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

BRIEF OF RESPONDENT-DEFENDANT-INTERVENOR DESERT WATER AGENCY

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Respondent-defendant-intervenor Desert Water Agency 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 3, 2020

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INTRODUCTION AND SUMMARY OF ARGUMENT

The plaintiffs are non-Indians who have leased lands on one of two Indian reservations in Riverside County, one reservation belonging to the Agua Caliente Band of Cahuilla Indians ("Agua Caliente Tribe," or "Tribe") and the other to the Colorado River Indian Tribes ("CRIT"). The plaintiffs seek refunds for their past payments of possessory interest taxes levied against them by defendant Riverside County ("County") and by defendant-intervenors Desert Water Agency ("DWA") and Coachella Valley Water District ("CVWD"). The County's tax is based on 1% of the value of the plaintiffs' possessory interests; the County's tax is limited to 1% of the value under Proposition 13, which was approved by California voters in 1978. DWA's and CVWD's taxes are based on the full value of the plaintiffs' possessory interests, and are not subject to Proposition 13's 1% limit; Proposition 13 provides an exemption from the 1% limit for taxes approved by voters prior to their approval of Proposition 13, and DWA's and CVWD's taxes were approved by voters before Proposition 13 was approved. Both the County's 1% tax and DWA's and CVWD's voter approved taxes are possessory interest taxes, because they are apply to the non-Indian lessees' possessory interests and not to the Indian tribe or its reservation.

The plaintiff non-Indian lessees contend that the possessory interest taxes of the County, DWA and CVWD are preempted by federal law or otherwise invalid under three principles of federal law—specifically (1) the taxes are preempted under 25 U.S.C. section 5108 (formerly section 465); the taxes are preempted under the balancing test established by the Supreme Court in *White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, which provides that whether state and local laws, including taxes, apply on Indian reservations depends on the balance of state, federal and tribal

interests; and (3) apart from preemption, the taxes are invalid because they interfere with tribal sovereignty.

The County argues in its brief that its 1% tax is not preempted or otherwise invalid under these principles of federal law, and DWA fully agrees with the County's argument. In this brief, DWA will focus on its voter approved tax, and will argue that its tax is not preempted or otherwise invalid under the principles of federal law cited by the plaintiffs.[1]

First, DWA's tax is not preempted by 25 U.S.C. section 5108. This provision preempts state and local taxes that apply to the "land or rights" of Indians. DWA's tax does not apply to the "land or rights" of the Indians, but instead applies to the possessory interests of the plaintiff non-Indian lessees.

Second, DWA's tax is not preempted under the *Bracker* balancing test, because the balance of state, tribal and federal interests weighs against preemption. The *state* interest weighs against preemption, because DWA provides governmental services, in the form of water supplies and service, to the plaintiff non-Indian lessees. The *tribal* interest does not support preemption, because DWA's tax applies to the plaintiff non-Indian lessees' possessory interests and not to the Tribe or its reserved land. The *federal* interest does not support preemption because, while the federal government has adopted regulations regulating leasing of Indian lands, the federal

[1] DWA applies its tax only against non-Indian lessees on the Agua Caliente Tribe's reservation and not against non-Indian lessees on the CRIT reservation, because only the Agua Caliente Tribe's reservation is within DWA's area of jurisdiction. Therefore, DWA's brief will address the preemption and tribal sovereignty issues only as they apply to non-Indian lessees on the Agua Caliente Tribe's reservation, although the issues are largely the same as applied to both reservations.

regulations, as interpreted by the Ninth Circuit and by this Court in *Herpel v. County of Riverside* (2020) 45 Cal.App.5th 96, do not preempt state and local taxes that are not otherwise preempted under federal law.

Third, DWA's tax is not preempted by tribal sovereignty, because the tax does not interfere with the Tribe's right of self-government, that is, its right to make its own laws and be ruled by them.

In *Herpel*, this Court recently held that Riverside County's possessory interest tax is not preempted as applied to the plaintiff non-Indian lessees in that case. *Herpel* strongly supports the conclusion that DWA's voter approved tax is not preempted as applied to the plaintiff non-Indian lessees in this case, for many of the same but also additional reasons.

For the reasons above, DWA's tax is not preempted or otherwise invalid, and this Court should affirm the judgment of the Superior Court below.

STATEMENT OF THE CASE

1. California's Possessory Interest Tax

A possessory interest is 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," including "[t]axable improvements on tax-exempt land." (Cal. Rev. & Tax Code §§ 107, subds. (a), -(b); *Herpel v. County of Riverside* (2020) 45 Cal.App.5th 96, 106.) Simply put, a possessory interest includes the right to possess land, but is not necessarily the same as ownership of the land. (*Herpel*, 45 Cal.App.5th at 106-107; *United States v. Fresno County* (1975) 50 Cal.App.3d 633, 638.) A possessory interest is a form of "property," and indeed "real

property," and thus is taxable just as the land itself is taxable. (Cal. Rev. & Tax Code § 104, subd. (a); *Herpel*, 45 Cal.App.5th at 106.) The taxable value of a possessory interest is the "full cash value" of the possessory interest, just as the taxable value of real property is its "full cash value." (Cal. Rev. & Tax Code § 100.1, subd. (a); *Riverside County v. Palm-Ramon Development Co.* (1965) 63 Cal.2d 534, 537); *Agua Caliente Band of Mission Indians v. Riverside County* (9th Cir. 1971) 442 F.2d 1184, 1186.)

Commonly, a possessory interest is the right of a private individual to use government-owned land or improvements that are, themselves, exempt from state or local taxation, and the right to use the land is considered a private interest that may be subject to state or local taxation even though the land itself is exempt from taxation. (*Kaiser Co. v. Reid* (1947) 30 Cal.2d 610, 618; (*Herpel*, 45 Cal.App.5th at 106-107; *Fresno County*, 50 Cal.App.3d at 638.) Thus, a state may apply its ad valorem tax to possessory interests in government-owned land that is otherwise exempt from taxation. (*Id*.) As the California Supreme Court has stated, when a lessor leases property that is exempt or immune from state taxation, the lessor "creates valuable privately-held possessory interests, and there is no reason why the owners of such interests should not pay taxes on them just as lessees of private property do through increased rents. Their use is not public, but private, and as such should carry its share of the tax burden." (*Texas Co. v. County of Los Angeles* (1959) 52 Cal.2d 55, 63).) As this Court recently stated, "[i]n the context of Indian tribes, although the state cannot directly tax reservation lands belonging to the federal government, it may tax privately held possessory interests in those lands in the absence of preemption." (*Herpel*, 45 Cal.App.5th at 107 (citations omitted).)

2. Riverside County's 1% Tax

Riverside County ("County") assesses and collects ad valorem taxes on all property within the County that is not exempt from taxation. (Appellant's Appendix ("AA") 233 (¶ 12).) The County's ad valorem tax is limited to 1% of the value of the taxed property, because Proposition 13—approved by California voters in 1978 and codified in Article 13A of the California Constitution—provides that an ad valorem tax on real property shall not exceed 1% of the "full cash value" of the property. (Cal. Const., Art. 13A, § 1(a); AA 231 (¶ 1).) Proposition 13 also provides that a share of the revenues generated by the 1% tax may be distributed to taxing districts within the County "according to law," that is, "according to statute." (*Id*.; *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 246-247.)

The County retains a portion of the revenues generated by its 1% tax to fund governmental services that it provides to taxpayers, such as police and fire protection, code enforcement, legal services, and health services, among other services. (AA 235 (¶ 24).) The County also distributes a portion of the revenues to various taxing entities in the County that also provide governmental services, and which are authorized under Proposition 13 to receive a portion of the revenues "according to law." (Cal. Const., Art. 13A, § 1(a); AA 235 (¶ 23).)

DWA is among the taxing entities that receive a share of the revenues generated by the County's 1% tax. (AA 260 (¶¶ 177, 178.) DWA receives a share of the revenues because it provides governmental services, in the form water supplies and service, to the people of the Coachella Valley within its jurisdiction. (AA 257 (¶ 147.) Since DWA provides the governmental services, it is entitled to receive a share of the County's 1%

tax "according to law" under Proposition 13. (Cal. Const., Art. 13A, § 1(a).)

The County applies its 1% tax to the possessory interests of non-Indians who have leased allotted lands of the Agua Caliente Tribe's reservation, because their possessory interests are a form of property under California law, as described above. (AA 234 (¶ 15).) The lands were allotted to individual tribal members under the General Allotment Act of 1887 (25 U.S.C. § 334 *et seq*.), which provided for the allotment of tribal lands to individual members of an Indian tribe,[2] and under the Mission Indians Relief Act of 1891 (26 Stat. 712, 713), which extended the

[2] Under the General Allotment Act, individual tribal members were allowed to acquire allotments of tribal lands that were to be held in trust for a 25-year period, during which time the lines could not be alienated or encumbered without approval of the Secretary of the Interior; at the expiration of the 25-year period, the Secretary was required to issue a patent conveying a fee interest in the allotted land to the allottee. (25 U.S.C. § 348; *United States v. Waller*, 243 U.S. 452, 460, 463-464 (1917).) Many Indian allottees, as in this case, have leased their allotted lands to non-Indians, who use the lands for residential or commercial purposes. As the Ninth Circuit has stated, the allotment policy represented a shift in federal objectives from segregation of Indians on reservations to their assimilation into non-Indian culture and society, and to encourage them to become self-supporting citizens by making them landowners. (*Colville Confederated Tribes v. Walton* (9th Cir. 1981) 647 F.2d 42, 49.) Congress suspended its allotment policy by enactment of the Indian Reorganization Act of 1934, although then-existing allotments remained in effect. (25 U.S.C. §§ 461 *et seq*.) Although the plaintiffs cite a Ninth Circuit decision as asserting that the government's allotment policy was a "method[] of repression and suppression unparalleled in the modern world outside of Czarist Russian and Belgian Congo," the plaintiffs fail to note that this hyperbolic statement was not made by the Ninth Circuit, but by a congressman at the end of a long statement supporting rescission of the allotment policy that was quoted by the Ninth Circuit in a footnote. (*See* Pltf. Br. 15, citing *Blackfeet Tribe of Indians v. Montana* (9th Cir. 1984), 729 F.2d 1192, 1197 n. 14.)

