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

No. E073926

LEONARD ALBRECHT, ET AL.
Plaintiffs-Appellants,

v.

COUNTY OF RIVERSIDE,
Defendant-Respondent,

DESERT WATER AGENCY, ET AL.,
Intervenor-Respondents.

PATRICIA L. ABBEY, ET AL.
Plaintiffs-Appellants,

v.

COUNTY OF RIVERSIDE,
Defendant-Respondent,

DESERT WATER AGENCY, ET AL.,
Intervenor-Respondents.

Riverside County Superior Court No. PSC 1501100,
consolidated with No. RIC 1719093
Honorable Craig G. Reimer

COUNTY OF RIVERSIDE'S RESPONSE BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Defendant-Respondent County of Riverside is a governmental entity of the State of California and therefore is not required to file a certificate under Rule 8.208 of the California Rules of Court.

DATED: September 4, 2020

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GLOSSARY

AA	Appellants' Appendix
AB 8	Assembly Bill 8
Agua Caliente	Aqua Caliente Band of Cahuilla Indians
Agua Caliente Land	Both Tribal Trust Land and Allotted Lands
Agua Caliente Lessees	Non-Indians who lease Allotted or Tribal Trust Land from the Agua Caliente
Allotted Land	Land allotted to members of the Agua Caliente with restrictions on alienation
Allottees	Members of the Agua Caliente with Allotted Land
BIA	Bureau of Indian Affairs within the U.S. Department of the Interior
Challenged Taxes	Both the 1% Tax and the Voter Approved Taxes
CRIT	Colorado River Indian Tribe
CVWD	Coachella Valley Water District
DWA	Desert Water Agency
Fee Land	Land that is not held by the United States in trust or restricted fee status
Indian Lands	Lands held in trust or restricted fee status for tribes or their members
IRA	Indian Reorganization Act of 1934
RA	Respondents' Appendix
RT	Reporter's Transcript
RTC	Rev. & Tax Code
Section 5	Section 5 of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. § 5108 (previously numbered as 25 U.S.C. § 465)

Secretary	Secretary of the Department of the Interior
TRA	Tax rate area
Tribal Trust Land	Lands held in trust for the Agua Caliente Tribe only. It does not refer to land occupied by CRIT
Voter-Approved Taxes	Taxes approved by a majority or two-thirds vote by voters voting on a proposition and imposed by local governments for specific purpose. (*See* AA 231-33 ¶¶ 1, 10)
1% Tax	Tax on real property or possessory interests in real property set forth in the California Constitution, art. XIII A, sec. 1 (AA 231 ¶ 1)

I. SUMMARY OF ARGUMENT

Residents of Riverside County benefit from a wide array of governmental services, including police, fire and emergency services, public health services, roads, voting and elections, education, parks and recreation, roads, flood protection, water and sewer services, refuse disposal, and other services. Riverside County, and the local governments, school districts, and special districts that provide these essential services, depend substantially on property taxes for funding.

The Plaintiffs in this case—like all County residents—directly benefit from these services. They just don't want to pay for them. Plaintiffs claim that the taxes they pay on their possessory interests in lands they lease from the Colorado River Indian Tribe (CRIT) or from members of the Agua Caliente Band of Cahuilla Indians "strike at the heart of Indian land interests and sovereign self-government." (Opening Brief (Op. Br.) at 12.) And, they argue, because their payment of possessory interest taxes harms the Tribes, the Court should order the County to refund the taxes Plaintiffs have paid for up to a decade.

Courts have rejected these same claims multiple times, including—most recently—this Court in *Herpel v. County of Riverside* (2020) 45 Cal.App.5th 96. The Ninth Circuit did the same in *Agua Caliente Band of Mission Indians v. Riverside County* (9th Cir. 2019) 749 Fed.App'x. 650 ("*Agua Caliente II*"). Yet despite these decisions, Plaintiffs argue that *they* have better arguments and evidence regarding the impacts their payment of

possessory interest taxes has on Agua Caliente's tribal sovereignty than the Tribe itself had.

That is not so. Plaintiffs make substantially the same arguments, using the same facts, that the courts in *Herpel* and *Agua Caliente II* rejected. And their claims fail for the same reasons. The possessory interest taxes are not preempted under Section 5 of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. § 5108, as Plaintiffs argue, because the Agua Caliente Reservation was not acquired pursuant to the IRA.[1] (*Herpel*, 45 Cal.App.5th at 113.) Plaintiffs' possessory interest taxes do not infringe tribal sovereignty because there is no evidence that the taxes significantly or negatively affect tribal interests. After all, possessory interest taxes are imposed on non-Indian lessees only. The Tribes and their members are never liable, and their lands are never subject to liens or foreclosure for non-payment.

And as in *Herpel*, Plaintiffs' claims fail under the balancing test set forth in *White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136. The federal interests reflected in the Long-Term Leasing Act, 25 U.S.C. § 415, are not stronger in this case than in *Herpel*. (Cal.App.5th at 111, concluding that "the nature of the federal government's interest in prohibiting the possessory interest tax [did not] strongly support preemption.") Plaintiffs' possessory interest taxes do not significantly or negatively affect tribal interests, and there is no legal reason or factual basis for concluding that the

[1] Section 5 of the IRA was previously codified at 25 U.S.C. § 465. In 2016, Title 25 of the United States Code and the IRA's provisions were renumbered. Section 5 is now codified at 25 U.S.C. § 5108. The County refers to the provision as "Section 5" throughout.

Tribe cannot impose its own taxes. (*Id.* at 113.) The state's interest, by contrast, is very strong because the County and various agencies provide virtually all essential governmental services (*Id.* at 115.) The same is true in this case.

As the Supreme Court observed, taxes "are what we pay for civilized society." (*Compania General de Tabacos de Filipinas v. Collector of Internal Revenue* (1927) 275 U.S. 87, 100 (Holmes, J., dissenting).) The "[e]njoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws *are inseparable from responsibility for sharing the costs of government*." (*New York ex rel. Cohn v. Graves* (1937) 300 U.S. 308, 312–313, emphasis added.) These Plaintiffs enjoy the privileges of residence in Riverside County, including the right to invoke the protection of its laws before this Court, and they should continue to share in the costs of government. The Court should affirm the trial court's decision.

II. LEGAL BACKGROUND

A. Federal Tax Preemption

Federal preemption of state taxes is disfavored. (*New York Dept. of Social Services v. Dublino* (1973) 413 U.S. 405, 413.) The framework for analyzing whether a state tax applicable to non-Indians is preempted when the conduct or property taxed is located on Indian lands differs from other contexts. "[T]wo conceptual barriers have been erected to block State law from regulating Indian behavior: federal enactments and Indian sovereignty." (*Barona Band of Mission Indians v. Yee* (9th Cir. 2008) 528 F.3d 1184, 1189

[citing *Ramah Navajo School Board., Inc. v. Bureau of Revenue of New Mexico* (1982) 458 U.S. 832, 837].)

"'The initial and frequently dispositive question in Indian tax cases . . . is *who* bears the legal incidence of [the] tax.'" (*Wagnon v. Prairie Band Potawatomi Nation* (2005) 546 U.S. 95, 101 [quoting *Oklahoma Tax Commission v. Chickasaw Nation* (1995) 515 U.S. 450, 458, emphasis added].) Courts look to the legal incidence of the tax, not who bears the economic burden. (*Oklahoma Tax Commission v. Chickasaw Nation* (1995) 515 U.S. 450, 115.) If the legal incidence of a tax falls directly on a tribe or tribal members within Indian country, the tax is preempted. (*California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202, 215 n.17.) If the legal incidence of the tax falls on non-Indians for activities in Indian country, the court must consider the various interests at stake under the test set forth in *Bracker*.

Under *Bracker*, courts must consider "the degree of federal regulation involved, the respective governmental interests of the tribes and states (both regulatory and revenue raising), and the provision of tribal or state services to the party the state seeks to tax." (*Salt River Pima-Maricopa Indian Community v. Arizona* (9th Cir. 1995) 50 F.3d 734, 736, internal quotation marks and citation omitted.) 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.)

B. The California Property Tax System

1. Taxable Property

California relies on property taxes assessed and collected at the local level to fund essential governmental services. The California Constitution and implementing statutes declare that "all property is taxable" and "shall be assessed at the same percentage of fair market value." (Cal. Const. art. XIII, § 1; Rev. & Tax Code (RTC) § 201.)

"Property" includes both real and personal property, and "real property" includes the "[p]ossession of, claim to, ownership of, or right to the possession of land" and "improvements." (RTC §§ 103, 104.) "Possessory interests" are defined as the "[p]ossession of, claim to, or right to the possession of land or improvements that is independent, durable, and exclusive of rights held by others in the property, except when coupled with ownership" and "taxable improvements on tax-exempt land." (*Id.* § 107(a), (b).)

Property that is owned by governmental entities is exempt. (*See, e.g.*, Cal. Const. art. XIII, § 3.) Lands held in trust or restricted fee status for tribes or their members (hereinafter, "Indian lands") are not subject to state taxation. (*See McClanahan v. State Tax Commission of Arizona* (1973) 411 U.S. 164, 169.) If a non-exempt entity obtains a possessory interest in otherwise tax-exempt land, however, that possessory interest is taxable.

