

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CONFEDERATED TRIBES OF THE
CHEHALIS RESERVATION, a federally
recognized Indian tribe on its own behalf and as
parens patriae for its members, and CTGW,
LLC, a limited liability company organized
under Delaware law,

Plaintiffs,

v.

THURSTON COUNTY BOARD OF
EQUALIZATION, a political subdivision of the
state of Washington; Thurston County Board of
Equalization members JOHN MORRISON,
BRUCE REEVES and JOE SIMMONDS, in
their official capacities; THURSTON
COUNTY, a political subdivision of the State of
Washington; and THURSTON COUNTY
ASSESSOR PATRICIA COSTELLO, in her
official capacity,

Defendants.

NO. _____

MOTION AND MEMORANDUM IN
SUPPORT OF PRELIMINARY
INJUNCTION, AND REQUEST FOR
EXPEDITED DECISION BEFORE
OCTOBER 30, 2008

ORAL ARGUMENT REQUESTED

Noted for Motion Calendar:
Friday, October 3, 2008

COMES NOW, Plaintiffs Confederated Tribes of the Chehalis Reservation ("Tribe"), a
federally recognized Indian tribe, and CTGW, LLC ("CTGW"), a Delaware limited liability
company in which the Tribe is the majority owner, pursuant to Federal Rule of Civil Procedure

MOTION AND MEMORANDUM IN SUPPORT OF PRELIMINARY
INJUNCTION, AND REQUEST FOR EXPEDITED DECISION
BEFORE OCTOBER 30, 2008 - 1

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65, respectfully move this Court for entry of a preliminary injunction until a final decision on the merits. The injunction, if granted, would enjoin Defendants from (1) seeking to collect, collecting, or enforcing the collection of a personalty tax against Plaintiffs, and (2) proceeding with Plaintiff CTGW's challenge that is presently before the Thurston County Board of Equalization, *CTGW, LLC v. Patricia Costello, Thurston County Assessor*, No. 07-1110. Plaintiffs seek an expedited decision before October 30, 2008, since the Board of Equalization has scheduled a hearing on that date. Plaintiffs seek this injunction because they have no adequate remedy at law.

1. INTRODUCTION

This case presents a "unique" and "unusual situation" involving a small, federally-recognized Indian tribe's attempts to diversify its economic base to support its essential governmental services. *See* Ex. 2¹: Letter from M. Bohe, Wash. Dept. of Revenue, to Great Wolf Resorts et al. (Feb. 27, 2007). The Tribe, in order to obtain the necessary expertise and financing support, agreed through a limited liability company to joint venture with a non-Indian company to create the Great Wolf Lodge Grand Mound ("Lodge"). The State of Washington, through its Department of Revenue, has twice recognized that under the unique circumstances of this case, the State and its entities are preempted by federal law and cannot tax this enterprise.

However, the Defendant Assessor of Thurston County, Washington, has determined to act outside the scope of her authority by seeking to tax an undivided 49% interest in the buildings comprising the Lodge under a personal property tax analysis disavowed by the State. This motion demonstrates why the Tribe and CTGW are likely to succeed on the merits and why, without an injunction that preserves the status quo, they will suffer irreparable injury.

¹ Exhibits attached to supporting Declaration of Chairman David Burnett.

This motion and memorandum is organized as follows: Section 2 describes the relief sought; Section 3, the standard for issuing a preliminary injunction; and Section 4, the facts supporting the motion. Sections 5.1.1, 5.1.2 and 5.1.3 describe the alternative legal tests that, when applied, lead to a determination that the personalty tax is federally preempted. Section 5.1.4 explains why the County lacks authority to look beyond an LLC and its operating agreement and apportion ownership interests between members. Section 5.2 demonstrates why Plaintiffs will suffer irreparable injury if an injunction is not issued; Section 5.3 describes the serious questions going to the merits, and Section 5.4 shows why the balance of hardships tips in the Plaintiffs' favor.

2. RELIEF SOUGHT

The Tribe and CTGW seek to enjoin Defendants, pending a final decision on the merits, from: (1) seeking to collect, collecting, or enforcing the collection of the personalty tax against Plaintiffs; and (2) proceeding to further litigate the case of *CTGW, LLC v. Patricia Costello*, Thurston County Assessor, No. 07-1110. Plaintiffs seek this injunction because they have no adequate remedy at law.

3. STANDARD FOR ISSUING A PRELIMINARY INJUNCTION

The purpose of a preliminary injunction is to preserve the status quo and avoid irreparable injury before adjudication. *Textile Unltd., Inc. v. A. BMH and Co., Inc.*, 240 F.3d 781, 786 (9th Cir. 2001). The Ninth Circuit's standard for granting a preliminary injunction balances the plaintiff's likelihood of success on the merits against the hardship to the parties. *Id.* To prevail on a motion for preliminary injunction, a party must demonstrate either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in the moving party's favor. *Id.* These alternatives do not represent separate tests, but rather

1 extremes of a single continuum. *Id.* The greater the relative hardship to the moving party, the
 2 less probability of success must be shown. *Clear Channel Outdoor Inc. v. City of Los Angeles*,
 3 340 F.3d 810, 813 (9th Cir. 2003).