allotment provisions of the General Allotment Act to the Mission Indians of California, which include the Agua Caliente Tribe. The County's 1% tax as applied to the non-Indian lessees is a possessory interest tax, because the tax does not apply to the Tribe's reservation land but instead applies to the non-Indian lessees' possessory interests in the land. Both federal and state courts, including this Court in *Herpel*, have held that a county's ad valorem tax, as applied to non-Indian lessees on an Indian reservation, is a possessory interest tax and is not a tax on the tribal land itself. (*E.g.*, *Riverside County v. Palm-Ramon Development Co.* (1965) 63 Cal.2d 534, 537); *Herpel*, 45 Cal.App.5th at 98,106-107; *Palm Springs Spa v. Riverside County* (1971) 18 Cal.App.3d 372, 375; *Agua Caliente Band of Mission Indians v. Riverside County* (9th Cir. 1971) 442 F.2d 1184, 1186.)[3]

3. Desert Water Agency's Voter Approved Tax

DWA is a public agency of the State of California, having been created by the Legislature in 1961 by enactment of the Desert Water Agency Law ("DWA Law"). (Cal. Water Code App. §§ 100-1 *et seq*. (West 2016); AA 260 (¶ 180).) DWA is authorized to provide, and does provide, water supplies and service to persons and entities within its borders, which include the City of Palm Springs, a portion of Cathedral

[3] The plaintiffs assert that "the County is taxing the entire value of the lessees' 'possessory interest,' which is defined to be precisely equivalent to the value of the 'real property' itself," and therefore the County is taxing "the use of [the Tribe's] land itself." (Pltf. Br. 32.) On the contrary, the County's tax applies to the possessory interest in the land, which is defined as "real property." (Cal. Rev. & Tax Code §§ 104, 107, 110.1).) Thus, the County is not taxing the Tribe's reserved land itself, or its use. Obviously a possessory interest in land is a lesser interest than ownership of the land, and thus the taxable value of the possessory interest will necessarily be less than the taxable value of the land itself.

City, and surrounding areas in California's Coachella Valley. (AA 239 (¶ 43), 257 (¶¶ 147-149).)

Under the DWA Law, DWA is authorized to apply an ad valorem tax on all non-exempt property within its jurisdiction, which compensates DWA for its costs in providing water supplies and service, and the County is responsible for imposing and collecting the tax and remitting the revenues to DWA. Specifically, the DWA Board of Directors is required annually to determine the amount of taxes necessary to meet DWA's obligations, and to certify the taxes to the Riverside County Board of Supervisors, and the County is then responsible for assessing and collecting the taxes and remitting the revenues to DWA. (Water Code App. §§ 100-25, -27; AA 259 (¶ 170, 171).) After DWA certifies the taxes to the County, the County Assessor determines the taxable value of each parcel of property that is subject to DWA's tax (AA 260 (¶ 176)); the County Treasurer-Tax Collector includes the DWA tax in tax bills sent to owners of the property within DWA's boundaries (AA 259 (¶ 171)); and the County Treasurer-Tax Collector collects the taxes and remits the revenues to DWA. (*Id.*.) Even though the County assesses and collects DWA's tax, the tax is DWA's and not the County's, because the tax is authorized under DWA's governing law and the revenues are remitted to DWA.

DWA's tax, as authorized under the DWA Law, is not subject to the 1% limit that applies to the County's 1% tax. Proposition 13 exempts certain ad valorem taxes and special assessments from the 1% limit, including "[i]ndebtedness approved by the voters prior to July 1, 1978," which was the effective date of Proposition 13. (Cal. Const., Art. 13A, § 1(b)(1); *Goodman v. County of Riverside* (1983) 140 Cal.App.3d 900, 907.) In *Goodman*, the Court of Appeal held that DWA's tax fell within Proposition 13's exemption for prior voter approved indebtedness, because

DWA uses its tax to pay its proportionate share of the costs of the State Water Project, and the voters approved the State Water Project in 1960, prior to their approval of Proposition 13 in 1978. (*Goodman*, 140 Cal.App.3d at 910.) Thus, while subsection 1(a) of Proposition 13 limits the County's tax to 1% of the assessed value of property, subsection (b)(1) of Proposition 13 exempts DWA's voter approved tax from the 1% limit.[4]

DWA's tax will henceforth be referred to as its voter approved tax, or "VAT," to differentiate it from the County's 1% tax.

Since DWA's VAT applies to all non-exempt property within its jurisdiction, DWA's VAT applies to the possessory interests of non-Indian lessees on the allotted lands of the Tribe's reservation. (AA 259 (¶¶ 167-172.) DWA applies its VAT to the non-Indian lessees because DWA provides water supplies and service to them, as to others within its jurisdiction. (AA 257 (¶¶ 147, 149).) DWA's VAT, as applied to the non-Indian lessees, is a possessory interest tax, because the tax does not apply to the Tribe's reservation but instead applies to the non-Indian lessees' possessory interests. (AA 259 (¶ 169.)[5]

The Tribe itself does not provide water supplies and service to the plaintiff non-Indian lessees. (AA 256 (¶ 143).) Thus, the plaintiff lessees

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[4] As the plaintiffs note, other governmental entities in Riverside County also apply their own pre-Proposition 13, voter approved taxes, which are not subject to 1% limit of Proposition 13. (Pltf. Br. 22-24; AA 264 (¶ 221), 265-269 (¶¶ 231-246).)

[5] DWA's VAT, as applied to the non-Indian lessees, is calculated based on the assessed value of each lessee's right of possession of the land and improvements. (AA 232 (¶ 6), 234 (¶ 15). In calculating DWA's VAT as applied to each lessee, the County Assessor multiplies the approved tax rate for DWA's VAT and the assessed value of the lessee's possessory interest in the allotted land. (*Id*.)

within DWA's borders obtain their water supplies and service from DWA and from no other source.

In sum, DWA's VAT applies to the plaintiff non-Indian lessees, and DWA also receives a share of the County's 1% tax as applied to the lessees, in both cases because DWA provides governmental services, in the form of water supplies and service, to the lessees.

4. DWA's Provision of Water Supplies and Service to Non-Indian Lessees

We now explain more fully the nature of the governmental services, in the form of water supplies and service, that DWA provides to the non-Indian lessees, and how the revenues from the taxes compensate DWA for its costs in providing the water supplies and service.

In 1960, the voters of California approved the State Water Project ("SWP"), a major water project constructed, operated and maintained by the State of California that stores and delivers water to meet California's varied needs for agricultural, municipal, industrial and other uses. (*Metropolitan Water Dis. v. Marquardt* (1963) 59 Cal.2d 159, 170.)[6] The SWP is operated and maintained by the California Department of Water Resources ("DWR"). (AA 257 (¶ 150).)

In 1961, the year after the voters approved the SWP, the California

[6] In fact, the California Legislature authorized the SWP in 1951. (*Marquardt*, 59 Cal.2d at 170; *In re Bay Delta Cases* (2008) 43 Cal.4th 1143, 1154-1155.) Construction of the SWP did not begin, however, until the Legislature in 1959 enacted the California Water Resources Development Bond Act (Cal. Water Code § 12931), also known as the Burns-Porter Act, which authorized issuance of bonds for construction of the SWP, and the voters of California approved the issuance of bonds under the Burns-Porter Act the following year, 1960. (*Id.*; AA 257 (¶ 150).)

Legislature enacted the DWA Law, which created DWA. (Cal. Water Code App. §§ 100-1 *et seq*.) The Legislature created DWA in order that DWA would be able to obtain and deliver SWP water to the people of the Coachella Valley within its borders, and that DWA, as the water supplier, would have the financial capability of entering into a contract with DWR to participate in construction, operation, and maintenance of the SWP. (AA 257, 260 (¶¶ 150, 155, 173, 174).)

In October 1962, the year after DWA was created, DWA entered into a water supply contract with DWR, under which DWR is required to deliver SWP water to DWA. (AA 257 (¶ 151).) Under the contract, DWR is obligated to deliver up to 55,750 acre-feet ("AF") of SWP water to DWA each year. (AA 257-258 (¶¶ 155-156).) DWA is required under the contract, as are other SWP contractors under their own contracts, to pay a proportionate share of DWR's costs in constructing, operating and maintaining the SWP; DWR's costs are those in obtaining, storing and delivering SWP water, constructing and maintaining the necessary facilities, and employing a workforce to operate, maintain and administer the SWP. (AA 258 (¶ 165).) The contract also obligates DWA to use its taxing and assessment power to raise sums necessary to pay its share of SWP costs to DWR. (AA 257 (¶¶ 152-154).) DWA estimates that its annual contractual obligations to DWR under the contract are, on average, approximately $21 million. (AA 258 (¶ 165).)

DWR does not, however, directly deliver SWP water to DWA or CVWD, because SWP facilities do not extend to DWA's or CVWD's service areas. (AA 258 (¶ 158), 263 (¶ 209).) Accordingly, DWA and CVWD have entered into exchange agreements with another SWP customer, the Metropolitan Water District of Southern California ("MWD"), under which MWD delivers Colorado River water from its

Colorado River Aqueduct to DWA and CVWD, in exchange for MWD's right to receive DWA's and CVWD's annual allocation of SWP water. (AA 258 (¶¶ 159-162), 263 (¶ 210)). The water that DWA and CVWD receive through their exchange agreements with MWD is imported by MWD into the Whitewater River groundwater subbasin, and is used by DWA and CVWD to recharge and replenish the basin and to meet the needs of their customers. (AA 257 (¶¶ 147-149, 258 (¶ 159).) DWA and CVWD pump water from the Whitewater River subbasin as necessary to meet their customers' needs, including the needs of the non-Indian lessees on the Tribe's reservation. (AA 258 (¶ 159.) DWA currently operates 23,000 domestic water connections that serve roughly 106,000 people. (AA 257 (¶ 148).)

