No. E073926

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Government Code § 6103

In the Court of Appeal, State of California

FOURTH APPELLATE DISTRICT, DIVISION TWO

Leonard Albrecht, et al.,
Plaintiffs and Appellants

vs.

County of Riverside, Desert Water Agency, et al.,
Defendants and Appellees.

Appeal From the Superior Court of the State of California
County of Riverside. Case No. PSC1501100
Consolidated with Case No. RIC1719093
Honorable Craig G. Reimer, Judge Presiding

DEFENDANT-INTERVENOR COACHELLA VALLEY WATER DISTRICT'S RESPONDENT'S BRIEF

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rules of Court, rule 8.208, the following brief is submitted by Coachella Valley Water District. The following entities or persons have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves:

Water users in the Coachella Valley Water District.

DATED: September 3, 2020

COLANTUONO, HIGHSMITH & WHATLEY, PC

_/s Pamela K. Graham_____
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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

United States Constitution

California Constitution

Statutes

Rules

Regulations

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs seek to avoid paying their fair share of Respondent Coachella Valley Water District's ("CVWD") costs to import water to the Coachella Valley and to ensure a reliable water supply for all residents, property owners, and visitors there. Plaintiffs present no new evidence or arguments to justify the tax exemption they claim for Indian land they lease. They cite facts and law repeatedly rejected by state and federal courts in cases involving the Agua Caliente Band of Cahuilla Indians ("Tribe") and lessees of land held in trust for the Tribe and its members. Under the balancing test established by the U.S. Supreme Court, no federal or tribal interest outweighs CVWD's interest in levying property taxes necessary to fund water imports to serve all who own and use property in the Coachella Valley — including Plaintiffs.

This Court freshly decided these questions in *Herpel v. County of Riverside* (2020) 45 Cal.App.5th 96 ("*Herpel*"). *Herpel* rejected the Tribe's argument that federal law preempts any property tax on the possessory interests held by non-Indian lessees of tribal land (a possessory interest tax or "PIT"). Balancing the federal, state, and tribal interests under *White Mtn. Apache Tribe v. Bracker* (1980) 448 U.S. 136, this Court found no federal preemption of tax. It did not consider the federal government's interest to strongly support preemption of the PIT. (*Id.* at p. 111.) It found the Tribe's interests

were neither significantly nor negatively affected since the tax's burden falls only on possessory interest holders — not the Tribe — and the Tribe could impose its own taxes in addition to state or local taxes. (*Id.* at pp. 112–113.) Finally, it found a strong state interest, considering the County's and local agency's provision of "substantial services benefitting non-Indians and the Tribe alike," which are "not limited to benefitting plaintiffs 'off the reservation.'" (*Id.* at pp. 114–115.)

Plaintiffs offer no reason to revisit or distinguish *Herpel*. They cannot establish the PIT interferes with tribal sovereignty, economic self-determination, or self-governance. The prodigious development of tribal land in the Coachella Valley over the last four decades refutes any such claim. Indeed, leases of Allotted Lands (i.e., land held in trust for Tribe members rather than the Tribe itself) have grown from eight acres in 1971 to an estimated 20,000 leases of 4,300 acres in 2011. (See AA:1:247[1] at ¶ 83.) These are the most valuable Indian land leases anywhere in America. (AA:1:247 at ¶ 89.)

That Plaintiffs here challenge the Voter Approved Taxes in addition to the 1% Tax at Issue (AC) changes nothing. CVWD's Voter Approved Tax funds water imports to recharge the Coachella

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[1] Citations to the Appellant's Appendix are in the form AA:[Vol.]:[Page(s)]; to the Reporter's Transcript in the form RT:[Page(s)]; and to the Respondents' Joint Appendix in the form RA:[Vol.]:[Page(s)].

Valley groundwater basin and thereby to supply water to **all** residents, property owners, and visitors in the District, including Plaintiffs. This levy also is "simply too indirect and too insubstantial to support a claim of pre-emption" as it does not interfere with tribal sovereignty, economic self-determination, or governance — rather it funds vital services that increase the value of tribal land. And, as Plaintiffs receive the same benefits from CVWD's water imports as all others within the District, there is a strong interest in preventing them from unfairly benefitting from services they do not fund — i.e., from being free-riders on an essential public service.

Water imports are particularly critical in the Coachella Valley, which receives, on average, only 3 inches of rain a year. (AA:1:260 at ¶ 181.) CVWD relies on PIT revenues to fund its water imports, and the loss of income from Plaintiffs' leaseholds would significantly degrade its ability to serve water. Nor does the Tribe have any prospect of replacing those supplies should the CVWD cease its service to Tribal lands upon loss of the revenues to fund it.

This brief addresses only those the Opening Brief's points specifically to CVWD. These include Plaintiffs' arguments CVWD's Voter Approved Tax is expressly or impliedly preempted and that CVWD could recover the revenues Possessory Interest Taxes provide by increased water rates. CVWD also argues Plaintiffs failed to exhaust their administrative remedies as to CVWD's Voter

Approved Tax, providing an independent ground to affirm the trial court's rejection of Plaintiffs' challenge to that tax.

CVWD joins in those portions of the County of Riverside's and the Desert Water Agency's (DWA) briefs responding to Plaintiffs' arguments that the 1% Possessory Interest Tax is expressly or impliedly preempted.

II. STATEMENT OF FACTS

A. JOINDER IN COUNTY AND DWA'S STATEMENTS OF FACTS

CVWD joins in the statement of facts in the County's and DWA's briefs, incorporating them here by reference under California Rules of Court, rule 8.200(a)(5).

B. POSSESSORY INTEREST TAXES

The California Constitution and statute provide that "all property is taxable" (unless exempt under state or federal law) and "shall be assessed at the same percentage of fair market value." (Cal. Const., art. XIII, § 1; Rev. & Tax Code, § 201.) The Revenue and Tax Code defines "property" to include both real and personal property. (Rev. & Tax Code, § 103.) "Real property" includes the "possession of, claim to, ownership of, or right to the possession of land" and "improvements." (Rev. & Tax. Code, § 104.) When an exempt or immune entity (like a Tribe or a government agency) leases its property:

> It 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 [taxable leasehold in exempt land owned by city].) Although state and local authorities cannot directly tax lands the federal government holds in trust for Indian tribes and their members (*Cotton Petroleum Corp. v. New Mexico* (1988) 490 U.S. 163, 175 ("*Cotton Petroleum*")), they may tax privately held possessory interests in those lands absent federal preemption (*New Mexico v. Mescalero Apache Tribe* (1983) 462 U.S. 324, 333 ("*Mescalero*")).