4 **4. FACTS SUPPORTING MOTION FOR PRELIMINARY INJUNCTION**

5 **4.1. The Tribe is a Sovereign Nation With Powers of Self-Governance.**

6 The Confederated Tribes of the Chehalis Indian Reservation (“Tribe”) occupy a
 7 reservation at the confluence of the Black and Chehalis Rivers in Southwest Washington
 8 (“Reservation”). *Confederated Tribes of the Chehalis Indian Reservation v. State of*
 9 *Washington*, 96 F.3d 334, 338 (9th Cir. 1996). The Reservation, which was created by
 10 Secretarial Order in 1864, was set aside for “the use and occupation of the Chehalis Indians.”
 11 1 Kappler, *Indian Affairs, Laws and Treaties* 901-04 (2d ed. 1904). The Tribe has
 12 approximately 800 members, which include persons descended from the Upper Chehalis
 13 Indians, the Lower Chehalis, Cowlitz, Satsop, Qualioqua and other aboriginal tribes of
 14 Southwest Washington. Declaration of Chairman Burnett at ¶ 5 (Sept. 16, 2008) (“Burnett
 15 Decl.”). The Reservation has a land area of approximately 4,200 acres (about 7.022 square
 16 miles) in southeastern Grays Harbor and southwestern Thurston Counties. *Id.*

17 The Tribe is governed by a Business Committee and General Council under a Tribal
 18 Constitution adopted in 1973. The Chehalis members specifically adopted the Constitution to
 19 “handle our Reservation affairs and improve the economic condition of ourselves and our
 20 posterity.” Const., Preamble. The Business Committee’s powers include “prevent[ing] the
 21 sale, disposition, lease, or encumbrance of tribal lands, . . . and other tribal assets” without the
 22 Tribe’s consent. *Id.* at Art. V, § 1(c).

23 The Tribe provides services to its members, their families and the Reservation
 24 community. Burnett Decl. at ¶ 6. These services include law enforcement, education, housing,
 25

1 natural resources management, social services and economic development. *Id.* Unlike state
 2 and local governments, the Tribe has little ability to levy property taxes to generate revenue to
 3 fund essential governmental services. *Id.* Federal funding has declined over the last 12 years,
 4 without any inflationary adjustment. *Id.*

5 **4.2. The Tribe, With the United States' Ongoing Assistance, Engaged in This**
 6 **Economic Development Project.**

7 The Tribe, in an effort to economically diversify and increase its self-sufficiency in
 8 providing essential governmental services, has taken several critical steps in recent years. *Id.*
 9 at ¶ 7. The Tribe, based on an initial request from Thurston County, purchased a 43-acre parcel
 10 of land located outside of the exterior boundaries of the Reservation, near Exit 88 of Interstate
 11 5. *Id.* The Tribe then requested that the United States take the land into trust for the benefit of
 12 the Tribe, which the United States did. *Id.* The Thurston County Commissioners supported the
 13 Tribe's fee to trust request. *Id.*

14 In approximately 2005, the Tribe and Great Wolf Resorts Inc. ("GW"), a non-Indian
 15 corporation with waterpark expertise, formed a joint venture limited liability company, CTGW,
 16 LLC, under Delaware law, for the purpose of building and owning Great Wolf Lodge Grand
 17 Mound ("Lodge"). *Id.* at ¶ 8. The Lodge is located on 39 of the 43 acres ("Trust Property"),
 18 and consists of a hotel, conference center, indoor water park and other improvements
 19 ("Improvements"). *Id.* at ¶ 9. The Tribe leases the Trust Property to CTGW. Plaintiffs' Ex.
 20 A: U.S. Dept. of the Interior Business Development Lease (recorded by the Bureau of Indian
 21 Affairs ("BIA") on July 2, 2007) ("Lease"). While CTGW owns the Improvements during the
 22 Lease term, ownership reverts to the Tribe at Lease expiration or termination. *Id.* at Lease Art.
 23 11, 16.

24 CTGW conducts no business within Washington State's jurisdiction. Burnett Decl. at
 25 ¶ 10. Its business activities are limited to the Trust Property where the Improvements are

1 located, which is where CTGW maintains copies of its business records. *Id.* GW is the
 2 Managing Member of the LLC, but there is no true centralized management at the LLC level.
 3 *Id.*

4 Under the LLC Agreement, the Tribe has a majority “proportionate share” of CTGW
 5 profits of 51%, and GW, 49%. *Id.* at ¶ 11. GW is the managing member of CTGW. *Id.* The
 6 LLC Agreement, however, secures to the Tribe the significant rights to, among other things,
 7 approve or disapprove: (1) the construction budget and modifications; (2) the general
 8 contractor and architect; (3) operating and capital improvement budgets; and (4) GW’s
 9 decision to sell, assign or otherwise transfer (with specified exceptions²) CTGW’s interest
 10 under the Lease or any portion of the project. *Id.*