DWA utilizes the revenues from the taxes at issue in this case—both its VAT and its share of the County's 1% tax—solely to meet its obligations under its water supply contract with DWR, and for no other purpose. (AA 259 (¶¶ 168, 172).) The revenues compensate DWA for its costs in meeting its obligations under its water supply contract with DWR. (AA 258 (¶ 165).)[7] If DWA were unable to impose its VAT and receive revenues therefrom, DWA's ability to meet its contractual obligations to DWR, and its ability to receive the SWP water that it provides to the plaintiff non-Indian lessees, would be impaired.

[7] DWA's VAT, as applied to the possessory interests of non-Indian lessees on the Tribe's reservation, generated revenues of $1,286,923.87 in fiscal year ("FY") 2015-2016; $1,314,676.53 in FY 2014-2015; and $1,518,885.32 in FY 2013-2014. (AA 245 (¶ 71).) DWA's share of the County's 1% tax, as also applied to the non-Indian lessees, generated revenues of $161,158 in FY 2013/2014; $163,145.01 in FY 2014/2015; and $169,544.39 in FY 2015/16. (AA 239 (¶ 43).)

ARGUMENT

I. DESERT WATER AGENCY'S VOTER APPROVED TAX IS NOT PREEMPTED BY 25 U.S.C. SECTION 5108.

The plaintiffs argue that DWA's VAT, as well as the City's 1% tax, is preempted by 25 U.S.C. section 5108 (formerly section 465), which was adopted as section 5 of the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. § 461 *et seq*. (Pltf. Br. 30-38.) Section 5108 authorizes the Secretary of the Interior to acquire "any interest in lands" or "water rights" "for the purpose of providing land for Indians," and provides that "any lands or rights acquired pursuant to this [Indian Reorganization] Act . . . shall be taken in the name of the United States," and that "such *lands or rights* shall be exempt from State and local taxation." (Emphasis added.)

In *Herpel*, this Court held that section 5108 did not preempt the County's tax as applied to the non-Indian lessees in that case, because the Tribe's trust lands were not "acquired pursuant to" the IRA, which was enacted in 1934, but instead were acquired pursuant to the presidential executive orders of 1876 and 1877, which respectively created and expanded the Tribe's reservation. (*Herpel*, 45 Cal.App.5th at 118-122.) The plaintiffs contend that Congress in 1990 enacted a statute, 25 U.S.C. section 5126 (formerly section 5102), that extended the Tribe's trust rights, and that, as a result of the extension, the Tribe's trust rights were "acquired pursuant to" the IRA within the meaning of section 5108. (Pltf. Br. 34-36.) Therefore, they argue, section 5108 preempts DWA's VAT and the County's 1% tax. (*Id*.)

Regardless of whether the Tribe's reservation lands were "acquired pursuant to" the IRA, section 5108 does not preempt DWA's VAT, or for that matter the County's 1% tax, for a different and more fundamental reason. Section 5108, according to its terms, preempts state and local taxes

that apply to the "lands or rights" of Indians. DWA's and the County's taxes do not apply to the "lands or rights" of the Agua Caliente Tribe or its members, but instead apply to the possessory interests of non-Indian lessees on the Tribe's reservation, *i.e.*, the "right" to possession held by the non-Indian lessees. The non-Indian lessees' possessory interests are not the same as, and are entirely different from, the "lands or rights" of the Tribe and its members. As the Superior Court stated in the instant case below, "[t]he Taxes [the County's 1% tax and DWA's and CVWD's voter approved taxes] are imposed on the plaintiffs' possessory interest in reservation land, not on the land or the owner of the land." (AA 1021.) Since section 5108 preempts state and local taxes that apply to the "lands or rights" of the Indians, and since DWA's and the County's taxes do not apply to the "lands or rights" of the Tribe or its reservation and instead apply to the possessory interests of non-Indian lessees, section 5108 does not preempt DWA's and the County's taxes as applied to the plaintiff non-Indian lessees here.

The Ninth Circuit Court of Appeals and the California courts have held in several cases that state possessory interest taxes are not preempted as applied to non-Indian lessees on an Indian reservation precisely because they apply to the non-Indian lessees' possessory interests and not to the Indian tribe or its members or its reservation. (*Agua Caliente Band of Mission Indians v. Riverside County* (9th Cir. 1971) 442 F.2d 1184, 1186) (County's tax "does not purport to tax the land as such, but rather taxes the 'full cash value' of the lessee's interest in it"); *Fort Mojave Tribe v. San Bernardino County* (9th Cir. 1976) 543 F.2d 1253, 1255-1256 (same); *Confederated Tribes of Chehalis Reservation v. Thurston County* (9th Cir. 2013) 724 F.3d 1153, 1158 n. 7 (same); *Riverside County v. Palm-Ramon Development Co.* (1965) 63 Cal.2d 534, 537 (tax applies to the "full cash

value of the possessory interest in the land"); *Palm Springs Spa v. Riverside County* (1971) 18 Cal.App.3d 372, 375 (tax applies to "the leasehold interest carved from the tax exempt federally owned fee").

The plaintiffs contend that their preemption argument is supported by the Supreme Court's decision in *Mescalero Apache Tribe v. Jones* (1973) 411 U.S. 145. (Pltf. Br. 30-32.) There, the Supreme Court held, first, that section 465 (section 5108's predecessor) did *not* preempt New Mexico's gross receipts tax as applied to an off-reservation ski resort owned by an Indian tribe, because section 465 "exempts [from state taxes] lands and rights in land, not income derived from its use." (*Mescalero*, 411 U.S. at 155.) The Court also held, however, that New Mexico's use tax as applied to the ski lifts *was* preempted by section 465, because the ski lifts were permanently attached to the land and thus the tax on the ski lifts was in reality a tax on the land. (*Id*. at 158.) The Court stated that the Indian tribe's "use" of its property is among the "bundle of privileges that make up property or ownership of property," and that "a tax upon use is a tax upon the property itself," which is preempted. (*Id*. (citations and internal quote marks omitted).)

But *Mescalero*—in stating that that the New Mexico tax was preempted as applied to the tribe's "use" of its property and that such "use" is part of the "bundle of privileges" of the tribe's property—was referring to the Indian tribe's *own* use of its *own* property, namely the ski lifts, and was not referring to any property of a non-Indian on a reservation, such as a non-Indian lessee's possessory interest. (*Mescalero*, 411 U.S. at 158.) Although *Mescalero* held that the state cannot tax an Indian tribe's property or its use, *Mescalero* did not suggest that the state cannot tax the possessory interest of non-Indian lessees. On the contrary, *Mescalero* stated that "[l]essees of otherwise exempt Indian lands . . . are subject to state

taxation." (*Id*. at 157 (citing *Oklahoma Tax Comm'n v. Texas Co.* (1949) 336 U.S. 332).) Thus, *Mescalero* made clear that the state can tax the non-Indian lessees' possessory interests even though the state cannot tax the property of the Indians themselves. Further, *Mescalero* stated that the Supreme Court "has repeatedly said that tax exemptions are not granted by implication" (*Mescalero,* 411 U.S. at 156), further indicating that the non-Indian lessees' possessory interests are not exempt from state taxation by implication. In short, *Mescalero* plainly distinguished between the Indian tribe's rights and lands and a non-Indian lessee's possessory interest, and held that state taxes are preempted as applied to the former but not the latter. *Mescalero* contradicts the plaintiffs' preemption argument rather than supports it.

The plaintiffs' analysis of *Mescalero* is also contradicted by the Ninth Circuit's analysis of *Mescalero* and section 465 in *Confederated Tribes of Chehalis Reservation v. Thurston County* (9th Cir. 2013) 724 F.3d 1153. There, the Ninth Circuit, albeit in dictum, differentiated between the state use tax on tribal trust lands invalidated in *Mescalero* and a state possessory interest tax as applied to non-Indians, and held that section 465, as interpreted in *Mescalero*, preempts the former tax but not the latter tax. The Ninth Circuit stated:

> Where a state or local government assesses a tax on land or improvements covered by § 465, we are bound by § 465 and *Mescalero* to invalidate such taxes. [Citation.] This is not so, however, when state or local governments impose taxes on interests other than the "lands or rights" covered by § 465. 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. 442 F.2d at 1186.

(*Chehalis*, 724 F.3d at 1158 n. 7.) Thus, the Ninth Circuit stated that a state

tax on the "lands or rights" of Indians would be preempted by section 465, but that a state tax on a non-Indian lessee's possessory interest is not preempted. *Chehalis* properly analyzed *Mescalero* and section 465, and its analysis should be followed here.

The plaintiffs also argue that their preemption argument is supported by the Eleventh Circuit Court of Appeals' decision in *Seminole Tribe v. Stranburg* (11th Cir. 2015) 799 F.3d 1324, 1335. (Pltf. Br. 32.) There, the Eleventh Circuit held that a Florida rental tax was preempted as applied to rental payments made by non-Indian lessees to the lessor Indian tribe. In *Herpel*, this Court properly distinguished *Seminole Tribe* on grounds that the Florida tax was "a business license tax that, unlike the County's tax, closely resembled the preempted tax in *Ramah* [*Navajo School Board, Inc. v. Bureau of Revenue of New Mexico* (1982) 458 U.S. 832]." (*Herpel*, 45 Cal.App.5th at 115.) *Seminole Tribe* is also distinguishable on other grounds. The Florida rental tax invalided in *Seminole Tribe* was applied to rental payments made by the lessees to the lessor Indian tribe (*Seminole Tribe*, 799 F.3d at 1328), and thus the tax was levied directly on income received by the tribe, unlike the taxes challenged here. Also unlike the instant case, the Seminole Tribe was responsible for collecting the Florida rental tax and remitting it to the state, and the Tribe was liable for paying the tax if the lessees failed to pay it (*id*. at 1326); here, by contrast, the Tribe is not responsible for collecting DWA's tax and remitting it to DWA, and is not liable for the tax if the lessees fail to pay it. Thus, *Seminole Tribe* is distinguishable on several grounds, in addition to the grounds cited in *Herpel*.