Thus, taxable "possessory interests" are rights to possess or use real property owned by a tax-exempt person. Moreover, they are "independent, durable, and exclusive of rights held by others in the real property." (Rev. & Tax. Code, § 107(a).) Taxable possessory interests outside the Indian land context commonly involve rights to possess government land, as by concessionaires. (E.g., *County of Los Angeles v. County of Los Angeles Assessment Appeals Bd.* (1993) 13 Cal.App.4th 102 [tax assessment of rental car concessions at public airports].)

Lands the federal government holds in trust or restricted fee status for tribes or their members are not subject to state taxation. (*McClanahan v. State Tax Commission of Arizona* (1973) 411 U.S. 164, 169 ("*McClanahan*").) Pursuant to 25 U.S.C. § 415, tribes may lease trust or restricted fee lands to others, with the approval of the Secretary of the Interior. Section 415 says nothing of non-Indians who make such leases.

In 2013, the Secretary of the Interior issued what the parties here label "the 2013 Rule." Section 162.017, subdivision (c) of the 2013 Rule states:

> Subject only to applicable Federal law, the leasehold or possessory interest is not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State. Leasehold or possessory interests may be subject to taxation by the Indian tribe with jurisdiction.

Because the Secretary of Interior is not Congress, and due to the phrase "subject only to applicable Federal law," the 2013 Rule did not displace state and local taxation of possessory interests in trust land — notwithstanding its otherwise broad language. (*Desert Water Agency v. United States Department of the Interior* (9th Cir. 2017) 849 F.3d 1250, 1255 ("*Desert Water*").)

C. THE COACHELLA VALLEY WATER DISTRICT AND ITS SERVICES

CVWD's water services are — literally — vital to all within its boundaries. Water is a critical resource anywhere; in the arid Coachella Valley, it is particularly crucial. Such land with water is very valuable; without water, it can be nearly worthless. The Coachella Valley is part of the Sonoran desert that stretches north from Mexico and east into Arizona and New Mexico. (AA:1:260 at ¶ 181.) It receives on average just 3 inches of rain per year. (AA:1:260 at ¶ 181.) The Valley's urban development and population depend on water imports from the Colorado River and the State Water Project. (AA:1:260–261 at ¶ 182.) CVWD relies heavily on property taxes to fund those imports. (AA:1:265 at ¶ 230.) Thus, CVWD has a strong interest in the two PITs at issue — its share of the 1% Tax at Issue (AC)[2] (AA:1:265 at ¶ 228) and its Voter Approved Tax (AA:1:264 at ¶ 217).

The Tribe provides no water services to non-Indian lessees of Indian land. (AA:1:248 at ¶ 94; AA:1:256 at ¶ 143.) These Tribal lands are interspersed with non-Indian lands in checkerboard fashion. (AA:2:732.) This makes impractical separate utility systems for

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[2] The stipulated facts apply the label "(AC)" to issues pertinent to the Agua Caliente Band, as the Colorado Indian River Tribes' lands are also involved in the case, but those Tribes hold no land within CVWD.

Tribal and non-tribal lands. CVWD and DWA are the sole water providers in the Coachella Valley. Early property owners there formed CVWD in 1918 to protect the Valley's quickly diminishing groundwater and to ensure reliable water supplies. (AA:1:261 at ¶ 190.) Upon its creation, CVWD immediately began lobbying to protect Coachella Valley groundwater basins, obtaining presidential orders setting aside public lands in the Whitewater River area for groundwater recharge. (AA:1:261 at ¶ 191.) CVWD delivers irrigation and domestic (drinking) water, collects and recycles wastewater, provides regional storm water protection, replenishes the groundwater basin, and promotes water conservation. (AA:1:262 at ¶ 192.) It manages the area's water supply to ensure it can meet demand now and for future generations. (AA:1:261 at ¶ 184.)

CVWD provides a safe, affordable, and reliable water supply to all customers in its approximately 1,000-square-mile service area, which includes the Agua Caliente Reservation. (AA:1:262 at ¶ 193.) That service area is mostly in Riverside County, with small portions in Imperial and San Diego Counties. (AA:1:261 at ¶ 185.) CVWD serves water to more than 108,000 homes and businesses, including non-Indian lessees of Allotted Lands (i.e., lands allotted to members of the Agua Caliente Band). (AA:1:261 at ¶¶ 186–187.)

CVWD relies on multiple sources to serve its customers: groundwater, recycled wastewater, and water imported from: the State Water Project, the Colorado River via the Coachella Canal (a

branch of the All-American Canal), the Metropolitan Water District of Southern California ("MWD"), and the Glorious Land Company. (AA:1:262 at ¶ 194.)

CVWD entered into its first water supply contract in 1919 to bring Colorado River water to the Coachella Valley. (AA:1:262 at ¶ 195.) However, due to political complications and the two World Wars, the Coachella Valley did not actually receive Colorado River water until 1949. (*Ibid*.) Coachella Valley land values multiplied tenfold when Colorado River water became available, rising from $25 per acre in 1940 to $250 per acre in 1954. (AA:1:262 at ¶ 196.)

In the 1960s, CVWD first entered the domestic water delivery business, acquiring small water retailers. (AA:1:262 at ¶ 197.) Such acquisitions continued through the 1970s. (*Ibid*.) In 1968, CVWD began offering wastewater treatment and recycling services after it purchased the Palm Desert Country Club's water and sewer system. (AA:1:262 at ¶ 198.) CVWD opened its first wastewater treatment and recycling facility in 1975. (*Ibid*.) Following a major flood in 1965, CVWD adopted a stormwater master plan and began flood control efforts, constructing a major storm channel. (AA:1:262 at ¶ 199.)

Currently, CVWD's greatest priority is groundwater protection and replenishment. (AA:1:262 at ¶ 200.) The Coachella Valley relies on imported water to replenish groundwater. (AA:1:265 at ¶ 227.) Replenishment is an important tool in eliminating overdraft of an aquifer — i.e., the taking of more water than can be

replenished, which lowers groundwater levels, depletes supplies, and can permanently reduce the water-holding capacity of the soil layers which constitute the aquifer. (AA:1:263 at ¶ 201.) The Coachella Valley groundwater basin is currently in overdraft. (*Ibid*.) A significant factor contributing to continuing overdraft is increased development of tribal lands since 2002, which has increased water demand. (See AA:1:247 at ¶ 83.) Due to CVWD's aggressive efforts to conserve water and recharge the basins, groundwater levels are expected to stabilize by 2022, such that groundwater use will no longer exceed natural and artificial recharge. (AA:1:262 at ¶ 200.)

CVWD therefore provides a range of valuable services to all residents and owners and users of property in the Coachella Valley, whether of Indian or non-Indian land, including groundwater management and replenishment, domestic water delivery, wastewater treatment and recycling, and flood control. The taxes disputed here fund those services.