2. The 1% Tax

All property in California is uniformly taxed at the rate of one percent"—hereinafter, the "1% Tax." (Cal. Const. art. XIII A, § 1(a); RTC § 93, subd. (b); AA 231 ¶ 1.) In 1978, voters adopted Proposition 13, which capped

property taxes at one percent of the property's value, as assessed in the 1975-1976 tax year, and restricted annual increases to an inflation factor not to exceed two percent. (*See generally Nordlinger v. Hahn* (1992) 505 U.S. 1; Cal. Const. art. XIII A, §§ 1(a), 2.)

The immediate effect of Proposition 13 was to significantly reduce the revenues available to fund local governments. To address that shortfall, the Legislature passed laws requiring public school districts to give up part of their property tax revenues, with the State assuming greater responsibility in school funding. (*See City of Scotts Valley v. County of Santa Cruz* (2011) 201 Cal.App.4th 1, 8.) The Legislature subsequently enacted Senate Bill 154, which mandated that a local government's share of property tax revenues going forward be based on its relative share before Proposition 13, and Assembly Bill 8 (AB 8), which directed that local governments receive property tax revenues equal to what each received the prior year, plus any increase in revenue growth due to the increase in assessed value within its boundaries. (*See* Tax Justice Act of 1977, ch. 292, 1978 Cal. Stat. 582; Act effective July 24, 1979, ch. 282, 1979 Cal. Stat. 959; AA 234 ¶¶ 19, 20.) The Legislature has amended the allocation system several times to address inequities and state shortfalls. (*See, e.g.*, RTC §§ 98, 97.)

As a result of Proposition 13 and subsequent legislation, "there is only a single local property tax rate." (*City of Los Angeles v. County of Los Angeles* (1983) 147 Cal.App.3d 952, 957 [citing RTC § 93, subd. (b)].)

3. Voter-Approved Taxes

Proposition 13 and subsequent amendments eliminated the ability of local governmental entities to impose their own property tax rates. (Cal. Const. art. XIII D, § 3.) Local governments cannot impose new taxes on property without (a) a majority vote of the electorate for "general" taxes or (b) a two-thirds vote for "special" taxes. (Cal. Const. art. XIII C, § 2(c), (d); *id*. art. XIII D, § 3.) A "general tax" is any tax imposed for general governmental purposes, whereas a "special tax" is any tax imposed for specific purposes. (Cal. Const. art. XIII C, § 1(a), (d); *see also* RTC § 93.) Special purpose districts, including school districts, do not have the power to levy general taxes. (Cal. Const. art. XIII C, § 2(a).)

4. The Role of Counties in the State Property Tax System

California counties are responsible for implementing the State's property tax system. (Cal. Const. art. XIII A, § 1, subd. (a).) County assessors must assess and collect taxes on all taxable real property, and possessory interests in tax-exempt real property, located within the county. (RTC §§ 405, 601; AA 233 ¶ 12.) Counties are responsible for allocating the revenues generated from the 1% Tax to the local governments, pursuant to the state-mandated formulas. (*See generally* RTC, Chapt. 6.)

Counties must also assess and collect taxes to make payments on general obligation bonds or other indebtedness incurred before 1978 and other voter-approved measures on behalf of the taxing agencies. Tax rates on those measures are adjusted annually pursuant to State law, and all property tax revenues generated are allocated to specific tax rate areas or "TRAs." (RTC

§§ 100-100.96.) TRAs are small geographical areas within a county that contain properties all served by a unique combination of taxing jurisdictions (AA 236 ¶ 27)—the county, a city, and the same set of special districts and school districts.

III. FACTUAL BACKGROUND

A. The Lands Leased by Plaintiffs

Each Plaintiff leases allotted land from members of the Agua Caliente Tribe or land from the CRIT. The vast majority lease land from Agua Caliente Allottees. (AA 232 ¶ 5.) Nine Plaintiffs lease land from the CRIT Tribe. (AA 233 ¶ 10; AA 255 ¶ 131.)

1. The Agua Caliente Reservation

The Agua Caliente Tribe is a federally recognized tribe with a reservation established in 1876 and expanded by Executive Order in 1877. (AA 246 ¶¶ 73–75.) The Reservation is a checkerboard by design; the 1877 Executive Order designated only even-numbered sections as the Reservation. (*Id*. ¶¶ 72, 74.) The Reservation includes land in Palm Springs, Cathedral City, and Rancho Mirage, and extends to unincorporated areas of Riverside County. (*Id*. ¶ 72.)

In 1891, Congress directed allotment of the Reservation, pursuant to the Mission Indian Relief Act (26 Stat. 712), and later, pursuant to the Act of March 2, 1917 (39 Stat. 969, 976). Despite Congress having made allotment mandatory under the Act of March 2, 1917, the Secretary made very few allotments before 1959. In 1935, the Agua Caliente tribal members voted

against application of the IRA, which would have terminated all future allotment in severalty. (*See Arenas v. United States* (1944) 322 U.S. 419, 433 n.15.) In 1944, the Supreme Court ordered the Secretary to comply with the Act of March 2, 1917. (*Id.* at 433–34.)

When that failed to happen, Congress stepped in by enacting the Agua Caliente Equalization Act of 1959, 25 U.S.C. § 951, *et seq*. Under the Equalization Act, the Secretary allotted 23,660 acres of Reservation land valued at $12,800,000 to 85 members whose allotments were the lowest valued allotments such that their allotments were "equalized" at a value of $335,000 each (in 1957-58 dollars). (AA 246 ¶¶ 78–80.) At the end of equalization, a total 104 tribal members had been allotted over 90 percent of the Reservation. (*Id*.) The Tribe retained approximately 2,111 acres of the original Reservation, including a church and a cemetery, four mountain canyon areas of historical and cultural significance, and the Mineral Springs area. (AA 247 ¶ 81.) The Reservation is now comprised of Tribal Trust Land, Allotted Land, and Fee Land. (*Id*. ¶ 82.)

The same year it passed the Equalization Act, Congress authorized the Secretary of the Interior to approve leases of land located within the Reservation for up to 99 years. (Pub. L. No. 86-326, 73 Stat. 597 (1959) (now codified at 25 U.S.C. § 415); AA 252 ¶ 109.) Since 1971, the amount of Allotted Land leased to non-Indians has grown from eight (8) acres to approximately 4,300 acres, which are leased under approximately 20,000 master leases, mini-master leases, subleases, and sub-subleases.[2] (AA 247 ¶¶ 83–

[2] The Tribe leases certain parcels of allotted land from Allottees. (AA 247 ¶ 85.) It does not pay any taxes on those leases (AA 248 ¶ 93) and does not provide any

88.) Tribal members possess another 20,300 acres of unleased Allotted Land within the Reservation. (AA 247 ¶ 86.) The Tribe leases 14.75 acres to non-Indians under four commercial leases and two residential leases. (AA 247–48 ¶¶ 87–88, 92.)

Of the total 4,314.75 acres of leased Agua Caliente Land, 99.7% is Allotted Land. Only approximately 0.3% (14.75 acres) is Tribal Trust Land. (AA 247–48 ¶¶ 87–88, 92.) Based on the tax revenues generated from the 1% Tax on lessees of Agua Caliente Land, the total value of possessory interests in the leased 4,300 acres of Allotted Land is more than $2.28 billion. (AA 251–52 ¶ 108.) All but nine of the Plaintiffs lease land from an Agua Caliente member and have paid the 1% Tax and one or more of Voter-Approved Taxes on their possessory interests in Agua Caliente land.[3] (AA 232 ¶ 4.)

2. The Colorado River Indian Tribe

Congress established a 75,000-acre reservation in the Territory of Arizona for the CRIT in 1865. (AA 255 ¶ 134.) President Grant enlarged the Reservation by Executive Order in 1874 to include land within California. (*Id*. ¶¶ 135, 136.) Two years later, however, President Grant re-designated the Reservation's western boundary to run from four miles north of Ehrenberg, Arizona, south to the west bank of the Colorado River. (AA 256 ¶ 137.) The precise location of the western boundary of the CRIT Reservation has

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governmental services to the land. (AA 236 ¶ 33; AA 239-40 ¶ 44; AA 248–49 ¶¶ 94, 96; AA 256 ¶¶ 141–143.)

[3] Plaintiffs stipulated that they do not lease land from the Agua Caliente Tribe. (*See* AA 252 ¶ 113.)

been disputed for decades and remains unresolved. (*Id*. ¶ 138; *see also Arizona v. California* (2000) 530 U.S. 392, 411–12, 418–19 [noting that whether the western boundary is ambulatory or fixed remains unresolved].)

Because of that uncertainty, Congress excluded land located in California when it authorized CRIT leases in 1964:

> That the authorization herein granted to the Secretary of the Interior [to approve leases of CRIT land] shall not extend to any lands lying west of the present course of the Colorado River and south of section 25 of township 2 south, range 23 east, San Bernardino base and meridian in California, and shall not be construed to affect the resolution of any controversy over the location of the boundary of the Colorado River Reservation; Provided further, That any of the described lands in California shall be subject to the provisions of this Act when and if determined to be within the reservation.

(Pub. L. No. 88-302, 78 Stat. 189 (Apr. 30, 1964).)

Nine Plaintiffs lease land from CRIT and have paid the 1% Tax and one or more of Voter-Approved Taxes from the Palo Verde Unified School District, Palo Verde Unified School District, Coachella Valley Water, and Desert Water Agency on the value of their possessory interests in Disputed Land. (AA 233 ¶ 10.)