II. DESERT WATER AGENCY'S VOTER APPROVED TAX IS VALID AND NOT PREEMPTED UNDER THE *BRACKER* BALANCING TEST.

A. Under the *Bracker* Balancing Test, Whether State Laws Apply to Non-Indians on Indian Reservations Depends on the Balance of State, Federal and Tribal Interests.

Although the Supreme Court in an earlier age held that Indian reservations are separate enclaves in which state laws have "no force" (*Worcester v. Georgia* (1832) 31 U.S. 515, 561), the Supreme Court in the modern age has "departed" from this earlier view. (*White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, 141.) Under the Supreme Court's modern view, state laws may apply on Indian reservations unless federal law preempts their application, or the state laws infringe on the right of reservation Indians to make their own laws and be ruled by them. (*Bracker*, 448 U.S. at 142; *Rice v. Rehner* (1983) 463 U.S. 713, 718; *McClanahan v. Arizona State Tax Comm'n* (1973) 411 U.S. 164, 171-172; *Mescalero Apache Tribe v. Jones* (1973) 411 U.S. 145, 146; *Organized Village of Kake v. Egan* (1962) 369 U.S. 60, 75.) "[E]ven on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." (*Rice*, 463 U.S. at 718; *Mescalero*, 411 U.S. at 148; *Kake*, 369 U.S. at 75.) Applying these principles, the Supreme Court has held that state laws generally do not apply to Indians on their reservations, because the state's regulatory interest is likely to be minimal and the federal interest is likely to be at its strongest. (*Bracker*, 448 U.S. at 144.)

Regarding the conduct of *non-Indians* on Indian reservations, however, the Supreme Court has adopted a different and more "flexible" preemption analysis, one that is "sensitive to the particular facts and circumstances involved." (*Cotton Petroleum Corp. v. New Mexico* (1989)

490 U.S. 163, 176.) Under this more flexible analysis, a court, in determining whether state laws apply to non-Indians on an Indian reservation, 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.) In short, the Supreme Court has adopted a balancing test—generally known as the *Bracker* balancing test—in determining whether state laws apply to non-Indians on Indian reservations, which requires consideration of state, federal and tribal interests. Under this balancing test, the Supreme Court has generally upheld state laws as applied to non-Indians on Indian reservations. As the Court stated in *Cotton Petroleum*, "[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.)

In *Herpel*, this Court applied the *Bracker* balancing test in holding that Riverside County's possessory interest tax was not preempted as applied to the non-Indian lessees on allotted lands of the Agua Caliente Tribe's reservation in that case. (*Herpel,* 45 Cal.App.5th at 108-116.) The Court held that the *federal interest* did not support preemption, because the relevant federal statute, the Long-Term Leasing Act (69 Stat. 539 (1955)), sought the removal of restrictions on Indian land but was not concerned with state taxation (*Herpel*, 45 Cal.App.5th at 109-110); that the *tribal interest* did not support preemption, because the plaintiffs failed to demonstrate that the County's possessory interest tax "significantly and negatively" affects the Tribe's interests (*id.* at 112); and that the *state interest* weighed heavily against preemption, because the County provided "virtually all essential governmental services in connection with" the

allotted lands and tribal trust lands, and such services were provided by the County and not by the Tribe. (*Id*. at 114.)

Notwithstanding this Court's decision in *Herpel*, the plaintiffs in the instant case—who like the plaintiffs in *Herpel* are non-Indians who have leased allotted lands on the Tribe's reservation—argue that the possessory interest taxes in this case—the County's 1% tax and DWA's and CVWD's VATs—are preempted under the *Bracker* balancing test, because, they contend, the federal and tribal interests weigh strongly in favor of preemption and the state interest that weighs against preemption is weak. (Pltf. Br. 39-63.)

As we now argue, DWA's VAT, as applied to the plaintiff non-Indian lessees, is not preempted under the *Bracker* balancing test, because the balance of state, federal and tribal interests weighs against preemption of DWA's VAT. The *state interest* weighs strongly against preemption, because DWA provides essential governmental services and functions, in the form of water supplies and service, to the plaintiffs. The *federal interest* does not support preemption, because, as this Court held in *Herpel*, the applicable federal statutes and regulations governing leasing of Indian lands evince no intent to preempt state and local possessory interest taxes. The *tribal interest* does not support preemption, because the legal incidence and economic burden of DWA's VAT falls on the non-Indian lessees and not on the Tribe or its reservation. Thus, just as *Herpel* held that the County's tax was not preempted under the *Bracker* balancing test, DWA's VAT is not preempted under the *Bracker* balancing test here.

B. The State Interest Weighs Strongly Against Preemption.

The main factor that applies in determining the state interest under the *Bracker* balancing test is whether the state provides services or

functions to the non-Indians on an Indian reservation that justify the imposition of the state tax against them. (*Cotton Petroleum*, 490 U.S. at 183-187; *Bracker*, 448 U.S. at 148-150; *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico* (1982) 458 U.S. 832, 843; *Herpel*, 45 Cal.App.5th at 102, 106, 113-116.) In *Bracker*, the Supreme Court struck down Arizona's motor vehicle and fuel taxes as applied to a non-Indian company that harvested timber on an Indian reservation, because the Court was "unable to discern a responsibility of [Arizona] service that justifies the assertion of" the taxes, holding instead that "this is not a case in which the State seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall." (*Bracker,* 448 U.S. at 150.) Similarly, in *Ramah*, the Supreme Court struck down a New Mexico tax as applied to gross receipts of a non-Indian construction company that built a school for Indian children on a reservation, because New Mexico asserted no "specific, legitimate regulatory interest to justify the imposition of the gross receipts tax." (*Ramah*, 458 U.S. at 843.) In *Cotton Petroleum*, on the other hand, the Supreme Court upheld a New Mexico severance tax as applied to a non-Indian lessee who produced oil and gas on an Indian reservation, because "New Mexico provide[d] substantial services to both the Jicarilla Tribe and Cotton costing the State approximately $3 million per year." (*Cotton Petroleum*, 490 U.S. at 185 (citation and internal quote marks omitted).) Indeed, *Cotton Petroleum* distinguished *Bracker* and *Ramah* on grounds that the states in those cases—unlike the state in *Cotton Petroleum*—"had nothing to do with the on-reservation activity, save tax it." (*Id*.)

In *Herpel*, this Court held that the case before it—which involved whether Riverside County's possessory interest tax was preempted as applied to non-Indian lessees on the Agua Caliente Tribe's reservation—

was much more like *Cotton Petroleum* than *Bracker* or *Ramah* in terms of the state interest, because "virtually all essential governmental services in connection with Allotted Land and Tribal Trust Land are provided by the County, not the Tribe." (*Herpel*, 45 Cal.App.5th at 114.) Indeed, *Herpel* stated that—because of the similarity between *Cotton Petroleum* and the case before it—"*Cotton Petroleum* is controlling here." (*Herpel*, 45 Cal.App.5th at 108.) Thus, *Herpel* held that since the County provided essential governmental services to the plaintiff non-Indian lessees, the state interest weighed heavily in favor of the County's right to apply its possessory interest tax against them.

Similarly, the state interest here weighs heavily in favor of DWA's right to apply its VAT to the plaintiff non-Indian lessees here. As explained earlier, DWA provides essential governmental functions and services, in the form of water supplies and service, to the plaintiff lessees. (*See* pages 19-21, *supra*; AA 257 (¶¶ 147-149).) Specifically, the Legislature created DWA in 1961, shortly after the State Water Project ("SWP) was approved, for the purpose of obtaining and providing SWP water to the people of the Coachella Valley within its borders. (AA 257 (¶ 150).) DWA acquires the SWP water pursuant to its water supply contract with the California Department of Water Resources ("DWR"), which operates the SWP. (AA 257 (¶ 151).) Under the water supply contract, DWA, like other SWP contractors, is obligated to pay a proportionate share of DWR's costs in constructing, operating and maintaining the SWP. (AA 258 (¶ 165).) The contract also obligates DWA to use its taxing and assessment power to raise sums necessary to meet its contractual obligations to DWR. (AA 257 (¶¶ 152-154).)

Under its governing law, DWA is authorized to apply an ad valorem tax against all non-exempt taxable property within its jurisdiction. (Cal.

Water Code §§ 101-25, -27.) The revenues from the tax compensate DWA for its costs in obtaining SWP water that it provides to people within its jurisdiction. (AA 259 (¶¶ 168, 172.) DWA uses the revenues from its VAT, as well as its share of revenues from the County's 1% tax, solely to meet its obligations under its water supply contract with DWR, and for no other purpose. (AA 259 (¶¶ 168, 172).) If DWA were unable to impose its VAT and obtain revenues therefrom, DWA would be unable to meet its contractual obligations to DWR, and thus unable to obtain the SWP water that DWA provides to its customers, which include the plaintiff lessees. DWA's VAT as applied to the non-Indian lessees is a possessory interest tax, because the tax applies to the lessees' possessory interests and not to the Tribe or its reservation. (AA 257 (¶ 149).) While the Tribe and its reservation may be exempt from state taxes (25 U.S.C. § 5108), the non-Indian lessees' possessory interests are not.

The Agua Caliente Tribe itself does not provide water supplies or service to the non-Indian lessees. (AA 256 (¶ 143).) Thus, the plaintiff lessees rely on DWA to provide them with the necessary water to meet their needs.

