IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION TWO

Leonard Albrecht, et al.,

Plaintiffs-Appellants,

v.

County of Riverside, Desert Water Agency, et al.,

Defendants-Appellees.

Patricia Abbey, et al.,

Plaintiffs-Appellants,

v.

County of Riverside, Desert Water Agency, et al.,

Defendants-Appellees.

Court of Appeal No. E073926

(Super. Ct. No. PSC 1501100, Consolidated with No. RIC 1719093)

On Appeal from a Judgment of
The Superior Court, County of Riverside,
Hon. Craig G. Reimer, Judge.

APPELLANTS' OPENING BRIEF

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Service on the Attorney General of the State of California Required by Cal. Rules of Court, Rule 8.29.

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to Rule 8.208 of the California Rules of Court, counsel for Appellants certify that, to the best of their knowledge, no entity has an ownership interest of 10 percent or more in any of the entities that are parties to this case, nor is there any other person or entity, other than the parties themselves, that has a financial or other interest in the outcome of the proceeding that counsel reasonably believes the justices should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics. Counsel will promptly supplement this certificate if additional information comes to light.

By: */s/ Jane Maschka*

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INTRODUCTION

This case presents the question whether the County of Riverside and other state entities may pursue their objective of raising general revenue to support government services by imposing annual taxes on the full value of Indian land that is leased to non-Indians. The answer to this question is, no, they cannot raise revenue in this particular way because federal law forbids it.

The taxes at issue strike at the heart of Indian land interests and sovereign self-government. They are annual, *ad valorem* taxes assessed against the full value of the Indian-owned land. Because a tax imposed directly on the land or its owners would unquestionably be preempted, these taxes are imposed on the lessees based on the value of the leasehold interest—but the value of the leasehold interest is defined to be the same as the value of the land itself. The record shows, moreover, that the tax is so high that it precludes the Agua Caliente Tribe from imposing its own tax and thus strips the Tribe of the ability to direct its own economic development and fund its own self-government.

Because the tax strikes at the heart of Indian interests in land and self-governance, it is forbidden by three separate doctrines of federal preemption: (1) express preemption by § 465 of the IRA; (2) implied preemption of state actions that infringe on tribal sovereignty and self-government; and (3) implied preemption under the Supreme Court's *Bracker* balancing test.

Just because the County cannot raise revenue through this particularly invasive way does not mean that it is precluded from raising revenue in other ways. Indeed, the services provided by the Defendant Water Districts can easily be supported by user fees, and the

more general government services can be supported by an inter-governmental agreement with the Agua Caliente Tribe. The Tribe is already party to several inter-governmental agreements with the County and its cities, and it stands ready to enter another one addressing this subject. The dispute in this case is not over *whether* the County can raise revenue, but over *how* it has chosen to do so. It cannot annually tax the value of Indian land because the right to raise revenue in that way belongs solely to the Tribe.

We acknowledge that previous decisions in the Ninth Circuit and California state court have upheld the County's taxes against preemption arguments. But the initial federal case (to which a recent decision deferred) was decided before the Supreme Court's modern preemption jurisprudence, and it is inconsistent with that jurisprudence. This Court's recent decision also is not controlling because it did not consider many of the arguments presented here, since plaintiffs in that case did not raise them. This Court should now hold the taxes to be preempted based on the factual record and legal arguments presented here.

STATEMENT OF THE CASE

At issue in this case are three groups of taxes that the County of Riverside and other state entities impose on non-Indians who lease Indian land either within the Agua Caliente Indian Reservation or on trust land belonging to the Colorado River Indian Tribe ("CRIT"). The taxes are the mirror images of the property taxes that the County concededly cannot impose—they annually impose the same percentage rate on the same value of the property. The question is whether these taxes are preempted by federal law.

I. The History of Takings Of Indian Land And The Development Of Federal Protection Against Further Takings.

The history of federal, state, and local attempts to take Indian land is not a proud one. Over the last four hundred years, Indian tribes have lost nearly all their land. In the 1900s alone, under the federal government's allotment policy that ended in 1934, Indian land holdings were reduced from 138 million acres to 48 million acres. *Cohen's Handbook of Federal Indian Law* § 1.04, 1.05 (Neil Jessup Newton ed., 2012). Under the allotment policy, individual Indians and tribes were granted small parcels of land on reservations, and the land was opened up to sale or alienation by other means.

The aim of the allotment policy "was to terminate tribal governments and extinguish tribal territories by dismantling the tribal land base." Stella Saunders, *Tax Law-Tribal Taxation and Allotted Lands:* Mustang Prod. Co. v. Harrison, 27 N.M. L. Rev. 455, 460 (1997). The policy was undeniably effective, and state taxes played a significant role in its success. Much of the allotted land, and its value, was taken from Indians "through tax sales because of the nonpayment of state taxes." Scott A. Taylor, *State Property Taxation of Tribal Fee Lands Located Within Reservation Boundaries: Reconsidering County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation and Leech Lake Band of Chippewa Indians v. Cass*, 23 Am. Indian L. Rev. 55, 68 (1998). Many tribes have now been relegated to patchwork reservations, comprised of scattered pieces of property intermingled with property owned by non-Indians. These checkerboard-shaped reservations resulted in the "breakdown of tribal governmental structures." Robert C.

Batson, *Addressing the Opioid Crisis in Indian Country with a* Parens Patriae *Action in Tribal Court*, 11 Alb. Gov't L. Rev. 106, 113 (2018).

Allotment is now considered a "method[] of repression and suppression unparalleled in the modern world outside of Czarist Russia and the Belgian Congo." *Blackfeet Tribe of Indians v. Montana*, 729 F.2d 1192, 1197 n.14 (9th Cir. 1984) (citation omitted); *see also Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1000 (8th Cir. 2010).

In 1934, however, United States policy changed with the passage of the Indian Reorganization Act ("IRA"). Under the IRA, the federal government began restoring Indian land to Indian ownership and control, aiming "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (cleaned up). To "put a halt to the loss of tribal lands," *id.* at 151, the IRA authorized the United States to acquire "lands" and "interests in lands" for Indian tribes as well as "individual Indian[s]." 25 U.S.C. § 5108 (codifying § 5 of the IRA and referred to as "§ 465" based on its predecessor statute).

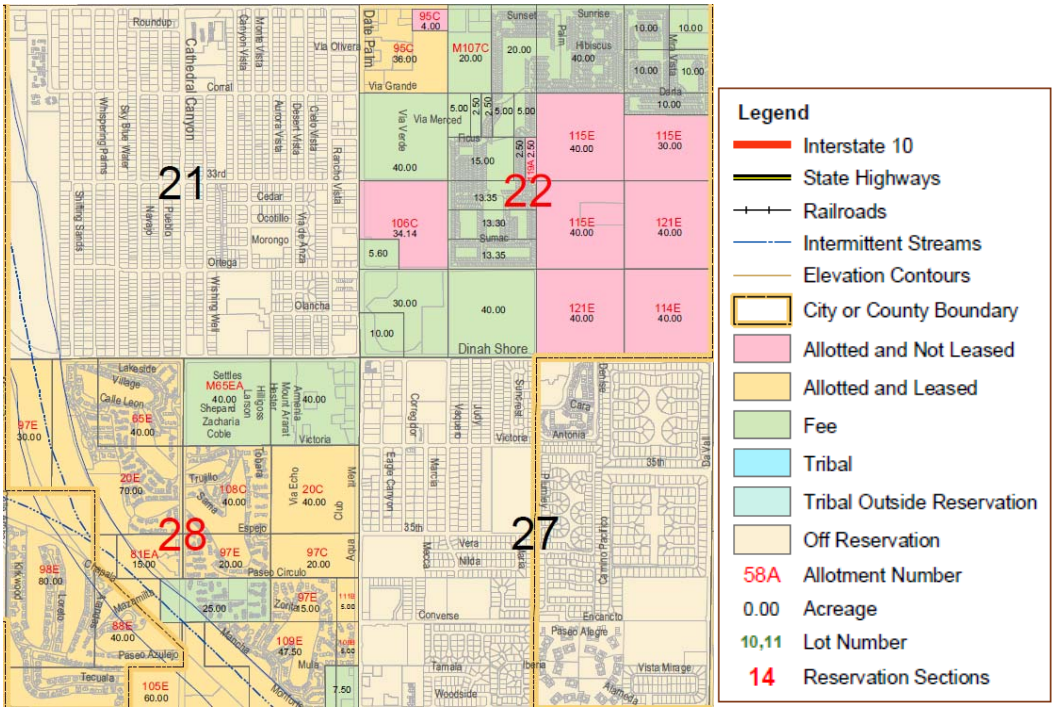
Although federal policy has changed, many state and local governments have continued their efforts to tax, take, and control Indian lands. Because "the power to tax involves the power to destroy," *M'Culloch v. State*, 17 U.S. 316, 431 (1819), the IRA provides that all "lands or rights" acquired under the IRA by the United States in trust "***shall be exempt from State and local taxation***." 25 U.S.C. § 5108 (emphasis added). Additionally, federal law broadly precludes state taxes on reservation lands as "an unwarrantable interference, inconsistent with the original title of the Indians, and offensive

to their tribal relations." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764-65 (1985) (citation omitted).

II. The Agua Caliente Reservation, And Plaintiffs' Leases of Reservation Land.

The tribes and reservation at issue suffered under the allotment policy and have been fighting ever since to regain their economic independence and self-governance under the protection of federal law.

The Agua Caliente Indian Reservation is the home of the Agua Caliente Tribe. The Reservation was established by Executive Order in 1876 and expanded in 1877. (Appellants' Appendix ("AA"), 1 AA 246). Established as a checkerboard, the reservation was diminished and perforated by the allotment policy. Today it covers roughly 31,000 acres spread across Riverside County in parts of Palm Springs, Cathedral City, Rancho Mirage, and unincorporated land. (1 AA 246-47; 2 AA 732). Its checkerboard pattern—and the loss of land within the checks—can be seen in the map below:



The land within the Agua Caliente Reservation is the Agua Caliente Tribe's most valuable natural resource. To monetize that value, the Tribe and its members lease 4,314.75 acres to non-Indians under some 20,000 lease agreements. (1 AA 247).