B. The Provision of Governmental Services to Plaintiffs by Local Governments

The County, local governments, and school and special districts provide 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 to all County residents, including Plaintiffs, Allottees, and the Tribes. (AA 266 ¶¶ 233, 234.) The revenues generated from property taxes are critical to funding

theses services. (AA 253 ¶ 117; AA 266 ¶ 232; *see City of Los Angeles*, 147 Cal.App.3d at 956 [explaining that there is "a single local property tax" collected by the county that is "shared by local government agencies designated by the Legislature"].)

The County distributes revenues from the 1% Tax and Voter Approved Taxes to the local governments. (AA 235–236 ¶ 27.) Although the County does not normally "track" how those revenues generated from Plaintiffs' possessory interests are spent, it can calculate how those dollars were allocated by applying the TRA and State allocation formulas specific to the possessory interests in Agua Caliente and CRIT land. (AA 234 ¶ 18.)

1. Revenues from the 1% Tax generated from lessees of Agua Caliente Land are allocated to local governments to fund governmental services.

In fiscal year 2013-14, and similarly for subsequent years, the County collected approximately $22.8 million in 1% Tax revenues from lessees of Agua Caliente Land. (AA 241 ¶ 53.) The County's allocation was $3.3 million or 14% of those revenues, which it used to fund fire and police protection, health and sanitation, road district services, and emergency services for all residents. (AA 235–36 ¶¶ 23, 25, 30; AA 241–43 ¶¶ 54, 59, 61, 62; AA 249–50 ¶ 97; AA 265 ¶ 231.) The County additionally provided fire protection services to Agua Caliente Tribal Trust Land. (AA 236 ¶ 31.) From 2011-2015, for example, the Riverside County Fire Department responded to a total of 2,392 incidents on the Agua Caliente Reservation. (*Id.* ¶ 32.) The County also used possessory interest revenues to fund the Sheriff's Office, corrections services, the district attorney, health and mental health services,

the public defender, probation services, code enforcement services, animal control 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. (AA 235–36 ¶¶ 24, 25, 30; AA 242–43 ¶¶ 59, 62.)

The approximately $19.5 million remaining from the 1% Tax went to political subdivisions, tax districts and other service agencies. (AA 241 ¶ 55.) Palm Springs, Cathedral City, and Rancho Mirage received approximately $4.1 million. (AA 237–38 ¶¶ 37–39.) Palm Springs used its share to provide police, fire, street maintenance and lighting, building and safety, railroad station, park maintenance, recreation and library services, and to maintain its convention center—all of which benefit the 5,427 lessees within its jurisdiction. (AA 237 ¶ 37.) There are 1,085 leases in Rancho Mirage, which used its share of 1% Tax revenues to fund public safety and police and fire protection services, general government functions, as well as engineering and other services (like the public library). (*Id*. ¶ 38.) And Cathedral City, where 3,093 leases are located, used 1% Tax revenues to fund the fire department and the provision of general government and community services. (AA 237–38 ¶ 39.) All of the services provided by the three cities were available to Plaintiffs, Allottees, and the Tribe. (*Id*. ¶¶ 37–39; AA 241–42 ¶¶ 57, 61; AA 249–50 ¶ 97; AA 265–66 ¶¶ 231–233.)

Districts with specific functions, such as DWA, CVWD, the Riverside County Flood Control and Conservation District, the Desert Regional Medical Center, the Coachella Valley Mosquito and Vector Control District, and

others, received approximately $2.1 million in revenues from the 1% Tax. (AA 235–241 ¶¶ 23, 29, 34, 40–43, 50–52.) These services benefit Agua Caliente Lands by providing water, preventing floods, providing medical services, and protecting against insect-transmitted diseases—all of which benefit residents and their property. (AA 238–242 ¶¶ 41–52, 55, 61; AA 249–50 ¶ 97; AA 265–66 ¶¶ 231–233.)

The greatest portion of the 1% Tax revenues—approximately $13.1 million—is used to fund education services. (AA 234–37 ¶¶ 19, 34–35.) Two school districts in Palm Springs, the Desert Community College, and the County Office of Education all receive a share of the revenues, and approximately $4.3 million is allocated to the ERAF, which is used to alleviate statewide education funding obligations. (AA 236–37 ¶ 34; AA 242–43 ¶¶ 60, 63.) Agua Caliente Plaintiffs benefit from the provision of these services. (AA 242 ¶ 61; AA 249–50 ¶ 97; AA 265–66 ¶¶ 231–233.)

2. Revenues from the 1% Tax from lessees of CRIT Land are also allocated to local governments to fund governmental services.

Riverside County collected $440,389 from Lessees of CRIT Land from the 1% Tax in fiscal year 2017-18. (Respondents' Appendix (RA) 35.) Of that amount, the County received $86,952 or 18.7%, of which $58,700 went to the County's general fund, $24,124 to fire protection, and $4,127 to roads. (*Id.*) Schools received $337,852 or 78% of the 1% Tax revenues, with $291,811 allocated to Palo Verde United School District, $38,442 allocated to Palo Verde Community College, $16,821 allocated to the Riverside County Office of Education, and $62,780 to the ERAF Fund. (*Id.*) Of the

remaining 1% Tax revenues, the Palo Verde Valley Library received $8,716, the Palo Verde Valley Hospital received $4,188, and the Palo Verde Cemetery received $2,680. (*Id.*) CRIT Plaintiffs benefit from the provision of these services. (*Id.*)

3. Revenues from the Voter-Approved Taxes fund governmental services provided by special and school districts.

a. Water Districts

DWA is a groundwater management agency that provides water service to customers in Palm Springs, a portion of Cathedral City, and surrounding areas. (AA 257 ¶ 147.) DWA currently has approximately 23,000 domestic water connections serving roughly 106,000 people, including many Plaintiffs. (*Id.* ¶¶ 148, 149.) A large portion of DWA's cost of providing water service is funded from tax revenues derived from DWA's share of the 1% Tax applied to the property located within DWA's boundaries and Voter Approved Taxes, which the County levies and collects exclusively for DWA's use. (AA 260 ¶ 178.) As set forth in DWA's papers, DWA depends on the 1% Tax and Voter-Approved Taxes to fund operations. (DWA Br. at 19–21.)

Like DWA, CVWD is responsible for delivering water to property owners and occupants within its service boundaries and managing the water supply to ensure it can meet demand now and for future generations. (AA 261 ¶ 184.) CVWD's service area covers approximately 1,000 square miles, most of which lies in Riverside County. (*Id.* ¶¶ 185, 186.) As a result of CVWD's services, the value of the Coachella Valley's land rose from roughly $25 per acre in 1940 to $250 per acre in 1954 due to the availability of Colorado River water. (AA 257 ¶ 148.) CVWD meets the needs of more

than 108,000 homes and businesses in its service area. (AA 261 ¶ 186.) In fiscal year 2015–2016, CVWD received an estimated $631,526 from Voter Approved Taxes from lessees of Agua Caliente Land. (AA 265 ¶ 226.) It used that revenue to fund the purchase and delivery of water to replenish the groundwater basin. (*Id*. ¶ 227.) As set forth in CVWD's papers, CVWD relies on the 1% Tax and Voter-Approved Taxes to fund its operations. (CVWD Br. at 9–12.)

b. School Districts

The Palm Springs Unified School District offers public education to all residents within the District. (AA 267 ¶ 239.) Located within Riverside County, the School District serves more than 23,000 students enrolled in 16 elementary schools, four middle schools, four high schools, and a continuation high school in the communities of Palm Springs, Palm Desert, Cathedral City, North Palm Springs, Desert Hot Springs, Rancho Mirage and Thousand Palms. (AA 266 ¶ 236.) Revenues from Voter-Approved Taxes fund public education that is available to all residents, including the families of lessees of Agua Caliente Land. (AA 266 ¶ 236; AA 267 ¶ 239.)

In 2008, 62.18% of voters (20,923 voters) within the Palm Springs Unified School District voted to approve a measure authorizing the issuance and sale of bond to $516,000,000, resulting in an estimated tax rate of $0.04523 per $100 ($45.23 per $100,000) for the purpose of providing funds for the acquisition, construction and modernization of specified school facilities and school projects. (*Id.* ¶ 237.) In 2016, 75.47% of voters (39,831 voters) within the Palm Springs Unified School District voted to approve a

measure authorizing the issuance and sale of bonds up to $216,460,000 resulting in an estimated tax rate of $0.0478 per $100 ($47.88 per $100,000) to design, construct and equip a new school and buy land for three future elementary schools, one middle school and one high school. (*Id.* ¶ 238.) These school facilities are available to residents within the District, including Plaintiffs.

The Desert Community College District governs the College of the Desert, one of over 112 community colleges in California. (*Id.* ¶ 240.) A two-year institution that offers various associate degrees and certificates, the College of the Desert is centrally located in Coachella Valley in Palm Desert, but it has several off-campus locations in the eastern and western Coachella Valley. (*Id.*) The current average student enrollment each semester is approximately 10,000 students. (*Id.*) In 2016, 72.5% of voters (94,765 voters) within the Desert Community College District within Riverside County voted to approve a measure authorizing the issuance and sale of bonds up to $577,860,000, which was estimated to result in a tax rate of $1.95 per $100 ($19.50 per $100,000) of assessed value, for the purpose of modernizing, upgrading, renovating, rehabilitating, and building, and related activities classrooms, classroom buildings, and related facilities at its campuses and Palm Desert Campus, Indio Campus, East Valley Campus, West Valley Campus, and Community Centered sites throughout the Coachella Valley. (AA 268 ¶ 241.) Revenues from Voter Approved Taxes for the Desert Community College District are used to fund public education that is available to all residents. (*Id.* ¶ 242.)