As a simple matter of fairness and equity, the plaintiff non-Indian lessees should have the same obligation as other taxpayers within DWA's jurisdiction to pay their fair share of DWA's VAT, because the plaintiff lessees receive the same benefit of water supplies and service that other taxpayers receive. If the plaintiffs were not required to pay their share of DWA's VAT, they would get a free ride at the expense of other taxpayers, by receiving the same benefit of water supplies and service that others receive but without having to pay their fair share of the VAT that compensates DWA for providing the water supplies and service.

The plaintiffs contend that DWA's VAT is preempted because it does not meet several conditions that the plaintiffs contend apply to the VAT—namely that the VAT is not "narrowly tailored" to the leasing of Indian land; that the VAT serves "community-wide interests, not interests tied specifically to the leased land"; that the VAT revenues make up only a small percentage of DWA's budget; and that DWA could impose a "usage fee" rather than "taxing the leaseholds." (Pltf. Br. 61.) On the contrary, the U.S. Supreme Court has never suggested, in *Cotton Petroleum*, *Bracker* and other cases cited above—nor did this Court in *Herpel* suggest—that a state's right to apply its tax to non-Indians on an Indian reservation is limited by the conditions claimed by the plaintiffs. Rather, *Cotton Petroleum* held—in a passage cited by this Court in *Herpel*—that the state's right to apply its tax to non-Indians "must ordinarily be justified by functions or services performed by the State in connection with the on-reservation activity." (*Cotton Petroleum*, 462 U.S. at 336; *Herpel*, 45 Cal.App.5th at 113.) Thus, if DWA provides functions and services to the non-Indians that justify its tax—as DWA does—DWA has the right to apply its tax to the non-Indians regardless of whether its tax meets the additional conditions claimed by the plaintiffs. The plaintiffs' claim that DWA's VAT must meet the additional conditions claimed by the plaintiffs is plainly inconsistent with *Cotton Petroleum* and *Herpel*.

There is no logical or principled basis for requiring DWA to meet the additional conditions cited by the plaintiff lessees as a prerequisite for DWA's right to apply its tax to them. Indeed, it is absurd to suggest that DWA cannot apply its tax to the plaintiffs because DWA provides the same water supplies and service to others in the community, or because the tax is not limited to leasing of the Indian lands; the plaintiffs are not entitled to an exemption from DWA's tax simply because DWA provides the water

supplies and service to all who need it rather than solely to the plaintiffs, or because the water supplies and service are provided to non-tribal lands as well as lessees on the Tribe's reservation. Nor is it relevant for *Bracker* balancing purposes whether DWA's tax is in the form of a tax rather than a usage fee, or because of the budgetary impacts on DWA; neither relates to whether the state provides functions and services to the non-Indian lessees, or the nature of the functions and services provided. The *Bracker* balancing test, as applied in *Cotton Petroleum* and *Herpel*, looks to whether DWA provides services and functions to the plaintiff non-Indian lessees that justify the tax, as DWA plainly does here.[8]

Since DWA provides important governmental benefits to the plaintiff non-Indian lessees, in the form of water supplies and service, the state interest as relevant under the *Bracker* balancing test weighs heavily in favor of DWA's right to apply its VAT to the plaintiff lessees, and against preemption of DWA's VAT as so applied.

C. The Federal Interest Does Not Support Preemption.

The plaintiffs argue that the federal interest supports preemption of DWA's VAT because the Indian Long-Term Leasing Act (69 Stat. 539 (1955), 25 U.S.C. § 415), and accompanying regulations "comprehensively regulate" the leasing of Indian lands, thus leaving "no room" for state laws

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[8] In support of their claim that DWA's VAT is preempted because it does not meet the conditions cited by the plaintiffs, the plaintiffs cite the Wisconsin district court's decision in *Oneida Tribe v. Village of Hobart* (E.D. Wis. 2012) 891 F.Supp.2d 1058. (Pltf. Br. 61.) In *Oneida*, the district court held that a village's charge for a storm water facility could not be imposed against an Indian tribe because the charge was a tax rather than a fee, and a tax cannot be applied against an Indian tribe. (*Oneida*, 891 F.2d at 1064-1067.) *Oneida* is inapposite because DWA's tax does not apply to an Indian tribe, as in *Oneida*, but instead applies to non-Indian lessees.

as applied to the lands. (Pltf. Br. 51-55.) The plaintiffs also argue that "substantial deference" should be accorded to a leasing regulation adopted by the Secretary of the Interior, 25 C.F.R. section 162.017(c), which they contend preempts DWA's VAT; this regulation provides that "[s]ubject only to applicable Federal law" state and local taxes may not be applied to "the leasehold or possessory interest" on an Indian reservation. (Pltf. Br. 50-51.)

In *Herpel*, this Court held that the Indian Long-Term Leasing Act and accompanying regulations did not demonstrate a strong federal interest in precluding state taxation of non-Indian possessory interests on Indian reservations. (*Herpel,* 45 Cal.App.5th at 108-111.) *Herpel* held that, while the statute and regulations are "extensive," "nothing in the text of the Long-Term Leasing Act 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.) *Herpel* stated that the Indian Long-Term Leasing Act is similar to the Indian Mineral Leasing Act of 1938 (25 U.S.C. § 396a *et seq*.) that was before the Supreme Court in *Cotton Petroleum*, in that both acts "sought nothing more than the removal of restrictions imposed solely on Indian land" and neither act "was . . . concerned with state taxation." (*Id*. at 109-110.) *Herpel* concluded that—since *Cotton Petroleum* held that the Indian Mineral Leasing Act did not demonstrate federal preemption—neither does the Indian Long-Term Leasing Act. (*Id*. at 110-111.) Thus, the Indian Long-Term Leasing Act and accompanying regulations do not support the plaintiffs' argument that DWA's tax is preempted as applied to them.

Herpel also held that section 162.017(c) of the leasing regulations, which purports to preempt state taxes as applied to "the leasehold or possessory interest" on an Indian reservation, does not in fact have a

preemptive effect. (*Herpe*l, 45 Cal.App.5th at 116-118.) *Herpel* held that the regulation contains an important caveat—that it is subject to "applicable Federal law"—and that "applicable Federal law" includes the *Bracker* balancing test; therefore, if a state tax is valid under the *Bracker* balancing test, as *Herpel* held that the County's tax was, the tax is not preempted by the regulation. (*Id.*) In other words, because of the "applicable Federal law" caveat, section 162.017(c) is subject to whatever federal law otherwise applies in determining whether a state tax is preempted, and the provision itself has no independent preemptive effect. *Herpel* is fully consistent with the Ninth Circuit's recent decision holding that—because of the "applicable Federal law" caveat—section 162.017(c) "does not purport to change existing law." (*Desert Water Agency v. U.S. Dep't of Interior* (9th Cir. 2017) 849 F.3d 1250, 1254.) *Herpel* also held that section 162.017(c) was not otherwise entitled to deference, both because the language of the regulation is "unambiguous," and because the regulation considered only federal and tribal interests and did not consider the state interest, as required under the *Bracker* balancing test. (*Herpel*, 45 Cal.App.5th at 117.)

The fact that the federal government has adopted regulations that extensively regulate the leading of Indian lands does not, itself, suggest that state taxes as applied to non-Indians on the leased lands are preempted, because there is no conflict between the substance of the federal regulations and the state taxes. In *Cotton Petroleum*, the Supreme Court held that even though the Indian Mineral Leasing Act of 1938 extensively regulates the production of oil and gas on Indian reservations, New Mexico's severance tax was valid and not preempted as applied to a non-Indian lessee's production of oil and gas on the reservation, because the state provided "substantial services" both to the non-Indian producer and the tribe. (*Cotton Petroleum*, 490 U.S. at 185.) Similarly, the Ninth Circuit has held

that the fact that the federal government has adopted regulations that extensively regulate leasing of Indian reserved lands does not, itself, indicate that state taxes are preempted as applied to non-Indians. (*Gila River Indian Community v. Waddell*, 91 F.3d 1232, 1237 (9th Cir. 1996) (rejecting Indian tribe's argument that "regulations governing such leasing [of Indian lands] constitute a comprehensive regulatory scheme with preemptive effect on state laws," and stating that the tribe's argument that "the mere existence of federal oversight over leasing of Indian lands preempts a state tax is without support"); *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107, 1112 (9th Cir. 1997) (holding that "regulation of the leases by the Secretary of the Interior . . . [was] not enough to outweigh" the factors favoring permitting the state taxes).) Thus, the fact that the federal government has adopted regulations that extensively regulate the leasing of Indian reservation lands does not support the plaintiffs' contention that DWA's VAT is preempted as applied to them.

The plaintiffs contend that their preemption argument based on the federal leasing regulations is supported by the Ninth Circuit's decision in *Segundo v. City of Rancho Mirage* (9th Cir. 1987) 813 F.2d 1387. (Pltf. Br. 55.) There, the Ninth Circuit held that the federal leasing regulations preempted a city's zoning ordinance as applied to a mobile home park operated by a non-Indian lessee on an Indian reservation. In *Herpel*, this Court distinguished *Segundo* on grounds that *Segundo* "did not consider the Leasing Regulations in the context of the Long-Term Leasing Act or the congressional policy behind it." (*Herpel*, 45 Cal.App.5th at 111.) *Segundo* is also distinguishable because the city's zoning ordinance regulated the non-Indian lessees' use of the Indian tribe's land, and thus regulated the tribe's reserved land itself. In short, *Segundo* involved a local land use regulation that regulated the tribe's land and its use, and did not involve a

state or local tax that applied to a non-Indian's possessory interest. Indeed, *Segundo* distinguished the case from a tax case on that very ground, stating that "[u]nlike the field of taxation, where the laws of both the State and Tribe may be enforced simultaneously," the city's zoning regulation nullified the tribe's authority to "regulate the use of its lands." (*Segundo*, 813 F.2d at 1393.) Thus, while *Segundo* held that the city could not regulate the use of the tribe's land, *Segundo* recognized that a state or local tax that applied to the possessory interests of non-Indian lessees on the reservation would be valid.