D. THE STATE WATER PROJECT AND CVWD'S VOTER APPROVED TAX

Due to the limited local water supply and historic overuse of groundwater, CVWD could not serve water to all in its boundaries absent imports from the State Water Project ("SWP"). The SWP is a water storage and delivery system of reservoirs, aqueducts, power plants, and pumping stations that distributes water to urban and

agricultural water suppliers around California. (Water Code, §§ 12930 et seq.; *Metropolitan Water Dist. of Southern Cal. v. Marquardt* (1963) 59 Cal.2d 159 [validating SWP funding and describing its genesis in a 1960 ballot measure] ("*Marquardt*").)

CVWD became a SWP contractor in 1963. (AA:1:263 at ¶ 202.) It contracts with the California Department of Water Resources ("DWR") for SWP water supplies (the "Water Supply Contract"). (AA:1:263 at ¶ 203.) When CVWD made the Water Supply Contract, no facilities existed to deliver SWP water to CVWD. (AA:1:263 at ¶ 209.) CVWD estimated its cost to build an aqueduct to transport SWP water to the Coachella Valley at $150 million. (AA:1:263 at ¶ 210.) Therefore, CVWD negotiated an exchange agreement with the Metropolitan Water District of Southern California ("Met") to swap CVWD's SWP water entitlements for an equal amount of Met's Colorado River Water. (*Ibid*.) Thus, CVWD takes MWD's Colorado River water via its own facilities, and MWD takes CVWD's SWP water via SWP aqueducts serving MWD. (AA:1:263 at ¶¶ 211, 212.)

CVWD uses this imported water to replenish Valley groundwater and, ultimately, to serve its customers. (AA:1:265 at ¶ 227.) CVWD is contractually entitled to up to 126,350 acre-feet per year (afy) of SWP water. (AA:1:263 at ¶ 208.) Under their exchange agreement, neither CVWD nor Met may charge the other for the exchanged water. (AA:1:263 at ¶ 213.) Rather, CVWD and Met each remain obligated to pay DWR's charges under their respective Water

Supply Contracts. (AA:1:263 at ¶ 214.) These include CVWD's share of costs DWR incurs to obtain, store, and deliver SWP water; construct and maintain SWP facilities; and to operate, maintain, and administer the SWP. (AA:1:264 at ¶ 215.)

To fund these water imports, CVWD levies a property tax, the CVWD Voter Approved Tax challenged here. (AA:1:264 at ¶ 217.) Imposition of this tax is a condition of CVWD's Water Supply Contract with DWR. (AA:1:263 at ¶ 204; AA:1:264 at ¶ 216.) Section 34(a) of that contract obligates CVWD to use its taxing or assessment powers to raise sums required to pay its share of SWP costs. (AA:1:263 at ¶ 206.) Thus, CVWD is contractually obligated to exercise its tax authority if it is otherwise unable to raise sufficient revenues to fund its portion of SWP costs. (AA:1:264 at ¶ 216.) Such promises were essential to financing of the SWP's construction. (*Marquardt*, *supra*, 59 Cal.2d at pp. 171–174 [discussing debt financing of SWP].)

As statute permits, CVWD levies this Voter Approved Tax as an ad valorem tax on the assessed value of property. (AA:1:264 at ¶ 218.) Water agencies may levy ad valorem taxes in addition to the 1 percent permitted by Proposition 13 (Cal. Const., art. XIII A, § 1, subd. (a)) to fund SWP imports. (AA:1:244 at ¶ 66.) These are deemed voter-approved taxes compliant with the subsequently adopted Proposition 13 because voters approved the SWP in 1960 and authorized taxes to fund it. (*Ibid*.) CVWD's Voter Approved Tax

predates 1978's Proposition 13, which first established a voter-approval requirement for such taxes, and is therefore exempt from it. (AA:1:244 at ¶ 66; AA:1:264 at ¶ 223; Cal. Const., art. XIII A, § 1, subd. (b)(1) [authorizing taxes in addition to the 1 percent tax to fund "indebtedness approved by the voters prior to July 1, 1978"]; *Goodman v. County of Riverside* (1983) 140 Cal.App.3d 900 [DWA's Voter Approved Tax lawful under Cal. Const., art. XIII A, § 1, subd. (b)(1)] ("*Goodman*").) This exemption applies to taxes levied to pay any obligations under a SWP contract whether formally debt or ongoing "take or pay" obligations for water supply. (*Goodman*, *supra*, 140 Cal.App.3d at p. 900.)[3]

CVWD's Voter Approved Tax has always applied to all taxable property in the District. (AA:265 at ¶ 224.) This includes taxable real property and possessory interests in tax-exempt property, including non-Indian lessees' possessory interests in Indian land. (AA:1:264 at ¶ 222; AA:1:265 at ¶ 224.) CVWD's Voter Approved Tax on lessees of Allotted Land is calculated by multiplying the annual tax rate by the assessed value of a lessee's possessory interest. (AA:1:265 at ¶ 225.) The Riverside County Assessor determines assessed value. (*Ibid.*)

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[3] The continuing vitality of *Marquardt* and *Goodman* is pending before this Court on a writ petition as to which it has issued an order to show cause. (*Roberts v. Coachella Valley Water District*, Case No. E074010, fully briefed as of June 10, 2020.)

CVWD's Board of Directors annually adopts a resolution certifying the rate of the Voter Approved Tax. (AA:1:264 at ¶ 219; Water Code, § 31701.) The Board of Supervisors is then obligated to levy the tax and certify it to the County Auditor for entry on the assessment roll. (AA:1:264 at ¶ 220; Water Code, § 31702.4.) Thereafter, the Board of Supervisors levies the tax, as required by statute, and the County Treasurer-Tax Collector includes it on property bills to owners of taxable real property, including non-Indian lessees of Indian Land. (AA:1:264 at ¶ 220.) The County Treasurer-Tax Collector then disburses to CVWD amounts collected on its behalf. (*Ibid*.)

The CVWD Voter Approved Tax rate was 0.10000 percent (100 mils or a tenth of a percent) in 2016–2017 and 2017–2018. (AA:1:245 at ¶ 71.) The tax generated on possessory interests on Allotted Lands historically are:

- $631,526.00 in FY 2015–2016;
- $645,144.94 in FY 2014–2015; and
- $745,355.34 in FY 2013–2014.

(*Ibid*.)

E. CALIFORNIA'S PROPERTY TAX SYSTEM AND THE 1% TAX

Like most American states, California taxes property to fund essential government services. 1978's Proposition 13 limited the property tax to 1 percent of assessed value and provided the newly

lowered tax would be apportioned among cities, counties, school districts, and other special districts, "according to law" (the "1% Tax"). (Cal. Const., art. XIII A, § 1.) Our Supreme Court decided "according to law" meant "according to statute" — i.e., that Proposition 13 authorized the Legislature to apportion tax proceeds among local agencies. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 246–247.)