The Palo Verde Unified School District is in Blythe, in Riverside County. (*Id.* ¶ 243.) The District includes one preschool, three elementary schools, one high school, and one continuation high school serving over 3,000 students. (*Id.*) In 2014, 62.90% of voters within the Palo Verde Community College District within Riverside County voted to approve a measure authorizing the issuance and sale of bonds to $12,500,000, estimated to result in a tax rate of $0.02500 per $100 ($25.00 per $100,000), to upgrade and expand educational facilities. (AA 268–69 ¶ 244.)

C. Governmental services provided by the Tribes to Lessees of Agua Caliente or Disputed Land are minimal or non-existent.

Plaintiffs did not present evidence regarding the governmental services CRIT provides, if any.

The Agua Caliente Tribe provides very limited governmental services. Nearly all (99.7%) of Agua Caliente Land leased to non-Indians is Allotted Land. (AA 247 ¶¶ 87, 88.) The Tribe provides governmental services to only five parcels of leased Allotted Land and only because those five parcels are located within unincorporated Riverside County and are not covered by the land use agreements that the Tribe has entered with the County and other local jurisdictions. (AA 248–49 ¶¶ 95, 96.) The services Agua Caliente provides to those five parcels are limited to fee-based, environmental review and building code enforcement. (AA 248 ¶ 94.) Agua Caliente provides no other services to lessees of Allotted Land, including all Plaintiffs.

The Tribe is not involved in the leasing of Allotted Lands. (AA 252 ¶ 113.) It does not review leases of Allotted Land for compliance with land use

or other applicable regulations because the Tribe does not consider such review its responsibility. (AA 250 ¶¶ 99, 100.) Nor does it receive any portion of revenues generated by leases of Allotted Lands. (AA 247 ¶ 90.) Although the Agua Caliente Tribe has contracted with BIA under the Indian Self-Determination and Education Assistance Act of 1975 to assume federal responsibility for reviewing leases for compliance with federal regulations and recordation, it does so in the capacity of a federal contractor. (AA 248 ¶ 91; AA 254 ¶ 124.) Employees performing those federal functions are prohibited by law from sharing any information with the Tribe that they obtain when reviewing the leases of Allotted Land. (AA 248 ¶ 91; AA 254 ¶ 125.) When an Allottee leases her land, the Tribe is not involved in any part of that transaction and is unaware of the identities of the lessees of Allotted Land. (AA 250–52 ¶¶ 101, 113.) In its capacity as a federal contractor, the Tribe charges administrative fees for reviewing leases for compliance with federal regulations. (RA 36.)

With respect to Tribal Trust Lands, the only services the Tribe provides are: (1) road maintenance services on the South Palm Canyon Road; (2) flood protection services in portions of Indian Canyons and Tahquitz Canyon (although the County also provides such flood protection services to those Tribal Trust Lands); (3) delivery of potable water to the Trading Post at Indian Canyons; (4) fee-based, environmental permitting review services where the Tribe does not have a land use agreement with a local jurisdiction; (5) fee-based, building code enforcement services where the Tribe does not have a land use agreement with a local jurisdiction; (6) occupational and

safety code enforcement services to Tribal Trust Land; (7) food safety code enforcement services to Tribal Trust Land; and (8) in conjunction with the EPA, storm water permitting services and waste water permitting services on Tribal Trust Land. (AA 248–49 ¶ 96; *see also* AA 236 ¶ 33; AA 239–40 ¶ 44; AA 248–49 ¶96; AA 256 ¶¶ 141–143.)

The Tribe does not provide public education services to Plaintiffs. (AA 256 ¶¶ 141, 142.) It does not provide any fire or emergency services to Plaintiffs. (AA 236 ¶ 33.)

IV. PROCEDURAL HISTORY

This is the fifth time the County has defended the assessment and collection of possessory interest taxes from lessees of Agua Caliente Land. The first two cases—*Palm Springs Spa, Inc. v. County of Riverside* (1971) 18 Cal. App. 3d 372 and *Agua Caliente Band of Mission Indians v. Riverside County* (9th Cir. 1971) 442 F.2d 1184—were resolved in the County's favor decades ago. In 2013, the Secretary of the Interior revised the regulations governing the leasing of Indian lands, prompting this recent round of challenges. (*See* 77 Fed. Reg. 72440 (Dec. 5, 2012).) Each of the three recent cases has also been resolved in the County's favor—two through appeal, *Herpel v. County of Riverside* (2020) 45 Cal.App.5th 96 and *Agua Caliente Band of Cahuilla Indians v. Riverside County* (9th Cir. 2019) 749 Fed.App'x 650, and this case in the trial court.

On March 6, 2015, 189 plaintiffs filed this challenge, several months after the litigants in *Agua Caliente II* and *Herpel* filed their cases. As the challenges in *Agua Caliente II* and *Herpel* proceeded, this case was stayed at

Plaintiffs' initiative. During that time, Plaintiffs amended their complaint twice for the sole purpose of adding 162 taxpayers, and in October 2017, identical claims were filed on behalf of 147 more taxpayers in *Abbey, et al. v. Riverside County*.[4] *Albrecht* and *Abbey* were consolidated for all purposes soon after.[5]

On January 26, 2018, Plaintiffs filed a motion for summary adjudication, arguing that Section 5 of the IRA prohibits the assessment and collection of possessory interest taxes from lessees of Agua Caliente land.[6] The trial court denied the motion, concluding—among other things—that "[t]here is no evidence, or even contention, that the Secretary acquired any of the land or rights being taxed here by virtue of the IRA" and that there was no evidence how continued taxation of lessees' possessory interests would threaten the Tribe or Tribal members with the loss of allotted land.[7]

On May 4, 2018, the County filed a motion in limine to exclude claims and evidence related to Voter-Approved Taxes. The trial court denied the County's motion, finding that the Plaintiffs' complaints generally defined the possessory interest tax as an ad valorem property tax on the possession and use of Indian trust land—a definition that could include voter-approved

[4] (Amended Complaint (filed Feb. 16, 2016); Second Amended Complaint (filed Aug. 15, 2016); *see Abbey, et al. v. Riverside County*, RIC1719093, Complaint (filed Oct. 10, 2017).)

[5] (Order to Consolidate Related Cases (signed Oct. 26, 2017).)

[6] (Plaintiffs' Mem. in Support of Summary Adjudication (Jan. 26, 2018).)

[7] (Court Minute Order and Tentative Ruling for April 11, 2018 at 2.)

taxes.[8] Soon after the decision, the trial court granted motions of DWA and the CVWD to intervene.[9]

At trial, Plaintiffs argued that federal law preempts the 1% Tax and Voter Approved Taxes, because: (1) Section 5 of the IRA expressly preempts taxes on non-Indian possessory interests; (2) the challenged taxes interfere with the Agua Caliente Tribe's sovereignty; and (3) the possessory interest taxes are preempted under *Bracker*'s balancing test. The trial court rejected Plaintiffs' arguments. With respect to Plaintiffs' Section 5 argument, the trial court held that "[n]one of the lands leased by the plaintiffs was acquired . . . pursuant to the IRA," and Plaintiffs' possessory interests were not acquired pursuant to the IRA. "[T]hose rights were acquired by the plaintiffs pursuant to leases . . . ." The trial court also held that the County's interests in collecting the taxes "are sufficient to outweigh the federal and tribal interests."[10]

Plaintiffs appeal from a final judgment entered after bench trial. This Court has jurisdiction pursuant to Code of Civil Procedure section 904.1, subdivision (a).VI.

V. STANDARD OF REVIEW

Because the case was tried on stipulated facts, the issues here are primarily legal, which the Court reviews de novo. (*Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal.App.4th 1463, 1475.) To the extent that any facts are in

[8] (Court Minute Order and (Tentative) Ruling on County's Motion in Limine No. 1 (issued May 11, 2018).)

[9] (Court Order (signed Jun. 28, 2018); Court Order (signed Jul. 11, 2018).)

[10] (Tentative Decision on First Bifurcated Issue (signed Apr. 24, 2019); Court Order (signed Oct. 9, 2019).)

dispute, the substantial evidence standard of review applies. (*Niko v. Foreman* (2006) 144 Cal.App.4th 344, 364.) That standard is deferential, such that courts are 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.)

VI. ARGUMENT

Plaintiffs raise three arguments in this appeal. First, they argue that Section 5 expressly preempts the disputed taxes—the 1% Tax and Voter Approved Taxes—for Agua Caliente and CRIT lessees. (Op. Br. at 30.) Second, they assert that the disputed taxes are preempted because they interfere with the Agua Caliente's and CRIT's sovereign functions. (*Id*. at 39.) And finally, Plaintiffs assert that the disputed taxes are preempted under *Bracker* balancing with respect to Agua Caliente lessees (*id*. at 48), but do not make this argument for CRIT leases. Because none of these arguments has merit, the Court should affirm.

A. Section 5 of the IRA does not preempt the disputed taxes.

Plaintiffs argue that Section 5 of the IRA expressly preempts the possessory interest taxes. (Op. Br. at 30.) There are two independent reasons why this is not so. First, Section 5 does not prohibit taxation of non-Indian interests; it prohibits states and local governments from taxing Indians and Indian tribes on the land and interests the Secretary acquires in trust on their behalf pursuant to the IRA. Second, none of the land leased by Plaintiffs was acquired pursuant to Section 5 or any other provision of the IRA.