The Colorado River Reservation is the home of the CRIT. The Reservation was created by the Act of March 3, 1865. (1 AA 255). Originally limited to Arizona, the Reservation was expanded to California by an 1874 Executive Order. (1 AA 255-56). The location of the western boundary of the Reservation remains subject to a dispute that cannot be resolved in this suit. (1 AA 256). The CRIT and its members lease trust land to non-Indians. (1 AA 255; 2 AA 464).

Plaintiffs are a group of 499, non-Indian taxpayers who lease land within the Agua Caliente Reservation or on trust land belonging to the CRIT. (1 AA 246, 255).

III. The Federal And Tribal Regulation Of The Leases.

The leases that Plaintiffs entered, and the leasing of land within the Agua Caliente Reservation generally, is subject to comprehensive federal and tribal regulation.

Land within the Reservations is held in trust by the United States for the benefit of either the Tribe or individual tribal members, depending on the parcel. (1 AA 247, 254; 2 AA 732). Trust land cannot be leased to non-Indians without approval from the Bureau of Indian Affairs ("BIA"), a bureau within the United States Department of the Interior. (1 AA 251, 254). To be approved, leases must provide "adequate consideration" to the Indian lessor, and they are subject to comprehensive federal review, approval, oversight, and enforcement. *See* 25 U.S.C. § 415 and related regulations. (1 AA 254; *see* 25 CFR Part 162). By federal decree, the leases must contain certain provisions related to land use, federal enforcement of the lease provisions, and payment to the federal government. *See, e.g.*, 25 CFR §§ 162.313–14, .324, 361–74.; *infra* at 59-60 (discussing the requirements in more detail).

The oversight of the leasing of Agua Caliente Reservation land is overseen partly by the BIA and partly by the Agua Caliente Tribe, exercising authority delegated by the BIA. The BIA oversight is performed by a dedicated department in Palm Springs. (1 AA 248, 251, 254.); *Palm Springs Agency*, BIA.Gov, https://www.bia.gov/regional-offices/pacific/palm-springs-agency (last visited April 24, 2020). Under a contract between the Tribe and BIA, tribal employees perform BIA administrative functions necessary for residential lease administration. (1 AA 248, 254; 2 AA 700-15.)

The Agua Caliente Tribe oversight is performed by the Economic Development Division ("EDD"), a branch of the Tribal Planning & Development Department. Acting under a Tribal Business Leasing Ordinance that the BIA approved, the EDD exercises reviews, approves, enforces, and administers leases of tribal trust land for business purposes. (2 AA 734-36). Like the federal regulations, the Ordinance prescribes mandatory lease terms (2 AA 737-45), and the EDD is authorized to enter the leased premises at any reasonable time (2 AA 746-47). All lease payments must be made to the EDD. (2 AA 740). The Secretary of the Interior, however, has ultimate authority to enforce or cancel a lease authorized pursuant to the Tribe's Ordinance. 25 U.S.C. § 415(h)(7).

All of Plaintiffs' leases were approved and are currently managed by either the BIA or the EDD. *See* 25 U.S.C. § 415(a), (h), (1 AA 254).

IV. The Annual Taxes Imposed On The Full Value Of The Leased Reservation Land.

At issue are three groups of local taxes that are annually imposed against the full value of the leased reservation land: a general-revenue levy, water-district taxes, and education taxes.

These taxes, by design, mirror the property taxes that state and local governments impose on non-Indian land. Each year, the County of Riverside assesses *ad valorem* taxes[1] on all taxable property in the County, annually collecting in excess of $2.5 billion. (1 AA 233, 253); Cal. Const., art. XIII, § 1. The taxes are levied against "real property," which is

[1] *Ad valorem* taxes are assessed as a percentage of the value of (according to the value of) the thing taxed, here land or the right to possess land.

defined to include "[t]he possession of, claim to, ownership of, or right to the possession of land," as well as all "[i]mprovements." Cal. Rev. & Tax. Code §§ 103, 104.

When the fee simple ownership interest in land is tax exempt but the land is leased and the lease is taxable, the County taxes the possessory interest obtained by the lease in exactly the same way it would have taxed the property. (2 AA 720-22). "Possessory interests" are defined as "[p]ossession of, claim to, or right to the possession of land or improvements that is independent, durable, and exclusive" of the rights held by the fee simple title holder. Cal. Rev. & Tax. Code § 107. The possessory-interest taxes are calculated *ad valorem*—according to the value of the interest—just like the property taxes. (1 AA. 232, 234.)

As relevant to this case, because the County cannot tax Indian land, it instead taxes the non-Indians who lease Indian land, based on the value of the possessory interest they obtain. Cal. Rev. & Tax. Code § 107; (1 AA 232-34). Like all real property taxes in the County, the possessory-interest taxes are comprised of the 1% general-purpose levy (the "General-Purpose Levy") and several taxes on voter-approved debts ("VATs"). (1 AA 231-33).

A. The General-Purpose Levy.

The principal tax at issue is the General-Purpose Levy. (1 AA 231, 253). The General-Purpose Levy is imposed annually in the amount of 1% of the possessory interest. (1 AA 231-32, 234, 251, 259-60, 264; 2 AA 679-93).

As its name suggests, the General-Purpose Levy is a "general revenue tax" (1 AA 234, 244), and the money it raises can be used "for any public purpose" (2 AA 724). As an

administrative matter, the revenues are first deposited in the County's general fund, then distributed to over 350 entities, with some retained for the County itself. (1 AA 235-36, 241). "Virtually all government services that are rendered to the citizens of California or citizens of Riverside County are funded in part by the[] [General-Purpose Levy]." (Reporter's Transcript ("RT"), RT 200:12-14; 2 AA 725-26). These services are available to all County residents and visitors. (1 AA 265-66).

Only a minuscule portion of the County's annual budget comes from Indian Land Revenues. The County annually collects approximately $2.5 billion in property taxes (1 AA 233, 253), of which only $22.8 million came from non-Indian lessees with leases on the Agua Caliente Reservation ("Indian Land Revenues") in FY2013/2014. The County does not separately track how the Indian Land Revenues are used; they are commingled with other property tax revenues. (1 AA 235; 2 AA 727). Based on its allocation formulas, the County ***estimates*** that the commingled Indian Land Revenues would be distributed as follows:

Recipient	**Amount**
Retained by County	$3.3 million
Palm Springs Unified School District	$6,152,718 ($3,776,171 for general purposes; $2,376,547 for redevelopment)
Desert Community College	$1,760,994 ($1,079,310 for general purposes; $681,684 for redevelopment)
Riverside County Office of Education	$985,071 ($587,200 for general purposes; $397,871 for debt service)
Educational Revenue Augmentation Fund[2]	$4,317,307 ($2,799,097 for general funding; $1,518,210 for redevelopment)

[2] The Educational Revenue Augmentation Fund (ERAF) is a mechanism enacted by the California Legislature in 1992 to shift local property tax revenues from cities, counties, and special districts into a state-controlled fund. ERAF funds are allocated by the State to schools throughout California to help meet minimum funding requirements. *See generally*

Recipient	Amount
Palm Springs	$3,148,348 ($2,482,465 for general purposes; $665,883 for redevelopment)
Rancho Mirage	$268,261
Cathedral City	$685,296
Riverside County Regional Parks and Open Space District	$77,186
Palm Spring Cemetery District	$21,951
Desert Healthcare District	$467,184
Coachella Valley Mosquito & Vector Control District	$228,701
CVWD	$670,788
DWA	$161,158
Riverside County Flood Control and Conservation District	$547,962
FY2013/2014 Total Indian Land Revenues	**$22.8 million**

(1 AA 236-41, 243).

B. The Voter-Approved Taxes.

In addition to the General-Purpose Levy, several Voter-Approved Taxes ("VATs") are imposed annually, each adding a fractional percentage to the tax burden. Each non-Indian lessee of tribal land pays one or more VATs. (1 AA 233).

1. Water District taxes.

Most non-Indian lessees pay a tax to either the Desert Water Agency ("DWA") or the Coachella Valley Water District ("CVWD"). The *ad valorem* rate for each tax is 0.1%, and revenues are used to fund the districts' annual obligations for water deliveries from the State Water Project. (1 AA 245).

City of Scotts Valley v. Cty. of Santa Cruz, 201 Cal. App. 4th 1, 13–18 (Cal. Ct. App. 2011), as modified on denial of reh'g (Nov. 23, 2011) (describing history of ERAF legislation).

In FY2017/2018, CVWD expected to receive nearly $370 million in total revenues. (1 AA 238). Of that, $60 million was estimated to come from its VAT. (*Id.*) And of that $60 million, only about $700,000 comes from taxes assessed against non-Indian lessees of Indian land. (1 AA 245).

In FY2014/2015, DWA received $52 million in revenues, including $17-18 million from its VAT, of which just $1.3 million derived from taxes imposed on non-Indian lessees of Indian land. (*Id.*)

2. Public-education institution taxes.

Many non-Indian lessees of tribal land also pay VATs related to debts taken on by public education institutions. Lessees of Agua Caliente land pay taxes for the Palm Springs Unified School B&I 1992 A and the Desert Community College B&I debts, while lessees of CRIT land pay taxes for the Palo Verde Unified School B&I and Palo Verde Community College District debts. (1 AA 232-33). Taxes are paid at the following rates:

Debt	**Rate (tax year)**
Palm Springs Unified School B&I 1992 A	0.11802% (2016-17); 0.11146% (2017-18)
Desert Community College B&I	0.02036% (2016-17); 0.04030% (2017-18)
Palo Verde Unified School B&I	0.04402% (2016-17); 0.04286% (2017-18)
Palo Verde Community College District	0.00025% (2016-17); 0.01555% (2017-18)

(1 AA 244-45, 268-69, 453).