The Legislature, confronted with an urgent need to allocate the property tax "pie" in 1978, did what was politically expedient — it allocated the 1% Tax in proportion to the allocation of property taxes levied just before Proposition 13 took effect. (Gov. Code, § 26912, subd. (b).) The following year, the Legislature enacted the "AB 8" formula (named after the Assembly Bill which became that statute), to apportion proceeds of the 1% Tax. (AA:1:234 at ¶ 19.)

Since FY 1980–1981, the AB 8 formula has been implemented by Revenue and Taxation Code sections 96.1, 96.2, and 96.5. This allocation is determined in substantial part on the 1978–1979 revenues of each taxing jurisdiction. (AA:234 at ¶ 20.) First, "base" tax allocation is determined, i.e., in each tax rate area (an administrative division of a community in which all taxes are allocated alike because the land is served by the same array of governments), each local governmental entity is allocated the property tax it was allocated in the preceding year. (See AA:1:234 at ¶¶ 19, 20; AA:1:236 at ¶ 29; Rev. & Tax. Code, § 96.1, subd. (a)(1).)

Second, annual tax "increment" (i.e., growth in tax revenues due to new development, increases in property values, land sales, etc.) is allocated under section 96.5 in the same proportions as the base allocation. (Rev. & Tax. Code, §§ 96.1, subd. (a)(2), 96.5.) In short, the AB 8 formula is backward looking and adds historical shares of property taxes to shares of annual "tax increment" to determine amounts the County Auditor remits to each beneficiary of the property tax.

The AB 8 formula has been amended repeatedly since 1980 — mostly to increase revenues to K–14 education at the expense of cities and counties to meet the State's obligation to fund education under *Serrano v. Priest* (1971) 5 Cal.3d 584 — and remains substantially in effect two generations later. For example, reallocations in 1992 and 1993 diverted what had been allocations to cities and counties to the Educational Revenue Augmentation Fund ("ERAF") for distribution to schools. (*City of Scotts Valley v. County of Santa Cruz* (2011) 201 Cal.App.4th 1, 14.) Although subsequent changes have reduced the value of ERAF to schools and thereby the State, it is a permanent feature of our property tax allocation system. It can be thought of as an additional taxing entity entitled to a portion of annual property-tax revenues but, in fact, is a device to transfer property tax proceeds from cities and counties to schools (and, thereby, to benefit the State). Other reallocations may result

when a new city is incorporated, or a district formed. (Rev. & Tax Code, § 99.)

Pursuant to statute, the County allocates proceeds of the 1% Tax to taxing agencies. (AA:1:235 at ¶ 23.) All beneficiaries of the 1% Tax use its proceeds to fund governmental services. (See AA:1:236 at ¶ 28; *City of Los Angeles v. County of Los Angeles* (1983) 147 Cal.App.3d 952, 956 [counties collect a "single local property tax" that is "shared by local government agencies designated by the Legislature"].)

CVWD receives an allocation of property tax revenues under AB 8. (AA:1:265 at ¶ 228.) In FY 2015–2016, in addition to the proceeds of the Voter Approved Tax reported above, CVWD received approximately $705,696 from the 1% PIT assessed on non-Indian lessees of Indian Land (the "1% Tax at Issue (AC)"). (AA:1:265 at ¶ 229.) CVWD uses this revenue to fund water service to the Coachella Valley. (AA:1:265 at ¶ 230.)

Thus, CVWD has two taxes at issue here – its share of the 1% Tax at Issue (AC) calculated pursuant to the AB 8 formula (AA:1:265 at ¶ 228), and its separate, special Voter Approved Tax (AA:1:264 at ¶ 217) calculated at a rate it sets annually. These two revenue sources fund a large portion of the cost to CVWD's water service. (AA:1:265 at ¶ 230.)

III. PROCEDURAL HISTORY AND APPELLATE JURISDICTION

Albrecht was filed March 6, 2015,[4] and *Abbey* on October 10, 2017, and the two were consolidated for all purposes. On May 11, 2018, the trial court denied the County's Motion in Limine 1, seeking to exclude evidence or argument regarding the Voter Approved Taxes. The trial court held that Plaintiffs' pleadings, despite referencing only the PIT, applied to any ad valorem tax on the possession and use of tribal land. Thus, the Voter Approved Taxes levied by, among others, CVWD and DWA, were at issue. CVWD then moved to intervene to defend its Voter Approved Tax. The trial court granted that motion July 11, 2018.

Plaintiffs seek exemption from the possessory interest taxes, including CVWD's Voter Approved Tax, arguing federal law preempts taxes on their leasehold interests in tribal land. Plaintiffs argue federal preemption of the possessory interest taxes on three bases, citing:

- section 465 of the Indian Reorganization Act (codified at 25 U.S.C. § 5108);
- interference with the Agua Caliente Band's sovereignty; and,
- *Bracker*'s balancing test.

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[4] CVWD cites dates to reference the record with specificity, but no issues of timing are disputed here.

CVWD addresses each of these preemption arguments as to its own Voter Approved Tax. It joins in, and incorporates by reference, arguments as to the general 1% possessory interest tax in the County's and DWA's Respondent's Briefs.

Plaintiffs appeal from a final judgment entered after bench trial. Thus, jurisdiction on appeal lies under Code of Civil Procedure section 904.1, subdivision (a).

IV. STANDARDS OF REVIEW

As the case was tried on stipulated facts, the issues here are primarily legal — reviewed de novo. (E.g., *Rodriguez v. RWA Trucking Co., Inc.* (2013) 238 Cal.App.4th 1375, 1384.) To the extent any facts are in issue, this Court reviews the trial court's findings of fact for substantial evidence. (E.g., *Morgan v. Imperial Irrigation Dist*. (2014) 223 Cal.App.4th 892, 916.)

V. ARGUMENT

A. CVWD'S VOTER APPROVED TAX IS NOT EXPRESSLY PREEMPTED

Plaintiffs claim 25 U.S.C. § 5108 expressly preempts the County's Possessory Interest Taxes, including CVWD's Voter Approved Tax. (Op. Br. at p. 30.) Only Congress can preempt state law and only pursuant to powers enumerated in the Constitution. (U.S. Const., art. VI, Supremacy Clause; *California Div. of Labor Standards Enforcement v. Dillingham Construction* (1997) 519 U.S. 316,

325.) "It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so." (*New York Dept. of Social Services v. Dublino* (1973) 413 U.S. 405, 413.) "Whether federal law preempts state law is fundamentally a question whether Congress has intended such a result." (*Peatros v. Bank of America* (2000) 22 Cal.4th 147, 157.) Intent to preempt may be either "explicitly stated in the statute's language or implicitly contained in its structure and purpose." (*Fidelity Federal Sav. & Loan Assn. v. de la Cuesta* (1982) 458 U.S. 141, 152–153.) Such intent may be inferred when the federal regulatory scheme is so pervasive as to leave no room for states to supplement it. (*Id*. at p. 153.) Courts are "reluctant to infer preemption." (*Exxon Corp. v. Governor of Maryland* (1978) 437 U.S. 117, 132.)