Thus, the federal interest as relevant under the *Bracker* balancing test does not support preemption of DWA's VAT as applied to the plaintiff non-Indian lessees.

D. The Tribal Interest Does Not Support Preemption.

1. The Primary Factor That Applies in Determining the Tribal Interest Is the "Legal Incidence" of the State Tax.

The primary factor that applies in determining the tribal interest under the *Bracker* balancing test is whether the legal incidence of the state tax falls on Indians or non-Indians. (*Oklahoma Tax Comm'n v. Chickasaw Nation* (1995) 515 U.S. 450, 458 ("*Chickasaw*"); *Washington v. Confederated Tribes of the Colville Reservation* (1980) 447 U.S. 134, 150-151 ("*Colville*"); *Wagnon v. Prairie Band of Potawatomi Nation* (2005) 546 U.S. 95, 102.) As the Supreme Court stated in *Chickasaw*, the "initial and frequently dispositive question" in Indian tax cases is "who bears the legal incidence of a tax." (*Chickasaw*, 515 U.S. at 458.) In *Chickasaw*, the Supreme Court held that a state motor fuel tax was preempted as applied to sales by Indians to non-Indians on a reservation, because the "legal incidence" of the tax fell on the Indians. (*Id*. at 458-459, 461-462.) In

Colville, on the other hand, the Supreme Court held that a state sales tax was *not* preempted as applied to sales by Indians to non-Indians purchasers on a reservation, "because [the tax's] legal incidence fell on the non-Indian purchaser." (*Colville,* 447 U.S. at 151.)

In a non-Indian case, the Supreme Court applied the same factor—of who bears the "legal incidence" of the tax—in upholding California's possessory interest tax as applied to federal employees in housing that the federal government owned and provided to them as part of their compensation. (*United States v. Fresno County* (1977) 429 U.S. 452, 464.) The Court held that California's possessory interest tax was valid as applied to the federal employees because the "legal incidence" of the tax fell on the federal employees, and did not fall not on the federal government or its property; as the Court stated, "[t]he 'legal incidence' of the tax . . . falls neither on the Federal Government nor on federal property," and "is imposed solely on private citizens who work for the Federal Government." (*Fresno*, 429 U.S. at 464.) "The tax can be invalidated . . . only if it discriminates against the Forest Service or other federal employees, which it does not do." (*Id*.)

Also applying the "legal incidence" factor, the California courts have upheld Riverside County's possessory interest tax as applied to non-Indian lessees on the Agua Caliente Tribe's reservation, because the legal incidence of the tax falls on the non-Indian lessees and not on the Tribe or its reserved land. In *Riverside County v. Palm-Ramon Development Co.* (1965) 63 Cal.2d 534, 537, 540 ("*Palm-Ramon*"), the California Supreme Court held that Riverside County's possessory interest tax applied to the "full cash value" of the lessees' "possessory interest in the land," and thus was valid as so applied. In *Palm Springs Spa v. Riverside County* (1971) 18 Cal.App.3d 372, 375 ("*Palm Springs Spa*"), the California Court of

Appeal, following *Palm-Ramon*, held that the County's possessory interest tax was not preempted as applied to the non-Indian lessees, because the tax applied to "the leasehold interest carved from the tax exempt federally owned fee." The Court stated that the County's tax does not apply to "the underlying fee interest held in trust by the United States," and thus "cannot form an encumbrance on the underlying fee interest of the United States." (*Id.* at 375-376.)

Similarly, the Ninth Circuit Court of Appeals has upheld California's possessory interest tax as applied to non-Indian lessees on Indian reservations in California—including, notably, Riverside County's possessory interest tax as applied to non-Indian lessees on the Agua Caliente Tribe's reservation—because the legal incidence of the tax falls on possessory interests of the non-Indian lessees and not on the Indian tribes or their reserved lands. (*Agua Caliente Band of Mission Indians v. Riverside County* (9th Cir. 1971) 442 F.2d 1184, 1186 ("*Agua Caliente I*"); *Fort Mojave Tribe v. San Bernardino County* (9th Cir. 1976) 543 F.2d 1253, 1255-1256 ("*Fort Mojave*"); *Agua Caliente Band of Cahuilla Indians v. Riverside County* (9th Cir. 2019) 749 Fed. App'x 650 ("*Agua Caliente II*"); *see Confederated Tribes of Chehalis Reservation v. Thurston County* (9th Cir. 2013) 724 F.3d 1153, 1158 n. 7 ("*Chehalis*") (dictum).) In *Agua Caliente I,* the Ninth Circuit held that Riverside County's tax is not preempted as applied to non-Indian lessees on the Tribe's reservation because the tax "does not purport to tax the land as such, but rather taxes the 'full cash value' of the lessee's interest in it." (*Agua Caliente I*, 442 F.2d at 1186 (quoting *Palm-Ramon*, 63 Cal.2d at 537); *see also Chehalis*, 724 F.3d at 1158 n. 7 (citing and quoting *Agua Caliente I*, 442 F.2d at 1186.) In *Fort Mojave*, the Ninth Circuit held that since the "legal incidence" of San Bernardino County's possessory interest tax "clearly falls

on the lessee," the lessor Indian tribe "will never be personally liable for any delinquent taxes arising under this taxing statute," and thus "there cannot be a direct encumbrance on the lessor's reversionary interest." (*Fort Mojave*, 543 F.2d at 1256.)[9]

The plaintiffs contend that the Ninth Circuit and California decisions cited above are inapposite because they were decided before *Bracker* or did not apply a *Bracker* analysis. (Pltf. Br. 62.) On the contrary, the Ninth Circuit in *Chehalis*—a post-*Bracker* case—stated that "[e]ven prior to *Bracker*, we applied a similar mode of analysis in holding that possessory interest taxes on 'non-Indian lessees of property held in trust by the United States Government for reservation Indians' was not per se preempted," and in support of the statement the Ninth Circuit cited its decisions in *Agua Caliente I* and *Fort Mojave*. (*Chehalis*, 724 F.3d at 1158.) *Chehalis* made clear that the Ninth Circuit has applied a *Bracker*-like analysis in upholding California's possessory interest tax as applied to non-Indian lessees on Indian reservations, including Riverside County's possessory interest tax as applied to non-Indian lessees on the Agua Caliente Tribe's reservation.

Thus, the overwhelming weight of federal and state authority is that state possessory interest taxes are not preempted as applied to non-Indian lessees on Indian reservations, because the legal incidence of the taxes falls

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[9] The Ninth Circuit has also applied the "legal incidence" factor in upholding state taxes other than possessory interest taxes as applied to non-Indians on Indian reservations. (*Salt River Pima-Maricopa Indian Community v. Arizona* (9th Cir. 1995) 50 F.3d 734, 737 (state sales tax valid as applied to non-Indian seller of goods to non-Indians on an Indian reservation, because "legal incidence" of tax fell on non-Indian sellers); *Yavapai-Prescott Indian Tribe v. Scott* (9th Cir. 1997) 117 F.3d 1107, 1113 (state tax on hotel rentals and food/beverage sales valid as applied to non-Indian lessees on an Indian reservation, because "legal incidence" of tax fell on non-Indian lessees).)

on the non-Indian lessees and not on the Indian tribe or its reserved lands.

2. The "Legal Incidence" of DWA's VAT Falls on Non-Indian Lessees and Not on the Tribe or Its Reservation.

The legal incidence of DWA's VAT falls on the plaintiff non-Indian lessees and not on the Tribe or its reserved lands. Under California law, a possessory interest tax, as applied to non-Indian lessees on an Indian reservation, applies to the "full cash value" of the lessees' possessory interests. (Cal. Rev. & Tax Code § 110.1; *Agua Caliente I*, 442 F.2d at 1186; *Chehalis*, 724 F.3d at 1158 n. 7.) DWA's VAT, as applied to the plaintiffs here, applies to their possessory interests. Specifically, the tax applies to "the ownership of taxable real property and possessory interests in tax-exempt property, including non-Indian lessees' possessory interests in Allotted Land, within DWA's boundaries." (AA 259 (¶ 169).) Since DWA's tax applies to the plaintiff lessees' possessory interests, the tax does not apply to the lessor Tribe or its reserved lands. If a lessee fails to pay DWA's tax, the lessor Tribe is not responsible for paying it, because the tax applies to the non-Indian lessee and not the lessor Tribe. (AA 252 (¶ 114).) DWA's tax does not serve as an encumbrance or lien on the Tribe's reservation lands if the lessee fails to pay the tax. (*Id.*)

Since the legal incidence of DWA's VAT falls on the non-Indian lessees and not on the Tribe or its reserved lands, the tribal interest as relevant under the *Bracker* balancing test does not support preemption of DWA's tax.

3. The "Economic Burden" of DWA's VAT Does Not Fall on the Tribe.

The plaintiffs contend that—even though the legal incidence of the County's and DWA's taxes may fall on non-Indians—the economic burden

of the taxes falls on the Tribe and thus the taxes are preempted. (Pltf. Br. 44-48.) They argue that—if the County's and DWA's taxes did not apply to the non-Indian lessees' possessory interests—the Tribe would apply its own tax on their possessory interests, and has refrained from doing so to avoid double taxation of the lessees; thus, they argue, the County's and DWA's taxes cause the Tribe to suffer a potential loss of tribal revenues. (*Id.*)

The Supreme Court has held that—even though the "legal incidence" of a state tax may fall on non-Indians—the tax nonetheless may be preempted if its "economic burden" falls on the Indians (*Ramah,* 458 U.S. at 853-854), but the Court has also held that the tax is not preempted unless its economic burden on the Indians is "substantial" and not merely "indirect" or "marginal." (*Cotton Petroleum*, 490 U.S. at 186-187.) In fact, DWA's VAT does not cause the Tribe to suffer an economic burden—much less a "substantial" and not merely "indirect" or "marginal" economic burden—for several reasons.