11 The U.S. Department of the Interior (“Interior”) has played and continues to play an
 12 integral and significant role in the Lodge project. *Id.* at ¶ 12. In carrying out its duty as trustee
 13 to the Tribe and its members, and its role as holder of the underlying title to the Trust Property,
 14 Interior is charged with advancing the Tribe’s economic diversification, self-sufficiency and
 15 self-governance. *Id.*

16 Accordingly, on April 5, 2007, Interior approved the Lease between the Tribe and
 17 CTGW, pursuant to 25 U.S.C. § 415. Plaintiffs’ Ex. A: Lease, cover letter. Interior, as a
 18 precursor to approving the Lease, also reviewed the LLC Agreement, Management Services
 19 Agreement and Licensing Agreement. *See Id.* at Lease Art. 4. The Lease repeatedly refers to
 20 the LLC Agreement.³ CTGW leases the Trust Property from the Tribe for a 25-year term, with
 21
 22

23 ² The exceptions involve security for specified borrowing and mortgage financing to refinance the construction
 24 loan or other permanent loan. Burnett Decl. at ¶ 11.

25 ³ *See* Lease Art. 4 (definitions); Art. 19 (capital contributions required by the LLC Agreement satisfy construction
 bonding requirements); Art. 22 (consistent with the LLC Agreement, Tribe after lease expiration must require that
 any successive owner of the premises assume the License Agreement and Management Agreement).

1 a 25 year option to renew. *Id.* at Lease Art. 5. The Interior-approved Lease provides, in
 2 relevant part:

3 This Lease is an integral part of an overall economic development joint venture
 4 between the Confederated Tribes of the Chehalis Reservation [. . .] and GW.
 5 The joint venture is being accomplished through the Lessee, in which the Tribe
 6 owns a majority interest. The parties to the joint venture have provided for the
 7 realization of economic benefits through the use of the Lease in a manner
 8 determined by the Tribe, in its sovereign determination, to be in the best
 9 interests of the Tribe and consistent with the Tribe's plans for economic
 10 diversification. As a result, the Tribe has placed a nominal value upon the
 11 leasehold payment [i.e., \$1.00 annually] in order to properly meet the economic
 12 goals of enhanced revenue production from the activities of Lessee. (Art. 7)

13 Lessee has submitted to Lessor and the Secretary, and Lessor and Secretary
 14 have approved a plan (the "Site Plan") setting forth the proposed location of all
 15 improvements to be initially developed at the leased premises. (Art. 9)

16 All buildings and improvements on the Premises shall be owned in fee by
 17 Lessee during the term of this Lease provided that such buildings and
 18 improvements (excluding removable personal property and trade fixtures) shall
 19 remain on the Premises after the termination of this Lease and shall thereupon
 20 become the property of the Lessor. (Art. 11)

21 Unless otherwise provided, all buildings and improvements, excluding
 22 removable personal property and trade fixtures of Lessee, on the leased
 23 premises shall remain on the leased premises after termination of this Lease and
 24 shall thereupon become the property of the Lessor. (Art. 16)

25 The Lease or any right to or interest in, [sic] this Lease, or any of the
 improvements on the leased premises, may be encumbered or mortgaged or
 otherwise subjected to a security interest with the written approval of the
 Secretary No such encumbrance, mortgage or security interest shall be
 valid without said approval. (Art. 25)

. . . Lessee shall have the right to contest any claim, tax, or assessment against
 the property by posting bond to prevent enforcement of any lien resulting there
 from, and Lessee agrees to protect and hold harmless the Lessor, the United
 States and the leased premises and all interest therein and improvements thereon
 from any and all claims, taxes, assessments and like charges and from any lien
 there from or sale or other proceedings to enforce payment thereof. . . . (Art. 26)

While the leased premises are held in trust by the United States or subject to a
 restriction against alienation imposed by the United States, all of the Lessee's
 obligations under this Lease and the obligations of Lessee's sureties, are to the
 United States, as well as to the owners of the land. (Art. 36)

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1 Nothing contained in this Lease shall be deemed to constitute waiver of
2 applicable laws providing tax immunity to trust or restricted property to any
interest or income therefrom. (Art. 46)

3 Under the LLC Agreement, the Tribe is also responsible for all dealings with other
4 governments related to access to the Lodge, and has the option to extend the Lease beyond the
5 initial 50-year term. Burnett Decl. at ¶ 14. The LLC Agreement acknowledges the Tribe's
6 substantial contribution to the LLC. *Id.* Among other things, the Tribe contributed the Lease
7 and other interests valued at approximately \$12 million, as well as between \$5 and \$ 6 million
8 in cash. *Id.*

9 Finally, the Tribe and CTGW generate value on the Reservation by providing
10 recreational opportunities and ancillary services to the Lodge's patrons. *Id.* at ¶ 15. Patrons
11 usually spend extended periods of time at the Lodge enjoying the services that the Tribe and
12 CTGW offer. *Id.*

13 **4.3. The Tribe Provides All Governmental Services to the Lodge and Trust**
14 **Property.**