A federal regulation can preempt state law when a federal agency acts with authority Congress has conferred. (*Louisiana Public Service Com'n v. F.C.C.* (1986) 476 U.S. 355, 369.) A regulation's preemptive effect "does not depend on express congressional authorization to displace state law." (*Fidelity Federal Sav. & Loan Assn. v. de la Cuesta*, *supra*, 458 U.S. at p. 154.) Instead, the determinative issues are whether the agency intended its regulation to have a preemptive effect and whether it acted within the scope of its authority. (*Ibid*.) If both tests are met, federal regulations have the same pre-emptive effect as statutes. (*Id*. at p. 153.)

25 U.S.C. § 5108 (formerly 25 U.S.C. § 465) ("Section 465")[5] cannot expressly preempt the taxes disputed here because the Indian Lands were not acquired under that statute. Section 465 provides:

> Title to any lands or rights acquired **pursuant to this Act** [the Indian Reorganization Act ("IRA")] **or the Act of July 28, 1955** … 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.

(25 U.S.C. § 5108, emphasis added.)

Section 465 does not apply here because the Tribe did not acquire the lands in issue "pursuant to" the cited statutes. Instead, an 1876 executive order established the Aqua Caliente Band's Reservation (AA:1:246 at ¶ 73) and, a year later, another extended it (AA:1:246 at ¶ 74). This Court recently affirmed this conclusion: "the land underlying the leases was set aside for the tribe some decades before the legislation [i.e., the Indian Reorganization Act] was enacted." (*Herpel*, *supra*, 45 Cal.App.5th at p. 118.) Plaintiffs can, of course, cite no new facts as to the origin of the Tribe's land holdings; Section 465's narrow sweep makes it unhelpful to the Tribe still.

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[5] Plaintiffs' Opening Brief references the earlier numbering of this statute, as do many of the relevant cases. CVWD does likewise.

Plaintiffs contend the "rights in the Agua Caliente land held in trust by the United States" are nevertheless within Section 465. This argument relies on *Mescalero*, in which the Supreme Court applied Section 465 to land located outside the Mescalero Apache Tribe's reservation, but which that tribe leased. (*Mescalero*, *supra*, 411 U.S. at p. 146, 155 fn. 11.) *Herpel* rejected this argument, too: "the requirement that land be acquired 'pursuant to' section 5108 is unambiguous." (45 Cal.App.5th at p. 119.) *Mescalero*'s facts are distinguishable, as the land here is not off-reservation federal land leased by the Tribe for its own, sovereign use and, in any event, the statute's terms are unambiguous. (*Id*. at pp. 121–122.) This Court has already rejected Plaintiffs' overly expansive reading of *Mescalero*'s footnote 11. (*Id*. at p. 121.) The Ninth Circuit has, too. (*Agua Caliente Band of Cahuilla Indians v. Riverside County* (2019) 749 Fed.Appx. 650, 652.)[6] Nothing warrants a different result here.

B. CVWD'S VOTER APPROVED TAX DOES NOT INTERFERE WITH SOVEREIGN FUNCTIONS

Plaintiffs argue any tax which interferes with the Tribe's ability to exercise sovereign functions is preempted. (Op. Br. at p. 39.) The tribal sovereignty doctrine is outdated, and provides no

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[6] "Citing unpublished federal opinions does not violate our rules. (Cal. Rules of Court, rule 8.1115.)" (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1096, fn. 18.)

independent basis for preemption. (*McClanahan*, *supra*, 411 U.S. at p. 172.)

> [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.

(*Ibid*.) Moreover, the tribal sovereignty doctrine has little application to laws applied to non-Indians on Indian land. Such laws are evaluated under *Bracker*'s balancing test, which treats a tribe's interests in its sovereignty as but one factor. (*Bracker*, *supra*, 448 U.S. at p. 145; *Cotton Petroleum*, *supra*, 490 U.S. at p. 176; *Herpel*, *supra*, 45 Cal.App.5th at p. 101.)

Even if this doctrine applied, there can be little tribal interest in preventing levy of CVWD's Voter Approved Tax on Plaintiffs because that tax does not burden the Tribe. The Tribe and its members do not pay it. (AA:1:248 at ¶ 93.) (Cf. *Herpel*, *supra*, 45 Cal.App.5th at p. 112 ["The parties do not dispute that the burden of the tax here falls only on the possessory interest holder … ."].) That

tax falls only on non-Indian lessees, such as Plaintiffs. (AA:1:252 at ¶ 114.) This is true even though CVWD's services benefit the Tribe along with all other Valley residents, property owners, and visitors.

The Tribe does not serve water to non-Indian lessees of Indian land. (AA:1:248 at ¶ 94; AA:1:256 at ¶ 143.) Nor is there any evidence in this record the Tribe could do so if it wished. Water rights do not abound in the Sonoran Desert. This means the Tribe does not contract with SWP for water supplies, or offer any water import or groundwater recharge services like those CVWD funds by its Voter Approved Tax. Even Plaintiffs' expert admitted the Tribe offers no water or sewer services — the two water districts do. (RA:1:32 at ¶ 84.) There is no evidence the Tribe has ever sought to import water to recharge groundwater supplies, or that it could do so. If CVWD provided no water to these lands, no one would and the Plaintiffs, the Tribe, and federal interest all would suffer. Desirable though it might be, the free ride Plaintiffs seek is a fantasy.

Nor is there any evidence CVWD's Voter Approved Tax has disproportionate impact on the Tribe's leasing efforts. Plaintiffs' expert did not address CVWD's Voter Approved Tax or its impact on the Tribe. (RT: 33:1–13.) Yet the Tribe and non-Indian lessees benefit from CVWD's services, which preserve the groundwater within the Coachella Valley for all users, present and future. Indeed, the rapid increase of land values in the Coachella Valley upon CVWD's first delivery of imported water demonstrates CVWD's

services make Indian land more valuable. (AA:1:262: at ¶ 196; RA:1:12 at ¶ 32) [discussing the increased values of Indian Trust Land].)

The Tribe has no sovereign interest in shielding non-Indian lessees from a tax that allows CVWD to import water for the benefit of those lessees and of the Indian land.