First, this Court in *Herpel* held that the "economic burden" of Riverside County's possessory interest tax did not fall on the Tribe because the non-Indian lessee "is responsible for paying the possessory interest tax" and the County has "no recourse against the lessor non-payment" of the tax." (*Herpel*, 45 Cal.App.5th at 112.) Similarly here, the burden of DWA's VAT does not fall on the Tribe, because the non-Indian lessees—not the Tribe—are responsible for paying DWA's VAT, and DWA has no recourse against the Tribe if the lessees fail to pay the tax. In *Herpel*, this Court held that the plaintiff non-Indian lessees in that case had failed to produce evidence showing that the County's tax "significantly and negatively affects" the Tribe's interest. (*Herpel*, 45 Cal.App.5th at 111-113.) Similarly here, the plaintiffs here have failed to produce evidence

showing that DWA's VAT causes the Tribe to suffer significant and negative effects. On the contrary, the Tribe benefits from DWA's provision of water supplies and service to the non-Indian lessees; since DWA provides water supplies and service to them, the lessees have the benefit of water for their leased lands, and the Tribe is relieved from the responsibility of having to provide water for the leased lands.

Second, even if *arguendo* DWA's VAT were held to be preempted, there would be no basis for the Tribe to impose its own tax to replace DWA's VAT. DWA imposes its VAT against the plaintiff lessees to compensate DWA for its costs in obtaining SWP water that DWA provides to the lessees. The plaintiffs have produced no evidence, however, showing that the Tribe has the facility, capability or intention to provide water to the lessees if DWA did not provide the water—and if the Tribe fails to provide the water to the lessees, there would be no basis for the Tribe to apply a tax against them. Although the Tribe has adopted a possessory interest tax that it holds in abeyance, the Tribe has not offered any corresponding service that would justify imposing a possessory interest tax. The plaintiffs' theoretical assumption that the Tribe *might* provide the water service that DWA currently provides *if* DWA's tax were held to be preempted, is pure speculation unsupported by any evidence.

Third, both the Supreme Court and Ninth Circuit have held that state taxes otherwise valid as applied to non-Indians on Indian reservations are not preempted simply because the taxes may have the indirect effect of reducing tribal revenues by discouraging Indian tribes from applying their own taxes. (*Cotton Petroleum*, 490 U.S. at 186-187 (fact that state tax may have "marginal effect" on tribe's ability to "increase its tax rate" is "simply too indirect and too insubstantial" to support tribe's preemption claim); *Washington v. Confederated Tribes of the Colville Reservation* (1980) 447

U.S. 134, 156 (state does not infringe on tribal sovereignty by imposing taxes that "deprive the Tribes of revenues which they are currently receiving"); *Gila River Indian Community v. Waddell* (9th Cir. 1996) 91 F.3d 1232, 1239 ("[T]he mere fact that a tax upon a non-Indian may ultimately have an economic impact on a tribe is not sufficient to defeat the tax"); *Squaxin Island Tribe v. Washington* (9th Cir. 1986) 781 F.2d 715, 720 (state tax or regulation is not invalid "merely because it erodes a tribe's revenues," even though the tax "substantially impairs the tribal government's ability to sustain itself and its programs"); *Crow Tribe v. Montana* (9th Cir. 1981) 650 F.2d 1104, 1116 (same); *White Mountain Apache Tribe v. Arizona* (9th Cir. 1981) 649 F.2d 1274, 1282 (tribal interest in obtaining revenues "weighs only lightly in the preemption scales, for the Tribes have no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all"); *Fort Mojave Tribe v. San Bernardino County* (9th Cir. 1976) 543 F.2d 1253, 1258; *Chemehuevi Indian Tribe v. California State Board of Equalization* (9th Cir. 1986) 800 F.2d 1446, 1449 (rejecting tribe's argument that imposition of state tax on non-Indians "will deprive it [the tribe] of badly needed income," because "we have repeatedly held, as has the Supreme Court, that reduction of tribal revenues does not invalidate a state tax.").) As the Ninth Circuit stated in *Fort Mojave*:

> The assertion that "double taxation," resulting from the imposition of a tax both by the county and the tribe, impairs the ability of the tribe to levy its tax is not persuasive. There is no improper double taxation here at all, for the taxes are being imposed by two different and distinct taxing authorities. The tribe faces the same problem as other taxing agencies confront when they seek to impose a tax in an area already taxed by another entity having taxing power. We hold that the uncertain economic burden here imposed on the tribe's ability to levy a tax does not interfere with their right of self-government.

Fort Mojave, 543 F.2d at 1258. Thus, it is immaterial for preemption purposes that the Agua Caliente Tribe may have refrained from applying its own possessory interest tax because the County and DWA apply their own taxes. The Tribe has the right to apply its own tax, and has simply chosen not to do so.

The plaintiffs cite the testimony of their expert witness, Eric Henson, who testified, in the plaintiffs' words, that the County's tax "prevent[s] the Agua Caliente from imposing its own possessory interest tax and generating revenue from its land and discourage[s] the Tribe from offering additional services," and thus "interferes with the Tribe's sovereignty and deprives the Tribe of valuable economic development tools." (Pltf. Br. 27-28.) Mr. Henson's testimony is not only speculative and conclusory but also irrelevant, because, as explained above, state taxes are not preempted as applied to non-Indians on Indian reservations simply because they may have the indirect effect of reducing tribal revenues.

The plaintiffs contend that their economic burden argument is supported by the Ninth Circuit decisions in *Hoopa Valley Tribe v. Nevins* (9th Cir. 1989) 881 F.2d 647, and *Crow Tribe v. State of Montana* (9th Cir. 1981) 650 F.2d 1104 ("*Crow II*"), which, the plaintiffs state, held that the tribal interests in those cases weighed heavily in support of preemption of state taxes as applied to non-Indians on the tribes' reservations. (Pltf. Br. 40, 43, 56, 61.) In *Herpel*, however, this Court properly distinguished *Hoopa Valley* and *Crow II*—as well as the Eleventh Circuit's decision in *Seminole Tribe v. Florida* (11th Cir. 2015) 799 F.3d 1324, discussed earlier (*see* page 26, *supra*)—on grounds that the state taxes in those cases were "taxes on business activity only," and were not related to "the activity that the possessory interest tax reaches," which is "substantially related to the

many services the County provides." (*Herpel*, 45 Cal.App.5th at 115-116.)[10]

The plaintiffs also contend that the County's tax is so high that it is not proportionate to the services and functions that the County provides to them. (Pltf. Br. 45.) It is not clear whether the plaintiffs make the same argument as applied to DWA's VAT. In any event, the Supreme Court in *Cotton Petroleum* held that a state tax as applied to non-Indians on an Indian reservation is not preempted simply because the tax may be disproportionate to the value of the services or functions that the state provides to the non-Indians. (*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

[10] *Hoopa Valley* held that a state tax as applied to non-Indian production of timber harvesting on an Indian reservation was preempted because "California plays no role in the Hoopa Valley Tribe's timber activities" and "the burden of the tax concededly falls on the Tribe." (*Hoopa Valley*, 881 F.2d at 660.) *Hoopa Valley* is distinguishable here because DWA provides substantial services, in the form of water supplies, to the plaintiff non-Indian lessees, and because the burden of DWA's VAT falls on the non-Indian lessees and not on the Tribe. *Crow II* held that an Indian tribe, in alleging that the Indian Mineral Leasing Act of 1938 preempted Montana's severance tax as applied to non-Indian coal mining on the tribe's reservation, had stated a claim upon which relief could be granted, but the court did not adjudicate the merits of the claim. (*Crow II*, 650 F.2d at 1111-1114.) As *Herpel* noted, the Supreme Court in *Cotton Petroleum* held that the Mineral Leasing Act "sought nothing more than the removal of restrictions imposed solely on Indian land" and that "Congress was not concerned with state taxation," and therefore the Mineral Leasing Act did not preempt New Mexico's severance tax as applied to a non-Indian company's production of oil and gas on an Indian reservation. (*Herpel*, 45 Cal.App.5th at 109-110.) Thus, *Crow II* appears to be inconsistent with *Cotton Petroleum*, and in any event is inapposite here because this case does not involve the Indian Mineral Leasing Act.

its tax obligations.").) As *Cotton Petroleum* stated, "[n]ot only would such a proportionality requirement create nightmarish administrative burdens, but it would be antithetical to the traditional notion that taxation is not premised on a strict quid pro quo relationship between the taxpayer and the tax collector." (*Id*. at 185 n. 15.) Similarly, the Ninth Circuit has held that a state tax as applied to non-Indians on an Indian reservation is not preempted simply because the tax may be disproportionate to the value of the services provided to the non-Indians. (*Gila River Indian Community v. Waddell* (9th Cir. 1996) 91 F.3d 1232, 1239; *Salt River Pima-Maricopa Indian Community v. Arizona* (9th Cir. 1995) 50 F.3d 734, 737.)

Finally, the plaintiffs argue that the County's and DWA's taxes apply to the Tribe's "use" of its reserved land and thus apply to the land itself, which they contend is prohibited under federal law. (Pltf. Br. 43.) The County's and DWA's taxes do not apply to the use of the Tribe's reserved land, or the land itself; rather, the taxes apply to plaintiffs' possessory interests, which are entirely different from the Tribe's land and its use. The Tribe is free to regulate the non-Indian lessees' use of the land in any way it wants, subject to other principles of federal law that limit an Indian tribe's right to regulate non-Indian conduct on the reservation.[11] The Tribe's right to regulate the use of its land does not limit the County's and DWA's rights to apply their taxes to the non-Indian lessees' possessory interests, as such rights are recognized under the *Bracker* balancing test.