1. Section 5 of the IRA does not prohibit state taxation of non-Indian possessory interests.

Section 5 authorizes the Secretary to "acquire . . . any interest in lands, water rights, or surface rights to lands." (25 U.S.C. § 5108.) It also provides 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*., emphasis added.)

By its plain terms, Section 5 exempts from taxation the "land or rights" *the Secretary acquires title to pursuant to the IRA*—nothing more. The possessory interests involved here, however, are neither lands or rights acquired by the Secretary pursuant to the IRA, nor rights taken into trust. The Plaintiffs acquired their possessory interests directly from Agua Caliente Allottees through privately negotiated leases that the Secretary approved pursuant to the Long-Term Leasing Act, 25 U.S.C. § 415. That statute says nothing about taxation. (*Herpel*, 45 Cal.App.5th at 109; *see also Agua Caliente II*, 2017 WL 4533698, at *11 & n.14, *affd. mem.* (9th Cir. 2019) 749 Fed.App'x. 650.) CRIT Plaintiffs acquired their possessory interests directly from CRIT through privately negotiated leases that were not federally approved. Thus, the tax exemption in Section 5 would not bar the state's possessory interest taxes even if the leased lands had been acquired pursuant to the IRA.

Plaintiffs nonetheless argue that California's possessory interest tax is "precisely the type of tax that [Section 5] prohibits because it taxes the use of the land, and taxing the land's use is considered 'a tax upon the property

itself.'" (Op. Br. at 32 [quoting *Mescalero Apache Tribe v. Jones* (1973) 411 U.S. 145, 158].) First, it is not correct that possessory interest taxes are "precisely the type of tax" Section 5 prohibits. Congress included the tax exemption in Section 5 because Section 5 authorizes the Secretary to acquire title to *fee lands*, which are subject to taxation. The United States cannot eliminate state taxing jurisdiction merely by acquiring title. (*See, e.g., United States v. Mummert* (8th Cir. 1926) 15 F.2d 926, 928 [stating that "lands formerly subject to taxation are not exempted therefrom by a purchase"].) Section 5 includes the tax exemption to establish that states can no longer tax property the Secretary acquires title to via "purchase, relinquishment, gift, exchange, or assignment." Second, when Congress passed the IRA in 1934, there was no general leasing authority.[11] Congress did not pass the Long-Term Leasing Act until 1955—over two decades after it passed the IRA. Non-Indian possessory interest taxes were not the type of tax Congress intended to prohibit.

Third, a possessory interest tax is not—as a matter of law—considered "'a tax upon the property itself.'" (Op. Br. at 31.) "A possessory interest assessment is not made *against the government or government property*; the 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. County of Fresno* (1975) 50 Cal.App.3d 633, 640, *aff'd*, 429 U.S. 452 (1977), emphasis added [upholding California's tax on Forest Service employees' possessory interests in housing located on na-

[11] In 1891, Congress had passed a statute authorizing the leasing of fee lands owned by Indians that were not needed for agricultural purposes (25 U.S.C. § 397) and the leasing of unallotted lands for oil and gas mining purposes, which authorized state taxation of Indian royalties (25 U.S.C. § 398).

tional forest land because tax is on the possessory interest, not land ownership]; *cf. United States v. City of Detroit* (1958) 355 U.S. 466, 471 [acknowledging the distinction between a tax "simply and forthrightly imposed on the property itself" and a tax "on the privilege of using or possessing" property and upholding the latter].)

Section 5 was designed, and has only ever been applied, to prevent states and local governments from taxing *Indians* and *Indian tribes* on their trust lands. *Mescalero Apache* is no exception. Plaintiffs argue that *Mescalero Apache* stands for the proposition that taxing the land's use is considered "a tax upon the property itself." (Op. Br. at 31.) But, unlike this case, the taxpayer in *Mescalero* was an Indian tribe that leased land from the United States, and the state's use compensating taxes were imposed on the purchase price of materials the Tribe used to construct two ski lifts on the land. (*Mescalero Apache*, 411 U.S. at 156.) The incidence of the tax fell on the Tribe, so the tax was on the *Tribe's* use of its land. The Court did not treat possessory interests as problematic. To the contrary, the Court stated that "[l]essees of otherwise exempt Indian lands are also subject to state taxation."[12] (*Id*. at 157 [citing *Oklahoma Tax Commission v. Texas Co.* (1949) 336 U.S. 342].)

[12] The Court also distinguished between different types of use taxes by citing *City of Detroit*. (*Mescalero Apache*, 411 U.S. at 157.) *City of Detroit* upheld a possessory interest tax on a lessee of governmental property, after rejecting the government's argument that if a tax is "measured by the value of the property used it should be treated as nothing but a contrivance to lay a tax on that property." (355 U.S. at 470.) Thus, when the Court in *Mescalero Apache* stated that "[t]his is not to say that use taxes are for all purposes to be deemed simple ad valorem property taxes" and cited *City of Detroit*, it was acknowledging that its analysis regarding

As the Supreme Court has explained, "'[t]he initial and frequently dispositive question in Indian tax cases . . . is *who* bears the legal incidence of [the] tax.'" (*Wagnon,* 546 U.S. at 101 [quoting *Oklahoma Tax Commission,* 515 U.S. at 458].) If the legal incidence of a tax falls on Indians in Indian country—as in *Mescalero Apache*—the tax is preempted. If the legal incidence of a tax falls on non-Indians, however, *Bracker* balancing applies.[13] (*Id.*) There is no support for Plaintiffs' argument that the tax exemption in Section 5 preempts any tax that falls on non-Indians.

2. Because the lands Plaintiffs lease were not acquired under the IRA, Section 5 does not apply.

Plaintiffs' argument fails for the separate reason that Section 5 has no application to the lands involved in this case. The tax prohibition in Section 5 applies only to the "lands or rights acquired *pursuant to this Act*." (25 U.S.C. § 5108, emphasis added.) Neither reservation was acquired pursuant to the IRA. The Agua Caliente Reservation was established pursuant to an 1876 executive order (AA 246 ¶ 73) and expanded by executive order a year later (*id*. ¶ 74). The CRIT Reservation was set aside by Congress in 1865 and

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Montana's use compensating taxes did not apply to possessory interest taxes. (*Mescalero Apache,* 411 U.S. at 157.)

[13] Indeed, if Plaintiffs were correct that Section 5 alone preempted taxes because "the use of the land itself is being taxed" (Op. Br. at 32), no tax on non-Indians in Indian country would ever be permissible, effectively nullifying *Bracker*. The taxes on reservation timber in *Bracker* and the permanent improvements in *Ramah Navajo School Bd.*, 458 U.S. 832, for example, are instances where the use of the land itself is being taxed. Yet the Court evaluated the taxes under the *Bracker* balancing test, not Section 5. Likewise, the Court upheld severance taxes on non-Indian mineral leases in *Cotton Petroleum Corp. v. New Mexico* (1989) 490 U.S. 163 under *Bracker*.

expanded by executive order decades before Congress passed the IRA.[14] (AA 255 ¶¶ 134–136.)

In *Herpel*, the Court concluded that the Section 5 tax exemption applies only to lands acquired pursuant to the IRA. (45 Cal.App.5th at 119.) Thus, whatever taxes fall within the scope of Section 5's tax exemption, Section 5 does not apply in this case.

a. The cases Plaintiffs cite do not extend Section 5 to Agua Caliente or CRIT lands.

Plaintiffs contend that the Court's conclusion in *Herpel* that Section 5 does not apply is not "controlling, or even persuasive." (Op. Br. at 38.) But none of the cases Plaintiffs cite supports that claim.

Plaintiffs argue that *Mescalero Apache* extends Section 5 to Indian lands set aside under different authorities, but that is not so. (Op. Br. at 33.) The Court in *Mescalero Apache* treated lands the Tribe leased from the United States Forest Service to build a ski resort as Section 5 lands, because: (1) the United States already owned the land such that transferring title to itself under Section 5 would have been pointless; and (2) the Tribe obtained the equipment and construction money from a federal loan under Section 10 of the IRA. (*Mescalero*, 411 U.S. at 146, 155 n.11). Moreover, the taxpayer was the Tribe, not non-Indians.

In this case, the Tribes have not leased land from the federal government using loans they acquired under Section 10 of the IRA. The Plaintiffs

[14] Plaintiffs have not established that the leased CRIT lands are trust lands or part of the CRIT Reservation, and they cannot. (*See Arizona v. California*, 530 U.S. at 411–12; AA 256 ¶ 138.)

leased lands that have been in trust for well over a century. As the Court concluded in *Herpel*, the circumstances in *Mescalero Apache* look nothing like the facts here. (45 Cal.App.5th at 121–122; *see also Agua Caliente II*, 2017 WL 4533698, *7–8 [distinguishing the land acquisition in *Mescalero Apache* from the creation of the Agua Caliente Reservation].)

Plaintiffs' reliance on *Seminole Tribe of Florida v. Stranburg* (11th Cir. 2015) 799 F.3d 1324 fails for similar reasons. (Op. Br. at 32.) The Florida statute challenged in *Seminole Tribe* taxed *the Tribe* for 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 in an amount equal to 6 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, s. 5, ch. 2010-147.) For that reason alone, the tax was barred. (*Oklahoma Tax Commission*, 515 U.S. at 459 ["If the legal incidence . . . rests on a tribe . . . the tax cannot be enforced"].) In any case, this Court has disagreed with the Eleventh Circuit's analysis. (*See Herpel*, 45 Cal.App.5th at 112, n.12.) Plaintiffs provide no reason for the Court to depart from its prior conclusion.