C. CVWD'S VOTER APPROVED TAX IS NOT IMPLIEDLY PREEMPTED UNDER *BRACKER*

1. FEDERAL INTERESTS ARE NOT PERVASIVE AND DO NOT PREEMPT THE VOTER APPROVED TAX

Federal interests are greatest when the government's regulation of a given sphere is "comprehensive and pervasive." (*Barona Band of Mission Indians v. Yee* (9th Cir. 2008) 528 F.3d 1184, 1192.) The federal government regulates leasing of Indian land and has an interest in tribal economic development. (25 C.F.R. § 162.001 et seq.) Federal regulations govern who may consent to a lease (25 C.F.R. § 162.013), its duration (25 C.F.R. § 162.311 [residential leases]; 25 C.F.R. § 162.411 [business leases]), and its contents (25 C.F.R. § 162.313 [residential leases]; 25 C.F.R. § 162.413 [business leases]). Here, Agua Caliente Band employees review residential leases of Allotted Lands, but do so as a Bureau of Indian Affairs function. They may not share any information as to such residential leases with the Band. (AA:1:248 at ¶ 91.)

However, once a lease is approved, federal involvement is limited to its enforcement. (25 C.F.R. § 162.364 [residential leases]; 25 C.F.R. § 162.434 [business leases].) The federal government does not oversee a lessee's use of the land, except to ensure compliance with the lease. (*Ibid*.) Recent revisions to Part 162 further limit federal involvement in lease regulation to reduce the regulatory burden on tribes. (77 Fed. Reg. 72440, 72440–72442 (Dec. 5, 2012).) These revisions intentionally reduced the comprehensive nature of these regulations. (*Ibid*.) This absence of regulation contrasts with the extensive timber regulations disputed in *Bracker*, which regulated equipment to be used, the number of trees to be cut, and even vehicle speeds. (*Bracker*, *supra*, 448 U.S. at pp. 145–148.)

This Court addressed this factor in *Herpel*, finding it insufficient to establish a strong federal interest: "the mere fact that the Leasing Regulations are extensive does not require us to conclude that the federal interest strongly supports preemption." (*Herpel*, *supra*, 45 Cal.App.5th at pp. 109.) Rather, *Bracker* analysis focuses on the statute and the congressional policies underlying it. (*Ibid*.) Leases on Allotted Land and Tribal Trust Land are governed by 25 U.S.C. § 415. Nothing in that statute, or in the Long Term Leasing Act of which it is part, evidences Congressional intent to exclude state taxation of non-Indians' leases of Indian land. (*Herpel*, *supra*, 45 Cal.App.5th at p. 109.) Rather, the statutory purpose was to remove restrictions on Indian land which disadvantaged tribal

economic activity in competition with owners and occupants of lands not so regulated. (*Id*. at p. 110.) Thus, the nature of the federal government's interest does not support preemption of the Voter Approved Taxes. (*Id*. at p. 111.)

Regulations governing leases of Indian lands demonstrate no federal interest in making non-Indian lessees free riders at the expense of others who pay the CVWD taxes which fund SWP supplies. Leasing regulations alone cannot exempt non-Indian lessees of Indian land from a tax that funds water service to those non-Indian lessees. (*Gila River Indian Community v. Waddell* (9th Cir. 1996) 91 F.3d 1232, 1237 ["[T]he Tribe's argument that the mere existence of federal oversight over leasing of Indian lands preempts a state tax is without support."].)

Fairness requires non-Indian lessees to pay — just as do all others who receive the same service. No federal interest suggests otherwise. It would be inefficient to the point of impracticality for CVWD to limit its water supply to the non-Indian portions of the checkerboard that is the Coachella Valley, depriving Indian land of services. Nor could CVWD efficiently serve the whole Valley if only half its land contributed to the cost of doing so. Nothing indicates a federal interest in requiring either scenario.

2. CVWD'S VOTER APPROVED TAX DOES NOT INFRINGE TRIBAL SOVEREIGNTY

As discussed in Section V.B, *supra*, CVWD's Voter Approved Tax does not burden the Tribe, and therefore there can be little tribal interest in preventing its levy of the. This factor, too, was addressed and held insufficient to support preemption in *Herpel*. (45 Cal.App.5th at p. 112.) This Court held that, as the burden of the tax falls only on possessory interest holders, not the Tribe, no tribal interest supports preemption. (*Ibid*.) So too, here. Both the legal and economic incidence of CVWD's Voter Approved Tax fall on Plaintiffs alone, non-Indian lessees, not on the Tribe or its members. CVWD incorporates by reference DWA's argument on this point. (DWA Respondent's Brief at pp. 38–43.)

The Tribe bears no economic burden of CVWD's Voter Approved Tax because the Tribe cannot adopt a State Water Project Tax. CVWD's Voter Approved Tax is levied pursuant to CVWD's Water Supply Contract with the State's Department of Water Resources, which obligates CVWD to pay its share of DWR's costs to construct, operate, and maintain the SWP, whether or not it takes any water — a so-called "take or pay" arrangement. (*Marquardt*, *supra*, 59 Cal.2d at pp. 194–196; AA:1:264 at ¶ 215.) The Tribe is not a State Water Project Contractor, and Plaintiffs have produced no evidence that the Tribe has the desire or ability to become one. Plaintiffs cite no evidence for their claim the Tribe might replace

CVWD's Voter Approved Tax with its own tax. The Tribe certainly cannot become a State Water Project contractor at this late date — the services and facilities of that system are fully subscribed. (See, e.g., AA:1:263, ¶ 207; RA:1:65 at ¶ 15(b) [requiring State approval for changes in organization of contractor, e.g., dissolution, exclusion of lands, consolidation or merger]; *Antelope Valley-East Kern Water Agency v. Local Agency Formation Com.* (1988) 204 Cal.App.3d 990 [detachment of territory does not relieve land of SWP tax obligations].)

Plaintiffs seek to distinguish *Herpel* in part due to expert testimony here as to the effect of the possessory interest taxes on the Tribe. However, that evidence did not address CVWD's Voter Approved Tax. The expert's report did not address CVWD services funded by its Voter Approved Tax. (RA:1:32 at ¶ 84.) Nor did he testify in deposition to any impacts of CVWD's Voter Approved Tax — he was therefore precluded from doing so at trial. (RA:1:316–319; RT:33:1–13.) Thus, as in *Herpel*, "there is no evidentiary showing that the tribe would be negatively affected if it imposed its own taxes on top of" CVWD's Voter Approved Tax. (45 Cal.App.5th at p. 112.)

3. State Interests in the Possessory Interest Tax Are Strong

When a tax is levied to fund services to non-Indians on Indian land, the state's interests in levying the tax outweigh federal interests in preemption. (*Cotton Petroleum*, *supra*, 490 U.S. at p. 175.)

Unlike the taxing agency in *Bracker*, which could identify no regulatory function or service to Indian land its tax funded (*Bracker*, *supra*, 448 U.S. at pp. 148–149), CVWD funds essential services to non-Indian lessees with the challenged PITs. (AA:1:261 at ¶¶ 187–188.) Lessees of tribal lands here are not convenient deep pockets, they are service recipients who appropriately pay for what they receive on identical terms to all other CVWD customers. Indeed, *Bracker* made this very distinction. (448 U.S. at p. 150 ["[T]his 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."].) Plaintiffs cannot contend CVWD "has had nothing to do with the on-reservation activity, save tax it." (*Cotton Petroleum*, *supra*, 490 U.S. at p. 186.)