Revenues from these taxes are used to fund projects such as modernizing classrooms and facilities, replacing heating and cooling systems, and improving the community

college's veteran's centers and programming. None of the revenues are used to provide services to the Tribes' reservations, and nothing in the record suggests that any non-Indian lessees of tribal land attended any of the institutions or otherwise used services funded by VAT revenues. (1 AA 244-45, 267, 269; 2 AA 511-678).

V. The Interference With The Agua Caliente Tribe's Independence And Right Of Self-Governance.

By unilaterally imposing the challenged taxes on leases of Reservation land, the County has denied the Agua Caliente Tribe the ability to set its own tax policy and raise core property-tax revenue to support its own self-governance.

The Agua Caliente Tribe is sovereign over its Reservation land and exercises the attendant rights of self-governance. The Tribe operates under a Constitution and Bylaws, which give governing powers to an elected Tribal Council, including the powers to adopt laws, impose taxes, and otherwise govern the Tribe. (2 AA 456-63). The Tribal Council has enacted regulatory codes and policies to guide use and development of its Reservation land, including a land use ordinance, building and safety code, and Tribal Environmental Policy Act. (1 AA 253; 2 AA 480-510, 733-50; 3 AA 752-894). The Tribe also provides government services to tribal members and Reservation residents, such as environmental review and building code enforcement to parcels of Reservation land that are not subject to a land-use agreement between the Tribe and a local government. (1 AA 248). The Tribe also offers a variety of services to parts of the 7,674 acres of tribal trust land on the Reservation, including road maintenance and repair, flood protection, and enforcement of food, occupational, and safety codes. (1 AA 248-49).

To support its government, the Tribe has the authority to impose taxes. The Tribal Tax Code recognizes that the imposition of taxes is an appropriate method to generate revenues to pay for "the costs of governmental services and programs," "provide direct and indirect civic and economic benefits" to tribal members and Reservation residents, "promote economic development on the Reservation," and "preserve tribal existence." (2 AA 482-83, 505).

Because the County has unilaterally imposed the challenged taxes on leased Reservation land, however, the Tribe is unable to levy its own taxes because they would further burden the Indian owners and make the land unmarketable. In 1967, the Agua Caliente Tribal Council adopted an ordinance establishing a tax on lessees' rights to use or possess real property within the Reservation. (3 AA 895-99). The tax is now memorialized in the Tribal Tax Code, which provides for a 1% tax on those interests. (2 AA 504-06). "[T]o avoid double taxation" of non-Indian lessees, however, the Tribe is holding its possessory interest tax in abeyance until: (1) the challenged taxes are preempted; (2) the County stops collecting them; or (3) the County and Agua Caliente execute an inter-governmental agreement "for mutual tax collection." (1 AA 250, 252; 2 AA 505). If one of these events occurs, the Agua Caliente intends to use revenues from its possessory interest tax "to provide essential government services in the local area." (1 AA 253). As it stands, the Agua Caliente is denied these revenues and the corresponding ability to decide what services should be provided on its Reservation and how they should be provided.

VI. The Availability Of Inter-Governmental Agreements As An Alternative To The Annual Taxes.

The County has continued to impose the challenged taxes on leased Reservation land despite the ready availability of less-intrusive means of coordinating with the Tribe—namely, inter-governmental agreements.

The Tribal Council has express authority to negotiate with federal, state, and local governments and enter into agreements with those governments regarding issues of mutual concern, including the use of land, "while maintaining ultimate Tribal sovereignty in all cases." (2 AA 461-62). Moreover, the Tribal Tax Code specifically permits the Tribal Council to enter into inter-governmental agreements regarding taxes. (2 AA 508).

Already, the Tribe is party to several "inter-governmental agreements," including land-use agreements with the County and the cities of Palm Springs, Cathedral City, and Rancho Mirage (1 AA 252), as well as a gaming compact with the State of California (1 AA 303-452). Through that compact, the Tribe pays funds to the State that the State then uses for numerous purposes, including to (a) reimburse costs incurred by State and local government agencies as a result of tribal gaming and (b) compensate local governments for law enforcement, fire, public safety, and other emergency response services. (1 AA 252, 324-25).

Nothing would prevent the County and Tribe from entering into further agreements to replace the taxes the County now unilaterally imposes on leased Reservation land.

VII. Plaintiffs Seek to Invalidate the Annual Taxes as Preempted Under Federal Law.

Plaintiffs, who are lessees of Reservation land, filed administrative claims with the County alleging that the challenged taxes are illegal and seeking to recover the taxes they paid the previous four years. The County never responded to Plaintiffs' claims, so Plaintiffs filed suit. *See* Cal. Rev. & Tax. Code § 5141(b). Water districts DWA and CVWD later intervened.

A two-day bench trial was held in October 2018. For the most part, the trial record was based on stipulated facts. But Plaintiffs called Eric Henson to testify as an expert in tribal government, tribal sovereignty, and tribal and general economic development. (RT 51:1-3, 67:1-6).

Henson holds a Masters in Public Policy degree from Harvard University and undergraduate and graduate degrees in economics. Since 1998, he has held an appointment at the Harvard Project on American Indian Economic Development at the Kennedy School, where he lectures, teaches, and conducts research concerning tribal governance and economic development. Henson also works at Compass Lexecon as an economic consultant, providing economic analysis and advice to Indian tribes and companies. Henson is a primary author of a prominent textbook about the policies governing Indian tribes and tribal strategies to promote self-determination and economic development. He has testified before the United States Congress on five occasions.

At trial, Henson testified about the General-Purpose Levy's impact on the Agua Caliente, concluding that the tax interferes with the Tribe's sovereignty and deprives the

Tribe of valuable economic development tools. (RT 67:16-20). Henson characterized the General-Purpose Levy as a "large tax," because unlike other one-off forms of taxation such as a sales tax, the General-Purpose Levy is re-imposed annually. (RT 69:18-24, 70:3-11). Over the course of a lease, according to Henson, the repetitive nature of the tax substantially decreases the value of the Indian lessor's interest and his or her ability to generate revenues. (RT 75:15-76:18, 80:28-86:6). Henson also testified that the General-Purpose Levy prevented the Agua Caliente from imposing its own possessory interest tax and generating revenue from its land and discouraged the Tribe from offering additional services. (RT 77:21-28, 78:23-79:22, 80:28-86:6, 89:15-96:4, 99:8-102:17). These impairments to the Tribe's right to self-government, said Henson, were completely unnecessary, because Defendants had other means for recovering revenues from non-Indians, such as inter-governmental agreements. (RT 102:1-6, 106:5-108:7, 110:16-111:8, 112:10-113:10). Since Defendants presented no witnesses, Henson's testimony went unrebutted.

Without making any factual or credibility determinations, the Superior Court ruled in Defendants' favor on each of Plaintiffs' three arguments. The Superior Court rejected Plaintiffs' contention that the possessory-interest taxes infringed upon the Tribe's right to self-government. On Plaintiffs' argument regarding the preemption test set forth in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), the Superior Court agreed with Plaintiffs that federal supervision of Indian leasing was pervasive and extensive. But it held that, because federal supervision was not "continuous," federal and tribal interests were outweighed by the state's general interest in raising revenues to support government

services. (4 AA 1019-22). Finally, the Superior Court rejected Plaintiffs' argument based on Section 465 of the Indian Reorganization Act, stating without any case support—in just five sentences—that the statute does not preempt the taxes. (4 AA 988-89).

VIII. Statement of Appealability.

The Superior Court entered its judgment on October 9, 2019. (4 AA 1024-28). On October 11, 2019, Plaintiffs filed a timely notice of appeal from the judgment (4 AA 1261-66). *See* Cal. Civ. Proc. Code § 904.1; Cal. R. Ct. 8.104.

STANDARD OF REVIEW

Whether a state or local law is preempted by federal law is a question of law that is reviewed *de novo*. *Zubarau v. City of Palmdale*, 192 Cal. App. 4th 289, 305 (2d Dist. 2011); *see People v. McCovey*, 36 Cal. 3d 517, 524-33 (1984) (analyzing *Bracker* question without deference to the trial court). At a minimum, this appeal concerns mixed questions of law and fact, which are also subject to *de novo* review. *Crocker Nat'l Bank v. City & Cty. of S.F.*, 49 Cal. 3d 881, 888-89 (1989). Because this case was submitted on stipulated facts except for the testimony of Plaintiffs' expert, and because the Superior Court did not make any factual or credibility findings, the substantial-evidence standard does not apply. *See Cellphone Termination Fee Cases*, 193 Cal. App. 4th 298, 311 (4th Dist. 2011).

ARGUMENT

The County's annual tax, imposed on the full value of Indian land leased to non-Indians, is preempted by federal law for three separate reasons. First, it is expressly preempted by Section 465 of the Indian Reorganization Act ("IRA"). Second, it directly interferes with tribal sovereignty. Third, it fails the U.S. Supreme Court's *Bracker*

balancing test by interfering too much with a federal regulatory scheme, on a matter too close to core tribal interests, without a sufficiently compelling state interest. Each of these reasons provides an independent basis for reversing and directing judgment for Plaintiffs.

I. The County's Possessory-Interest Taxes Are Expressly Preempted By Section 465 Of The Indian Reorganization Act.

Enacted in 1934, the Indian Reorganization Act was intended "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (cleaned up). To "put a halt to the loss of tribal lands," *id.* at 151, the IRA authorized the United States to acquire "lands" and "interests in lands" to be held in trust for "Indian tribe[s]" as well as "individual Indian[s]." 25 U.S.C. § 5108 (codifying § 465 of the IRA and referred to as "§ 465").

Under the express terms of § 465, all "such lands or rights" acquired under the IRA by the United States in trust "***shall be exempt from State and local taxation***." 25 U.S.C. § 5108 (emphasis added).

The application of § 465 preemption turns on two questions. First, is the challenged State or local tax the type of tax covered by § 465? Second, are the "lands or rights" being taxed covered by § 465? In this case, the answer to both questions is yes, so the possessory-interest taxes are barred.

