

BENJAMIN H. SETTLE

IN THE 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,)

No. C08 5562 BHS

Plaintiffs,)

vs.)

THURSTON COUNTY ASSESSOR'S
RESPONSE TO PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION

THURSTON COUNTY BOARD OF EQUAL-)
IZATION, 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.)

This case concerns assessment of property taxes against property owned by a Delaware limited liability company, CTGW, LLC, (hereinafter "CTGW") that owns and operates the Great Wolf Lodge resort and water park on property in Grand Mound in southern Thurston County. While the Plaintiffs assert that the personal property taxes fall on the Confederated Tribes of the Chehalis Reservation [hereinafter "Tribe"], the taxes at issue in this case are not assessed against the Tribe.

THURSTON COUNTY ASSESSOR'S RESPONSE TO PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION - 1

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Cause No: No. C08 5562 BHS

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1 CTGW is a joint venture of the Tribe and Great Wolf Resorts, Inc., (hereinafter "Great Wolf")
 2 a non-Indian, publicly-traded corporation with assets totaling \$855,979,000.00. Declaration of Jane
 3 Futterman, Exhibit A. Great Wolf owns 49% of the Great Wolf Lodge and the Tribe owns 51%.
 4 Declaration of Jane Futterman, Exhibit A.

5 The Great Wolf Lodge at Grand Mound is a \$100 to \$110 million project. Exhibit B attached
 6 to the Declaration of Chairman David Burnett, p.2. The resort is expected to have 400,000 visitors per
 7 year arriving at Great Wolf Lodge and nearly 500 employees. Declaration of Jane Futterman, Exhibit
 8 B. Several Great Wolf Lodges are in operation across the United States and are operated under
 9 various subsidiaries of Great Wolf. Great Wolf is the largest owner, operator and developer in North
 10 America of drive-to family resorts featuring indoor water parks and other family-oriented
 11 entertainment activities. Declaration of Jane Futterman, Exhibit A.

12 The issue presented in this case is whether the improvements owned by CTGW are entirely
 13 exempt from state and local property taxes based on the Tribe's involvement in the project. Stated
 14 more broadly, the issue is whether a non-Indian company is entitled to the benefits of the Tribe's
 15 exemption from state taxation simply by virtue of involving the Tribe in its business venture.

17 I. PROCEDURAL ISSUES

18 A. Abstention

19 An administrative proceeding filed by CTGW is pending before the Thurston County Board of
 20 Equalization (BOE) seeking a determination that CTGW's improvements at the Great Wolf Lodge are
 21 exempt from personal property tax. Because of the pending proceeding, under the doctrine set forth in
 22 *Younger v. Harris*, 401 U.S. 37 (1976), this Court should abstain.

23 The Plaintiffs contend, without citing any authority, that the available state proceeding is an
 24 inappropriate forum in which to raise their claims. RCW 84.48.010 states, in relevant part, "The board
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1 may review all claims for either real or personal property tax exemption as determined by the county
2 assessor, and shall consider any taxpayer appeals from the decision of the assessor thereon to
3 determine (1) if the taxpayer is entitled to an exemption, and (2) if so, the amount thereof.” The statute
4 does not state any limitation on the nature of exemptions the BOE may consider. Also, RCW
5 84.68.020 authorizes a proceeding in state court. With the availability of the administrative proceeding
6 and the option to file an action in state court, this Court should abstain.

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8 **B. Standing and Jurisdiction**

9 The Plaintiffs have failed to establish that this Court has subject matter jurisdiction entitling
10 them to injunctive relief. Without subject matter jurisdiction, the Court can not issue an injunction.
11 *FTC v. H.N. Singer, Inc.* 668 F.2d 1107, 1109 (9th Cir. 1982).

12 CTGW filed its petition to the Thurston County Board of Equalization (BOE). It now wishes
13 to avoid having the BOE hear the case by asking a federal court to enjoin the case CTGW filed.
14 Rather than litigate to enjoin a proceeding clearly within its own control, CTGW should merely
15 withdraw its petition to the BOE.