Again, this Court has already rejected Plaintiffs' arguments on this factor. (*Herpel*, *supra*, 45 Cal.App.5th at pp. 113–116.) CVWD does not tax Plaintiffs' leaseholds without serving them. (*Id*. at p. 114.) Rather, this Court held that the services Possessory Interest Tax in Riverside County funds are substantial, benefitting non-Indians and Tribe members alike, on and off Tribal land. (*Id*. at p. 115.) The County's possessory interest tax was related to the residential and business purposes of the taxed leaseholds, unlike the taxes preempted in the cases the *Herpel* petitioners cited. (*Id*. at pp. 115–116.)

CVWD's interest in, and responsibility for, water services is the same as to non-Indian and Indian land. Coachella Valley residents' water demands, particularly in light of recent development of Indian land, exceed local supplies. (AA:1:263 at ¶ 201.) CVWD uses its SWP entitlement to import Colorado River Water to recharge the groundwater basin so it can serve its customers. (AA:1:263 at ¶ 210; AA:1:265 at ¶ 227.) CVWD expects to stabilize the Coachella Valley groundwater basin by 2022 — an historic achievement, a century in the making. (AA:1:262 at ¶ 200.)

CVWD levies its Voter Approved Tax to fund its obligations under the SWP Contract. (AA:1:264 at ¶ 217.) If CVWD did not pay its share of DWR's costs, it would no longer receive SWP water. Absent that supply, CVWD could not meet the needs of Coachella Valley businesses and residents, including non-Indian lessees of Indian land. Thus, all residents, including Plaintiffs, benefit from CVWD's SWP Contract, which ensures water supplies for current and future uses.

Revenue from the Voter Approved Tax as applied to possessory interests on Allotted Lands is in the hundreds of thousands of dollars per year, as detailed *supra*. (AA:1:245 at ¶ 71.) If Plaintiffs did not pay CVWD's Voter Approved Tax, they would get a free ride at the expense of CVWD's other customers, benefiting from CVWD's water supplies without paying their fair share of costs

others pay — if CVWD could afford to continue those services for anyone.

D. PROPOSITION 218 BARS CVWD FROM INCREASING USER FEES TO COVER THE LOSS OF PLAINTIFFS' POSSESSORY INTEREST TAXES

Plaintiffs argue the state interest in imposing CVWD's portion of the general 1% possessory interest tax and its Voter Approved Tax is weak, because CVWD could replace tax proceeds from Plaintiffs with a user fee. (Op. Br. at p. 61.) They fundamentally misunderstand California's Constitutional restrictions on property-related fees.

In 1996, California voters adopted Proposition 218 to establish substantive and procedural restrictions on local government taxes, assessments, and a class of newly defined "property-related fees." (*City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1200 ("*Ventura*"), citing Cal. Const., art. XIII D, § 3, subd. (a); League of California Cities, **Propositions 26 and 218 Implementation Guide** (May 2019) at p. 16 ("Props. 26 & 218 Guide").[7]) Proposition 218 requires the amount of a "fee or charge

[7] This is available at < https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Proposition-26/LCC-218-26-Guide-2017-FINAL.aspx > as

imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel." (*Ventura, supra,* 3 Cal.5th at p. 1200, quoting Cal. Const., art. XIII D, § 6, subd. (b)(3).) Voters extended Proposition 218's requirements in 2010 by Proposition 26. It defines the "taxes" which require voter approval under the earlier measure to include "any levy, charge, or exaction of any kind imposed by a local government," except those in seven express, and two implied, exceptions. (*Ibid*., quoting Cal. Const., art. XIII C, § 1, subd. (e); Props. 26 & 218 Guide, at pp. 53–77.)

Plaintiffs fail to address or acknowledge these restrictions, blithely asserting CVWD can "adjust the fees for users who lease Reservation land to offset the inability to tax the leasehold … ." Not so. Proposition 26 requires that rates be imposed "for a specific government service or product provided directly to the payor that is not provided to those not charged ... ." (Cal. Const., art. XIII C, subd. (e)(2), italics added.) If Plaintiffs do not pay for the water service they receive, CVWD cannot charge others to cover the gap. (*Green Valley Landowners Assn. v. City of Vallejo* (2015) 241 Cal.App.4th 425, 438, 440 [Prop. 218 forbade city to subsidize service on exurban water system with urban rates].)

Taxes, in contrast, need not fund any particular service or benefit to those taxed. "Nothing is more familiar in taxation than the

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of Aug. 30, 2020.

imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied." (*Jensen v. Franchise Tax Board* (2009) 178 Cal.App.4th 426, 437 [quoting *Carmichael v. Southern Coal & Coke Co.* (1937) 301 U.S. 495, 521–522].) The revenue CVWD receives from the general 1% possessory interest tax is not tied to any particular service provided to Plaintiffs, or any other water customer. Rather, it is used to fund the District's operations, which generally benefit all customers, including Plaintiffs. If Plaintiffs cease paying the general 1% possessory interest tax, and therefore CVWD ceases to receive its share of those tax monies, CVWD has no recourse to recover that lost revenue. Plaintiffs would still benefit, however, from the improvements and water services funded in part by the property taxes paid by all other residents of the Coachella Valley Water District, thereby receiving a "free ride."

E. PLAINTIFFS FAILED TO EXHAUST ADMINISTRATIVE REMEDIES AS TO CVWD'S VOTER APPROVED TAX, AND LACHES BARS EQUITABLE RELIEF

Even if Plaintiffs could establish federal preemption of CVWD's Voter Approved Tax, this Court may nonetheless affirm the judgment as to CVWD for Plaintiffs failure to exhaust administrative remedies as to that tax. (*Hill RHF Housing Partners, L.P. v. City of Los Angeles* (2020) 51 Cal.App.5th 621 [affirming judgment for assessing

agency because Prop. 218 challenger did not raise issues to be litigated in hearings on assessment] ("*Hill RHF*").) The exhaustion of administrative remedies requirement is well settled. "The cases which so hold are legion." (*County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 73.) If an administrative remedy is provided, it must be exhausted before judicial review is available. (*Ralph's Chrysler-Plymouth v. New Car Dealers Policy & Appeals Bd.* (1973) 8 Cal.3d 792, 794.) It is jurisdictional and applies whether or not the remedy to be exhausted affords complete relief. (*Yamaha Motor Corp. v. Superior Ct.* (1987) 195 Cal.App.3d 652, 657; *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 496–501.)

