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' REPLY BRIEF

Aaron Van Oort (*pro hac vice*)*
Jerome A. Miranowski (*pro hac vice*)
Jane E. Maschka (#235789)
Joshua T. Peterson (*pro hac vice*)
FAEGRE DRINKER BIDDLE & REATH LLP
90 South Seventh Street, Suite 2200
Minneapolis, Minnesota 55402
(612) 766-7000 (phone)
Aaron.vanoort@faegredrinker.com; Jerome.miranowski@faegredrinker.com;
Jane.maschka@faegredrinker.com; Josh.peterson@faegredrinker.com
Attorneys for Plaintiffs-Appellants

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

RULES

REGULATIONS

OTHER AUTHORITIES

GLOSSARY

RECORDS AND BRIEFS

AA	=	Appellant's Appendix
AOB	=	Appellants' Opening Brief
CVWDB	=	Coachella Valley Water District's Brief
DWAB	=	Desert Water Agency's Brief
RA	=	Respondent's Appendix
RB	=	Riverside's Brief
RT	=	Reporter's Transcript

INTRODUCTION

This is a case about sovereign power. Defendants claim the right to directly tax the full value of Indian land that is leased to non-Indians, without the Indian Tribes[1] having any say about either the amount of the taxes or how the revenue is used. But Defendants do not have this right for three separate reasons. First, this kind of tax on Indian land is expressly preempted by Section 465 of the Indian Reorganization Act ("IRA"), and Section 465 applies because the Tribes acquired rights and interests in the land at issue through the IRA when the 1990 Amendment (25 U.S.C. § 5126) indefinitely extended their tribal trusts. Second, the imposition of this kind of tax so completely precludes the Tribe[2] from being able to fund its own government that it is preempted as an infringement upon the Tribe's sovereignty. Finally, these taxes are preempted under the *Bracker* balancing test because the Tribe's sovereign interests and the federal government's interest in regulating the leasing of Indian land together outweigh Defendants' interests in imposing this kind of tax.

Defendants repeatedly argue that this case is about whether people can obtain government services for free. That is simply not correct. As Plaintiffs explained in their opening brief, there is a clear way for Defendants to get paid for their services: inter-governmental agreements with the Tribes. Those agreements would permit the Defendants to raise funds but would do so in a way that respects the Tribes' sovereignty—the Tribes would have a say in how much they pay and for which services, enabling them to have

[1] "Tribes," plural, refers to the Agua Caliente Tribe and the Colorado River Indian Tribe.
[2] "Tribe," singular, refers to the Agua Caliente Tribe.

control over their own affairs and finances. In the over 30,000 words that Defendants collectively wrote in their responding briefs, they never once mention "inter-governmental agreements." It thus stands undisputed that Defendants could meet their revenue needs through those agreements.

That Defendants refuse to pursue a collaborative route shows that this case is about the power for Defendants to do whatever they want without giving any voice to the Tribes; it is not about legitimately paying for government services. This is all too consistent with the shameful history of States' abuse of Indian Tribes and Indian land, but it is entirely inconsistent with federal law. This Court should hold that the taxes at issue are preempted.

STANDARD OF REVIEW

Both sides are essentially in agreement on the Standard of Review that applies. (RB at 34–35; CVWDB at 29).[3] The case was tried on stipulated facts, and the issues are almost entirely legal, so the Court's review is de novo. Riverside and CVWD contend that the substantial-evidence standard will apply to any findings about disputed facts, but because the Superior Court did not *make* any such findings, the issue is moot. (*See* AOB at 29 (citing *Cellphone Termination Fee Cases*, 193 Cal. App. 4th 298, 311 (4th Dist. 2011)).)

ARGUMENT

I. Section 465 Prohibits Taxation Of Plaintiffs' Possessory Interests.

Our opening brief showed that Section 465 preemption turns on two questions. First, is the tax in question a tax on "land" or "interests in lands"? Second, were the "land or

[3] DWA did not propose a standard of review.

rights" in question "acquired" through the IRA? Here, the possessory-interest taxes are a tax on the Tribe's "land or rights," and those rights were acquired through the IRA. The possessory-interest taxes are therefore expressly preempted.

A. Under *Mescalero*, a tax on the right to possess land is a tax on the land within the meaning of Section 465.

Under *Mescalero*, a tax on the right to use Indian land is a tax on the land itself—which Section 465 prohibits. (AOB 31–32 (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1975)).) The Respondents ignore the rule in *Mescalero* and ignore that the possessory-interest tax is based on tribal members' property rights, instead attempting to shift the Court's focus to who is paying the tax. In some places, Respondents argue that Section 465 does not preempt possessory-interest taxes on Indian lands. (RB at 36–38.) In other places, they concede that Section 465 *does* preempt possessory-interest taxes, but they argue that it does so only if the taxes are levied on Indians or Indian Tribes. (RB at 38–39.) Neither argument is consistent with the plain meaning of Section 465.

1. Section 465 bars possessory-interest taxes.

First, the County suggests that the statute does not apply because the leases were approved through the Long-Term Leasing Act, 25 U.S.C. § 415, not the IRA. (RB at 36.) This is an opaque way of arguing that the tax is levied on the lessees' possessory interests, not upon the land itself. But the Supreme Court has already rejected the argument that a tax on the right to use the land does not fall within Section 465. In *Mescalero*, the Court held: "[i]t has long been recognized that 'use' is among the 'bundle of privileges that make up property or ownership' of property and, in this sense, at least, a tax upon 'use' is a tax

upon the property itself." *Mescalero*, 411 U.S. at 158. Applying this holding, the Eleventh Circuit has struck down the very same type of tax at issue in this case, holding: "[t]he ability to lease property is a fundamental privilege of property ownership," and by taxing the "privilege" of leasing property, the State is taxing the "privilege of property ownership" itself. *Seminole Tribe of Fla. v. Stranburg*, 799 F.3d 1324, 1330 (11th Cir. 2015).

In support of its contrary argument, the County cites two inapposite cases, *United States of Am. v. Cty. of Fresno*, 50 Cal. App. 3d 633 (Ct. App. 1975), aff'd 429 U.S. 452 (1977) and *United States v. City of Detroit*, 355 U.S. 466 (1958). (RB at 37–38.) Neither of those cases involved Indian trust land, like this case does. Instead, both cases involved federal land, and in both cases the plaintiffs' challenges rested on the "thoroughly repudiated" doctrine of intergovernmental immunity. *Seminole*, 799 F.3d at 1334 (quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 174 (1989)). Plaintiffs' challenge in this case does not rest on intergovernmental immunity. Instead, it relies on the plain text of the express preemption provision of Section 465, "the contours of which must be interpreted like any other statute." *Id. Mescalero* is the controlling law on Section 465, not the County's cases, and it holds that for purposes of that statute, a tax on the use of Indian land "is a tax upon the property itself." 411 U.S. at 158.

The DWA, in support of its arguments, cites virtually the same string cite of cases that the Eleventh Circuit already distinguished in *Seminole*. (DWAB at 23.) None of those cases are binding precedent, and they are distinguishable for the same reasons explained by the Court in *Seminole*—in short, they either did not address Section 465 or did not turn

on it. 799 F.3d at 1333–34.[4] The DWA also cites *Riverside Cty. v. Palm-Ramon Dev. Co.*, 63 Cal. 2d 534 (Cal. 1965) and *Palm Springs Spa, Inc. v. Cty. of Riverside*, 18 Cal. App. 3d 372 (Ct. App. 1971), but both cases precede *Mescalero*, the latter does not mention Section 465, and the former does not address preemption.