A. The possessory-interest tax is the type of tax prohibited by § 465 because it annually taxes the full value of the land and its improvements.

First, the possessory-interest tax is precisely the type of tax that § 465 prohibits because it taxes the use of the land, and taxing the land's use is considered "a tax upon the property itself." *Mescalero*, 411 U.S. at 158.

The controlling case is the Supreme Court's decision in *Mescalero*, which held that § 465 barred the State of New Mexico from imposing a "compensating use tax" on the purchase price of materials used to build ski lifts at a resort operated by an Indian tribe. *Id.* The Court reasoned that the ski lifts as "permanent improvements on the Tribe's tax-exempt land would certainly be immune from the States' ad valorem property tax." *Id.* Therefore, "the same immunity extends to the compensating use tax on the property," because "[i]t has long been recognized that 'use' is among the bundle of privileges that make up property or ownership of property." *Id.* (cleaned up). "This is not to say," the Court commented, "that use taxes are for all purposes to be deemed simple ad valorem property taxes." *Id.* But in the context of § 465's protection of Indian land, the "***use*** of permanent improvements upon land is so intimately connected with ***use*** of the land itself that an explicit provision relieving the latter of state tax burdens ***must*** be construed to encompass an exemption for the former." *Id.* (emphasis added). Hence, New Mexico's tax was barred.

It follows *a fortiori* from *Mescalero* that the County's possessory-interest tax is the type of tax barred by § 465. In *Mescalero*, the Supreme Court found the use of permanent improvements to be "intimately connected with" the "use of the land itself." 411 U.S. at

158. With the possessory-interest tax, the use of the land itself is being taxed. In *Mescalero*, the tax was imposed on the purchase price of the improvements. *Id.* at 147. Here, the County is taxing the entire value of the lessee's "possessory interests," which is defined to be precisely equivalent to the value of the "real property" itself. Cal. Rev. & Tax. Code §§ 104, 107. (*See also* 1 AA 231-32, 234, 251, 259-60, 264 (stipulating to these definitions)). In *Mescalero*, the tax applied just one time at purchase. 411 U.S. at 147. But here, the tax applies repeatedly on an annual basis—exactly like the *ad valorem* property tax it is designed to replace, and exactly what § 465 preempts.

The United States Court of Appeals for the Eleventh Circuit recently applied *Mescalero* to hold that § 465 barred a Florida tax on the rental of Indian land to non-Indian lessees. *Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324, 1335 (11th Cir. 2015). Unlike Riverside County's possessory-interest tax, the Florida tax was imposed on the value of the lease or rental payments, not the value of the property itself. *Id.* at 1326. Yet the court still held it to be preempted. "The ability to lease property is a fundamental privilege of property ownership," the court reasoned, and thus "[b]y taxing the privilege of engaging in the business of renting, leasing, letting, or granting a license of the use for any real property, [Florida] is taxing a privilege of ownership just as New Mexico's tax in *Mescalero* taxed the privilege of use." *Id.* at 1330 (cleaned up).

Under *Mescalero* and *Seminole Tribe*, there can be no doubt that the County's possessory-interest taxes meet the first criterion of being the type of tax that is barred by § 465.

B. The rights in the Agua Caliente land held in trust by the United States fall within the rights protected by § 465.

The County's possessory-interest taxes also meet the second criterion for § 465 preemption because they are being applied to "rights acquired pursuant to" the IRA. 25 U.S.C. § 5108.

The plain text of § 465 protects a broad range of rights and interests acquired by the United States in a wide variety of ways, all to serve "the purpose of providing land for Indians." *Id.* The text applies to "***any interest*** in lands, water, rights, or surface rights to lands," regardless of whether those lands or rights are "within or without existing reservations," and "including trust or otherwise restricted allotments." *Id.* The text also applies regardless of how the United States acquires the rights, whether "through purchase, relinquishment, gift, exchange, or assignment." *Id.*

Because of this expansive language, the Supreme Court has applied § 465 broadly, holding that the acquisition of "interests" and "rights" under the IRA brings the "land" within the statute, even if the land itself was not acquired under the Act. In *Mescalero*, for example, the Court applied § 465 to land located outside the Mescalero Apache Tribe's reservation that the United States did not acquire under the IRA but that it owned and the Tribe leased. *See* 411 U.S. at 146, 155 n.11. The Court acknowledged that the "ski resort land was not technically 'acquired' in trust for the Indian tribe." *Id.* at 155 n.11. But the Court nonetheless held that "the lease arrangement here in question was sufficient to bring the Tribe's interest in the land within the immunity afforded by § 465." *Id.*

Similarly, in *Cass Cty., Minn. v. Leech Lake Band of Chippewa Indians*, the Court held that § 465 applied to land after the United States acquired trust rights in the land under the IRA, even though the tribe had earlier acquired the land outside the IRA by purchasing it from non-Indians. 524 U.S. 103, 115 (1998). At issue in *Cass* were several parcels of land that had previously been sold to non-Indians but the tribe later repurchased. *Id.* at 109-10. Interpreting § 465, the Court held that in it, "Congress has explicitly set forth a procedure by which lands held by Indian tribes may become tax exempt." *Id.* at 114. There, the repurchased land became tax exempt when the tribe "successfully applied to the Secretary of the Interior under § 465 to restore federal trust status," *id.* at 115, even though the Secretary had not acquired the land itself, just the trust rights.

Here, the interests of the Agua Caliente Tribe and its members in the land fall within the broad scope of interests covered by § 465 because the current trust rights were acquired by the United States under the IRA in 1990. The Agua Caliente Indian Reservation (the "Reservation") was established by Executive Order in 1876 and expanded in 1877. (1 AA 246). Under the United States' allotment policy, much of the land was allotted to individual Agua Caliente members and either kept in trust or sold to become land owned in fee. (1 AA 246). After U.S. policy switched, the United States prohibited further allotments and made it more difficult for individuals to sell the land, attempting to keep the land in trust. Wheeler-Howard Act, Pub. L. No. 73-783, 48 Stat. 984 (1934) (now codified at 25 U.S.C. ch. 45) (requiring the Secretary's approval for sales of restricted Indian land). But the trust

rights on the Reservation were set to expire in 1994.[3] 53 Fed. Reg. 30673-02 (Aug. 15, 1988) (providing notice of Secretary of Interior's extension of trust status to Indian land that was set to expire on January 1, 1994).

In 1990, the United States acquired extended trust rights when the IRA was amended to provide that "[t]he existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress." 25 U.S.C. § 5102; Act of May 24, 1990, Pub. L. No. 101-301, § 3(a), 104 Stat. 207 (1990) (now codified at 25 U.S.C. § 5126); *see also* 25 U.S.C. § 5126 (making the IRA applicable to all Indian trust land regardless of whether a tribe voted to accept the IRA); (1 AA 254).

Under the plain language of § 465, the extended trust rights that the United States acquired on Agua Caliente land through the 1990 IRA amendment bring that land within the protection of the section. The section provides that title to "***any*** lands ***or rights*** acquired

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[3] The trust period for allotted Reservation land expired 25 years after the allotment unless the President "in his discretion" extended the trust period. Mission Indian Relief Act, 26 Stat. 712 (1891) (limiting the trust period to 25 years); Act of March 2, 1917, 39 Stat. 969, § 3 (1917) (allowing the President to extend trust period of allotted land); *see* 25 C.F.R. ch. 1, Appx. (listing the trust period extensions).

If the Tribe had voted for the IRA to apply to it, like the CRIT, the United States would have acquired the rights to hold the land in trust much earlier. However, the Tribe did not, so the United States did not acquire the rights until the 1990s.

Because the CRIT voted to accept the IRA in December 1934, its trust rights were acquired under the IRA at that time. United States Indian Service, *Ten Years of Tribal Government under I.R.A.* at 14 (1947), https://edit.doi.gov/sites/doi.gov/files/migrated/library/internet/subject/upload/Haas-TenYears.pdf. Consequently, this argument equally applies to the CRIT land leased by plaintiffs.

pursuant to this Act . . . shall be taken in the name of the United States in trust . . . and such land ***or rights*** shall be exempt from State or local taxation." 25 U.S.C. § 5108 (emphasis added). The trust rights that the United States acquired in 1990 were "rights" within the plain meaning of § 465, and they were "acquired pursuant to this Act" because the 1990 amendment was an amendment to the Act. Act of May 24, 1990, Pub. L. No. 101-301, § 3(a), 104 Stat. 207 (1990). Hence, the "arrangement here in question [is] sufficient to bring the Tribe's interest in the land within the immunity afforded by § 465." *Mescalero*, 411 U.S. at 155 n.11.

According to the County's theory, since the Agua Caliente land was first taken into trust under federal laws other than the IRA, the land could now come within the protection of § 465 only if it were first taken out of trust, then brought back in under the IRA. This argument ignores the fact that the current trust rights were acquired under the IRA through the 1990 Amendment, not through some other law. In addition, the pointless, technical exercise that the County advocates is precisely what the Supreme Court held was unnecessary in *Mescalero*. There, the land used for the ski resort operated by the tribe was owned by the United States, which meant it "was not technically 'acquired' in trust for the Indian tribe." 411 U.S. at 155 n.11. But as the United States argued, and the Court agreed, "it would have been meaningless for the United States, which already had title to the forest, to convey title to itself for the use of the Tribe." *Id.* The Court did not require that meaningless step, and this Court likewise should not require the meaningless step of taking the Agua Caliente land out of trust, only to take it back in.

Taking the Agua Caliente land out of trust, only to bring it back in, would not only be pointless, but it would be time consuming and expensive. To take the land out of trust involves a lengthy process under 25 CFR §§ 152.1-152.16. To have the Secretary accept it back into trust is more complicated still and is regulated by a 100-page how-to handbook published by the Secretary.[4] Academic commentary recognizes the expense and complexity of this process. *See, e.g.,* Sullivan, Bethan C. and Turner, Jennifer L., *Enough is Enough: Ten Years of* Carcieri v. Salazar, 40 Pub. Land & Resources Law Rev. 37, 143 (2019). It is difficult enough when there is reason to do it. To do it for no reason at all is nonsensical.