15 The Tribe provides all governmental services to the facility. *Id.* at ¶ 16. It contracts
16 with Thurston County for sewer, sanitation and water services, for which it paid substantial
17 connection fees. *Id.* The Tribe also funded, designed, managed and constructed sewer and
18 water lines to and from the Trust Property. *Id.* Garbage collection is contracted by CTGW
19 with a private company. *Id.* The Tribe provides the Lodge with 24-hour daily police
20 protection. *Id.* Tribal police regularly visit the site and are the first responders for any police-
21 related calls. *Id.* Additionally, the Tribe contracts for fire protection and emergency services
22 on a fee-for-services basis. *Id.*

23 During construction of the Lodge and Improvements, the Tribe's construction
24 company, Saxas, provided construction and security services. *Id.* at ¶ 17. The Tribe was the
25 sole permitting agency for construction. *Id.* The Tribe and CTGW use a private insurance

1 program, so Lodge employees are not part of the Washington State workers' compensation
2 program. Plaintiffs' Ex. C: Ltr. From B. Flaherty, Wash. Dept. of Revenue, to the Honorable
3 P. Costello, Thurston County Assessor at p. 2 (Aug. 28, 2008) ("2008 Revenue Letter"). None
4 of the streets, driveways or Improvements on the Trust Property either belong to or are serviced
5 by the State or the County. Burnett Decl. at ¶ 18.

6 The Tribe provides substantial employment services to maximize Tribal training and
7 employment at the Lodge, including upper management positions. *Id.* at ¶ 19. Seven percent
8 of Chehalis households have a member working at the Lodge. *Id.* Based upon BIA labor force
9 statistics (2006), of the approximately 114 tribal households on the Reservation,
10 unemployment on the Reservation was approximately 23%. *Id.* Employment at the Lodge
11 represents as much as 25% of the Chehalis households with unemployed Tribal members. *Id.*

12 All Tribal ordinances, including Tribal employment preference, zoning and
13 construction safety laws, apply to the Improvements and Trust Property where they are located.
14 *Id.* at ¶ 20. The Tribe has substantial control as an owner, as lessor, and as the sole jurisdiction
15 responsible for the health, safety and welfare of both the employees and the Lodge guests. *Id.*
16 The Tribe imposes room and sales taxes on the Lodge. *Id.*

17 Finally, the Tribe, by agreement with Thurston County, will improve access to the
18 facility by expanding a portion of Highway 99 that borders the Lodge. *Id.* at ¶ 21. The Tribe
19 contributed substantial monies for the construction designs for the expansion, and the right-of-
20 way land. *Id.*

21 **4.4. The Washington Department of Revenue Determined That State Taxes and**
22 **the County's Personalty Tax Are Preempted by Federal Law.**

23 A State statute defines "personal property" for purposes of taxation as including "all
24 improvements upon lands the fee of which is still vested in the United States." RCW
25

1 84.04.080. Thurston County enforces such taxes by placing liens on the assessed
2 improvements and then selling them at a tax sale. RCW 84.60.020.

3 In 2007, the Assessor determined the value of the Improvements for taxation in 2008 as
4 partially completed. Burnett Decl. at ¶ 22. The Assessor then reduced that value by the
5 Tribe's 51% ownership interest in CTGW, to a 2007 taxable value of \$10,115,462, and then
6 assessed CTGW a personal property tax based on the 49% interest of GW in CTGW. *Id.* The
7 Assessor also stated her intent to assess the Improvements at full completion at their full value
8 in 2008 for 2009. *Id.*

9 In February of 2007, the Washington State Department of Revenue ("DOR") reviewed
10 State law and the circumstances of this case, and found that Washington sales and use taxes
11 were federally preempted as against CTGW. Plaintiffs' Ex. B: Letter from M. Bohe, Wash.
12 Dept. of Revenue, to Great Wolf Resorts et al. (Feb. 27, 2007) ("2007 Revenue Letter").
13 Revenue made this determination by applying a test that balances federal, Tribal and state
14 interests as established by the U.S. Supreme Court in *White Mountain Apache Tribe v. Bracker*,
15 448 U.S. 136, 143 (1980).

16 In August of 2008, at the request of the Defendant County Assessor, DOR again
17 reviewed State law and the circumstances of this case and applied the balancing test as to the
18 County's personalty tax challenged herein. DOR determined that the instant tax was federally
19 preempted. 2008 Revenue Letter.

20 Solely to preserve all of its rights, the Tribe, on behalf of itself and CTGW, timely
21 appealed the County's tax to the Defendant Thurston County Board of Equalization ("Board").
22 *CTGW, LLC v. Patricia Costello, Thurston County Assessor*, No. 07-1110. The Board has
23 scheduled a hearing on October 30, 2008. The Board, however, is narrowly charged with
24 determining whether a taxpayer qualifies for an exemption under State law and, if so, the
25

1 amount thereof. RCW 84.48.010. The Board, for this and other reasons, is an inappropriate
 2 forum in which to seek determinations relating to federal issues of tribal tax immunity and self-
 3 governance.

4 Accordingly, the Tribe also challenged the tax in this Court, which is the proper forum
 5 to decide these issues. Once there is no question as to this Court's jurisdiction, the Tribe will
 6 voluntarily dismiss the Board's administrative proceeding. In the meantime, the Tribe
 7 respectfully requests that the Court temporarily enjoin the Board's hearing before the October
 8 30 hearing and any further proceedings before the Board pending the Tribe's voluntarily
 9 dismissal.