In sum, the possessory-interest tax is not like the taxes on income derived from land or on the value of resources or minerals removed from the land that Respondents try to compare it to. The possessory-interest tax is imposed on the value of the property itself and implicates virtually the entire "bundle" of property rights, including the right to have exclusive possession and control of the property. (1 AA 232); Restatement (First) of Property § 7 (1936). Moreover, the tax is not a one-time fee but is levied annually and in perpetuity. (AOB at 32.) It perfectly mirrors a direct tax on the property. Thus, as the Supreme Court has held, the tax is "intimately connected with use of the land" and the Tribe's rights in the land and is the exact sort of tax that is barred by Section 465. *See Mescalero*, 411 U.S. at 158–59; *see also Seminole*, 799 F.3d at 1331–32.

2. Section 465 bars taxes on Indian lands, not just on Indians.

Since it is clear under *Mescalero* that a tax on the right to use land is the same as a tax on the land itself under Section 465, both the County and DWA make the backup argument that Section 465 applies only if the tax is imposed on Indians. This argument,

[4] *Seminole*, 799 F.3d at 1333–34 (explaining that "neither the *Agua Caliente* nor *Fort Mojave* decisions mentioned or apparently considered § 465 at all" and explaining that the *Chehalis Reservation* footnote was dicta).

however, is precluded by the plain language of the statute, which bars taxes on Indian land regardless of who must pay them.

The County's argument is based on a misreading of a quote from *Mescalero* that the County takes out of context. The quote states that "lessees of otherwise exempt Indian lands are also subject to state taxation." (RB at 38 (quoting *Mescalero*, 411 U.S. at 157).) The County argues that this means that a tax on Indian land is not preempted by Section 465 if it is paid by non-Indian lessees. But that is not what the Supreme Court was discussing in that quote. Instead, the Court was discussing taxes on ***income*** derived from land, not taxes on the value of the land itself. *Mescalero*, 411 U.S. at 156–57. The case cited by the Court in that passage, *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342, 343 (1949), dealt with a state tax on ***income*** derived from petroleum production. *Id.* Thus, the Court was indicating that lessees of otherwise exempt Indian lands are subject to state taxation of ***income*** derived from the land. The opposite is true of taxes levied on the right to possess and use the land itself: those taxes are preempted, as *Mescalero* held.

In its argument, the County concedes that, under *Mescalero*, the State could not impose its possessory-interest tax on lessees who are tribal members. (RB at 38; *see also* DWAB at 22–23.) This concession is entirely correct. But under the plain text of Section 465, it requires the further holding that the possessory interest tax is preempted as to Indian land no matter *who* the lessee is, because there is no basis in the text of Section 465 for limiting preemption based on who the lessee is. The statute flatly forbids taxing "lands or rights" that were "acquired pursuant to this Act." 25 U.S.C. § 5108. There

is no exemption that allows a tax on "lands or rights" as long as the tax is paid by a non-Indian. Hence, Respondents' possessory-interest taxes are preempted in their entirety.

The DWA makes another variation of this same incorrect argument, erroneously maintaining that the Florida tax in *Seminole* was preempted only because it was collected by the Tribal landlords from the non-Indian lessees, whereas here the tax is collected by the state directly from the lessees.[5] (DWAB at 26; *see also* RB at 41.) But nothing in *Seminole* turned on that fact, and it is an administrative distinction without a legal difference. In both *Seminole* and here, the non-Indian lessee is responsible for paying the tax, but also in both *Seminole* and here, the tax is levied against the right to use the land. The latter fact is the legally dispositive one under Section 465. Hence, in both *Seminole* and here, the tax is preempted.

DWA also points out that the tax in *Seminole* was similar to a transactional tax on the tribe's income. (DWAB at 26.) But that fact weighed *against*, not for, preemption under Section 465 because it arguably separated the tax from the tribe's land. 799 F.3d at 1331–32. No such separation is possible here, so this is an even clearer case of preemption than *Seminole*.

In sum, the plain text of Section 465 turns on *what* is taxed, not on *who* pays the tax. Taxes on "lands or rights" that were "acquired pursuant to this Act" are preempted, full stop. 25 U.S.C. § 5108. Because a tax on the right to use land was held to be a tax on "lands

[5] DWA also cites analysis in *Herpel v. City of Riverside*, 45 Cal. App. 5th 96 (Cal. Ct. App. 2020) which distinguished *Seminole*. (DWAB. at 26.) But that part of the *Herpel* opinion distinguished *Seminole* for *Bracker* purposes, not Section 465.

or rights" by the Supreme Court in *Mescalero*, the possessory-taxes here meet the first criterion for preemption under Section 465.

B. The Tribe's trust rights were acquired under the IRA.

The taxes also meet the second criterion for preemption because the Secretary "acquired" the indefinite trust rights to that land "pursuant to" the 1990 Amendment to the IRA. (*See* AOB at 33–37.) Plaintiffs demonstrated, and the County never disputes, that the acquisition of indefinite trust rights under the IRA is sufficient to bring land within the protection of Section 465, so if those rights were acquired, preemption applies. In its response, the County makes three unrelated arguments for why the rights were not acquired under the IRA, but none is persuasive.

1. Section 465 applies whenever an "interest" or "right" was acquired, not just when an IRA loan is involved.

First, the County argues that loans under the IRA are not at issue here, whereas they were at issue in *Mescalero*. (RB at 40–41.) That is true but irrelevant. *Mescalero* stands for the general proposition that land is brought within the protection of Section 465 as long as "interests" or "rights" in the land are acquired under the IRA, even if the land itself was not originally acquired under the Act. (AOB at 33.) We do not understand the County to dispute that general point, and *Mescalero* established it by holding that the acquisition of a leasehold interest in land under the auspices of the IRA brought the land within the protection of Section 465, even though the United States acquired the land itself through other means. *Mescalero*, 411 U.S. at 155 n.11; *see also Cass Cty., Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 155 (1998). It is true, as the County highlights,

that the Tribe's *ski development* in *Mescalero* was paid for by a loan organized under Section 10 of the Act. *Id.*; (RB at 40–41; CVWDB at 31–32).[6] But the loan for the development was not why *Mescalero* held Section 465 to apply—indeed, the majority opinion only mentions the word "loan" one time. Rather, the Court held that Section 465 applied because a "right" or "interest" to the land—there, a leasehold interest—had been acquired under the Act. *Mescalero*, 411 U.S. at 155 n.11. Here, the "right" or "interest" acquired under the Act is the right to hold the land in trust indefinitely. (AOB at 34–37.) *Mescalero*'s holding establishes that the acquisition of this type of "right" or "interest" triggers Section 465's protection.

The County misinterprets Section 465 to argue that, for Section 465 to apply to a parcel of land, the Secretary must acquire *title* to it. (RB at 36.) The County's problem is that its focus is too narrow. The County highlights language of one section of the IRA, Section 465, to argue that the Secretary had to acquire title for Section 465 to apply. But Section 465's tax exemption applies to "any lands or rights acquired pursuant to this *Act*." 25 U.S.C. § 5108 (emphasis added). "Act" refers to the IRA in its entirety and not just the provisions of Section 465. *See, e.g.*, 25 U.S.C. §§ 5105-5107 (using "Act" to refer to the entirety of the IRA). Congress used the word "section," as opposed to "Act," when it intended to limit the application of the relevant language to just what was in the particular

[6] The County may also be arguing that the facts are distinguishable from *Mescalero* because, here, the tax applies to Plaintiffs' leases from the Tribe whereas, in *Mescalero*, the tax applied to the Tribe's lease with the federal government. If so, that argument confuses the first prong of the Section 465 analysis (whether the type of tax is covered) with the second (whether the land is covered), and as such fails for the reasons discussed above. *See supra* Section I.A.

section of the IRA. *See, e.g.*, 25 U.S.C. § 5103, 5104, 5108. One of the rights that Indians acquired under the Act was to have their land held in trust "until otherwise directed by Congress," which is the language made applicable to the Tribe's land through the 1990 Amendment.[7] 25 U.S.C. § 5102.