Under *Mescalero*, this Court should therefore hold that the Agua Caliente land is subject to § 465's protections. This follows directly from § 465's plain terms and *Mescalero*'s application of those terms. But if there were any ambiguity, the ambiguity would have to be resolved in favor of protection because the Indian canon of construction requires courts to liberally construe statutes in Indians' favor. *See Montana*, 471 U.S. at 766.

C. Prior decisions declining to apply § 465 preemption to Agua Caliente land did not consider the arguments raised here.

Two prior decisions have held that § 465 does not preempt Riverside County's possessory-interest taxes. *See Herpel v. Cty. of Riverside*, 45 Cal. App. 5th 96 (Cal. Ct.

[4] Bureau of Indian Affairs, Dep't of Interior, Acquisition of Title to Land Held in Fee or Restricted Fee Status (Fee-to-Trust Handbook) (Release #16-47, Version IV (rev. 1), June 28, 2016), https://www.bia.gov/sites/bia.gov/files/assets/public/raca/handbook/pdf/Acquisition_of_Title_to_Land_Held_in_Fee_or_Restricted_Fee_Status_50_OIMT.pdf.

App. 2020); *Agua Caliente Band of Cahuilla Indians v. Riverside Cty.*, 749 F. App'x 650 (9th Cir. 2019). But neither of those decisions considered the argument raised here, and hence neither one is controlling, or even persuasive.

In *Herpel*, plaintiffs made the broad argument that *all* Indian land held in trust by the United States is covered by § 465, regardless of whether the land or rights were acquired under the IRA. This Court rejected that argument, but it neither considered nor rejected the narrower argument we are making, because that argument was not made. Our argument, as shown above, is that the current trust rights in Agua Caliente land were acquired by the United States under the IRA in 1990. This is an open issue for this Court to address.

The Ninth Circuit's decision in *Agua Caliente* also did not address our argument. Rather, the Ninth Circuit held that it was bound by its own earlier decisions and thus considered only whether those decisions were "clearly irreconcilable with" recent Supreme Court precedent, not whether they were *de novo* correct. *Agua Caliente*, 749 F. App'x at 651. This Court is not bound by the Ninth Circuit's old precedent. Considering the issue *de novo*, the Court should hold the County's possessory-interest taxes to be barred by § 465 for the reasons given above.

* * *

In sum, because the possessory-interest taxes are the type of tax covered by § 465, and because the Agua Caliente land is subject to § 465, the land is "exempt" from the challenged taxes. This Court should so hold and order that Plaintiffs be refunded the possessory-interest taxes they were unlawfully required to pay.

II. The Possessory-Interest Taxes Are Preempted By Two Other Bodies Of Federal Law.

The possessory-interest taxes are also preempted by two other bodies of federal law—the law governing Indian tribes' right to exercise their sovereign functions, and the law regulating the leasing of Indian land.

The preemption analysis in Indian cases "is not controlled by standards of pre-emption developed in other areas." *Ramah Navajo Sch. Bd. Inc. v. Bureau of Revenue*, 458 U.S. 832, 838 (1982); *see also Crow Tribe of Indians v. Montana*, 819 F.2d 895, 898 (9th Cir. 1987) ("*Crow II*") ("The preemption analysis in Indian tribal cases differs from that used in other circumstances.").

Rather, in Indian cases, there are "two independent but related barriers to the exercise of state authority over commercial activity on an Indian reservation." *Ramah*, 458 U.S. at 837. First, a state law cannot "interfere with the tribe's ability to exercise its sovereign functions." *Id.* If it does, it is preempted for that reason alone. *Id*. Second, a state law cannot intrude more deeply on federal and tribal rights protected by "federal law" than the state interest justifies, *id.*, as assessed under the balancing test of *Bracker*, 448 U.S. at 145. If it does, once again the state law is preempted.

Here, the possessory-interest taxes are preempted for both reasons.

A. The possessory-interest taxes are preempted because they interfere with the Agua Caliente's ability to exercise its sovereign functions.

First, taxing the full possessory interest of Agua Caliente land strikes so deeply at the heart of Indian independence and self-governance that it is preempted for that reason alone, without any balancing required.

Federal law has "consistently guarded the authority of Indian governments over their reservations," *Williams v. Lee*, 358 U.S. 217, 223 (1959), and it "specifically prohibits state action that impairs the ability of a tribe to exercise traditional governmental functions." *Crow Tribe of Indians v. State of Mont.*, 650 F.2d 1104, 1110 (9th Cir. 1981). While states may protect their interests by regulating non-Indians in Indian country, they may do so only "up to the point where tribal government would be affected." *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 179 (1973).

In *Crow II*, the Ninth Circuit invalidated Montana's tax on coal mined by non-Indians on a reservation because it interfered with tribal government. Tribal sovereignty, the court explained, includes the "power to tax members and non-members alike" and "the power to manage the use of [tribal] territory and resources by both members and nonmembers." 819 F.2d at 902. Montana's tax interfered with these sovereign interests by taxing "mineral resources," which the court found to be "a component of the reservation land itself." In addition, "[b]y taking revenue that would otherwise go towards supporting the Tribe and its programs, and by limiting the Tribe's ability to regulate the development of its coal resources, the state tax threaten[ed] Congress' overriding objective of encouraging tribal self-government and economic development." *Id.* at 902-03. The tax was therefore preempted.

In the same way here, Defendants have taxed a component of the Agua Caliente land itself, precluding the Tribe from drawing on the primary source of revenue for local government and burdening tribal economic development. The tax is thus preempted.

1. The possessory-interest taxes impermissibly intrude on tribal sovereignty because they are the practical equivalent of forbidden, direct taxes on Indian land.

Taxing the full possessory interest of Agua Caliente land is the most extreme attempt to tax the value of tribal land there can be short of a direct *ad valorem* tax on the land itself—which everyone acknowledges would be preempted.

Nothing is more central to Indian independence and self-determination than control of Indian land, and attempts to eradicate Indians' sovereignty have always ultimately targeted their land. The tragic allotment policy of the United States was designed to "erase reservation boundaries, and force the assimilation of Indians into the society at large." *Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 253-54 (1992). These policies "reduced once coherent communities to jurisdictional checkerboards." *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1000 (8th Cir. 2010). The Agua Caliente now live on one such checkerboard.

After United States policy changed to protecting and promoting tribal independence and self-governance, the protection of Indians' ownership, use, and control of their land became the heart of that policy. Tribal sovereignty "centers on the land held by the tribe." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008). A tribe's right to use and occupy its land, held in trust by the United States, "is as sacred and securely safeguarded as is fee simple absolute title." *United States v. Shoshone Tribe of Indians of Wind River Reservation in Wyo.*, 304 U.S. 111, 117 (1938). Thus, the Supreme Court has consistently "guarded the authority of Indian governments over their reservations," and reservation boundaries "remain[] an important factor to weigh in

determining whether state authority has exceeded the permissible limits." *Bracker*, 448 U.S. at 151.

Given the unique role that land plays in tribal sovereignty, the more directly a state attempts to tax the land, the more absolute the case for preemption. At the one extreme, it is undisputed that, absent express congressional permission, state and local governments have no "power to tax reservation lands" directly. *Yakima*, 502 U.S. at 258. The Supreme Court has "never wavered" from this view, describing such taxes as "an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations." *Montana*, 471 U.S. at 764-65 (citation omitted); *see also United States v. Rickert*, 188 U.S. 432, 442 (1903) (disallowing tax on improvements on Indian lands).

At the other extreme, state and local governments have fairly wide latitude to tax economic activity that is only loosely connected to land, such as when non-Indians purchase non-Indian goods while on Indian lands. *See, e.g.*, *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155 (1980) (non-Indian tobacco products); *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1191-93 (9th Cir. 2008) (construction materials from non-Indian vendors).

Between the two extremes, when a state attempts to tax transactions connected somehow to the land, the closer the connection is, the stronger the case for preemption. Thus, many state taxes on and regulations of timber, wild game, and extracted minerals have been invalidated. *See Montana*, 471 U.S. at 764-65 (state tax on Indians' royalty income from oil and gas leases with non-Indians); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 329-30, 342 (1983) (state regulation of on-reservation hunting and fishing

by non-Indians); *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989) (timber yield tax imposed on non-Indians purchasing tribal timber); *cf. Bracker*, 448 U.S. at 137-38, 145-52 (motor carrier license and use fuel taxes assessed on non-Indians harvesting on-reservation timber). When the tax impinges too directly on Indian land, it is preempted outright, regardless of the state interest. *See Crow II*, 819 F.2d at 902-03 (state taxes on lessees of tribal mineral leases).

Here, the intrusion on tribal land interests is extreme. The County cannot directly tax the land. *Yakima*, 502 U.S. at 258. But what it taxes is defined by law to be precisely equal to the land: the county taxes the value of a lessee's "possessory interests," defined as the full value of the land and its improvements, identical to the value of "real property." Cal. Rev. & Tax. Code §§ 104, 107. (*See also* 1 AA 231-32, 234251, 258-60, 264 (stipulating to these definitions).)

Because the County tax is tied so closely to Indian land, it is preempted outright as an intrusion on tribal sovereignty. A tax on the *use* of Indian land is considered a tax on the land itself for purposes of preemption under § 465 of the IRA. *Mescalero*, 411 U.S. at 158. The same logic that applies there also applies here: Because the rights to "use" and "possess" the land are "among the bundle of privileges that make up property or ownership of property," Defendants' tax upon "'use' is a tax upon the property itself." *Id.* The direct nature of the County's attack on tribal sovereignty and independence itself requires the possessory-interest taxes to be invalidated, just as Montana's tax on mineral rights was held to be preempted in *Crow II*.

2. The possessory-interest taxes interfere with the Agua Caliente's right of self-governance by denying it the ability to impose its own tax and choose how the proceeds will be spent.