Nor does *Cass County, Minnesota. v. Leech Lake Band of Chippewa Indians* (1998) 524 U.S. 103 support Plaintiffs' argument. (Op. Br. at 34). The lands involved in *Cass County* had at one point been part of the Leech Lake Band Reservation, but Congress had removed the lands from federal jurisdiction and made them subject to state taxation. (524 U.S. at 113.) The Court explained that the Tribe's reacquisition of title to the lands alone did

not preempt the disputed taxes. (*Id.* at 114.) Title to the lands had to be acquired by the Secretary pursuant to Section 5 and placed in trust before they would become tax exempt. (*Id.*) Plaintiffs take the position that "the Secretary had not acquired the land itself, just the trust rights" (Op. Br. at 34), but that is not how Section 5 works or what the Court explained. The Secretary *creates* the trust, when he acquires the *title* to the land via "purchase, relinquishment, gift, exchange, or assignment." (25 U.S.C. § 5108.) None of these cases supports Plaintiffs' claim.

b. The Act of 1990 does not make Section 5 applicable to Agua Caliente or CRIT lands.

Plaintiffs finally argue that a 1990 statute makes Agua Caliente lands subject to Section 5 because that 1990 statute extends the restricted fee status of allotments.[15] (Op. Br. at 36 [citing Pub. L. No. 101–301, § 3(a), 104 Stat. 206, 207 (1990)].) That argument is unpersuasive.

The Agua Caliente Reservation was established in 1876. (AA 246 ¶ 73.) The Reservation was allotted to tribal members pursuant to the Mission

[15] Plaintiffs also claim that because CRIT voted to accept the IRA in December 1934, "its trust rights were acquired under the IRA at that time." (Op. Br. at 35 n.3 [citing United States Indian Service, *Ten Years of Tribal Government under I.R.A.* at 14 (1947)].)

The IRA prohibited allotment of existing Indian lands. (25 U.S.C. § 5101 ["On and after June 18, 1934, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian."].) It did not alter the authorities under which existing Indian lands were created. (*See* 25 U.S.C. § 5128 [preserving application of existing laws and authorities].) Apart from that, the legal status of the CRIT lands Plaintiffs lease remains disputed.

Indian Relief Act of 1891, the Act of 1917, and the Agua Caliente Equalization Act. (*Id*. ¶¶ 77–79.) The vast majority of the leased lands were allotted under the Agua Caliente Equalization Act. (*Id.* ¶¶ 78–80.)

Section 2 of the IRA indefinitely extends "the existing periods of trust placed upon any Indian lands and any restriction on alienation thereof … until otherwise directed by Congress." (25 U.S.C. § 5102.) That provision only applied to tribes that voted to have the IRA apply. The Agua Caliente Tribe voted against its application in 1934. (*See Prieto v. United States* (D.D.C. 1987) 655 F.Supp. 1187, 1188 n.2.) The Act of 1990, however, amends the IRA to make Section 2 applicable to all tribes and allotments such that the trust period of any allotment is extended indefinitely. (Act of May 24, 1990, Pub. L. 101–301, § 3, 104 Stat. at 207.)

Plaintiffs claim that the indefinite extension of restrictions are "rights" acquired under the IRA such that Section 5 applies. (Op. Br. at 33–34.) That is not so. The extension of existing trust periods—which results from the 1990 Act, not the IRA—had no effect on Allottees. The vast majority of Allottees received their allotments pursuant to the Equalization Act. The trust period for equalization allotments was already indefinite under Section 6 of the Equalization Act, which states that equalization allotments "shall not be subject to assignment, sale, or hypothecation or to any attachment or levy for claims or debts created before or after the effective date of this Act, *without the written approval of the Secretary*. . . ." (Pub. L. 86-339, § 6, 73 Stat. 602, 604 (Sept. 21, 1959), emphasis added.) To the extent that some unknown number of allotments were issued pursuant to earlier acts that were subject

to a 25-year trust period, those trust periods were automatically administratively extended.[16] (Op. Br. at 35 n.3.)

By extending Section 2 to all allotments, the Act of 1990 relieves the Secretary from having to publish general extensions under the various allotment acts. That is so because, in 1948, Congress authorized the Secretary "in his discretion, and upon application of the Indian owners, to issue patents in fee, to remove restrictions against alienation, and to approve conveyances, with respect to lands or interests in lands under the provisions of" the IRA. (25 U.S.C. § 5134.) Thus, the trust period in all allotments are indefinite, and allottees can obtain patents by applying to the Secretary—which is what the Equalization Act provides.

In short, the Act of 1990 did not create "rights" acquired pursuant to the IRA. Section 5 does not apply.

B. The disputed taxes do not interfere with tribal sovereignty or self-government.

Plaintiffs next contend that "taxing the full possessory interest of Agua Caliente land strikes so deeply at the heart of Indian independence and self-governance that it is preempted for that reason alone, without any balancing required." (Op. Br. at 39–40 [citing *Williams v. Lee* (1959) 358 U.S. 217, 223].) The Supreme Court has never held a tax preempted based on an

[16] (*See, e.g.*, Executive Order 6498 (Dec. 15, 1933) [extending periods of trust for all allotments by general order]; *see also* 43 Fed. Reg. 58368 (Dec. 14, 1978) ["This notice will serve to extend the period of trust or other restrictions against alienation of certain Indian lands which would otherwise expire during the calendar years 1979 through 1983."]; 48 Fed. Reg. 34026 (July 27, 1983) (same); 53 Fed. Reg. 30673 (Aug. 15, 1988) (same), 25 C.F.R. Ch. 1, App. 1.)

alleged interference with "tribal sovereignty."[17] As set forth in *McClanahan,* 411 U.S. at 172, the Court looks to federal preemption principles, not tribal sovereignty, as a bar to state jurisdiction.

Plaintiffs do not explain exactly how *their* obligation to pay taxes on their possessory interest "strikes so deeply at the heart of Indian independence," given that the Tribe has disclaimed any interest or involvement in overseeing Plaintiffs' leases. (AA 252 ¶ 113.) The Tribe does not review Plaintiffs' leases for any tribal purpose, including compliance with land use or other regulations, because it does not consider such review its responsibility. (AA 250 ¶¶ 99, 100.) It does not receive any part of the lease payments Plaintiffs make. (AA 247 ¶ 90.) In fact, sharing information BIA or the federal contractors obtain during the lease review process would violate federal law. (AA 248 ¶ 91; AA 254 ¶ 125.) Thus, any impact on the Tribe itself is indirect, at best, and economic in nature.

Plaintiffs' primary objection appears to be that possessory interest taxes are the "practical equivalent of forbidden, direct taxes on Indian land." (Op. Br. at 41.) That argument, which is largely a reiteration of their Section 5 claims, has been rejected. The State's possessory interest tax is a tax on non-Indian possessory interests, not Indian property. (*See, supra,* at II.B.1.)

[17] The Supreme Court has applied the *Williams v. Lee* test only to assess state actions that interfered with core governmental functions of a tribe that "infringe on the right of Indians to govern themselves." (358 U.S. at 223 [suit on a debt of an Indian to an on-reservation retailer had to be resolved in tribal court]; *Fisher v. District Court of Sixteenth Judicial Dist. of Montana* (1976) 424 U.S. 382, 386 [adoption of Indian child subject to tribal law].)

Only non-Indians are subject to the state's possessory interest tax—both under state law and the terms of their leases. (AA 252 ¶ 114.) Unpaid possessory interest taxes cannot become a lien or other charge on Allotted Lands. (*Id.*) There is nothing in the record to support Plaintiffs' claim that the state's possessory interests "impinge[] too directly on Indian land." (Op. Br. at 43.)

Plaintiffs next assert that the "possessory-interest taxes are so burdensome that they foreclose the Agua Caliente from imposing its own possessory-interest taxes" (Op. Br. at 44), but that argument is foreclosed as a matter of law. As the Court explained in *Washington v. Confederated Tribes of the Colville Reservation* (1980) 447 U.S. 134, 158, "[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." (*See also Wagnon*, 546 U.S. at 114 ["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 Corp. v. New Mexico* (1989) 490 U.S. 163, 189 ["Unless and until Congress provides otherwise, each of [state and tribe] has taxing jurisdiction over all of Cotton's leases."].)

Plaintiffs rely heavily on *Crow Tribe of Indians v. Montana* (9th Cir. 1981) 650 F.2d 1104 and *Crow Tribe of Indians v. Montana* (*Crow II*) (9th Cir. 1987) 819 F.2d 895, 902–903 (Op. Br. at 40), but the Court held in *Herpel* that the severance taxes in *Crow Tribe* are distinguishable from the possessory interest taxes here. (*See Herpel*, 45 Cal.App.5th at 115.) The severance taxes challenged in *Crow* applied to non-Indian coal mining on the tribe's reservation authorized under the Mineral Leasing Act of 1938. This

Court correctly concluded that the severance taxes were "taxes on business activity only," unrelated to "the activity that the possessory interest tax reaches." (*Id*. at 115–116.) Not only are the taxes distinguishable, the *Crow* court acknowledged that "[i]t is clear that a state tax is not invalid merely because it erodes a tribe's revenues, *even when the tax substantially impairs the tribal government's ability to sustain itself and its programs*."[18] (650 F.2d at 1116 [citing *Washington v. Confederated Tribes of Colville* (1980) 447 U.S. 134, 152–156, emphasis added]; *see also Crow II*, 819 F.2d at 903 [explaining that "some interference with the Tribe's economic development may be justified if the state's interests in imposing the taxes are legitimate")].)