The extension of trust rights was one of the seminal purposes for Congress passing the IRA. In passing the IRA, Congress sought to halt the tremendous losses of allotted Indian land. *Mescalero*, 411 U.S. at 151; *Chase v. McMasters*, 573 F.2d 1011, 1016 (8th Cir. 1978); *see also* 25 U.S.C. §§ 5101, 5102 (rejecting the allotment policy and extending the 25-year-trust-period indefinitely); Indian Reorganization Act, 48 Stat. 984, 984 (declaring the purpose of the Act to include conservation of Indian lands). Extending the lands' tax-exempt status by codifying a state and local tax exemption in Section 465 was "an important means of" accomplishing that purpose. *Chase*, 573 F.2d at 1016. That purpose would not be served if the tax exemption did not apply to land that was previously held in trust but for which the IRA granted ***indefinite*** trust rights, which constitutes approximately 48 million acres of the total 56.2 million acres of land held in trust for tribes today. *Cohen's Handbook of Federal Indian Law* §§ 1.04, 15.02, at 74, 995 (2012).

Statements from the only Senate floor debate on the IRA reveal that Congress understood that the IRA's tax exemption extended to Indian trust land for which it provided indefinite trust rights, regardless of whether the Secretary acquired title to the land itself

[7] This section of the IRA, 25 U.S.C. § 5102, was immediately applicable to any tribe that voted to adopt the IRA. 25 U.S.C. § 5125. However, the Tribe voted against adopting the IRA, so the section was not made applicable until the 1990 Amendment made it applicable to all Indian lands.

under the IRA. During the debate, just after offering a successful amendment to the language of Section 465, Senator Elmer Thomas of Oklahoma insisted upon an amendment to the bill to exclude the Oklahoma Indians from the operation of sections of the IRA. He was concerned that the extension of trust status in Section 462 (25 U.S.C. § 5102) would extend the tax-exempt status of Indian land in Oklahoma indefinitely: "[t]he bill proposes to extend the restrictions to all Indians forever. That would mean that many millions of acres of land in my state would never become taxable." 78 Cong. Rec. 11122, 11126 (1934). The senator successfully negotiated an exception for the Oklahoma Indians from application of the extension of trust rights in Section 462 to avoid the indefinite tax-exempt status it would have received under Section 465. 25 U.S.C. § 5118.

Additionally, the County's argument about the Secretary having to acquire title for Section 465 conflicts with Supreme Court precedent. In *Mescalero*, the Supreme Court held that Section 465 applied to a parcel of United States forestry land that the United States leased to a tribe for the tribe to operate under forestry rules and regulations created in connection with the IRA. *Mescalero*, 411 U.S. at 146; *see also* 25 U.S.C. § 5109. The title to that land did not change—the United States held title before the tribe started using it and held title afterwards; the parcel was never even placed in trust for the tribe, the tribe merely used it in connection with the IRA forestry program. *Id.* Similarly, here, the Tribe's land belonged to the United States before and after the 1990 Amendment. The difference, which favors application of Section 465 to the land, is that the land at issue here was held in trust for the Tribe. The Tribe acquired additional, indefinite trust rights with the 1990 Amendment. This satisfies the requirements of Section 465.

2. The County stipulated that the trust rights were acquired under the 1990 Amendment to the IRA and cannot contest that now.

The County next argues that the indefinite trust rights provided for by the 1990 Amendment to the IRA were not actually "acquired" under that Act for "the vast majority" of parcels at issue here, because those parcels were already held in trust indefinitely under the Equalization Act. (RB at 43.) The County also suggests that some "unknown number of allotments" had trust periods extended according to various Executive Orders. (*Id.* at 43–44 & n.16.)[8]

These arguments, raised for the first time on appeal, are insufficient. The County ***stipulated*** below that the 1990 Amendment to the IRA extended the trust rights of the Allotted Land indefinitely. (1 AA 254 ("Allotted Lands are indefinitely held in trust under 25 U.S.C. § 5126").) This stipulation is controlling, and the County cannot contradict it on appeal. *In re Nevill*, 39 Cal. 3d 729, 732 n.2 (1985) (explaining that "[a]s a general rule, an attorney is bound by the factual recitals in a stipulation" and is not permitted to "contradict the stipulated facts"); *Harris v. Spinali Auto Sales, Inc.*, 240 Cal. App. 2d 447, 453 (Ct. App. 1966) ("Ordinarily, a party will not be permitted to contradict a stipulation, even though it may be opposed to otherwise provable fact, and even though the stipulation affects the statutory and constitutional rights of the parties.").

[8] This new argument is also unresponsive to Plaintiffs' claims. The extensions identified by the County were finite, not indefinite. Executive Order 6498 (Dec. 15, 1933), available at http://www.fdrlibrary.marist.edu/_resources/images/eo/eo0013.pdf (extending trusts by 10 years); 3 Fed. Reg. 58368 (Dec. 14, 1978) (extending trusts by 1-year); 48 Fed. Reg. 34026 (July 27, 1983) (same); 53 Fed. Reg. 30673 (Aug. 15, 1988) (same). Even if the Secretary routinely extended the trusts, they were not indefinite by law and did not become so until the 1990 Amendment to the IRA.

In addition, even if the County's attempt to change its position could be considered, the County's new position concedes that its arguments about pre-existing trust rights would apply only to some parcels of land. As to all the parcels to which those arguments do not apply, Plaintiffs are entitled to a ruling of Section 465 preemption.

Finally, the County's stipulation was correct in the first place because the Equalization Act did not extend the trust rights for this land. As the County agrees, the land at issue is reservation trust land. The County has cited no provision of the Equalization Act that suggests that the Equalization Act indefinitely extended the trust rights for the land. Instead, it relies on a provision prohibiting the sale or transfer of the land without approval from the Secretary—which does not even mention the word "trust"—to make the argument that the land was already to be held in trust indefinitely. (RB at 43.) A restriction on alienation of the land is not the same as an indefinite extension of the United States' fiduciary trust responsibility over the land. *See* 25 U.S.C. § 5102 (extending indefinitely the "existing periods of trust placed upon any Indian lands ***and*** any restriction on the alienation thereof" (emphasis added)).

In truth, the land was still subject to the expiring trust period applicable to allotments made to Mission Indians (which includes the Tribe) that were made prior to the Equalization Act. (*See* AOB at 34–35) (explaining the expiration and extension of trust rights on the land); Mission Indian Relief Act, 26 Stat. 712 (1891) (limiting the trust period to 25 years for allotments as well as reservations). Thus, trust rights granted under the 1990 Amendment, making the IRA applicable to "all lands held in trust by the United States for

Indians," were granted whether the land itself was allotted under the Mission Indian Relief Act (the original act from 1891 allotting the Tribe's land) or the Equalization Act.

If the Court agrees that indefinite trust rights in the land in question were acquired under the 1990 Amendment to the IRA, then Respondents have only two backup arguments. One is that the only way for the land to qualify under the IRA is if the Secretary takes the land out of trust only to bring it back in. (*See* RB at 41–42.) This argument is baseless. The County neither justifies that overly formalistic and unnecessarily costly interpretation of the Act nor attempts to square it with *Mescalero's* contrary holding that requiring this would be pointless and "meaningless." *Mescalero*, 411 U.S. at 115 n.11. The second argument is that *Herpel* is controlling. It is not. As Plaintiffs explained, *Herpel* did not consider the argument presented here that the Tribe gained a "right" or "interest" in the land under the IRA due to the 1990 Act, because the argument was not raised in that case. (AOB at 37–38.)