16 The Anti-Injunction Act does not allow the Court to issue an injunction to restrain a proceeding
17 in state court. 28 USC § 2283 states: “A court of the United States may not grant an injunction to
18 stay proceedings in a State court except as expressly authorized by Act of Congress, or where
19 necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”

20 CTGW has adequate remedies either to proceed with its petition to the BOE and any appeals
21 therefrom, or to file an action directly in state court pursuant to RCW 84.68.020.

22
23 The Tax Injunction Act 28 U.S.C. § 1341 prohibits the federal district courts from enjoining or
24 restraining assessment, levy or collection of taxes under state law where a remedy is available in state
25 courts. 28 U.S.C. § 1341. The federal courts have recognized an exception to cases filed in federal

1 court by Indian tribes. *Amarok Corp. v. Nevada, Dep't of Taxation*, 935 F.2d 1068, 1070 (9th Cir.
 2 Nev. 1991). This remedy is not available to CTGW because it is not an Indian tribe. CTGW's request
 3 to this Court to enjoin the collection of state tax is precluded by the Tax Injunction Act. *Id.* The
 4 Tribe is neither a party to the proceeding before the BOE nor has it been assessed taxes. The
 5 improvements at Great Wolf are owned by CTGW and the personal property tax is assessed against
 6 CTGW, so a determination of whether the federal court will hear this case should be based on
 7 CTGW's interests. Those interests do not include invoking federal jurisdiction to enjoin either the
 8 collection of taxes or the BOE proceedings.
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10 II. PRELIMINARY INJUNCTION

11 A preliminary injunction should only be issued to preserve the status quo and prevent
 12 irreparable loss. *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984).
 13 In this case, the Plaintiffs have failed to make the required showing for issuance of an injunction.
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15 A. Likelihood of Success on the Merits

16 To obtain a preliminary injunction, plaintiff must show that it is "likely" to prevail on the
 17 merits. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 665, 124 S. Ct. 2783, 2791 (2004).

18 This means that plaintiff must demonstrate a likelihood of prevailing on any affirmative
 19 defense as well as on plaintiff's case in chief. *National Steel Car, Ltd. v. Canadian Pac. Ry.*, 357 F.3d
 20 1319, 1325 (Fed. Cir. 2004). In the present case, Plaintiffs have failed to do so.

21 Under Washington law improvements on land owned by the United States in trust for an Indian
 22 tribe and held under a lease are subject to personal property tax. In Washington, all property is taxable
 23 unless an exemption applies. As RCW 84.36.005 states, in pertinent part:

24 All property now existing, or that is hereafter created or brought into this state, shall be
 25 subject to assessment and taxation for state, county, and other taxing district purposes,
 upon equalized valuations thereof ...excepting such as is exempted from taxation by
 law.

1 For the purpose of property taxation, RCW 84.04.080 defines personal property, in relevant
2 part, as follows:

3 "Personal property" for the purposes of taxation, shall be held and construed to embrace
4 and include, without especially defining and enumerating it, . . . all leases of real property
5 and leasehold interests therein for a term less than the life of the holder; **all**
6 **improvements upon lands the fee of which is still vested in the United States**, or in
7 the state of Washington; . . . and all property of whatsoever kind, name, nature and
8 description, which the law may define or the courts interpret, declare and hold to be
9 personal property for the purpose of taxation and as being subject to the laws and under
10 the jurisdiction of the courts of this state, . . .

11 (emphasis added.) This definition explicitly provides that improvements upon land held in fee by the
12 United States are personal property.

13 The Washington State Supreme Court has applied the definition of personal property to
14 improvements on leased Indian trust land and determined that such improvements are personal
15 property subject to personal property tax. *Chief Seattle Properties v. Kitsap County*, 86 Wn.2d 7, 21,
16 541 P.2d 699 (1975). In making this determination, the Court held that RCW 84.04.080 applies to a
17 lease of Indian trust property to a non-Indian and to the lessee's improvements. *Id.*

18 The issue of whether property is taxable when owned jointly by a corporation and a public
19 entity pursuant to a joint venture was considered in the case *City of Kennewick v. Benton County*, 131
20 Wn.2d 768, 935 P.2d 606 (1997). The case concerned the Tri-Cities Coliseum owned 49% by the City
21 of Kennewick and 51% by a corporation. The court held that Kennewick's 49% interest in the
22 property was tax exempt as government-owned property under RCW 84.36.010, but that the
23 corporation's 51% interest was taxable. *Id.* at 775. Likewise the joint venture CTGW is assessed tax
24 based on the 49% interest of Great Wolf Lodge.