10 **5. ARGUMENT**

11 **5.1. Plaintiffs are Likely to Succeed on the Merits.**

12 For reasons described below, the Tribe satisfies both the "serious questions are raised"
 13 and "likelihood of success on the merits" alternative tests for a preliminary injunction. *Textile*,
 14 240 F.3d at 786.

15 **5.1.1. States and Their Political Subdivisions Have Limited Authority to** 16 **Tax in Indian Country.**

17 Indian tribes and their possessions are "unique aggregations possessing attributes of
 18 sovereignty over both their members and their territory." *Bracker*, 448 U.S. at 142. Tribes
 19 retain any aspect of their historical sovereignty "not inconsistent with the overriding interests
 20 of the federal government." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331
 21 (1983) (citations omitted). When states or local governments seek to regulate in Indian
 22 country, courts apply a doctrine that is similar to federal preemption to protect tribes from state
 23 regulation. *See Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S.

832, 837 (1982). Two “independent but related” barriers block states from regulating in Indian country: (1) federal enactments, and (2) Indian sovereignty. *Id.*

There are two alternative analyses, depending upon where the legal incidence of the tax falls. First, a state tax is *per se* invalid and unenforceable if its legal incidence falls on a Tribe within Indian country, unless Congress instructs otherwise. *See Oklahoma Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 453 (1995). If, however, the legal incidence of the tax falls upon a non-Indian doing business in Indian country, “[s]tate jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority.” *Mescalero*, 462 U.S. at 334.

As described in Sections 5.1.2 and 5.1.3 below, the County’s personalty tax is invalid under both alternative analyses. Section 5.1.4 describes how, apart from principles of Indian law, the County lacks authority to disregard both the LLC as a legal entity and the LLC’s 100% fee ownership of Improvements, to apportion ownership interests between members in contravention of the LLC’s governing documents and the governing law, and to assess a personalty tax based upon a nonexistent percentage ownership interests of the members.

5.1.2. The County’s Tax is *Per Se* Invalid Because its Incidence Falls on an Indian Entity in Indian Country.

For the following reasons, the legal incidence of the County’s personalty tax falls on a Tribal entity within Indian country. The tax is therefore *per se* invalid.

Courts determine the entity that bears the legal incidence largely by examining the state taxing statute. *Coeur D’Alene Tribe v. Hammond*, 384 F.3d 674, 681-682 (9th Cir. 2004). Under RCW 84.40.185, LLCs and other corporate entities must list personalty for tax purposes. Moreover, since the United States is immune from taxes as a landowner, a lessee that holds 100% fee title to improvements is the logical entity liable for taxes on improvements located

1 on lands in which the United States holds title. Accordingly, the legal incidence of the
 2 County's tax appears to fall on CTGW, which here is the lessee and owner of the
 3 Improvements.

4 For the following reasons, CTGW is a unique Tribal entity against which the County's
 5 tax is *per se* invalid. First, CTGW's structure is uniquely Indian. The Tribe is CTGW's
 6 majority owner. The Tribe exercises veto power over a host of critical CTGW activities. The
 7 Tribe helped construct the Improvements through its Tribal corporation Saxas. The Tribe is in
 8 no sense a passive, minority member of CTGW. *See State v. Moore*, 173 Ariz. 236, 841 P.2d
 9 231 (Ariz. Ct. App. 1992) (court determined that a joint venture that was victim of on-
 10 Reservation crime was not "Indian" for purposes of determining criminal jurisdiction, because
 11 tribe was only entitled to 5% of net profits and had no control over business operations);
 12 *Eastern Navajo Industries, Inc. v. Bureau of Revenue*, 89 N.M. 369, 552 P.2d 805 (N.M. Ct.
 13 App. 1976) (state gross receipts tax barred because taxpayer corporation had Indian identity,
 14 tribe owned 51% of corporation's stock, and corporation was formed to build tribal houses).

15 Moreover, CTGW's corporate structure provides the Tribe with dual roles as both
 16 majority LLC owner-lessee and lessor. Section 4.2, *supra*. Furthermore, Interior agreed to
 17 approve minimal annual rent of \$1.00 only because the structure maximized achievement of
 18 the Tribe's key sovereign objectives: i.e., economic diversification for the good of the
 19 members, and training and employment of Chehalis tribal members to increase their capacity to
 20 participate in and contribute to the local economy for the betterment of the Chehalis people.
 21 Burnett Decl. at ¶ 13. Finally, unlike ordinary LLCs, CTGW owes all of its obligations under
 22 the Lease not only to the Tribe, but also to the United States. Ex. A: Lease at Art. 36.

23 Second, CTGW's structure is uniquely Tribal because the Tribe's interests in the
 24 Improvements are intertwined as both landowner-lessor and majority interest lessee. Section
 25

1 4.2, *supra*. The federally-approved Lease prohibits CTGW from ever removing the
2 Improvements, whose ownership reverts to the Tribe when the Lease terminates or expires. *Id.*
3 CTGW is Tribal in nature and the Improvements are Indian property in all respects. Further
4 setting apart CTGW from an ordinary LLC is that the Lease prohibits CTGW from ever
5 encumbering the “improvements” without Interior’s approval. Ex. A: Lease at Art. 25.