3. There is no evidence that Congress did not intend Section 465 to apply to leases approved under the Long-Term Leasing Act.

The County argues that Congress could not have intended the tax exemption to apply to leases because the Long-Term Leasing Act was passed after the IRA. This argument fails based on the plain language of the statute—Section 465 applies to taxes levied against the "land or rights" in the land, the legal vehicle through which the rights to use the land are acquired is irrelevant. (RB at 37.) The County's inferences about Congress's intent carry no weight when the text of the statute is clear. *Viva! Int'l Voice for Animals v. Adidas Promotional Retail Operations, Inc.*, 41 Cal. 4th 929, 939 (2007) ("In

every preemption analysis, congressional intent is the ultimate touchstone, and the statutory text the best indicator of that intent." (internal quotation marks and citations omitted)).

Beyond that, the history of leasing laws reinforces the textual application of Section 465. When the IRA was passed in 1934, several laws already existed that permitted Indians to lease their allotted trust land. Indeed, leasing of allotted trust land dates as far back as 1891. *See* 1 *Cohen's Handbook of Federal Indian Law* § 17.02 (2019). Moreover, the IRA itself contained provisions upon its passage that permitted tribes to lease their land. *Id.*; *see also* 25 U.S.C. § 5124. Nothing in the statute's language or history suggests that Congress intended for Section 465 not to protect either those leases specifically or leases of Indian lands in general.

Moreover, the rule on tax preemption here is that preemption applies unless there is an express exclusion instead of an express inclusion. The County does not dispute that the land at issue is reservation trust land—whether it was allotted in the early 1900s or later on under the Equalization Act. Under *Cass County*, "State and local governments may not tax Indian reservation land absent cession of jurisdiction or other federal statutes permitting it." *Cass Cty. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 110 (1998) (quotation omitted). The boundary of that tax exemption is dictated by the same language in *Mescalero* that controls the boundary of the Section 465 tax exemption. The Court in *Mescalero* stated that the permanent improvements would "certainly be immune from the State's ad valorem property tax" if they were on the tribe's tax-exempt trust land, and "[w]e think the *same* immunity extends to the compensating use tax on the property" at issue in

the case, which was federal land that the tribe leased in connection with the IRA. *Mescalero*, 411 U.S. at 158 (emphasis added).

The Supreme Court has refused to find cession of federal jurisdiction permitting state taxation "unless [Congress] has made its intention to do so unmistakably clear." *Cass Cty.*, 524 U.S. at 110. To the contrary, Congress made it unmistakably clear that preemption does apply here.

* * *

In sum, the Tribe acquired rights and interests in its land through the 1990 Amendment to the IRA. The IRA therefore bars the County's tax on the "land and rights" the Tribe "acquired pursuant to this Act." 25 U.S.C. § 5108.

II. The Taxes At Issue Are Preempted Because They Infringe On The Rights Of The Tribe To Make Its Own Laws And Be Ruled by Them.

If the Court agrees that Section 465 preemption applies, it need not consider the other grounds for preemption. If it reaches those other grounds, however, the Court should hold that the possessory-interest tax is preempted because it interferes with the Tribe's rights to exercise its sovereign functions, and the imposition is so severe that the taxes are preempted regardless of any balancing of the State's interests.

A. The self-government doctrine can and does preempt the possessory-interest tax.

As a preliminary matter, the "self-government doctrine" or infringement test is separate from the *Bracker* balancing test, as *Bracker* itself expressly stated. (RB at 44–45; DWAB at 49–51; CVWDB at 32–33.) Respondents rely on the 1973 decision in *McClanahan v. State Comm'n*, 411 U.S. 164, 172 (1973), for the contrary argument that

preemption based on sovereignty no longer exists. But the Supreme Court expressly held otherwise in both *Bracker*, 448 U.S. at 142, and *Ramah Navaho School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 837 (1982), and both of those cases cited *McClanahan* in the very passages in which they recognized infringement on sovereignty as a separate basis for preemption. The Ninth Circuit correctly followed these cases in *Crow I*, holding that states "must not infringe on the rights of reservation Indians to govern themselves." *Crow Tribe of Indians v. State of Mont.*, 650 F.2d 1104, 1109 (9th Cir. 1981), *opinion amended on denial of reh'g*, 665 F.2d 1390 (9th Cir. 1982) (*Crow I*).

Under this controlling law, the possessory-interest tax impermissibly infringes on the Tribe's sovereignty and is preempted. As we established, the possessory-interest tax is the practical equivalent of a forbidden *ad valorem* tax on the land itself and is thus the exact sort of tax that infringes upon the Tribe's right to self-govern. (AOB at 41–43.) Respondents reply that the tax cannot, as a matter of law, infringe upon the Tribe's sovereignty because it is imposed upon the lessees and not the Tribe itself. (RB at 45–46; DWAB at 52; CVWDB at 33–34.) That is incorrect.

In *Crow I*, the legal incidence of the mineral-resource tax was born by the non-Indian mineral lessee. As with the possessory-interest tax here, the Tribe did not collect the tax, did not have to report upon it, and could not be liable for it. *Crow I*, 650 F.2d at 1110. Yet the Court concluded that the tax was preempted because it targeted the "Tribe's mineral resources, a component of the land itself," and could "substantially affect its ability to"

govern itself.[9] *Id.* at 1117. Here, the possessory-interest tax targets the Tribe's right to lease its land, "a component of" the Tribe's rights in the land, and substantially affects its ability to self-govern. *See supra* at Section I.A; (*see also* AOB at 43). If anything, the imposition is greater here than in *Crow I* because, there, the tax was levied on the value of resources extracted from tribal trust land whereas here it is a tax is on the value of tribal trust land itself. The possessory-interest tax also shifts a substantial amount of tax revenue away from the Tribe towards the Respondents and, by doing so, removes the Tribe's ability to have a seat at the table that decides what to do with those revenues.

B. The possessory-interest tax infringes upon the Tribe's sovereignty by preventing it from levying its own taxes.

Moreover, the possessory-interest tax—which is levied on the full value of the land and is the practical equivalent of a property tax levied in the reservation itself—is such an extreme infringement upon the Tribe's sovereignty that it must be invalidated without balancing it against the State's interests. (AOB at 43.) It effectively takes the Tribe's entire property tax base away from the governments that own and control it. (*Id.* at 44–46); *see also Crow Tribe of Indians v. State of Mont*, 819 F.2d 895, 902-03 (9th Cir. 1987) (*Crow II*). The County's response is to suggest that the Plaintiff's argument is "foreclosed as a matter of law" because the Tribe is *technically* free to levy its own taxes. (RB at 46.) That is incorrect because the burden of the County's tax is so severe that the Tribe could not impose its own, additional tax without destroying its own tax base.

[9] As the County points out, this ruling stems from a motion to dismiss. The Court determined that the Tribe could produce evidence that would support its claims. *Crow I*, 650 F.2d at 1117. Here, Plaintiffs have done just that.

The County's key case, *Washington v. Confederated Tribes of Colville Indian Reservation*, itself shows why preemption is required in this case. (RB at 46.) The Court explained in *Colville* that tribes' "interest in raising revenues for essential governmental programs . . . is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes." 447 U.S. 134, 156–57 (1980). In *Colville*, that principle cut against preemption because the cigarette taxes in question were only loosely related to the tribe and its land. Here, in contrast, the tax is directly tethered to the value of the Tribe's land itself: without the Tribe's land, there is nothing to tax. *See also Crow II*, 819 F.2d at 899 (explaining that the holding in *Colville* does not apply to taxes applied on tribal activities that generated "value on the reservations" and "in which they have a substantial interest" (citation omitted)).