[11] For example, the Supreme Court has held that Indian tribes do not have jurisdiction to regulate the conduct of non-Indians on fee lands of the reservations, except under limited circumstances. (*Montana v. United States* (1981) 450 U.S. 544, 564-566.)

Thus, the tribal interest as relevant under the *Bracker* balancing test does not support preemption of DWA's VAT.

E. Conclusion

As demonstrated above, the balance of state, federal and tribal interests under the *Bracker* balancing test supports DWA's right to apply its VAT against the plaintiff non-Indian lessees, and weighs against preemption of DWA's VAT as so applied.

III. DESERT WATER AGENCY'S VOTER APPROVED TAX IS NOT INVALID UNDER THE DOCTRINE OF TRIBAL SOVEREIGNTY.

The plaintiffs argue that—apart from preemption—the County's and DWA's taxes are invalid as applied to them because the taxes infringe on the Tribe's sovereignty, in that they interfere with the Tribe's sovereign right to exercise its functions and are the practical equivalent of direct taxes on the Tribe's lands. (Pltf. Br. 39-48.)

As noted earlier, the Supreme Court has held that state laws apply on Indian reservations unless the state laws are preempted by federal law or infringe on the Indians' sovereign right to govern themselves. (*See* page 27, *supra*.) "[E]ven on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." (*Rice v. Rehner* (1983) 463 U.S. 713, 718; *Mescalero Apache Tribe v. Jones* (1973) 411 U.S. at 145, 148; *Organized Village of Kake v. Egan* (1962) 369 U.S. 60, 75.) Thus, there are "two independent but related barriers" to the assertion of state jurisdiction over tribal reservations and members, one barrier based on federal preemption and the other on tribal sovereignty. (*Bracker*, 448 U.S. at 142; *Rice*, 463 U.S. at 718-719.)

The Supreme Court has held, however, that the modern trend is to rely on federal preemption and not tribal sovereignty as the basis for precluding the application of state laws on Indian reservations, and that tribal sovereignty serves primarily as a "backdrop" in interpreting the preemption issue. (*McClanahan v. State Comm'n* (1973) 411 U.S. 164, 172; *Rice*, 463 U.S. at 719; *Cotton Petroleum*, 490 U.S. at 176; *Bracker*, 448 U.S. at 143.) As the Supreme Court stated in *McClanahan*:

> [T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power. . . . [¶] The Indian sovereignty doctrine is relevant, then, . . . because it provides a backdrop against which the applicable treaties and federal statutes must be read.

(*McClanahan*, 411 U.S. at 172 (citations omitted).)

Thus, Congress is ultimately responsible for determining whether state laws apply on Indian reservations. Congress derives its power to regulate Indian reservations, and to determine whether state laws apply on them, under the Indian Commerce Clause of the U.S. Constitution. (U.S. Const., art. 1, § 8, cl. 3.) Under the Indian Commerce Clause, Congress exercises "plenary authority" over Indian reservations. (*Cotton Petroleum,* 490 U.S. at 192; *Morton v. Mancari* (1974) 417 U.S. 535, 551-552.) As the Supreme Court has said, "The right of tribal self-government is ultimately dependent on and subject to the broad powers of Congress." (*Bracker*, 448 U.S. at 143.) "After 1871, the tribes were no longer regarded as sovereign nations, and the Government began to regulate their affairs through statute or contractual agreements ratified by statute." (*DeCoteau v. District Court*

(1975) 420 U.S. 425, 431 (1975.)[12] Thus, while tribal sovereignty provides a "backdrop" in interpreting Congress' judgment, the ultimate touchstone in determining whether state laws apply on the reservations is whether Congress has preempted their application. If Congress has not preempted the application of state laws—as Congress' judgment is informed by the "backdrop" of tribal sovereignty—tribal sovereignty does not, itself, stand as a separate and independent barrier to the application of the state laws.

In the context of state laws that apply to *non-Indians* on an Indian reservation, the Supreme Court has fashioned an entirely different doctrine—the *Bracker* balancing test—in determining whether the state laws apply. The *Bracker* balancing test requires consideration not only of state and federal interests, but also—more importantly here—the tribal interest as well. (*Bracker*, 448 U.S. at 145; *Cotton Petroleum*, 490 U.S. at 176; *Herpel*, 45 Cal.App.5th at 101.) The tribal interest necessarily entails consideration of tribal sovereignty, because tribal sovereignty is an essential, and indeed paramount, component of the tribal interest. In short, tribal sovereignty is relevant in determining the tribal interest under *Bracker*, which in turn applies in determining whether state laws are preempted as applied to non-Indians on Indian reservations. Since tribal sovereignty is considered as part of the tribal interest in applying *Bracker*, tribal sovereignty is not a separate and independent barrier to the application of state laws in cases where *Bracker* applies. Otherwise, tribal sovereignty would be considered both as part of the *Bracker* analysis and separately from the *Bracker* analysis.

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[12] The 1871 statute cited in *DeCoteau* provided that "hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." (16 Stat. 566 (1871).)

This analysis is exemplified by this Court's decision in *Herpel*. There, this Court, in considering the tribal interest under the *Bracker* balancing test, considered the same factors that apply in determining tribal sovereignty, such as whether the burden of the County's possessory interest tax falls on the Tribe or the non-Indian lessees. (*Herpel*, 45 Cal.App.5th at 111-112.) Indeed, *Herpel* stated that *Bracker* itself referred to an aspect of "tribal sovereignty" (*i.e.*, a geographical component) as "highly relevant to the pre-emption inquiry." (*Bracker*, 448 U.S. at 151; *Herpel*, 45 Cal.App.5th at 449.) *Herpel* thus considered tribal sovereignty as part of, and not separately from, the tribal interest under *Bracker*. Indeed, if *Herpel* had considered tribal sovereignty separately from the tribal interest under *Bracker*, the Court's analysis would have been redundant, because the same factors that apply in considering tribal sovereignty also apply in considering the tribal interest under *Bracker*. Thus, the plaintiffs' argument that *Herpel* failed to consider "the extent to which the possessory-interest taxes impact tribal sovereignty" (Pltf. Br. 63), is misplaced, because *Herpel* fully considered tribal sovereignty as part of its consideration of the tribal interest under *Bracker*.

In any event, the Agua Caliente Tribe's sovereignty, whether considered as part of the tribal interest under *Bracker* or considered separately, does not support preemption of DWA's VAT as applied to the plaintiff non-Indian lessees. As argued above, both the legal incidence and economic burden of DWA's VAT fall on the non-Indian lessees and not on the Tribe or its reserved lands; DWA's VAT applies to the non-Indian lessees and not to the Tribe or its reserved lands, and the Tribe is not responsible for paying the VAT if the non-Indian lessees fail to pay it. (*See* pages 42-44, *supra*.) These factors demonstrate that DWA's VAT does not infringe on the Tribe's sovereignty, contrary to the plaintiffs' argument.

The essence of tribal sovereignty is an Indian tribe's right of "self-government" (*Rice*, 463 U.S. at 719; *Kake*, 369 U.S. at 75; *Mescalero*, 411 U.S. at 148), and the right of Indian tribes to "make their own laws and be ruled by them." (*Bracker*, 448 U.S. at 142; *McClanahan*, 411 U.S. at 171-172; *Williams v. Lee* (1959) 358 U.S. 217, 220.) DWA's VAT in no way interferes with the Tribe's right of self-government or its right to makes its own laws and be ruled by them. The Tribe is free to take whatever action it deems necessary to govern itself and its members, and DWA's VAT does not interfere with the Tribe's right to take such action. The Tribe's right of self-government does not, however, preclude DWA from applying its tax to the non-Indian lessees on the Tribe's reservation, because DWA has the right to apply its VAT under the *Bracker* balancing test, which means that DWA's VAT is not preempted by federal law. Since DWA's VAT is not preempted and since and tribal sovereignty serves only as a "backdrop" for analyzing preemption, DWA's VAT is not invalid under tribal sovereignty.

In the case below, the Superior Court concluded, properly, that the County's and DWA's taxes do not "infringe upon the tribes' sovereignty," because "[t]he Taxes are imposed on the plaintiffs' possessory interest in reservation, not on the land or owner of the land." (AA 1021.) "In short, the Court finds that the Taxes do not impermissibly infringe upon the Agua Caliente tribe's interest in self-government." (AA 1022.) As the Superior Court noted, the plaintiffs failed to provide evidence or analysis to support their argument that the County's and DWA's taxes infringe on the Tribe's sovereignty. (AA 1022.) Similarly on appeal here, the plaintiffs have failed to cite evidence or provide sufficient analysis to support their argument that the County's and DWA's taxes infringe on the Tribe's sovereignty.

In sum, DWA's VAT is not preempted under the doctrine of tribal sovereignty.

CONCLUSION

For the foregoing reasons, this Court should hold that Desert Water Agency's voter approved tax is not preempted as applied to the plaintiff non-Indian lessees, and should affirm the decision of the Superior Court below.

Dated: September 3, 2020

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that the foregoing brief was produced on a computer, is proportionately spaced, has a typeface of at least 13 points, is at least one-and-a-half spaced, and according to the word count function on the word processing form used, contains 13,968 words.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 3, 2020, at Orinda, California.

/s/ Roderick E. Walston
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CERTIFICATE OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. My business address is 2001 N. Main Street, Suite 390, Walnut Creek, California 94596.

I certify that on September 3, 2020, I served a copy of the within document(s), **BRIEF OF RESPONDENT-DEFENDANT-INTERVENOR DESERT WATER AGENCY**, on all parties or their counsel of record below through the TrueFiling Electronic system and Via First Class Mail as indicated below.

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On September 3, 2020, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s):

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County of Riverside
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Following ordinary business practices, the envelope was sealed and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date.

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Executed on September 3, 2020, at Walnut Creek, California.

/s/ *Irene Islas*
Irene Islas