25 The Tribe's retention of some authority to approve budgets, new construction activities and an
assignment or transfer of other member's interest in the joint venture does not rise to the level of
involvement in the commercial joint venture to make CTGW a "uniquely Indian" enterprise, as the

1 Plaintiffs contend. By virtue of Great Wolf's involvement as managing member of the joint venture,
2 and the fact that the development is owned and operated by a Delaware company the development is
3 not "uniquely Indian."

4 Plaintiffs argue that the property taxes at issue are invalid because the legal incidence of the tax
5 falls on the Tribe. This is incorrect. The legal incidence of the property tax falls on the owner of the
6 improvements, CTGW. The Tribe has chosen not to own the improvements on the trust land out right
7 and instead has leased the property and ownership of the improvements to the Delaware limited
8 liability company.

9 Federal preemption analysis consists of a balancing test involving a "particularized inquiry into
10 the nature of the state, federal and tribal interests at stake, an inquiry designed to determine whether, in
11 the specific context, the exercise of state authority would violate federal law." *White Mountain Apache*
12 *Tribe v. Bracker*, 448 U.S. 136, 145, 100 S. Ct. 2578 (1980). Factors to be considered when
13 determining whether a state tax is preempted include: the degree of federal regulation involved; the
14 respective governmental interests of the tribe and state; and the provision of tribal or state services to
15 the party the state seeks to tax. *Salt River Pima-Maricopa Indian Community v. Arizona*, 50 F.3d 734,
16 736 (9th Cir. 1995).

17 With regard to the degree of federal regulation involved, no specific federal laws or regulations
18 apply to the improvements constructed by CTGW at the Great Wolf Lodge. Likewise, no apparent
19 federal funds were involved with the development of the improvements at the Great Wolf Lodge.
20 Although the federal government has an interest in tribal economic self-sufficiency, that interest is
21 insufficient to preempt a state tax. *Salt River Pima-Maricopa Indian Cmty*, 50 F.3d at 739.

22 Plaintiffs assert that the U.S. Department of Interior has an "integral and significant role" in the
23 Great Wolf Lodge. Other than initially taking the property into trust and approving the lease of the
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1 tribal trust property, there is no apparent federal involvement in the operation of the Great Wolf Lodge.
2 The tribal chairman's conclusory statements regarding the U.S. government's role are not substantiated
3 by any facts at all. Declaration of Chairman David Burnett at ¶ 12-13. The facts presented establish
4 minimal federal interest in the Great Wolf Lodge.

5 The Plaintiffs argue that the federal role in the lease of the trust property raises a compelling
6 federal interest requiring preemption of the state taxes. Certainly, since the United States holds title to
7 the trust property, it is responsible for the lease of its land. The issue here is not the lease or taxation of
8 the federal trust land. Instead, the issue is taxation of improvements owned in fee by a limited liability
9 company. The rule set by the courts is that personal property owned by non-Indians on Indian land is
10 subject to state taxation. *Chief Seattle*, 86 Wn.2d at 16.

11 In considering the state interests in taxation, the state has a strong interest in collecting property
12 taxes to fund state and local government services. *Id.* The levies included in the property taxes
13 assessed on the improvements at the Great Wolf Lodge include those for state and local schools, the
14 county, Medic One, county roads, Timberland library, the Port of Olympia, fire district, cemetery
15 district and public utility district. Declaration of Dennis Pulsipher, ¶ 10.

16 While the Chehalis Tribe provides services to the Great Wolf Lodge, Washington's state and
17 local governments provide substantial services that are impacted by the Great Wolf Lodge.
18 Declaration of Dennis Pulsipher; Declaration of Brad Watkins. With an estimated 400,000 visitors
19 per year arriving at Great Wolf Lodge and nearly 500 employees, the county roads, public schools that
20 serve the employees' children, emergency services, law enforcement and legal system are just some of
21 the governmental services that may be impacted by the development.