The County cites another taxation-of-minerals-from-Indian-lands case, *Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 187 (1989), for the same proposition. (RB at 46, 48.) There, however, the district court made an explicit finding that "the Tribe could, in fact, increase its taxes without adversely affecting on-reservation oil and gas development." *Id.* at 185 (cleaned up). Here, the Superior Court made no similar factual finding. (4 AA 1021–22.) Instead, the undisputed record shows that the possessory-interest tax substantially decreases the value of the Indian lessor's interest and prevents the Tribe from imposing its own possessory-interest tax, fundamentally undermining the Tribe's ability to operate as a sovereign and engage in economic development in a way it sees fit. (AOB 27–28, 44, 46.) Thus, this case is like *Crow II*, which held a tax to be preempted, and which the Supreme Court left untouched in *Cotton Petroleum*. 490 U.S. at 186 n.17.

In the *same* paragraph of *Cotton Petroleum* cited by the County, (RB at 48), the Supreme Court explained that *Crow II* was distinguishable because the court there made findings that the taxes were high and negatively impacted the tribe. *Id.* Thus, the County is simply wrong in claiming that the Supreme Court has "made it clear that state taxes on non-Indians simply do not interfere with tribal sovereignty." (RB at 48.) As *Cotton Petroleum* recognized, there are cases—like *Crow II* and this one—in which a tax "imposes a substantial burden on the Tribe" and is therefore preempted. *Id.*

The County attempts to distinguish *Crow I* and *II* by relying upon this Court's analysis in *Herpel*. (RB 46–47.) But *Herpel* addressed *Crow I* in the context of *Bracker* balancing, explaining that the state interests in *Crow I* were too tangential to justify the tax. *Herpel*, 45 Cal. App. 5th at 115–16. *Crow I* and *II* certainly did consider whether Montana's tax on mineral resources violated a *Bracker*-type balancing test, but that was not the basis of their holding. *Crow I*, 650 F.2d at 1111–15; *Crow II*, 819 F.2d at 897–902. They invalidated the tax under the self-government doctrine, *Crow I*, 650 F.2d at 1115–17; *Crow II*, 819 F.3d at 902, ruling the tax was "invalid because it erodes the Tribe's sovereign authority." *Id.* at 903; *see also Crow I*, 650 F.2d at 1117. That is precisely what the possessory interest taxes do to the Tribe's sovereignty.

C. Plaintiffs established that the possessory-interest tax precludes the Tribe from levying its own taxes.

The same result as in *Crow I* and *II* holds here, doubly so because the impact on the Tribe and its interests are even greater. (AOB at 43.) The County argues that the tax is small compared to the tax at issue in *Crow II*. (RB at 47.) That is incorrect for two reasons.

First, the tax in *Crow I* and *II* was levied on only mineral interests, whereas here the tax is levied on the entire value of the land. Second, the tax there was imposed only a single time when minerals were extracted, whereas here the County reimposes its tax every single year. The net effect of the County's tax is a massive 40% decrease of the total value of the land over a lease's lifetime. (AOB at 47.)

Because of this substantial burden, the Tribe cannot levy its own tax. (*Id.* at 44–46.) The County's argument that "there is no factual or legal basis on which to conclude that the Tribe could not impose its own tax," (RB at 47) completely ignores the factual record in this case. (AOB at 44–48.) Put simply, the factual record here is not the same as it was in *Herpel*. (RB at 48.) The *Herpel* plaintiffs did not provide any expert testimony quantifying the economic impact of the tax on the Tribe. *Herpel*, 45 Cal. App. 5th at 112–13. Here, however, Plaintiffs' expert conducted an analysis and explained that, because of the checkerboard pattern of the reservation, potential lessees could rent property literally across the street from reservation property to avoid paying a higher tax rate. (AOB at 47.) And if the Tribe were to layer its own 1% tax on top of the County's, it would decrease the value of the land by over 40% and lose a significant portion of its tax base. (AOB at 44.)

The County complains that the Plaintiffs' expert never surveyed "potential lessees" to gather anecdotal evidence that they would avoid renting on tribal land if the Tribe were to levy another tax on top of the County's. (RB at 48.) But it does not take a survey to establish that reasonable consumers will choose to pay less rather than more for comparable properties. (AOB at 47.) More confusing is the County's claim that Plaintiffs' expert never quantified "the impact of California's possessory interest tax." (RB at 48.) He did, at

length. (*See* RA at 10–21.) The County's contrary claim is based on taking a deposition quote out of context. In the quote, Plaintiffs' expert Henson testified that he did not quantify the "literal dollar[]" impact on the ***County*** if the Tribe levied its own possessory-interest tax. (RA 356–61, 117:23–122:14 (referring to paragraph 43 of his report; RA 16 (paragraph 43)).). He quite clearly did quantify the impact of the tax on the Indian landowners and the Tribe.

* * *

The possessory-interest tax is a unique infringement on tribal sovereignty. Plaintiffs are aware of only two state or local governments attempting to tax the leasing of tribal lands: California (this case) and Florida (*Seminole*). In *Seminole*, the Florida tax was held to be preempted. This Court should reach the same holding here as to Defendants' tax.

III. The Taxes At Issue Are Preempted Under The *Bracker* Balancing Test.

Finally, if the Court believes that it needs to balance the state interests as part of the preemption analysis, then it should conclude that the tax is preempted because the balance of interests overwhelmingly demonstrates that the taxes violate federal law.

A. The Tribe's interests are substantial.

As explained above, the Tribe's interests are so substantial that they require preemption in their own right. *See supra* Section II. The possessory-interest tax precludes the Tribe from levying taxes on its own land, preventing it from engaging in core functions of government.

1. *Bracker* applies even though the possessory-interest tax is assessed on the lessees.

Two of the Respondents incorrectly argue that, because the "legal incidence" of the possessory-interest taxes fall upon the lessees and not the Tribe or its members, the tax does not implicate Indian interests for *Bracker* purposes. (DWAB at 38–42; CVWDB at 38.) This is backwards. If either the Tribe or its members' land were taxed directly, the tax would be categorically preempted. The *Bracker* balancing test only comes into play when, as here, the legal incidence falls on a non-tribal member. The case that DWA cites—*Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995)—draws precisely this distinction. (DWAB at 38.) *Chickasaw* explains that taxes are categorically barred when they are directly imposed on a tribe or tribal members. *Chickasaw*, 515 U.S. at 458–59. But it does not state that taxes are categorically permitted when their legal incidence falls elsewhere. Instead, the "balance of federal, state, and tribal interests"—the *Bracker* balance—must "favor[] the State" in that situation for it to "impose its levy." *Id.* at 459. The other cases that DWA cites pre-date *Bracker* and are inconsistent with it; they are no longer good law. (DWAB at 41.) This includes the pre-*Bracker* case of *Agua Caliente Band of Mission Indians v. Riverside Cty.*, 442 F.2d 1184, 1185 (9th Cir. 1971). Moreover, contrary to DWA's assertion otherwise (*see* DWAB at 41), just because the Ninth Circuit has not expressly overruled every pre-*Bracker* case does not mean those cases are applicable. For example, the section in *Fort Mojave Tribe v. San Bernardino City* cited by DWA relates to the IRA, not a broader preemption framework. 543 F.2d 1253, 1256 (9th Cir. 1976).

Ultimately, the DWA as much as admits that its "legal incidence" limitation on *Bracker* is incorrect when it states that, "[t]he Supreme Court has held that—even though the 'legal incidence' of a state tax may fall on non-Indians—the tax nonetheless may be preempted if its 'economic burden' falls on the Indians." (DWAB at 43 (quoting *Ramah*, 458 U.S. at 853–54).) That the County does not join DWA's argument about *Bracker* is perhaps the final indicator, if any were needed, that the argument is unfounded.

