UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 10-35642

CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, et al.,

Plaintiffs/Appellants,

v.

THURSTON COUNTY BOARD OF EQUALIZATION, et al.

Defendants/Appellees.

APPELLEES THURSTON COUNTY, THURSTON COUNTY ASSESSOR AND THURSTON COUNTY TREASURER'S PETITION FOR REHEARING EN BANC, OR, ALTERNATIVELY, REHEARING

JON TUNHEIM
PROSECUTING ATTORNEY

JANE FUTTERMAN
SCOTT C. CUSHING
Deputy Prosecuting Attorneys
Civil Division - Building 5
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5574
futterj@co.thurston.wa.us
cushins@co.thurston.wa.us

Attorneys For Thurston County
And Its Assessor And Treasurer

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

FEDERAL CASES **PAGE**

COURT RULES

STATUTES AND CODES

INTRODUCTION

Pursuant to Fed. R. App. P. 35, Defendants-Appellees (the "County") request rehearing en banc because the panel's decision conflicts with analysis in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), and its progeny, including *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997); *Gila River Indian Community v. Waddell (Gila River II)*, 91 F.3d 1232 (9th Cir. 1996); and *Salt River Pima-Maricopa Indian Community*, 50 F.3d 734 (9th Cir. 1995). Further, the panel decision misapplies the holdings of *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and *United States v. Rickert*, 188 U.S. 432 (1903). The decision involves a question of exceptional importance because of the wide-ranging revenue implications for local governments in this Circuit.

The watershed case of *White Mountain Apache Tribe v. Bracker* held that when a state asserts authority over non-Indians on the reservation, a court must engage in a "particularized inquiry into the nature of the state, federal, and tribal interests at stake . . . to determine whether in the specific context, the exercise of state authority would violate federal law." 448 U.S. at 145-46. Rather than engage in a *Bracker* analysis, the panel reverted to the pre-*Bracker* decision in *Mescalero* and expanded the holding of *Mescalero*. *Mescalero* held that a tribe's improvements on property leased by a tribe are not subject to state tax. *Mescalero*, 411 U.S. at 158-159. Here, the panel has expanded the holding to determine that

CTGW, LLC's improvements on property CTGW leases *from* the Tribe are not subject to state tax. DktEntry: 99-1 at 11.

In the event rehearing en banc is denied, rehearing is necessary because the panel decision addressed only permanent improvements. Rehearing is needed to correct the omission of any determination as to whether CTGW's non-permanent improvements, its unattached business personal property, is subject to state and local property taxation.

ARGUMENT

The issue presented in this matter is whether property owned by CTGW, LLC, a non-Indian, Delaware company, on land[1] held in trust by the United States is subject to state property taxation. DktEntry: 41-1 at 10, 12-16. The panel held that CTGW's permanent improvements are not subject to state property tax based on the holding of *Mescalero*. DktEntry: 99-1 at 14. Because the Tribe leased its land to CTGW to build and operate the Great Wolf Lodge, the holdings of *Mescalero* and *Rickert* are inapplicable.

In addition, by limiting its analysis to *permanent* improvements, the panel did not address whether CTGW's non-permanent, unattached business personal

[1] The panel noted that the land was converted to reservation during the litigation. DktEntry: 99-1 at 4, f.n. 2; *see* ER 80-86 (Proclaiming the land reservation on March 9, 2010). Yet, the opinion holds that permanent improvements on "non-reservation" may not be taxed by state and local governments. DktEntry: 99-1 at 3.

property is subject to property taxation. As the panel noted, the lease to CTGW provides that "buildings and improvements" shall be owned by CTGW during the term of the lease and, except for removable personal property, shall remain on the premises upon lease termination. DktEntry: 99-1 at 5-6 (quoting Article 11 of the lease). By restricting its opinion to *permanent* improvements, the panel rendered no determination on the non-permanent improvements.

The panel looked to *Mescalero* for its decision because the Great Wolf Lodge building is located on tribal land. However, *Mescalero*'s holding does not apply.

The panel viewed *Mescalero* as dispositive stating:

> *Mescalero* sets forth the simple rule that § 465 preempts state and local taxes on permanent improvements built on non-reservation land owned by the United States and held in trust for an Indian tribe. This is true without regard to the ownership of the improvements. Because the Supreme Court has not revisited this holding, we are required to apply it.

DktEntry: 99-1 at 14. The language of *Mescalero* that the panel relies upon as dispositive should not be read so broadly. In both *Mescalero* and *Rickert*, the entities that were taxed—a tribal business and individual Indians, respectively—were Indians. The improvements in both *Mescalero* and *Rickert* were owned by either a Tribe or by individual Indians. DktEntry: 41-1 at 29-35. Here, non-Indian CTGW owns the Great Wolf Lodge improvements.

In discussing the holding of *Mescalero*, the panel noted that:

> Relying on *Rickert* and § 465, the [*Mescalero*] Court reasoned that "these permanent improvements on the Tribe's tax-exempt land would certainly be immune from the State's ad valorem property tax."

DktEntry: 99-1 at 9 (citation omitted). In using the phrase, "these permanent improvements" the *Mescalero* court limited its ruling to the permanent improvements owned by the *Mescalero Apache Tribe*. The *Mescalero* decision does not hold that a non-Indian entity should be immune from the state tax.