6 Third, the Tribe is economically disadvantaged by the tax on CTGW, even if the tax is
7 limited to a 49% “ownership” of GW. Burnett Decl. at ¶ 24. For the following reasons, the
8 incidence of taxation will disproportionately fall upon the Tribe in excess of its 51% interest.
9 *Id.* Due to the financial structure of the equity, certain portions of the project’s equity are
10 deemed preferred and payable to GW to a significant degree before profit. *Id.* In addition, GW
11 receives revenue, based on gross receipts, before equity from its management and licensing its
12 brand. *Id.* Thus, the County’s tax will reduce the net revenues available to the Tribe. *Id.* As a
13 result of the fees and preferred payments to GW, the reduction in profit will fall more heavily
14 upon the Tribe than GW and the incidence of taxation will be passed to the Tribe and its
15 members. *Id.*

16 In other words, since every dollar of cost of the Lodge is undivided and belongs 51% to
17 the Tribe, when the County seeks to assess only 49% of the value of the Improvements, it is
18 actually applying the cost of the tax to the Tribe’s 51% undivided interest. *Id.* This passes
19 51% of the so-called non-Indian aspect of the tax directly to the Tribe. *Id.*

20 Finally, CTGW’s Indian corporate nature is underscored by the significant burdens that
21 the Tribe will bear when the County enforces its personalty tax. If the County places a lien on
22 49% of the Improvements and sells that share at public auction, the effect will be an unraveling
23 of (1) the federally-approved Lease that vested 100% ownership of the Improvements in
24 CTGW, (2) the LLC Agreement, and (3) the Tribe’s economic development project.

1 **5.1.3. The County's Tax is Invalid Under the Bracker Balancing Test.**

2 If the state tax falls on a non-Indian engaging in activity in Indian country, then courts
 3 apply the balancing test developed in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136,
 4 143 (1980). The test is fact-intensive, requiring “a particularized inquiry into the nature of the
 5 state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the
 6 specific context, the exercise of state authority would violate federal law.” *Id.* at 145. The
 7 factual sensitivity of the test means that “‘no rigid rule’ governs such an exercise of state
 8 authority.” *Red Mountain Machinery Co. v. Grace Inv. Co.*, 29 F.3d 1408, 1410 (9th Cir.
 9 1994). The Ninth Circuit has identified issues to consider when determining whether a state
 10 tax borne by non-Indians in Indian country is preempted, including “the degree of federal
 11 regulation involved, the respective governmental interests of the tribes and states (both
 12 regulatory and revenue raising), and the provision of tribal or state services to the party the
 13 state seeks to tax.” *Salt River Pima-Maricopa Indian Community v. Arizona*, 50 F.3d 734, 736
 14 (9th Cir. 1995) (citation omitted).

15 Here, DOR has already determined under the *Bracker* balancing test that state taxes on
 16 CTGW are federally preempted. More important, DOR has issued an opinion and advised the
 17 County that the same is true of the County's personalty tax. The federal, Tribal and state
 18 interests are analyzed below.

19 **(a) Significant Federal Interests are at Stake.**

20 The federal laws here – i.e., (1) the Secretarial Order that created the Chehalis
 21 Reservation; (2) 25 U.S.C. § 415 and 25 C.F.R. Part 162, under which the LLC Lease was
 22 approved and is regulated; and (3) the laws dictating how and why land is taken into trust, 25
 23 U.S.C. § 465, 25 C.F.R. Part 151 – embody the twin federal goals for Indian Country of self-
 24 determination and economic success. *See California v. Cabazon Band of Indians*, 480 U.S.
 25

202, 216-217 (1987); BIA, Final Rule, Acquisition of Title to Land in Trust (amending 25 C.F.R. Part 151), 66 Fed. Reg. 3452, 3455 (2001) (“BIA accepts title to land in trust outside a reservation only if the application shows that the acquisition is necessary to facilitate tribal self-determination, economic development, Indian housing, land consolidation or natural resource protection and that meaningful benefits to the tribe outweigh any demonstrable harm to the local community.”).

Federal interests are exceedingly strong in this context, as the Washington DOR agrees: “Leases are heavily regulated by the federal government. . . .” 2007 Revenue Letter at p. 2. Since the federal government holds fee title in trust for the benefit of the Tribe, it must protect its land and the Tribe’s interests. The Trust Property is the subject of a federally-approved and regulated Lease. Section 4.2, *supra*. The Lease and the corporate structure – i.e., the entire relationship between the Tribe and GW – are all subject to extensive federal regulation and approval. *Id.* And, “all of the lessee’s [i.e., CTGW] obligations” under the Lease, including as to the land and its Improvements, are to the United States as well as to the Tribe. Ex. A: Lease, Art. 36.