2. The taxes harm the Tribe.

Plaintiffs supplied ample evidence that the economic burden of the tax harms the Tribe. But Respondents claim that the evidence here is no different or better than what was presented in *Herpel*. (RB at 52–53; DWAB at 43–44; CVWDB at 39.) In *Herpel*, the plaintiffs admitted that they "did not do any quantification or any unique technical studies" to estimate the impact of the possessory-interest tax. *Herpel*, 45 Cal. App. 5th at 112. Here, in contrast, Plaintiffs supplied extensive expert testimony about the ways in which the tax harms the Tribe. (RA 1–34.)[10] As explained above, Respondents' attempts to challenge that evidence are unavailing. *See supra* Section II.C. The testimony and the record in this case distinguish it from cases like *Cotton Petroleum*, where the district court found that "[n]o economic burden falls on the tribe by virtue of the state taxes" and that the tribe "could, in fact, increase its taxes without adversely affecting" tribal leases. 490 U.S. at 185.

[10] The County and the CVWD argue that Plaintiffs' expert did not address the economic impact of VAT taxes. (RB at 52; CVWDB at 39.) Although the Superior Court did not permit Plaintiffs' expert to opine about the specifics of the VAT taxes, there is no logical reason why the impact would be any different. The VAT taxes are the same as the possessory-interest taxes except that the proceeds of the taxes are allocated to only CVWD and DWA.

The basic logic of the County's argument here is also in tension with other arguments it advances. The County implies that the possessory-interest tax imposes a minimal burden on the Tribe. (RB at 51, 53–55.) At the same time, it argues that collecting the possessory-interest tax from the Plaintiffs is vital to the County. (*Id.* at 55–58) (arguing that eliminating the tax would threaten the County's "ability to bear the costs of local government and to provide services" (citation omitted)).) It cannot be that losing roughly $22.8 million in potential tax revenue has "little effect on the Tribes," (RB at 51) but losing the same amount would "hurt" the County. (*Id.* at 56.)

Respondents further counter that, even if the cost of the tax falls on the Tribe, the benefits of the tax accrue to the Tribe as well. They suggest that the value of county services outweighs the cost of the tax, especially when compared to what the Tribe would have to spend to provide their own services. (RB at 53–55; DWAB at 43–44; CVWDB at 38–39.) This ignores two basic points.

First, Respondents suggest that because they raced to impose the tax first and used those tax funds to create infrastructure to provide services, they have all the interest and the Tribe has none. But with these tax revenues, the Tribe could also create its own infrastructure to provide those services *or* the Tribe could contract with the Respondents to continue receiving those same services. (*See* AOB at 58–59.) The Respondents cannot use the fact that their taxes are preventing the Tribe from providing these services as justification for preserving those same taxes.

The DWA and CVWD, in particular, emphasize that the Tribe has no independent means of providing water to its residents. (DWAB at 43–44; CVWDB at 38–39.) However,

they fail to mention that they are currently litigating the Tribe's water rights and that the Ninth Circuit recently held that the United States reserved water sources, including groundwater, when it created the Tribe's reservation. *See Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262 (9th Cir. 2017).[11] Thus, the water districts are using the Tribe's water, not the other way around.

Second, Respondents miss the fact that one of the undisputed harms to the Tribe is an infringement on its sovereignty, which includes the right to *choose* which services they pay for. If given the choice, the Tribe may opt to pay for the same services the Respondents currently provide through inter-governmental agreements. Or it may develop its own infrastructure to provide some of them. Or it may shift its focus and offer tax incentives to local businesses. Or it may invest in services and social programs different from the ones offered by the Respondents. (*See* AOB at 44–46.) The point is that the Respondents' taxes have prevented the Tribe from making those decisions for itself.

B. The Federal interests favor preemption.

Plaintiffs need not identify an "express congressional statement" of preemption. *Bracker*, 448 U.S. at 144. Rather, they only need to establish that the state taxes are inconsistent with a "comprehensive federal regulatory scheme." *Id.* at 148. And as Plaintiffs explained in their opening brief, "the federal government administers an extensive, exclusive, comprehensive, and pervasive regulatory framework governing the leasing of Indian land." *Seminole*, 799 F.3d at 1341.

[11] The parties are currently engaged in private mediation.

In response, Respondents rely almost entirely on *Herpel* and, in turn, *Cotton Petroleum*. In *Herpel*, this Court acknowledged that the "Leasing Regulations are extensive," but determined that, like the regulations in *Cotton Petroleum*, they were more concerned with removing restrictions to leasing land than increasing revenue. 45 Cal. App. 5th at 110. But *Herpel* is not binding, and it was wrong to suggest that the leasing regulations here are indistinguishable from those in *Cotton Petroleum. See Bracker*, 448 U.S. at 145 (required a "particularized inquiry" into the competing interests).

First, unlike in *Cotton Petroleum*, the regulations here are extensive *and* exclusive. In *Cotton Petroleum*, the Court identified several state regulations on oil production that were coextensive with the federal regulations. 490 U.S. at 185–86. Here, however, Respondents have not identified *any* state or local regulations that touch upon the Tribe's leasehold interests *except for* their taxes. *See Seminole*, 799 F.3d at 1339. The federal regulations control the field on everything else, and the question of taxes should be no different.

Second, unlike in *Cotton Petroleum*, there is ample indication that Congress intended the Long-Term Leasing Act and its corresponding regulations to preserve tribal sovereignty and increase revenue. In *Cotton Petroleum*, the only legislative history relating to revenue was one sentence in a letter from the Secretary of the Interior, which was attached to the Senate and House reports. *Cotton*, 490 U.S. at 179. Here, however, the Secretary has provided multiple pages of formal regulations explaining that the structure and intent of the leasing laws preempt state taxes because they interfere with Tribe's rights to sovereignty and to raise revenue off their land. 25 C.F.R. § 162.017(c); 77 Fed. Reg.

72440-01, 72447–48 (Dec. 5, 2012) (citing Sen. Rprt. No. 84-375 at 2 (May 24, 1955)); *see Wyeth v. Levine*, 555 U.S. 555, 576–77 (2009); *CallerID4u, Inc. v. MCI Commc'ns Servs. Inc.*, 880 F.3d 1048, 1061 (9th Cir. 2018). The purpose behind that act was not simply to reduce regulatory burdens, as the County argues. (RB at 50–51.) Rather, as the Secretary explained:

> The purposes of residential, business, and WSR leasing on Indian land 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. . . . Assessment of State and local taxes would obstruct Federal policies supporting tribal economic development, self-determination, and strong tribal governments. State and local taxation also threatens substantial tribal interests in effective tribal government, economic self-sufficiency, and territorial autonomy.

7 Fed. Reg. 72440-01, 72447. Moreover, the holding in *Cotton Petroleum* turned on the Court's determination that Congress had consistently permitted the taxation of mineral leases on Indian land, *Cotton Petroleum*, 490 U.S. 182–83, while there is no such history here.

Third, the taxes at issue in *Cotton Petroleum* and this case are vastly different. *Cotton Petroleum* involved a one-time, eight-percent production tax on oil and gas extracted from the reservation to be used by a non-Indian company located off the reservation (Cotton Petroleum) and its customers. 490 U.S. at 168. In contrast, this case involves the taxation of the value of reservation land itself, not resources extracted from it and sent off the reservation into the economy at large, and the tax is imposed in perpetuity, not just one time.