The panel further erred in determining that ownership of improvements is irrelevant under *Mescalero*. It stated:

> the form of the business through which the Mescalero Apache Tribe owned and operated the ski resort was unclear. *Mescalero* acknowledged this, but concluded it was unimportant because "the question of tax immunity cannot be made to turn on the particular form in which the Tribe chooses to conduct its business." *Mescalero*, 411 U.S. at 157 n.13. In light of this ruling, the question of immunity from the County's property tax assessments on the Great Wolf Lodge "cannot be made to turn on" the Tribe's decision to lease its land to the LLC to build and own the Lodge for the duration of the lease. *See id.*

DktEntry: 99-1 at 11. The panel seems to have based its decision on an erroneous understanding that CTGW, LLC is a tribal business. CTGW, LLC is a Delaware company and the Tribe is a member of this non-Indian entity along with the non-Indian corporation Great Wolf Resorts, Inc. DktEntry: 99-1 at 5. The fact that the Great Wolf Lodge was built and is owned and operated by lessee CTGW is significant when considering *Mescalero*. In *Mescalero*, the Tribe operated the ski resort on the land it leased. *Mescalero*, 411 U.S. at 146. By contrast, here, the

Chehalis Tribe leased its land to CTGW to build, own, and operate the Great Wolf Lodge. As the Court recognized in *Mescalero*, "[l]essees of otherwise exempt Indian lands are also subject to state taxation." *Id.* at 157 (quoting *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342 (1949)).

The *Mescalero* holding was based upon *Rickert*. The panel explained that *Rickert* forms the basis for its holding that permanent improvements on Indian land are not taxable:

> It followed that the "use of permanent improvements upon land is so intimately connected with use of the land itself that an explicit provision relieving the latter of state tax burdens must be construed to encompass an exemption for the former." *Id.* at 158 (citing *Rickert*, 188 U.S. at 441–43). On this basis, the Court struck down the tax.

DktEntry: 99-1 at 10. *Use* is an important word here because it begs the question, "used by *whom*?" The answer in both *Mescalero* and *Rickert* is used by Indians either as a tribal business or individually. Here, rather than an individual Indian or a tribal business using improvements on tribal land, CTGW is a for-profit Delaware LLC. Thus, the Tribe's lease of its land to CTGW broke the *intimate connection* to the Tribe's use of its own land, such that the land and CTGW's improvements do not fall within the holdings of *Mescalero* or *Rickert*.

In focusing on *Mescalero* and *Rickert*, the panel's opinion overlooks the issue of whether CTGW's other property consisting of non-permanent business personal property is subject to property taxation. The panel's limited holding

regarding "permanent improvements built on non-Reservation land" is seemingly inapplicable to the non-permanent property. It is unclear whether or not the panel intended its opinion to apply to CTGW's removable personal property.

The panel's opinion further conflicts with this Court's own opinions with similar factual scenarios decided using a *Bracker* analysis. *Bracker* holds that a determination of whether non-Indians doing business on Indian land should be subject to state tax requires a court to conduct a "particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Bracker*, 448 U.S. at 145. Because CTGW, LLC is a non-Indian entity doing business on tribal land, *Bracker* provides the proper framework in which tribal, federal and state interests are balanced.

This Court has decided at least three cases[2] wherein it has determined the taxable status of non-Indians on Indian land. In each of these cases, the Court conducted a *Bracker* balancing test. Because similar facts are presented here—a

[2] *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107, 1107-08 (9th Cir. 1997) (a tribe leased the land to a non-Indian entity to build a hotel and lease it back from the Tribe); *Gila River Indian Community v. Waddell*, 91 F.3d 1232, 1235 (9th Cir. 1996) (a tribe leased out land a non-Indian entity to operate motor and aquatic sporting events and another non-Indian entity sublet the land for an amphitheater for the performing arts); *Salt River Pima-Maricopa Indian Community*, 50 F.3d 734, 735 (9th Cir. 1995) (a Tribe leased out land to a non-Indian land developer who then subleased the land out to a variety of shopping entities to create a shopping mall).

non-Indian entity that owns improvements on Indian land—a *Bracker* analysis is appropriate. Furthermore, a *Bracker* analysis would address both the removable and permanent improvements at the Great Wolf Lodge. The distinction as to which, exact property is taxed would not be an outstanding question.

The panel's cursory consideration of *Bracker* focused on the type of tax at issue. In rejecting *Bracker* as a means to analyze the issues presented here, the panel described the cases that followed *Bracker* as "taxing transactions between Indians and non-Indians". DktEntry: 99-1 at 12. The panel noted that "[n]one of these cases involved property taxes, however, so they do not implicate § 465." DktEntry: 99-1 at 13. There is no support for the notion that *only* transactional taxes are to be considered under *Bracker*. *Bracker* only requires the Court to conduct the balancing test. There is no requirement that the tax at issue be a transactional tax or that a *Bracker* analysis should not be applied to property tax issues.

If the County's petition for a rehearing en banc is denied, then the County respectfully requests a rehearing regarding the issue of the personal property that is not permanently attached to the land, which was the subject of the County's motion for clarification. DktEntry: 102-1.

CONCLUSION

For the foregoing reasons, the County respectfully requests the Court grant rehearing en banc or rehearing.

Dated this 27th day of August, 2013.

JON TUNHEIM
PROSECUTING ATTORNEY

/s/

Jane Futterman, WSBA #24319
Scott C. Cushing, WSBA #38030
Deputy Prosecuting Attorneys
2000 Lakeridge Dr. SW, Bldg. 5
Olympia, WA 98502
(360) 786-5574
futterj@co.thurston.wa.us
cushins@co.thurston.wa.us

STATEMENT OF RELATED CASES

Appellees are not aware of any related cases pending in this Court pursuant to Ninth Circuit Rule 28-2.6.

Dated: August 27 , 2013.

/s/

Jane Futterman

CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Brief of Appellees is proportionately spaced, has a typeface of 14 points and contains 1,785 words.

Dated: August 27, 2013.

/s/
Jane Futterman

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 27, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: August 27, 2013.

/s/

Linda L. Olsen