Exhaustion requires full presentation to an agency of all issues later to be litigated and the essential facts on which they rest. (*Hill RHF*, *supra*, 51 Cal.App.5th at p. 621; *City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 609 [duty to exhaust PERB remedies before suing to enjoin strike].) Because it is jurisdictional, the rule is not a matter of judicial discretion. (*Roth v. City of Los Angeles* (1975) 53 Cal.App.3d 679, 687 [lawsuit barred even as to constitutional challenges because plaintiffs failed to object at city council hearing to assessment to abate public nuisance].)

The administrative remedy available here is a tax refund claim under Revenue and Taxation Code, section 5097. California law prohibits courts from issuing a writ of mandate or ordering any

other legal or equitable remedy "to prevent or enjoin the collection of property taxes sought to be collected." (Rev. & Tax Code, § 4807; cf. Cal. Const., art. XIII, § 32, subd. (a) [prohibiting injunctions against state taxes except as authorized by statute]; *Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 76 (extending art. XIII, § 32 to local taxes), disapproved on another ground by *McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613, 626.) However, the Revenue and Taxation Code allows a refund of an allegedly illegal or erroneous tax if the County refuses a refund claim filed pursuant to that code. (Rev. & Tax Code, §§ 5096, 5140.) "An order for a refund under this article shall not be made, except on a claim … filed within four years after making of the payment sought to be refunded … ." (*Id*., § 5097, subd. (a)(2).) "No recovery shall be allowed in any refund action upon any ground not specified in the refund claim." (Rev. & Tax. Code, § 5142.)

Plaintiffs filed Government Claims Act claims with the County for the amounts listed in their Second Amended Complaint (*Albrecht*) (AA:1:42–67) and Complaint (*Abbey*) (AA:1:79–89). (RA:1:144–239.) These amounts included the 1% Tax at Issue (AC) and the Voter Approved Taxes, as well as other fees and assessments not challenged here. (AA:1:232 at ¶ 4.) But, the Administrative Claims did not reference CVWD's Voter Approved Tax, and alleged only the "possessory interest tax" imposed by the County applied to Plaintiffs unlawfully. (E.g., RA:1:144.) Plaintiffs generally claimed:

"the whole assessment of the Property is void" and "the taxes imposed on the basis of the Property's assessment are and have been erroneously and illegally assessed, levied and collected." (*Ibid*.)

The Government Claims Act claims imply, but do not give notice of, challenge to CVWD's Voter Approved Tax. A refund claim must specify all grounds for a refund. (Rev. & Tax. Code, § 5142.) The reference to a general "possessory interest tax" is insufficient. Although the County collects the Voter Approved Tax, that tax is not part of the general 1% property tax Proposition 13 authorizes. (Cal. Const., art. XIII A, § 1, subd. (a).) CVWD's Voter Approved Tax is levied separately under Water Code section 31701. Plaintiffs failed to identify this authority, or provide any grounds for their claimed exemption from CVWD's Voter Approved Tax. Their claims are therefore barred. (Rev. & Tax Code, § 5142 ["No recovery shall be allowed in any refund action upon any ground not specified in the refund claim."].)

Moreover, the common law duty to exhaust administrative remedy is implicated, too. Because of Plaintiffs' failure to identify the CVWD Voter Approved Tax in their Government Claims Act claims, CVWD had no notice its Voter Approved Tax would be questioned here. CVWD did not receive notice of Plaintiffs' challenge to the Voter Approved Tax until summer 2018 — more than four years after the first of these suits was filed. This lack of notice deprived CVWD of the opportunity to evaluate the issues to

be litigated and the facts on which those issues rested before the filing of this action, to apply its expertise, and to develop a record to facilitate judicial review. (*City of San Jose v. Operating Engineers Local Union No. 3*, *supra*, 49 Cal.4th at p. 609.) These same facts establish a laches defense to the equitable relief Plaintiffs seek. (*Magic Kitchen LLC v. Good Things Internat. Ltd*. (2007) 153 Cal.App.4th 1144, 1161–1162.)

VI. CONCLUSION AND DISPOSITION

Plaintiffs repeat arguments the Tribe and other lessees asserted unsuccessfully in this Court and the Ninth Circuit, adducing the same evidence. They offer neither new evidence nor new authority to justify a different result now. This Court can safely follow *Herpel* and *Agua Caliente*.

As to CVWD's Voter Approved Tax, there is no justification for applying either express or implied preemption. The Tribe does not — and cannot — serve water to non-Indian lessees, or have any interest in protecting non-Indian lessees from paying for water service they need use their leaseholds. CVWD uses the revenues from both taxes to serve water and provide other services that benefit Plaintiffs both directly and indirectly — and Indian land, to boot.

The special legal status of Indians does not justify the free ride non-Indian Plaintiffs seek here. If they want water supply, they should pay for it — as does everyone in the Coachella Valley.

Accordingly, CVWD urges this Court to affirm the trial court judgment in full, bringing this case to its appropriate and long-awaited conclusion.

DATED: September 3, 2020

COLANTUONO, HIGHSMITH & WHATLEY, PC

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CERTIFICATE OF COMPLIANCE WITH RULES OF COURT, RULE 8.204(C)(1)

Pursuant to California Rules of Court, rule 8.204(c)(1), the foregoing Respondent's Brief is produced using 13-point Roman type and contains 8,725 words (excluding the tables, cover information, and Certifications) and is thus within the limit of 14,000 words. In preparing this Certificate, I relied on the word count of the Microsoft Office 365 Word MSO program used to prepare this brief.

DATED: September 3, 2020

COLANTUONO, HIGHSMITH & WHATLEY, PC

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PROOF OF SERVICE

Leonard Albrecht, et al. v. County of Riverside, et al.
Fourth District Court of Appeal, Division Two Case No. E073926
Riverside County Superior Court Case No. PSC1501100
Consolidated with Case No. RIC1719093

I, Ashley A. Lloyd, declare:

I am employed in the County of Nevada, State of California. I am over the age of 18 and not a party to the within action. My business address is 420 Sierra College Drive, Suite 140, Grass Valley, California 95945. On September 3, 2020, I served the document(s) described as **DEFENDANT-INTERVENOR COACHELLA VALLEY WATER DISTRICT'S RESPONDENT'S BRIEF** on the interested parties in this action as follows, by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST FOR METHOD OF SERVICE

XX BY MAIL: The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Grass Valley, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

XX BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, by causing the documents to be sent to the persons at the e-mail addresses listed on the service list on September 3, 2020 from the court authorized e-filing service at TrueFiling.com. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission.

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

Executed on September 3, 2020, at Grass Valley, California.

Ashley A. Lloyd

SERVICE LIST

Leonard Albrecht, et al. v. County of Riverside, et al.
Fourth District Court of Appeal, Division Two Case No. E073926
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