22 Certainly, the Chehalis Tribe has a governmental interest in the economic development created
23 by the Great Wolf Lodge. As a member of CTGW, the Chehalis Tribe has an interest in the success of
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1 its joint venture, but this interest is insufficient to preempt the state taxes. While the state property
 2 taxes will impact the profits enjoyed by the Chehalis Tribe and Great Wolf from their joint venture,
 3 this impact is insufficient to wholly exempt CTGW from property taxes. See *Cotton Petroleum Corp.*
 4 *v. New Mexico*, 490 U.S. 163, 191, 109 S.Ct. 1698 (1989). Further, since the assessment at issue was
 5 levied on only Great Wolf's 49% interest in CTGW, the Tribe was given the benefit of an exemption
 6 for its membership share of CTGW and the burden of the taxes need not fall on the Tribe.

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 8 The Plaintiffs assert a variety of services that are provided by the Tribe: sewer and water utility
 9 infrastructure and road improvements. However, these are improvements that many lessors may
 10 provide when leasing property. Any property on which improvements are to be built would require
 11 sewer, water and road service. And certainly a property owner seeking to attract a tenant would need
 12 to make sure the property is served by a fire department. The fact that the tribe has arranged and paid
 13 to have these services available establishes the tribe carrying out responsibilities of a lessor, but in no
 14 way establishes the Great Wolf development as a "distinctly Indian" enterprise.

15 Furthermore, the fact that the Tribe has paid for water, sewer or road improvements really just
 16 establishes that it has paid for the costs of its development like any other developer. As with any
 17 property owner, these utilities must be provided as part of the cost of improving the property.

18 The Tribe asserts that it provides all governmental services to the facility. It does pay for sewer
 19 and water service like many property owners. These services are not covered by property taxes.
 20 Declaration of Dennis Pulsipher, ¶ 10. (The Department of Revenue erroneously assumed that utility
 21 services are supported by property taxes and used the fact that the Tribe paid to provide these services
 22 to support the idea that there is minimal state or local interest. Exhibit C to Declaration of Chairman
 23 David Burnett, p. 2.)
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1 The state and local taxing districts provide significant services and have significant interests in
 2 state taxation. The property taxes fund the state and local public schools and colleges. The property
 3 taxes support county roads for ongoing maintenance of the roads. Declaration of Dennis Pulsipher, ¶
 4 10. The nearly 500 employees, their families, and the anticipated 400,000 annual customers drawn to
 5 Great Wolf Lodge benefit from the services funded by these taxes.

6 In support of a preliminary injunction, the Tribe cites the “substantial” employment that the
 7 Great Wolf provides to the Tribe. What it does not say is that only 8 of the nearly 500 employees at
 8 the Great Wolf Lodge are tribal members. Exhibit C attached to the Declaration of Jane Futterman, p.
 9 7. This represents only 1.6% of the work force at Great Wolf Lodge. The vast majority of employees
 10 hired by the Great Wolf Lodge are not tribal members and therefore not entitled to the services the
 11 Tribe provides for its members.

12 In balancing the state, federal and tribal interests, the tribal interests are not strong because the
 13 assessment at issue is only levied against the 49% interest in CTGW held by Great Wolf. The Tribe’s
 14 membership interest in CTGW is not being taxed. By assessing property taxes on Great Wolf’s 49%
 15 ownership interest in the improvements and not on the 51% interest owned by the Tribe, the tax need
 16 not fall on the Tribal interests.

17 The Plaintiffs look to the Washington State Department of Revenue’s (hereinafter “DOR”)
 18 correspondence to support their argument that the property tax is preempted by federal law. But DOR
 19 stated, “[I]t is difficult to say with legal certainty what the appropriate conclusion must be relative to
 20 state taxation of the personal property (improvements) located at Great Wolf.” Exhibit C to
 21 Declaration of Chairman David Burnett, p. 3. DOR also states, “This is a situation that is a matter of
 22 ‘first impression,’ at least in Washington, and as far as can be determined, in the United States.”
 23 Exhibit C to Declaration of Chairman David Burnett, p. 4. Finally, DOR concludes, “Although the
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relevant facts are still not as clear as we would like, and although a legitimate argument could be made either for federal preemption or for state taxation, it appears that the balance of the federal, state, and tribal interests tilt in favor of federal preemption for this property.” *Id.*