In the end, the *Cotton* decision does not rest on bright-line rules so much as a particularized balancing of the factors at issue in that case, as is required under *Bracker*. 448 U.S. at 145. The Court recognized the presence of federal and tribal interests but determined that, given the evidence in the record, the state interests outweighed them. *Cotton*, 490 U.S. at 186–87. That is not the case here. As Plaintiffs already demonstrated, the factual record here establishes that the possessory-interest tax imposes a substantial burden on the Tribe. And as discussed below, the state interests are minimal.[12]

Finally, the DWA attempts to distinguish *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1391, 1393 (9th Cir. 1987), but its analysis misses the point. The federal regulations at issue in *Segundo*—the same ones at issue here—were determined to be extensive, be comprehensive, and leave "no room" for conflicting local ordinances. *Id.* at 1393. The same regulations are at play here, and permitting the possessory-interest tax would not only "disrupt the federal and tribal regulatory scheme, but would also threaten Congress' overriding objective of encouraging tribal self-government and economic development." *Id.* (quoting *New Mexico vs. Mescalero Apache Tribe*, 462 U.S. 324, 341 (1983)).

[12] The DWA's other cases are also not controlling because they both involved a state tax "on the sale of non-Indian goods to non-Indians by a non-Indian business on a reservation." *Gila River Indian Cmty. v. Waddell*, 91 F.3d 1232, 1236 (9th Cir. 1996) (taxes on non-Indian entertainment center's ticket sales and concessions); *see also Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107, 1108 (9th Cir. 1997) (taxes on non-Indian hotel room rentals and food and beverage sales).

C. The State interests in taxing the Tribe's land are weak.

The final part of the balancing test considers the state interests in imposing the tax. Plaintiffs showed that those interests are weak in this case. (AOB 55–62.) Although Respondents argue that their interests are strong, they make a critical (but necessary) admission on one key point, and they fail to provide any response on a second point.

First, Respondents admit that the possessory-interest taxes are collected for general revenue only and make up only a minuscule portion of their budgets. As the County admits, its possessory-interest tax supports "general expenditures" untethered to any particular taxpayers. (RB at 56–57.) Similarly, the CVWD admits that "[t]he revenue CVWD receives from the general 1% possessory interest tax is not tied to any particular service provided to Plaintiffs." (CVWDB at 44.) These admissions are critical because *Bracker* made clear that "a general desire to raise revenue" is too weak a state interest to justify a tax on reservation land. *Bracker*, 448 U.S. at 150. Thus here, just as in *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 661 (9th Cir. 1989), and in *Seminole*, 799 F.3d at 1341–42, the taxes are preempted under *Bracker*.

What makes the state interest even weaker here is that the complained-of taxes make up only a minuscule portion of Respondents' overall budgets. Plaintiffs noted that the possessory-interest taxes make up less than 1% of the County's property-tax revenues, (AOB at 57–58), only 1.7% of the school revenue collected each year, (*id.* at 60), and only .35% of the CVWD's budget. (*Id.* at 61.) Respondents do not challenge those numbers. Instead, the County warns of "ripple" effects and unquantified harm to various agencies if it were unable to impose the taxes. (RB at 55–56.) DWA and CVWD offer similarly generic

arguments about the consequences of preempting taxes without quantifying or qualifying the alleged harms. Simply put, the Respondents' generalized interest in raising revenue cannot be substantial when the revenue in question is little more than a rounding error in their budgets. *Cf. Bracker*, 448 U.S. at 150.

Second, Respondents entirely ignore the key point they can raise revenue through the readily available means of inter-governmental agreements with the Tribe, and hence that they have no legitimate interest in maintaining their invasive possessory-interest tax. Plaintiffs established that the Tribe is already party to several inter-governmental agreements with the County and that Respondents could readily enter into more Agreements to pay for the services that are currently funded through the invasive taxes. (AOB at 26, 58–59.) Respondents never dispute this point, and it is a complete rebuttal to Respondents' free-rider argument. (RB at 13; DWAB at 32; CVWDB at 11, 13, 34, 37, 41–42, 44, 48.) As Plaintiffs have repeatedly said, this case is not about *whether* Respondents can raise revenue to support the services they supply, it is about *how* they can do it—specifically, whether they can unilaterally impose annual, *ad valorem* taxes on the full value of Indian land without the Tribe having any say in the matter.[13]

[13] In this respect, *Herpel* is distinguishable. One of the key holdings in *Herpel* was that the possessory-interest tax is different from the taxes at issue in *Seminole* and *Crow* because those only applied to businesses whereas the possessory-interest tax applied to residential leases, too. *Herpel*, 45 Cal. App. 5th at 115–16. Thus, the revenue raised from the taxes in *Seminole* were not "sufficiently connected" to the "taxes on business activity," whereas the services funded through the possessory-interest tax are. *Id.* As explained in Plaintiffs' opening brief, the plaintiffs in *Herpel* did not raise the argument that the defendants could enter into inter-governmental agreements with the tribe to obtain funds for the services it provides. The defendants' general interest in raising revenue through taxes to provide

Finally, the CVWD's argument that it cannot charge Plaintiffs a user fee in lieu of a tax is not supported by the record. (CVWDB at 42–44.) Both DWA's and CVWD's contract with the California Department of Water Revenue ("DWR") requires it to levy taxes if it "is otherwise unable to raise sufficient revenues to pay DWR for CVWD's portion of" water costs. (1 AA 257, 263.) Otherwise, it is permitted to use its "assessment power to raise" those funds. (*Id.*) Charging lessees user fees for their water rather than an *ad valorem* tax would avoid infringing upon the Tribe's property rights and would more closely connect the assessment to the service.

* * *

The possessory-interest taxes are so substantial that they prevent the Tribe from levying its own taxes and engaging in core functions of a sovereign nation. And the tax is levied in the context of a federal regulatory regime that is extensive, exclusive, and designed to increase tribal revenue and nurture tribal sovereignty. Against those weighty interests, Respondents cannot claim a counterbalancing interest in securing revenue for essential government services. Rather, Respondents can only claim an interest in securing revenue through their preferred means—a possessory-interest tax—rather than by negotiating inter-governmental agreements (which respects tribal sovereignty) or levying usage fees (which would tie the fee directly to the resource or service provided).

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services County- and city-wide, instead of through inter-governmental agreements, is not substantial.

IV. Plaintiffs Exhausted Their Administrative Claims.

The administrative-exhaustion doctrine exists to promote "administrative autonomy (i.e., courts should not interfere with an agency determination until the agency has reached a final decision) and judicial efficiency." *Hill RHF Hous. Partners, L.P. v. City of Los Angeles*, 51 Cal. App. 5th 621, 632 (Cal. App. 2020), *reh'g denied* (July 15, 2020). Plaintiffs met those goals because they properly submitted their administrative claims to the County Board of Supervisors and then proceeded to file this complaint in accordance with the rules laid out in the California Revenue and Taxation Code.

In their claims filed with the Board, Plaintiffs challenged the legality of levying a "possessory interest tax upon Indian trust lands," claiming that the land should not be subject to any "fee, tax, assessment, levy, or other charge imposed by any state or political subdivision of a state." (*E.g.* RA 144.) The claims then stated that the "taxes imposed" on the Plaintiffs' property "under California law and collected by Riverside County (on its own behalf and *for other taxing districts*) violate federal law," and subsequently listed the entire amount of illegal taxes assessed. (*Id.* at 145 (emphasis added).) The claims thus set out the legal basis by which Plaintiffs challenged all of the taxes at issue here, including those levied by the CVWD. The agency's autonomy was respected, and judicial efficiency preserved. *See Hill RHF Hous. Partners, L.P.*, 51 Cal. App. 5th at 632.