Plaintiffs' reliance on *Crow II* is misplaced for another reason—the taxes in that case were extraordinarily high (32.9%)—a rate that adversely affected the marketability of Indian coal, thereby interfering with federal and tribal interests. (*Crow Tribe II,* 819 F.2d at 899–900.) Here, the possessory interest taxes consist of the 1% Tax and Voter Approved Taxes. There is no evidence that Agua Caliente tried and failed to impose a tribal tax equivalent to the 1% Tax. The Tribe voluntarily elected not to impose its own tax (AA 253 ¶ 119), but there is no factual or legal basis on which to conclude that the Tribe could not impose its own tax.

Plaintiffs finally contend that "the possessory-interest taxes place an economic burden on the Indian landowners whose leases are taxed," which

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[18] *Crow Tribe* resolved a motion to dismiss. The court stated that "the Tribe must show [at trial] that the taxes substantially affect its ability to offer governmental services or its ability to regulate the development of tribal resources, and that the balance of state and tribal interests renders the state's assertion of taxing authority unreasonable." (650 F.2d at 1117.)

"provides further support for preemption." (Op. Br. at 46.) That is not correct. In *Herpel*, the Court agreed with the trial court's conclusion that there was no evidence of a disproportionate impact from the tax. (*Herpel*, 45 Cal.App.5th at 112–113.) The record is the same in this case. Plaintiffs' expert never conducted or reviewed any economic studies of the leasing market in Riverside County or the impacts of the taxes on the Tribe. (RA 300–302 at 61:8–63:24.) Their expert did not conduct an economic analysis to quantify the impact of California's possessory interest tax. (RA 410 at 171:13–14 ["I admit I have not attempted to quantify this in literal dollars."].) He did not collect information from Allottees or any current or potential lessees of Agua Caliente land. (RA 356–361 at 117:23–122:14.)

In any case, it is well established that an adverse impact on tribal finances is not sufficient to invalidate the tax. (*See Cotton Petroleum*, 490 U.S. at 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"]; *see also Herpel*, 45 Cal.App.5th at 113.) The Supreme Court has made clear that state taxes on non-Indians simply do not interfere with tribal sovereignty. (*See Colville*, 447 U.S. at 161 ["Nor would the imposition of Washington's tax on these purchasers [Indians not enrolled in the reservation tribe] contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe"].) The state's possessory interest taxes are not preempted under the doctrine of tribal sovereignty.

C. The State's interest in the challenged possessory interest taxes is strong and fully justifies the taxes.

The *Bracker* balancing test is used to assess state taxation of non-Indians. (*Wagnon,* 546 U.S. at 110.) Under *Bracker*, "[s]tate jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, *unless the State interests at stake are sufficient to justify the assertion of State authority*." (*Mescalero Apache*, 462 U.S. at 334, emphasis added.) The Court must undertake a "particularized inquiry into the nature of the state, federal and tribal interests at stake." (*Bracker*, 448 U.S. at 145; *Cotton Petroleum*, 490 U.S. at 176; *Herpel*, 45 Cal.App.5th at 101.) The Court has also noted that, "[u]nder current doctrine, . . . a State can impose a nondiscriminatory tax on private parties with whom the United States or an Indian does business, even though the financial burden of the tax may fall on the United States or tribe." (*Cotton Petroleum*, 490 U.S. at 175.)

This Court applied the *Bracker* balancing test in *Herpel* and concluded that federal law did not preempt the 1% Tax as applied to the non-Indian lessees on Allotted Lands. (*Herpel*, 45 Cal.App.5th at 108–116.) The Court held that the federal interest did not support preemption, because nothing in the relevant statute, 25 U.S.C. § 415, indicated an intent to "exclude state taxation or otherwise exercise exclusive control over everything in connection with leases on Indian lands" (*id.* at 109-110); that the tribal interest "does not mandate preemption" because the evidence did not demonstrate that "that the County's possessory interest tax significantly and negatively affects the Tribe's interests" (*id*. at 112–13); and that the state interest

weighed heavily against preemption, because the County and not the Tribe provided "virtually all essential governmental services in connection with" the leased lands (*id*. at 114).

Plaintiffs offer no arguments or facts that alter that conclusion for Agua Caliente lessees. With respect to CRIT, Plaintiffs stipulated below that they did not argue that the possessory interest taxes CRIT Plaintiffs paid are preempted under *Bracker* balancing. (AA 255 ¶ 130.)

1. Federal interests do not preempt possessory interest taxes.

Plaintiffs assert that federal interests support preemption because the Long-Term Leasing Act and the implementing regulations at 25 C.F.R. Part 162 "comprehensively regulate" the leasing of Indian lands. (Op. Br. at 49–55.) The Court rejected that argument in *Herpel*. (45 Cal.App.5th at 111.) There, the Court explained that the congressional policies underlying the Long-Term Leasing Act governs the Court's analysis, and nothing in its text "signals an intent on the part of Congress for the federal government to exclude state taxation or otherwise exercise exclusive control over everything in connection with leases on Indian lands." (*Id.* at 109.) The Court found that Congress's goal behind the Long-Term Leasing Act was analogous to the act addressed in *Cotton Petroleum* "in that both sought nothing more than the removal of restrictions imposed solely on Indian land—restrictions that put tribal economic activity at a disadvantage." (*Id.* at 109-110.)

That conclusion is consistent with the Secretary's goals in revising the implementing regulations in 2013. The 2013 revisions substantially furthered

the Secretary's goal to "delete[] regulatory burdens" and "limit BIA's involvement in substantive lease contents." (77 Fed. Reg. 72440, 72442 (Dec. 5, 2012).) The Secretary changed the regulations to "[p]rovide greater deference to tribes for tribal land leasing decisions" and "limit[] BIA's involvement in substantive lease contents, and le[ave] lease provisions and issue resolutions to negotiation, to the extent possible and consistent with our trust responsibility." (*Id*. at 72440, 72442, 72447; *but cf. Agua Caliente II*, 2017 WL 4533698, at *12, 15 [finding that although the leasing regulations were pervasive, they did not preempt the 1% Tax].)

Plaintiffs ignore that analysis and instead urge the Court to follow the Eleventh Circuit's *Seminole Tribe* decision. (Op. Br. at 55 [quoting *Seminole Tribe*, 799 F.3d at 1341].) The Court, however, acknowledged its disagreement with the Eleventh Circuit and other courts—which did not carefully consider the Long-Term Leasing Act and concluded that "the mere fact that the Leasing Regulations are extensive does not require us to conclude that the federal interest strongly supports preemption." (*Herpel,* 45 Cal.App.5th at 109.) For the reasons set forth in *Herpel*, and in DWA's and CVWD's briefs (DWA Br. at 36-38; CVWD Br. at 27-29), the Court should again conclude that the federal interests do not support preemption.

2. The tribal interests at stake do not favor preemption.

As the County explained in Section VII. B, *supra*, the 1% Tax and Voter Approved Taxes have little effect on the Tribes. The Court agreed with this conclusion with respect to the 1% Tax. (*Herpel*, 45 Cal.App.5th at 112.) As the Court observed, the possessory interest taxes do not fall on the Tribes

or Allottees; only Plaintiffs are responsible for paying the disputed taxes. (*Id.* [finding the tribal interests at stake in this case to be analogous to those in *Cotton Petroleum*].)

Plaintiffs argue that, unlike the litigants in *Herpel*, they have expert testimony addressing the effect of the possessory interest taxes on the Tribe. (Op. Br. at 63.) Plaintiffs' expert testimony does not shift the balance. First, neither Plaintiffs nor their expert addressed Voter-Approved Taxes. There is a total failure of proof regarding the federal and tribal interests affected by the Voter-Approved Taxes. Plaintiffs claim that the Vote-Approved Taxes for the specific educational services and provision of water harm tribal interests, but there is nothing in the record from either Tribe regarding their views. Plaintiffs vicariously assert the interests of Indians, but it is entirely possible that the Tribes strongly support Voter-Approved Taxes for fear that any diminution of those specific services would threaten the value of their lease revenues. Indeed, the Agua Caliente Tribe made clear in *Agua Caliente II* that it was not challenging DWA's Voter-Approved Taxes. (*See* Order, No. 14-0007 (C.D. Cal. Jun. 2, 2015), ECF No. 107.) Plaintiffs' failure to proffer any evidence of tribal interests, and the reasons set forth in CVWD's and DWA's briefs, make clear that no tribal interest is implicated by the Voter-Approved Taxes. (*See* CVWD Br. at 30-31; DWA Br. at 46.)