Federal courts have held that the Secretary, through laws that include 25 U.S.C. § 415 and BIA regulations at 25 C.F.R. Part 162, exercises extensive federal control over commercial leasing on Indian lands. *See, e.g., Brown v. United States*, 86 F.3d 1554 (Fed. Cir. 1996). The governing federal law, 25 U.S.C. § 415, requires that the Secretary of the Interior approve all business leases of tribal trust land. BIA’s responsibilities in administering and enforcing leases include:

[E]nsur[ing]e that tenants comply with the operating requirements in their leases, through appropriate inspections and enforcement actions as needed to protect the interests of the Indian landowners and respond to concerns expressed by them. We will take immediate action to recover possession from trespassers operating without a lease, and take other emergency action as needed to preserve the value of the land.

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25 C.F.R. § 108(b). Additionally, BIA regulations generally reject the application of state regulatory power, including taxing power, over leased trust property:

State and local regulation of the use of Indian property. (a) Except as provided in paragraph (b) of this section,⁴ none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

25 C.F.R. § 1.4 (emphasis added). Accordingly, the federal interests in the project, including the Improvements, are compelling.

(b) Significant Tribal Interests are at Stake.

The County's personalty tax substantially interferes with Tribal interests. The LLC is an indivisibly intertwined Tribal business. Section 4.2, *supra*. Despite minority non-Tribal ownership, the LLC has no significant centralized management and was formed only to operate within the confines of Indian Country. *Id.* The LLC in itself is an essential government service since it trains Tribal employees, and fosters employment and education. Burnett Decl. at ¶ 23. Further, the personalty tax will diminish the profitability of the LLC as a whole, resulting in diminished Tribal services to Chehalis tribal members. *Id.* at ¶ 24.

All of the Improvements at issue are located on trust land, and are inherently Tribal in character. Section 4.2, *supra*. The Tribe is the majority owner of the LLC that owns all of the personal property at issue. *Id.* When the Lease terminates or expires, all of the property ownership interests at issue will revert solely to the Tribe. *Id.* The Tribe, through the LLC,

⁴ Paragraph (b) allows the Secretary in "specific cases or in specific geographic areas" to adopt or make applicable to Indian lands all or any part of such laws, ordinances, codes, resolutions, rules or other regulations referred to in paragraph (a) of this section as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property. 25 C.F.R. § 1.4(b). The Secretary has not done so here.

1 employs Tribal members and relies on its uniquely Tribal location to provide value for sale in
 2 Indian country. *Id.* The Tribe provides all governmental services and infrastructure to the
 3 business. Section 4.3, *supra*. There are overwhelming Tribal interests implicated here,
 4 particularly in the personal property that sits astride federal trust lands.

5 Finally, the Tribe's interests are significant because the Tribe and CTGW generate
 6 value on the Reservation. They provide recreational opportunities and ancillary services to the
 7 Lodge's patrons. Section 4.2, *supra*; *see Cabazon, supra* (state gaming regulation preempted
 8 because, among other things, the tribe generated value on tribal trust lands). As in *Cabazon*,
 9 patrons usually spend extended periods of time at the Lodge enjoying the services that the
 10 Tribe and CTGW offer. *Id.*

11
 12 (c) **The County and State Interests are Insignificant.**

13 In comparison – and according to the State – the County's interest in taxing the 49%
 14 portion of the buildings is overwhelmingly outweighed by the federal and Tribal interests. The
 15 State and County lack any vital interest in raising revenue to provide services to the Lodge
 16 since the Tribe provides or pays for all governmental services there. Section 4.3, *supra*.

17 Finally, the State itself has determined that federal and Tribal interests outweigh its own
 18 interests. According to DOR, the County invests no money in the infrastructure or services of
 19 the Lodge, which improvements it seeks to tax. Plaintiffs' Ex. B: 2007 Revenue Letter at p. 2;
 20 *see Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 661 (9th Cir. 1989) (any state services must be
 21 directly connected and bear a relationship to the taxed item or activity in Indian country). The
 22 County suffers no increased regulatory or public services burden because the Tribe partnered
 23 with a minority non-Tribal member rather than own the LLC alone.
 24
 25

1 **5.1.4. The County Lacks Authority to Disregard CTGW as a Corporate**
 2 **Entity.**

3 Principles of Indian law aside, the County lacks authority to: (1) disregard both CTGW
 4 as an entity and its undivided fee ownership of the Improvements; (2) apportion ownership
 5 interests between members in contravention of CTGW's governing documents; and (3) assess
 6 taxes based upon an unsupported and baseless percentage of each member's ownership. For
 7 the reasons described below, the County's eagerness to look beyond the LLC as a corporate
 8 entity is an *ultra vires* action.

9 LLCs, including CTGW, are established for the purposes that include unifying
 10 ownership in a single corporate entity. *See, e.g., People's Counsel for Baltimore County v.*
 11 *Elm Street Development, Inc.*, 172 Md.App. 690, 697-698, 917 A.2d 166, 170-171 (2007) (in
 12 upholding County's subdivision approval, court recognized that LLC ownership of land met
 13 requirement for "sole ownership" or "unified control"). Accordingly, the County's approach to
 14 the tax destroys a key purpose for forming CTGW as an LLC.

