019 **PERKINS COIE LLP**

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DATED: February 22, 2019

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CERTIFICATE OF SERVICE

I, Meredith R. Weinberg, declare:

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Meredith R. Weinberg

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