The CVWD's exhaustion argument is premised on a nit with the language used in Plaintiffs' administrative claims. The claims challenge "possessory interest tax[es]" without explicitly referencing CVWD's voter-approved tax. (CVWDB at 46–47.) But CVWD's tax is an *ad valorem* possessory interest tax assessed upon the value of possessory

interests in the Allottees' property. (*Id.* at 22–23.) It is thus a "possessory interest tax" imposed by the County "on behalf of [an]other taxing district[]," and CVWD's tax was properly presented to the agency for its consideration. (RA 144–45.) The County apparently agrees—it stipulated to the fact that Plaintiffs filed an "Administrative Claim" and has not challenged those claims' adequacy. (1 AA 232.)

CVWD nevertheless argues that Plaintiffs did "not give notice of" their challenge. (CVWDB at 47–48.) But the law only requires Plaintiffs to file their claims with the Board of Supervisors, and it permits the Board to provide a refund for "taxes collected by county officers for a city or revenue district" like the CVWD. Cal. Rev. & T. Code § 5099. The exhaustion rule exists to preserve the County Board of Supervisors' administrative autonomy and judicial efficiency, not protect CVWD's due process right to notice. (CVWDB at 47–48.) CVWD crafts its common-law laches argument out of whole cloth—its complaint is not with Plaintiffs but with the administrative-claims statutes or, possibly, the County.

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: Nov. 23, 2020

/s/ Jane E. Maschka

Aaron Van Oort (*pro hac vice*)
Jerome A. Miranowski (*pro hac vice*)
Jane E. Maschka (#235789)
Joshua T. Peterson (*pro hac vice*)
FAEGRE DRINKER BIDDLE & REATH LLP
90 South Seventh Street, Suite 2200
Minneapolis, Minnesota 55402
(612) 766-7000 (phone)
Aaron.vanoort@faegredrinker.com;
Jerome.miranowski@faegredrinker.com;
Jane.maschka@faegredrinker.com;
Josh.peterson@faegredrinker.com
Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 10,201 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: Nov. 23, 2020

By: */s/ Jane E. Maschka*

Aaron Van Oort (*pro hac vice*)
Jerome A. Miranowski (*pro hac vice*)
Jane E. Maschka (#235789)
Joshua T. Peterson (*pro hac vice*)
FAEGRE DRINKER BIDDLE & REATH LLP
90 South Seventh Street, Suite 2200
Minneapolis, Minnesota 55402
(612) 766-7000 (phone)
Aaron.vanoort@faegredrinker.com;
Jerome.miranowski@faegredrinker.com;
Jane.maschka@faegredrinker.com;
Josh.peterson@faegredrinker.com
Attorneys for Plaintiffs-Appellants

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   b. Electronic service address of person served: jmaclean@perkinscoie.com / bsharp@perkinscoie.com
   c. On *(date):* November 23, 2020
   [x] The documents listed in 3. were served electronically on the persons and in the manner described in an attachment *(write "APP-009E, Item 4" at the top of the page)*.

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

Date: November 23, 2020

Jane E. Maschka
(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)

/s/ Jane E. Maschka
(SIGNATURE OF PERSON COMPLETING THIS FORM)

Form Approved for Optional Use
Judicial Council of California
APP-009E [New January 1, 2017]

APP-009E, Item 4 (Continued)

4. I electronically served on November 23, 2020 the documents listed in 3. as follows:

a. Names of person served: Meredith R. Weinberg
On behalf of: County of Riverside
b. Electronic service address of person served:
mweinberg@perkinscoie.com

a. Names of person served: Anne B. Beaumont
On behalf of: County of Riverside
b. Electronic service address of person served:
abeaumont@perkinscoie.com

a. Names of person served: Gregory P. Priamos, County Counsel / Ronak N. Patel, Deputy County Counsel
On behalf of: County of Riverside
b. Electronic service address of person served:
gpriamos@co.riverside.ca.us / rpatel@co.riverside.a.us

a. Names of person served: Roderick E. Walston / Miles B.H. Krieger
On behalf of: Desert Water Agency
b. Electronic service address of person served:
Roderick.walston@bbklaw.com / miles.krieger@bbklaw.com

a. Names of person served: Michael G. Colantuono / Pamela K. Graham / Liliane M. Wyckoff
On behalf of: Coachella Valley Water District
b. Electronic service address of person served:
mcolantuono@chwlaw.us / pgraham@chwlaw.us / lwyckoff@chwlaw.us

a. Names of person served: Sean D. Meenan / Morgan E. Stewart
On behalf of: Attorneys for Plaintiffs-Appellants in *Herpel v. County of Riverside, No. E070618*
b. Electronic service address of person served: smeenan@winston.com / mstewart@winston.com

PROOF OF SERVICE (Court of Appeal)

[x] **Mail** [ ] **Personal Service**

Notice: This form may be used to provide proof that a document has been served in a proceeding in the Court of Appeal. Please read *Information Sheet for Proof of Service (Court of Appeal)* (form APP-009-INFO) before completing this form. Do not use this form for proof of electronic service. See form APP-009E.

Case Name: Albrecht, et al. v. Riverside County, et al. / Abbey, et al. v. Riverside Cou

Court of Appeal Case Number: E073926

Superior Court Case Number: PSC1501100 / RIC1719093

1. At the time of service I was at least 18 years of age and **not a party to this legal action.**
2. My [ ] residence [x] business address is *(specify)*:
   1800 Century Park East, Suite 1500, Los Angeles, CA 90067
3. I mailed or personally delivered a copy of the following document as indicated below *(fill in the name of the document you mailed or delivered and complete either a or b):*
   Appellants' Reply Brief

   a. [x] **Mail.** I mailed a copy of the document identified above as follows:

      (1) I enclosed a copy of the document identified above in an envelope or envelopes **and**

         (a) [ ] **deposited** the sealed envelope(s) with the U.S. Postal Service, with the postage fully prepaid.

         (b) [x] **placed** the envelope(s) for collection and mailing on the date and at the place shown in items below, following our ordinary business practices. I am readily familiar with this business's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope(s) with postage fully prepaid.

      (2) Date mailed: November 23, 2020

      (3) The envelope was or envelopes were addressed as follows:

         (a) Person served:

            (i) Name: Hon. Craig G. Riemer, Judge of Superior Court

            (ii) Address:
            Superior Court of California County of Riverside
            4050 Main Street, Department 1
            Riverside, CA 92501

         (b) Person served:

            (i) Name: Office of the Attorney General

            (ii) Address:
            300 S. Spring Street
            Los Angeles, CA 90013-1230

         (c) Person served:

            (i) Name:

            (ii) Address:

         [ ] Additional persons served are listed on the attached page *(write "APP-009, Item 3a" at the top of the page).*

      (4) I am a resident of or employed in the county where the mailing occurred. The document was mailed from (city and state):

Case Name: Albrecht, et al. v. Riverside County, et al. / Abbey, et al. v. Riverside Cou	Court of Appeal Case Number: E073926
	Superior Court Case Number: PSC1501100 / RIC1719093

3. b. ☐ **Personal delivery.** I personally delivered a copy of the document identified above as follows:

(1) Person served:
(a) Name:
(b) Address where delivered:

(c) Date delivered:
(d) Time delivered:

(2) Person served:
(a) Name:
(b) Address where delivered:

(c) Date delivered:
(d) Time delivered:

(3) Person served:
(a) Name:
(b) Address where delivered:

(c) Date delivered:
(d) Time delivered:

☐ Names and addresses of additional persons served and delivery dates and times are listed on the attached page *(write "APP-009, Item 3b" at the top of the page)*.

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

Date: November 23, 2020

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

(SIGNATURE OF PERSON COMPLETING THIS FORM)