15 Moreover, as a general rule, LLC members have no interest in specific LLC property.
 16 Delaware law, under which CTGW was formed, provides, "A limited liability company
 17 interest is personal property. A member has no interest in specific limited liability company
 18 property." Del. Code Ann. Tit. 6, § 18-701 (emphasis added). And, contrary to the County's
 19 belief, the two members of CTGW do not own percentage interests in the Improvements.
 20 Section 4.2, *supra*. Rather, CTGW owns 100% of the Improvements in fee during the Lease
 21 term. *Id.* The LLC Agreement only establishes percentage "proportionate shares" that each
 22 member has for purposes of distributing profits, and not fractional ownership interests in the
 23 Improvements. *Id.*

1 **5.2. Plaintiffs Will Suffer Irreparable Injury.**

2 A plaintiff suffers irreparable injury when, because of the nature of the injury, there is
 3 no adequate legal remedy and monetary damages would be inadequate or difficult to ascertain.
 4 *United States v. Miami University*, 294 F.3d 797, 818 (6th Cir. 2002). State and local
 5 government interference with fundamental rights is presumed to constitute irreparable harm for
 6 this purpose. *Elrod v. Burns*, 427 U.S. 347, 359 (1976). Irreparable injury occurs when state
 7 actions interfere with tribal sovereignty, *Prairie Band of Potawatomi Indians v. Pierce*, 253
 8 F.3d 1234 (10th Cir. 2001), or adversely affect a tribal plaintiff's ability to provide essential
 9 governmental services or jobs to tribal members and reservation residents. *Seneca-Cayuga*
 10 *Tribe of Oklahoma v. Oklahoma*, 874 F.2d 709, 716 (10th Cir. 1989) (finding enforcement of
 11 state gaming laws on tribal lands would cause irreparable injury because tribes "would face the
 12 prospect of significant interference with their self-government" resulting from lost income used
 13 to support tribal social services and lost jobs). *See also Sac & Fox Nation of Missouri v. La*
 14 *Faver*, 905 F.Supp. 904, 907 (D. Kan. 1995) (finding enforcement state fuel tax laws against
 15 tribal fuel operations would cause irreparable injury because essential tribal services and jobs
 16 would be eliminated).

17 Here, the Court should grant the requested preliminary injunctive relief to preserve the
 18 status quo. The County's tax and enforcement action will directly interfere with the Tribe's
 19 sovereignty and federally-approved structure for economic development. Section 5.1.2, *supra*.
 20 By hampering the Tribe's ability to raise revenue, the County's tax will also harm the Tribe's
 21 ability to provide essential governmental services and jobs to Tribal members, their families
 22 and Reservation residents. *Id.* These are all harms that cannot be adequately remedied at law.

23 Additionally, allowing the County's tax will harm the Tribe's sovereignty by
 24 facilitating County intrusion into the Tribe's affairs and trust lands. *Id.* The County will seek
 25

1 ongoing access to the Trust Property and facilities to audit CTGW's records for each tax
 2 period, and to review modifications to the Lease and LLC Agreement. The only copies of
 3 these records in the State of Washington are kept on the Tribe's trust lands. Section 4.2, *supra*.
 4 Without an injunction, the County will be a continual presence on the Tribe's trust lands,
 5 which greatly infringes on the Tribe's right to self-governance.

6 The same is true of any County's imposition of tax liens, seizure of the Improvements,
 7 and tax sales to third parties that have not been vetted by the Tribe or Secretary of the Interior.
 8 Section 5.1.2, *supra*. The County's minimal contribution of services to the project does not
 9 come close to warranting this kind of harmful intrusion into the Tribe's sovereignty. Section
 10 5.1.3(c), *supra*. Moreover, actions by the County to enforce the tax via a tax sale would
 11 interpose a third party owner of Improvements without Secretary of Interior approval, which
 12 would breach the terms of the Lease. Section 5.1.2, *supra*.

13 **5.3. Plaintiffs Raise Serious Questions Going to the Merits.**

14 As discussed in Section 5.1 and its subsections, *supra*, the Plaintiffs have established
 15 that the issues presented are so serious and substantial, as to make them fair ground for
 16 litigation.

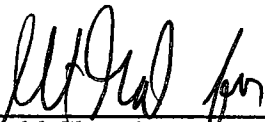
17 **5.4. The Balance of Hardships Tips in the Tribe's and CTGW's Favor.**

18 The County will lose the revenue produced by the personalty tax on the Improvements.
 19 This relatively negligible harm must be measured in terms of the Tribe's ability to carry on
 20 essential Tribal services, to provide jobs, and to self-govern without County interference.
 21 Issuance of an injunction will not hinder in any appreciable way the Defendants' abilities to
 22 carry out their responsibilities. If the injunction is not issued, the impact on the Tribe will be
 23 significant. Section 5.1.2, *supra*.

6. CONCLUSION

For the reasons described herein, Plaintiffs respectfully request that the Court issue a preliminary injunction that enjoin Defendants from: (1) seeking to collect, collecting, or enforcing the collection of the personalty tax against Plaintiffs; and (2) proceeding to further litigate the case of *CTGW, LLC v. Patricia Costello, Thurston County Assessor*, No. 07-1110, including holding the October 30, 2008, hearing that is presently scheduled.

DATED this 18th day of September, 2008.



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