Second, Plaintiffs' expert relied on the same evidence presented in *Herpel* and *Agua Caliente II.* He did not conduct or review any economic studies of the leasing market in Riverside County or the impacts of the disputed taxes on the Tribes. (RA 300 at 61:8–63:24; RA 410 at 171:13–14.) In

fact, he did not consider impacts on CRIT at all. No information regarding the Agua Caliente Tribe's finances, gaming revenues, other revenue streams, or economic development opportunities was considered. (RA 359 at 120:20–24.) Petitioner's expert testified that if the Tribe were to impose its own 1% Tax, the value of future leases to Indian lessors would fall by over 40%. (Op. Br. at 44 [citing RT 77:19–79:13, 80:28–86:6, 89:15–94:2].) But their expert did not attempt to conduct any economic analysis to quantify the impact of California's possessory interest taxes on the Tribe. (RA 410 at 171:13–14 ["I admit I have not attempted to quantify this in literal dollars."].) In fact, he did not even collect information from any current or potential lessees of Agua Caliente Land, much less obtain information to support his opinion that lessees are less likely to lease land because of the 1% Tax. (RA 356–361 at 117:23–122:14.)

The trial court did not find persuasive the Plaintiffs' speculative and conclusory expert testimony, nor should this Court. In fact, the trial court concluded that Plaintiffs' expert ignored the positive effect that the state services had on possessory interest values. (Tentative Decision on First Bifurcated Issue at 6 (issued Apr. 24, 2019).) Not only would leasehold values "drop dramatically if the governmental services currently funded by the Taxes were discontinued," the court explained, "to maintain the value of the rents, the tribe would have to spend an amount equal to or more than the Taxes currently imposed on the leaseholds." (*Id.*)

The fact is that the Tribe does not provide governmental services to Plaintiffs, and it has not indicated any intention of doing so. It provides virtually no services to Allotted Lands—no education, police or emergency services, roads, water, or other services. (AA 236–237 ¶¶ 33, 36, AA 248–49 ¶¶ 94, 96.) And no Plaintiff leases any of the 14.75 acres of Tribal Trust Land.

To the extent that the County's possessory interest taxes may reduce the rents that lessees are willing to pay—and Plaintiffs have not provided any evidence that they do—that reduction would not invalidate the 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. (*Colville*, 447 U.S. at 156-157 ["It can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes."]); *see also Cotton Petroleum*, 490 U.S. at 187 [rejecting 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"].)

In fact, the record indicates that the possessory interest taxes have not impeded development. To the contrary, since 1969, the amount of land leased to non-Indians has expanded from 8 to 4,300 acres, and the assessed value of non-Indian possessory interests is about $2.28 billion. (AA 247 ¶ 83; AA 251–252 ¶ 108.) Allottees lease only 4,300 acres out their total 24,600 acres, so substantial economic potential remains. (AA 247 ¶ 86.) Plaintiffs' efforts to materially distinguish their case from *Herpel* fails. As in *Herpel*, Plaintiffs

"have not demonstrated that the County's possessory interest tax significantly and negatively affects the Tribe's interests." (45 Cal.App.5th at 113.)

3. The state's interests in the possessory interest taxes to fund essential governmental services fully justifies the tax.

The possessory interest taxes Plaintiffs paid are used to provide them with essential governmental services. In such cases, the state's interests in levying the tax outweigh federal interests. (*Cotton Petroleum*, 490 U.S. at 175.) State interests would be adversely impacted by voiding the tax because any circumstance that diminishes a local government's tax base—such as a loss in property values or inability to collect property tax—"threaten[s] its ability to bear the costs of local government and to provide services." (*Gladstone Realtors v. Village of Bellwood* (1979) 441 U.S. 91, 110–11.) That is particularly true in California, where the State has developed a remarkably complex taxing system that allocates tax revenues pursuant to complex statutory procedures. (AA 234–236 ¶¶ 20, 23, 27–29.) Any reduction in revenues creates a ripple affecting not only a large number of taxing jurisdictions within the County, but also the State education funding process. (AA 235–237 ¶¶ 25, 26, 34, 35; AA 249–250 ¶ 97; *see City of Scotts Valley*, 201 Cal.App.4th at 8 [discussing AB 8, tax equity, ERAF, and other tax allocation statutes].)

In 2014, the County collected approximately $22,800,000 in revenues from the 1% Tax, but, by law, retained only $3.3 million for County services, including fire protection, public protection, health and sanitation, education and recreation, road districts, and other services. (AA 241 ¶¶ 53, 54.) The revenues were also used to fund the Sheriff's Office, Corrections, the District

Attorney, Health and Mental Health, the Public Defender, Probation, Code Enforcement, and Animal Services. (AA 236 ¶ 30; AA 241–243 ¶¶ 54, 62.) The County must also provide services to all unincorporated areas, including those portions of the Agua Caliente Reservation and trust lands that are outside of incorporated municipalities. (AA 236 ¶ 31; AA 241 ¶¶ 52, 57.) Indeed, the County provides fire protection services to the Tribe directly. (AA 236 ¶¶ 31–33.)

A reduction in revenues would not hurt only Riverside County. The Palm Springs school districts, community college, and the Riverside County Office of Education would lose $8,871,783 in the 1% Tax revenues and the ERAF fund would lose $4,317,307. (AA 236–237 ¶¶ 34, 35.) Palm Springs, Cathedral City, and Rancho Mirage—where there are a combined 9,605 lessees of trust land—would lose $4,102,535. (AA 235 ¶ 22; AA 237 ¶¶ 37–39.) Those revenues are used for police, fire, a convention center, street maintenance and lighting, building and safety, railroad station, parks maintenance, recreation and library services. (AA 237 ¶¶ 37–39.) Much of the remaining revenues from the 1% Tax are allocated to agencies with specific functions, including the CVWD, DWA, and the Flood Control District. (AA 238–240 ¶¶ 40–47.) All of these jurisdictions would be harmed by the loss of revenues. (AA 241 ¶¶ 54, 56.)

The effects would cascade most dramatically through those communities that directly serve Plaintiffs. The services that the County and local governments provide unquestionably benefit properties within the County, including the Indian lands Plaintiffs lease. Ad valorem taxes such as the 1%

Tax are levied "to pay for general expenditures, such as fire and police protection, and for general improvements, such as fire stations, police stations, and public buildings, that 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 and improvements." (*Solvang Municipal. Improvement District. v. Board of Supervisors* (1980) 112 Cal.App.3d 545, 552.) As the Ninth Circuit has noted, the interest of the state in collecting taxes from a non-Indian taxpayer is stronger "'when the taxpayer is the recipient of state services'"—which is clearly the case here. (*Barona Band*, 528 F.3d at 1193 [quoting *Salt River Pima–Maricopa Indian Community*, 50 F.3d at 737].)

Plaintiffs argue that the possessory interest taxes are not narrowly tailored and that they are disproportionate. (Op. Br. at 56-57.) Neither claim has merit. Drainage facilities built and maintained by the Flood Control District directly benefit Indian lands by preventing severe flooding. (AA 240 ¶¶ 45–49.) In fiscal year 2013–2014, the Flood Control District received about $547,962 in 1% Tax revenues, most of which was spent to construct and maintain Zone 6 facilities that directly benefit the lessees and the lessors of trust land by paying for various facilities (including dams and underground storm drains) that control flooding of trust land. (*Id*. ¶¶ 46, 47.) The Vector Control District in Riverside County provides pest control throughout the County, which not only provides protection from the nuisance of mosquitos, fire ants, gnats and flies so that lessees can enjoy their leased property, but it also plays a substantial role in protection of the public health because mosquitoes and other vectors are carriers of viruses. (AA 240–241 ¶¶ 50-52.)

These services cannot be provided to only non-Indian properties; they benefit all properties in the region. (AA 265 ¶ 231.) To the extent that Plaintiffs object that the possessory taxes are disproportionate, the Supreme Court held that state taxes are not preempted simply because the tax may be disproportionate to the value of the services provided. (*Cotton Petroleum*, 490 U.S. at 190 ["[T]here is no constitutional requirement that the benefits received from a taxing authority by an ordinary commercial taxpayer . . . must equal the amount of its tax obligations."].)

The Court concluded in *Herpel*, "[w]hatever the merits of holding that government services such as 'road, law enforcement, welfare, and health care services' are not sufficiently connected to taxes on only business activity, we view such services as sufficiently connected when, as here, the tax extends more broadly to cover residential activity as well." (*Herpel*, 45 Cal.App.5th at 115.) Because this is a case "in which the State seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall," the possessory interest taxes are permissible. (*Id.*at 116, quotation marks and citation omitted.)

CONCLUSION

The judgment in the County's favor should be affirmed.

DATED: September 4, 2020 **PERKINS COIE LLP**

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COUNTY OF RIVERSIDE

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CERTIFICATE OF COMPLIANCE

California Rules of Court, the undersigned certifies that Respondent's Brief is proportionately spaced, has type face of 13 points or more, and contains 12,825 words as calculated using the word count of the computer program used to prepare the brief, not including the cover, title page, table of contents, table of authorities, or this certificate of compliance.

DATED: September 4, 2020

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CERTIFICATE OF SERVICE

I, Sheri Pais, declare:

I am a citizen of the United States and employed in Washington, D.C. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Perkins Coie LLP, 700 13th Street, NW, Suite 800, Washington, D.C. 20005. I am employed in the office of a member of the bar of this Court at whose direction the service was made. On September 4, 2020, I served a copy of the within document(s):

COUNTY OF RIVERSIDE'S RESPONSE BRIEF

☒ **BY TRUEFILING:** On this day, I caused to have served the foregoing document(s) as required on the parties and/or counsel of record designated for electronic service in this matter on the TrueFiling website.

☒ **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Perkins Coie LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 4, 2020, at Washington D.C.

s/ Sheri Pais
Sheri Pais

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