DOR’s conclusion that this is a “matter of first impression” and “there is no legal certainty” is hardly the firm decision that the Plaintiffs contend. At most, DOR concluded that, based on the representations made by the Tribe with “facts not as clear as we would like,” it appears that the relative interests tilt in favor of federal preemption. Because the present case is a matter of first impression, no case law definitely states that Plaintiffs will prevail. Additionally, federal preemption analysis is highly fact-dependent requiring the court to balance interests. Here, the Plaintiffs have presented insufficient facts to show they are likely to prevail on the merits.

B. Irreparable Injury

Plaintiffs have failed to establish specific irreparable harm that may arise if an injunction does not issue, stating only that the ability to raise revenue would be hampered. The possible harms asserted by the Plaintiffs are merely speculative.

Plaintiffs speculate that the assessor will seek “ongoing access” to the Great Wolf property and to audit CTGW’s records. This assertion is entirely fabricated without any factual basis.

C. Balance of Interests

Just as the Plaintiffs assert that taxing the improvements will interfere with the Tribe carrying out services, the loss of property tax will limit each of the small taxing entities’ ability to provide their services. Road maintenance, Medic One emergency response, law enforcement response are all essential local services that will be impacted if the taxes on this development are enjoined.

The hardship created by maintaining basic local services for an additional 400,000 visitors traveling to the Great Wolf each year, without additional tax revenue to support these services is at

1 least as significant a hardship as any hardship the Tribe may experience if CTGW is required to pay
 2 property taxes on Great Wolf's interest in its commercial development.

3 The state and local schools, the county, Medic One, county roads, Timberland library, the Port
 4 of Olympia, fire district, cemetery district and public utility district all provide services for the public
 5 who may be both Tribal members and non-tribal members. The large number of employees and huge
 6 number of visitors drawn to the Great Wolf Lodge by the Plaintiffs makes the need to fund local
 7 services greater than ever.

8 D. Public Interest

9 The Plaintiffs fail to address the final factor the Court must consider: whether the public
 10 interest favors issuing an injunction. *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th
 11 Cir. 2002) (Consideration of the public interest is a element that deserves separate attention));
 12 *Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir 1988) (Failure to consider the public
 13 interest is an abuse of discretion).

14 In the present case, the Great Wolf Lodge is a major draw of tourists into the area. The Tribe
 15 and Great Wolf have the ability to structure their joint venture and to direct profits to new development
 16 and services based on after-tax profits. On the other hand, the local government services impacted by
 17 the Great Wolf do not have the same ability to ameliorate the potential impacts of the Great Wolf
 18 Lodge. The road maintenance, emergency services, law enforcement response and other services must
 19 be provided to the public. Balancing the public interest, favors denial of a preliminary injunction.
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21 III. SECURITY

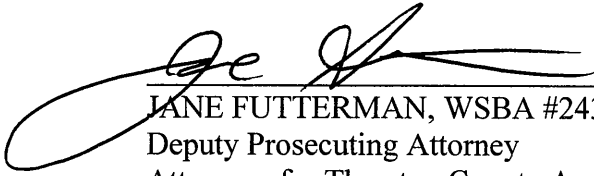
22 In the event the Court grants the Plaintiffs' motion for a preliminary injunction, the Plaintiffs
 23 should be required to post security. FRCP 65(c). Indian tribes are not exempted from the requirement
 24 to post security. *Squaxin Island Tribe v. Washington*, 781 F.2d 715, 723 (9th Cir. 1986). Security
 25

1 should be required in an amount to cover all taxes that are enjoined from collection. Because the
2 property taxes are assessed and collected on a yearly basis, security should be posted in the amount of
3 the taxes as they become due.

4 For all the above reasons, Defendant Thurston County Assessor requests that the Court deny
5 issuance of a preliminary injunction.

6 DATED this 29th day of September 2008.

8 EDWARD G. HOLM
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16 I hereby certify that on the 27 day of September, 2008, I electronically filed the foregoing with the Clerk of the Court
17 using the CM/ECF system which will send notification of such filing to the following attorneys for plaintiffs:

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