Not only does the possessory-interest taxes impinge too closely on Indian land, but they also interfere with tribal self-governance by denying to the Agua Caliente the ability to raise its own revenue and choose how it will be spent.

Tribes have a sovereign "interest in raising revenues for essential governmental programs," *Colville*, 447 U.S. at 156-57, and "the taxing power of Indian tribes" is "an essential instrument of self-government and territorial management." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 139 (1982); *see also Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 201 (1985) (calling the taxing power an "essential attribute of such self-government"). As the Secretary has recognized, when state or local taxes on land or leasehold interests cause Indian tribes to "refrain from exercising [their] own sovereign right to impose a tribal tax," this negatively affects both tribal self-determination and economic development. 77 Fed. Reg. at 72447-48.

Here, the possessory-interest taxes are so burdensome that they foreclose the Agua Caliente from imposing its own possessory-interest taxes. Plaintiffs' expert Henson testified that, if the Agua Caliente were to impose another 1% annual tax on non-Indian lessees' possessory interests, on top of the County's 1% annual tax, the value of future leases to Indian lessors would fall by over *40%*. He further testified that it would be practically impossible for the Tribal Council to impose its own possessory interest taxes. (RT 77:19-79:13, 80:28-86:6, 89:15-94:2.). This testimony is confirmed by what the Tribe has done. In 1967, the Agua Caliente Tribal Council adopted an ordinance establishing a

1% tax on lessees' rights to use or possess real property within the Reservation. (2 AA 504-06; 3 AA 895-99). "[T]o avoid double taxation" of non-Indian lessees, however, the tribe has held its tax in abeyance until the possessory-interest taxes are no longer collected. (1 AA 250, 252; 2 AA 505).

Although the mere possibility of double taxation is not enough to invalidate a state tax, *see, e.g.*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 188-89 (1989), when a state tax is so high that it prevents the Tribe from imposing its own tax—as it is here—that factor alone invalidates the state tax. *See Crow II*, 819 F.2d at 899 n.2, 902-03 (invalidating Montana's one-time tax of between 22% and 32.9% on the value of coal extracted from Indian lands). At that point, the burden moves beyond an economic one and becomes a burden on tribes' ability to make their own policy choices. That is true here, where the County's possessory-interest taxes have forced the Tribe to forsake its interest in raising revenue precisely where that interest is strongest—where "the revenues [would be] derived from value generated on the reservation." *Colville*, 447 U.S. at 156-57.

If the Agua Caliente were able to levy the 1% tax instead of the County, it could exercise the sovereign right of selecting and providing services to its Reservation land. As early as 1879, Congress recognized that Indian tribes' right of self-government includes the rights "to maintain peace and good order, improve their condition, establish school systems, and aid their people in their efforts to acquire the arts of civilized life." *Merrion*, 455 U.S. 140 (quoting S. Rep. No. 698, 45th Cong., 3d Sess., 1-2 (1879) (internal quotation marks omitted)); *see also Kerr-McGee Corp.*, 471 U.S. at 201 (recognizing the provision of one's "own police force, schools, . . . social programs" as aspects of sovereignty).

Modern legislation has sought to further tribal control by transitioning tribes away from federal- and state-provided services to services provided by the tribes themselves. *See, e.g.*, 25 U.S.C. § 5302(b).

As it stands, the Tribe has been stripped of any control to direct the money extracted from the use of its land to be used to address the needs and priorities of Reservation residents. (RT 100:19-22). If it were to gain control, it seems unlikely that it would make the same choices as the County, given that so much of the money is spent on uses having no connection with the land, its owners, or its lessees. Even if the Tribe were ultimately to make similar decisions, however, the point is that the right to make the choice belongs to the Tribe, not the County.

If the 1% tax were in the power of the Agua Caliente, the Tribe would also be able to attract business to the Reservation by offering tax incentives. Currently, it cannot do that because only the County controls the tax. This restriction "fundamentally undermines the Tribe's ability to operate as a sovereign and engage in economic development in a way it sees fit." (RT 67:18-20, 121).

The way in which the tax interferes with and undermines Agua Caliente's right of self-governance requires it to be invalidated.

3. Indians bear the economic burden of the possessory-interest taxes.

Finally, the possessory-interest taxes place an economic burden on the Indian landowners whose leases are taxed. This burden, while it would not be sufficient to justify preemption on its own, provides further support for preemption based on the interference with tribal sovereignty and self-government.

The annual imposition of the possessory-interest taxes—year after year after year—substantially diminishes the value that Agua Caliente land can generate. It has "a chilling effect on potential lessees," decreasing demand for Reservation properties. 77 Fed. Reg. 72440-01, at *72448. This chilling effect is particularly severe because the checkerboard pattern of the Reservation's land means that current and potential lessees can literally look across the street to find properties they can rent without paying the possessory-interest taxes. (RT 81:6-82:15). This effect is not only theoretical, but real. On several occasions, developers have told the Agua Caliente they would prefer not to lease tribal land because of the possessory-interest taxes. (1 AA 251).

To offset the cost of the possessory-interest taxes, the Indian landowners must reduce their rental rates, which directly reduces the productive value of their land. As the trial record showed, a 1% tax applied to leases of 10, 20, 30, or 99 years causes 9%, 16%, 22%, and 43% reductions, respectively, in the value of the leasehold interest. (RT 82:5-86:6, 89:15-94:20). That diminished value is taken from the Indians and used by Defendants without input from the Tribe.

The burden on Indian economic interests, although not dispositive, strongly supports preemption. As the Secretary recognized in promulgating the federal regulation of leases, allowing a state to impose a leasehold tax would "decrease the funds available to the lessee to make payments to the Indian landowner," burdening Indian economic interests in contravention of federal policy. 77 Fed. Reg. at 72448. The Supreme Court cited the same concern of reducing the economic benefits to the tribe in striking down the state tax in *Bracker*. *See* 448 U.S. at 149. Most recently, in *Seminole Tribe*, the court held that

"Indian economic well-being is one of the many federal interests embodied in the extensive federal regulation of leasing activity, and it is a valid interest weighing in favor of preemption in the final balance." 799 F.3d at 1340.

* * *

Land is special, and the County of Riverside's taxes on the full possessory interest of Agua Caliente land strike at the heart of Indian independence and self-governance. They are therefore preempted.

B. The possessory-interest taxes are preempted under the *Bracker* balancing analysis.

In the alternative, the depth of the challenged taxes' interference in tribal interests, combined with the federal interests in exclusively regulating the leasing of Indian land, outweighs the County's interest in raising revenue. The County's taxes are thus preempted under the *Bracker* balancing test.

Under the *Bracker* balancing test, "federal pre-emption is not limited to those situations where Congress has explicitly announced an intention to pre-empt state activity." *Ramah*, 458 U.S. at 838. Rather, a state law is preempted if it "conflicts with the *purpose* or *operation* of a federal statute, regulation, or policy" addressing Indian affairs. *Crow II*, 819 F.2d at 898 (citation omitted). The preemption analysis is guided by "the traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional Acts promoting tribal independence and economic development." *Ramah*, 458 U.S. at 838.

To conduct the *Bracker* balancing, a court makes "a particularized inquiry into the nature of the state, federal, and tribal interests at stake" to determine "whether, in the specific context, the exercise of state authority would violate federal law." *Bracker*, 448 U.S. at 145. The deeper the intrusion on tribal sovereignty, and the more comprehensive the federal regulation, the more powerful the state interest must be—and the more closely the action must be linked to its sustaining purpose—to sustain the state action.

In this case, the tribal and federal interests are overwhelmingly strong. As shown above, the tribal interests are *so* strong that they require preemption in their own right. The federal interests in favor of preemption are equally strong, because federal law comprehensively regulates every aspect of the leasing of Indian land. On the other side of the balance, the County's interests are weak because its taxes are not directly connected to any state services required by the leasing of Indian land but instead serves only the County's general interest in raising revenue.

In the recent *Seminole Tribe* case decided by the U.S. Court of Appeals for the Eleventh Circuit, the court held that a directly analogous tax imposed by Florida on leases of Indian land to non-Indians was preempted under *Bracker*. *See* 799 F.3d at 1338-43. This Court should reach the same preemption holding here.

1. The federal interest is overwhelmingly strong because federal law comprehensively regulates the leasing of Indian land.

Bracker preemption arises out of a federal law or set of regulations, and here the federal leasing regulations are so comprehensive that they leave no room for an interfering state role.

(a) The Secretary of the Interior has stated that the federal intent is to preempt state taxes on leases.

In a formal regulation, the Secretary has directly asked and answered the question of preemption. Asking "[w]hat taxes apply to leases approved under this part," the Secretary answers that taxes imposed by a State or political subdivision of a State do not apply:

> 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.

25 CFR § 162.017(c).

When the Secretary promulgated this regulation, he devoted two full pages to explaining the federal law and policy behind it. *See* 77 Fed. Reg. 72440-01, 72447-448 (Dec. 5, 2012). "The Federal statutory scheme for Indian leasing is comprehensive," the Secretary wrote, "and, accordingly precludes State taxation." *Id.* at 72447. To illustrate the regulation's broad scope, the Secretary listed more than 25 topics it covered, including "[c]onsent requirements for a lease and who is authorized to consent," "[w]hat laws apply to leases," "[e]mergency action by us if Indian land is threatened," "[r]ecordation," and "criteria for approval . . . for lease amendments." *Id.* "The purposes of" leasing on Indian land, the Secretary continued, "are to promote Indian housing and to allow Indian landowners to use their land profitably for economic development, ultimately contributing to tribal well-being and self-government." *Id.* "Assessment of State and local taxes," the Secretary therefore concluded, "would obstruct Federal policies" and "threaten[]

substantial tribal interests in effective tribal government, economic self-sufficiency, and territorial autonomy." *Id.*

Although the legal question of preemption ultimately lies with the courts, *see Wyeth v. Levine*, 555 U.S. 555, 576-77 (2009), the Secretary's formal, authoritative expression of federal policy under the leasing regulations is due substantial deference because of his "unique understanding of the statutes [he] administer[s]." *Id.* at 577; *see also CallerID4u, Inc. v. MCI Commc'ns Servs. Inc.*, 880 F.3d 1048, 1061 (9th Cir. 2018) ("When considering whether a federal statute preempts state law, we may look to the pronouncements of the federal agency that administers the statute for guidance."). Thus, in *Seminole Tribe*, the Eleventh Circuit concluded that, although the Secretary's discussion did not control the question of preemption, it provided "substantial evidence of the extensive federal regulation of Indian land leasing to inform the *Bracker* balancing inquiry." 799 F.3d at 1339. That level of consideration is certainly required, since in *Warren Trading Post* the Supreme Court gave similar consideration to the Solicitor of the Interior's informal interpretation of statutes regulating trade with Indians "to bar States from taxing federally licensed Indian traders on their sales to reservation Indians on a reservation." *Warren Trading Post Co. v. Arizona State Tax Commission,* 380 U.S. 685, 690-91 (1965).

(b) The Secretary's declaration of federal policy is amply supported by the substance of federal regulations.

The Secretary's conclusion that the federal intent is to leave no room for States to tax leasehold interests is fully supported by the substance of the comprehensive regulations.

For centuries, the transfer and leasing of Indian lands has been controlled by federal law, without the involvement of state actors. A leading treatise lists more than a dozen acts of Congress adopted since 1790 concerned specifically with leasing Indian lands. *See, e.g.*, *Cohen's Handbook of Federal Indian Law* §§ 1.03-.06, 5.02-.03, 15.06-.07, 17.02-.04. Many of these laws remain in effect today. They apply broadly—covering residential, commercial, agricultural, and subsurface leasing—with the common purpose of allowing Indians to develop and oversee their land as they see fit under exclusively federal oversight.

The modern form of federal regulation of Indian land leasing stems from Congress passing Public Law 255 in 1955 and corresponding regulations in 1971 Pub. L. 255, ch. 615, § 1, 69 Stat. 539 (Aug. 9, 1955); 25 CFR §§ 131.5, 131.8, 131.12 (1971) (original leasing regulations). This law is now codified at 25 U.S.C. §§ 415, 415a, 415b, 415c, 415d, and it supplements other federal leasing regulations. *See* § 415d.

Section 415 gives the Secretary of the Interior broad authority over the leasing of Indian lands. Indeed, Indian land cannot be leased except "with the approval of the Secretary." § 415(a). Before approving a lease, the Secretary must "satisfy himself that adequate consideration has been given" to a wide range of factors. *Id.* And the Secretary is expressly granted the authority to prescribe "terms and regulations" governing leases. *Id.*

Acting under his express, statutory authority, the Secretary has promulgated detailed regulations, stretching to several hundred numbered sub-parts. *See* 25 CFR Part 162. The regulations cover "any tract in which an individual Indian or Indian tribe owns an interest in trust or restricted status." 25 CFR § 162.004(a). Among many other things, the regulations prescribe: (1) what laws apply; (2) what taxes apply; (3) how leases may be

enforced; (4) what documents must be submitted to the BIA for approval, administration, or enforcement of leases; (5) maximum length; (6) mandatory terms; (7) the amount of rent; (8) how a lease must be recorded; and (9) whether and how a lease can be amended and assigned. *Id.* at §§ 162.001, 162.014, 162.017, 162.022, 162.027, 162.311, 162.313, 162.321, 162.323, 162.345-352.

With the Secretary's approval, tribes may assume the authority to regulate certain leases. 25 U.S.C. § 415(h)(3). The Agua Caliente has done so, adopting a Tribal Business Leasing Ordinance pursuant to Section 415(h), which the BIA has approved. (2 AA 733-50.)

Neither the State of California, however, nor the County of Riverside, has been given any authority over the leasing of land owned by the Agua Caliente Tribe or its members—and neither one plays any role in the leasing process. (1 AA 234).

(c) The federal interest in preemption here is as strong, if not stronger, than in other cases finding preemption.

Compared to other cases in which courts have found federal preemption of state regulation addressing Indian interests, the federal interest in preemption is at least as strong as the interests in those cases, if not stronger.

The three most analogous Supreme Court cases are *Bracker*, *Ramah*, and *Warren Trading Post*. *Bracker* addressed federal regulations governing the sale of timber from Indian land. In finding preemption, the Court noted that timber could be sold "only with the consent of the Secretary," the regulations were "comprehensive," the BIA exercised "literally daily supervision," and the regulations were intended to "assur[e] that the profits

derived from timber sales will insure to the benefit of the Tribe." *Bracker*, 448 U.S. at 146-48. At issue in *Ramah* were regulations governing the construction and financing of Indian educational institutions. 458 U.S. at 839. In finding preemption, the Court noted the long history of federal regulation, the grant of authority to the Secretary to promulgate regulations, the "wide-ranging authority" of the BIA to approve and review contracts, and the policy goal to "permit Indian children . . . to achieve the measure of self-determination essential to their social and economic well-being." *Id.* at 839-41. Finally, at issue in *Warren Trading Post* were federal regulations governing trade with Indians. 380 U.S. at 688-89. In finding preemption, the Court noted the long history of regulation, the "detailed regulations prescribing in the most minute fashion who may qualify to be a trader" and other issues, and the interpretation of the Solicitor of the Interior in favor of preemption. *Id.* at 688-90.

Here, as in those cases, the history of federal regulation dates back to the founding of the nation. *Cohen's Handbook of Federal Indian Law* § 1.03; *e.g.*, Act of July 22, 1790, 1 Stat. 137. Here, as under those regulatory schemes, transactions may be entered into only with the consent of the Secretary. 25 U.S.C. § 415(a). Here, as there, the regulations are comprehensive and detailed, numbering in the hundreds of sections. And here, as there, underlying the regulation is the purpose of empowering tribal "economic development, ultimately contributing to tribal well-being and self-government." 77 Fed. Reg. at 72447. If there is any material difference between the regulatory schemes in those cases and here, it is that here the Secretary has promulgated a formal regulation expressing the intent to preempt state law. 25 CFR §162.017(c).

Moreover, here, as in those cases, the County's "imposition of the [possessory-interest taxes] would undermine [federal] polic[ies]" and the "Secretary's ability to make the wide range of determinations committed to his authority" in approving a lease. *Bracker*, 448 U.S. at 149-50. The Secretary, for instance, would have to consider the state tax in deciding whether the Indian lessor will receive adequate consideration from the lease, 25 U.S.C. § 415(a), since "[t]he assessment of [the possessory-interest taxes] would throw additional factors into the federal calculus, reducing tribal revenues and diminishing the profitability of the enterprise." *Bracker*, 448 U.S. at 149-50.

In short, "the federal government administers an extensive, exclusive, comprehensive, and pervasive regulatory framework governing the leasing of Indian land." *Seminole Tribe*, 799 F.3d at 1341; *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1391, 1393 (9th Cir. 1987). This strongly supports preemption.

2. The state interest in imposing the taxes is weak because they are not tailored to leasing activity, and they can be replaced by less intrusive means.

In comparison to the overwhelming tribal and federal interests, the state interests in imposing the possessory-interest taxes are weak.

a. The possessory-interest taxes are general-revenue taxes that could be replaced with an inter-governmental agreement between the County and the Tribe.

Under *Bracker*, courts recognize that states have a strong interest in imposing taxes to recoup expenses caused by non-Indians' use of Indian land but only a weak interest in levying taxes to raise general revenue. Here, the County's interest is nothing more than the weak interest in raising general revenue.

The Superior Court got the law wrong on this point, concluding that the County had a strong interest in raising "the revenue necessary to fund governmental services." To the contrary, *Bracker* and its progeny hold that "[s]howing that the tax serves legitimate state interests, such as raising revenues for services used by tribal residents and others, is not enough." *Hoopa Valley*, 881 F.2d at 661; *Bracker*, 448 U.S. at 150 (state's "generalized interest in raising revenue" is insufficient). Thus, *Hoopa Valley* struck down California's timber yield tax as applied to timber harvested by Indian-owned firms because "California admit[ted] that there is no direct connection between revenues from the timber yield tax and the provision of services to tribal members or area residents generally," and its "general interest in revenue collection was insufficient." 881 F.2d at 661; *see also Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928, 937 (8th Cir. 2019) (holding that use tax was preempted where the state interest was to "rais[e] revenues to provide government services throughout South Dakota").

For the County to prove that it has a strong interest in its tax, it must show that the tax is "narrowly tailored." *Crow II*, 819 F.2d at 901. That is, the tax must fund services that are "clearly and critically connected" ***to the taxed activity***. *Seminole Tribe*, 799 F.3d at 1342-43; *Hoopa Valley*, 881 F.2d at 661 (holding that tax must "directly relate" to taxed activity). If most of the tax's revenue is allocated to government uses unconnected with the taxed activity, that indicates "a distant, rather than carefully tailored, relationship." *Crow II*, 819 F.2d at 901.

Here, the possessory-interest taxes are not tailored in any way either to offset costs created by the leasing or to provide services to the lessees. The County undisputedly does

not regulate or provide any services regarding the leasing process itself. (1 AA 252, 254). Nor is the County required to use the possessory interest taxes' revenue to provide services to the lessees, such as Plaintiffs.

Rather, as Defendants have admitted repeatedly, the General-Purpose Levy is a "general revenue tax," (1 AA 234-35, 244), and "[v]irtually all government services that are rendered to the citizens of California or citizens of Riverside county are funded in part by this one percent tax." (RT 200:11-14). Thus, the Indian Land Revenues were commingled with the County's property tax revenues and distributed to 350 recipient entities, many of which passed the money on to still more entities and service providers. (1 AA 235-36, 241). As courts have repeatedly recognized, the state interest in imposing this type of general-revenue tax is a weak one. *See Flandreau*, 938 F.3d at 937 (so holding for South Dakota general-revenue tax). "[T]he general raising of revenue to provide generalized services" does not weigh strongly in the state's favor. *Seminole Tribe*, 799 F.3d at 1343.

The County argues that, if it is not allowed to impose the possessory-interest taxes, there will be "insufficient funds to provide the services the citizens of the county have come to expect." (RT 200:24-26). But the revenue obtained from the possessory-interest taxes is a tiny fraction of the County's budget. In FY2015/2016, less than 1% of the County's $2.49 billion in property tax revenues came from Indian Land Revenues. (1 AA 253). As to the money the County retained for itself, the $3.3 million in Indian Land Revenues the County retained in FY2013/2014 made up just 0.52% of the County's $590

million discretionary budget, and a mere 0.066% of the County's $4.7 billion total budget. (1 AA 235, 241).

Moreover, the County could easily replace the revenue from the lost possessory-interest taxes by entering into an inter-governmental service agreement with the Agua Caliente. *See, e.g.,* Kathryn A. Mayer, *Negotiating Past the Zero-sum of Intractable Sovereignty Positions by Exploring the Potential of Possible Party Interests: A Proposed Dispute Resolution Framework for the Tobacco Tax Debacle Between the State of New York & the Seneca Nation of Indians*, 28 Ohio St. J. on Disp. Resol. 771 (2013) (recommending an inter-governmental agreement as a solution to a tax dispute between a tribe and the State of New York). Throughout the country, tribes have entered into hundreds of inter-governmental agreements with local and state governments regarding police, fire, and other public-interest-based services. (RT 107:2-11) (describing tribal-inter-governmental agreements)). Here, the Agua Caliente already has a land use agreement with the County and a gaming compact with the state, demonstrating the availability of such agreements. (1 AA 252, 303-451).

Given the checkerboard pattern of the Agua Caliente Reservation, the Tribe and the County are already highly integrated economically. The Tribe's businesses, such as its gaming facilities, attract visitors to the County who purchase lodging, food, and other items during their stays. It is well recognized that activities such as these "have benefitted states" by increasing tourism. Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 Or. L. Rev. 757, 835-36 (2001). Both the Tribe's businesses and also its residents also spend money in the County. *Id.*; Lorie Graham,

Securing Economic Sovereignty Through Agreement, 37 New Engl. L. Rev. 523, 536 (2003) (noting that tribal businesses spend billions off reservation). All of these expenditures benefit both the County and the Tribe.

Therefore, "it makes good economic sense" for the Tribe and County to work together. *Graham*, *supra*, 37 New Engl. L. Rev. at 536. "[S]tate governments have much to gain from increased economic activity by individual Indians on and off reservations, and from a reduction in poverty levels and the resulting social issues." *Miller*, *supra*, 80 Or. L. Rev. at 835-37. If the Tribe improves economically, it could provide some of the very services the County provides now. *Graham*, *supra*, 37 New Engl. L. Rev. at 536. But it may be that all parties will decide to have the County continue providing services and the Tribe pay for the portion directed to tribal lessors, given that "the checkerboard pattern of Indian and non-Indian land ownership" makes it efficient to have a single provider for some services. *Oneida Tribe of Indians of Wisc. v. Village of Hobart*, 732 F.3d 837, 841 (7th Cir. 2013).

In short, the County's interest in imposing the possessory-interest taxes is weak because their only purpose is to raise general revenue, and that purpose could easily be served by an inter-governmental agreement that would be less intrusive on tribal and federal interests.

b. The school taxes are not tailored to the leasing of Reservation land and could be replaced with an inter-governmental agreement.

The school taxes, like the possessory-interest taxes, are not narrowly tailored to provide services correlated to the leased land, and their revenue could likewise be replaced through an inter-governmental agreement.

The VATs imposed for the Palm Springs Unified School District and Desert Community College are in no way connected to the leasing of Agua Caliente land. The revenue they raise is not used to benefit "the individual owners of the property upon which the charges are assessed." *Oneida Tribe of Indians of Wis. v. Village of Hobart*, 891 F. Supp. 2d 1058, 1066 (E.D. Wis. 2012). Rather, it is used to help the schools upgrade facilities and improve programs. Every owner of taxable real property in the community "is assessed [the VATs] regardless of whether the property owners themselves have children attending public schools." *Id.* at 1067. Hence, the state interest in imposing the VATs is weak.

The revenue generated from the VATs is only a tiny percent of the revenue raised for the schools. For example, the $3.1 million in Indian Land Revenues the Palm Springs Unified School District received in FY2013/2014 amounted to just 1.7% of the $180 million in revenue it collects on average each year. (1 AA 266).

Moreover, just as with the possessory-interest taxes, the VATs can be replaced with an inter-governmental agreement that serves the interest in supporting schools while preserving tribal sovereignty over the choice of how to use the money generated from Indian land.

c. The water taxes are not narrowly tailored and could be replaced with tailored fees.

Finally, the VATs used to fund the district's State Water Project obligations also are not narrowly tailored to the leasing of Indian land, and they could be replaced with fees directly correlated to water use.

The interest that these VATs serve are community-wide interests, not interests tied specifically to the leased land. Like the storm water management taxes struck down in *Oneida Tribe*, "[e]veryone who lives in the [County], and even many outside the [County boundaries, have an interest" in the water shipped to the County via the State Water Project. *Oneida Tribe*, 891 F. Supp. 2d at 1066. The State Water Project "benefits the community as a whole." *Id.* at 1067. Thus, Defendants admit "that there is no direct connection between [VAT] revenues . . . and the provision of services to tribal members or area residents more generally." *Hoopa Valley*, 881 F.2d at 661. Like the general-purpose levy and school taxes, the state's interest in the water VATs is not narrowly tailored. Instead, it is a weaker, community-wide interest.

The revenue raised by the VATs make up just a tiny percent of the districts' budgets. The roughly $1.3 million that Defendant CVWD receives, for example, made up 0.35% of its $370 million in total revenue in Fiscal Year 2017/18. (1 AA 238, 245.)

Instead of taxing the leaseholds, DWA and CVWD could substitute usage fees. They already charge customers a fixed monthly water service charge, in addition to a usage fee based on the amount of water the customer uses. (1 AA 238). They could adjust these fees for users who lease Reservation land to offset the inability to tax the leasehold, thus

serving any legitimate interest in paying for service with a narrowly tailored tax that intrudes no more than necessary on tribal sovereignty.

3. The combined tribal and federal interests outweigh the County's weak interest.

This case combines (1) an overwhelmingly strong tribal interest in protecting Indian land and self-government; (2) an overwhelmingly strong federal interest in exclusively regulating the leasing of Indian land; and (3) a weak state interest in raising general revenue that can be satisfied through less-invasive means such as inter-governmental agreements with the Agua Caliente or adjusted user fees. On balance, the possessory-interest taxes and VATs are therefore preempted, just as Florida's tax on the "privilege [of engaging] in the business of renting [or] leasing . . . the use of any real property" was held to be preempted in *Seminole Tribe*, 799 F.3d at 1326.

In contrast to *Seminole Tribe* and the case law discussed above prohibiting taxation of Indian lands, the *only* courts that have upheld a state tax imposed on an interest in Indian land are the California courts that have considered the possessory-interest taxes. *Palm Springs Spa, Inc. v. Cty. of Riverside*, 18 Cal. App. 3d 372 (1971); *Agua Caliente Band of Mission Indians v. Cty. of Riverside*, 442 F.2d 1184 (9th Cir. 1971). The holdings of those courts are not supported by existing law. None of them considered whether the possessory-interest taxes unlawfully infringe on the Tribes' right of self-government under the test set forth in *Bracker*. Indeed, many of them were decided before *Bracker*, and the only post-*Bracker* case, the recent Ninth Circuit decision, *Agua Caliente Band of Cahuilla Indians v.*

Riverside Cty., 749 F. App'x 650 (2019) (unpublished memorandum opinion), punted to pre-*Bracker* case law without applying any of the governing preemption standards.

Even the recent decision in *Herpel* should not dictate the Court's decision in this case. The *Herpel* record contained no evidence regarding (a) the impact of the possessory-interest taxes on the demand for tribal leases; (b) the impact of the possessory-interest taxes on the Tribe's ability to impose its own tax; (c) the extent to which the possessory-interest taxes reduce the value of Indian leaseholds; (d) the extent to which the possessory-interest taxes impact tribal sovereignty; or (e) the Defendants' ability to enter inter-governmental agreements. Here, in contrast, the record contains evidence on all those points through the exhibits and Henson's unrebutted expert testimony. The *Herpel* plaintiffs also failed to explain the long history of federal regulation of Indian lands (including the restrictions on the sale or lease of the lands, regulation of lands, and taxes of the lands), and the *Herpel* panel relied on the lack of this history to distinguish *Bracker* and *Ramah*.

This Court, instead, should refer to *Seminole Tribe* and the numerous other cases cited above and conclude that the federal and tribal interests affected by the possessory-interest taxes far outweigh the limited state interests.

CONCLUSION

For any one of the three, independent bases addressed above, this Court should hold that the challenged taxes are preempted by federal law and direct Defendants to repay them to Plaintiffs.

Respectfully submitted,

DATED: June 4, 2020

/s/ Jane E. Maschka

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 14,000 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: June 4, 2020 By: */s/ Jane Maschka*

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4. I electronically served the documents listed in 3. as follows:
   a. Name of person served: Jennifer A. MacLean / Benjamin S. Sharp
   On behalf of *(name or names of parties represented, if person served is an attorney)*:
   County of Riverside
   b. Electronic service address of person served: jmaclean@perkinscoie.com / bsharp@perkinscoie.com
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Date: June 4, 2020

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APP-009E, Item 4 (Continued)

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a. Names of person served: Gregory P. Priamos, County Counsel / Ronak N. Patel, Deputy County Counsel
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         (b) Person served:

            (i) Name: Office of the Attorney General

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

Date: June 4, 2020

Rosie Garcia-Zapatero
(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)

▶ _____
(SIGNATURE OF PERSON COMPLETING THIS FORM)