BEFORE THE BOARD OF EQUALIZATION
FOR THURSTON COUNTY

CTGW, LLC, Petitioner, CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION, Intervenor, v. THURSTON COUNTY ASSESSOR, Respondent.	Parcel 99002085874 Petition Nos.: 09-1559, 10-1232, 11-0778, 12-0894 and 13-0607 BRIEF OF RESPONDENT THURSTON COUNTY ASSESSOR

I. INTRODUCTION

The Petitioner, CTGW, LLC and the Intervenor, Confederated Tribes of the Chehalis Reservation (the "Tribe"), collectively referred to as "Petitioners," ask the Board to determine that parcel 99002085874 is not subject to property taxation. Petitions for assessment years 2009 to 2013 are before the Board. The Tribe and CTGW present several theories based on federal law as to why they contend the business personal property assessed as parcel 99002085874 should not be subject to property tax. The Assessor's determination of value of parcel 99002085874 is set forth in the Declaration of Jane Futterman, Exhibit R-1.

In presenting their legal theories, Petitioners cite numerous court decisions, regulations, law review articles, and other sources that are not law that is applicable to the Board's decision. Court decisions from other states, law review articles, and treatises do not create precedent to be followed by the BOE. In determining whether to sustain the tax assessment set by the Assessor, the BOE must follow applicable federal law and Washington law. These may include United States or Washington

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constitutions, statutes, and regulations, and court decisions by the U.S. Supreme Court, Ninth Circuit Court of Appeals, and Washington's Supreme Court and Court of Appeals.

The property tax assessment on the Great Wolf Lodge (the "Lodge") building and permanent improvements was determined to be barred by federal law by the United States Ninth Circuit Court of Appeals. The Court ruled that the Lodge building and other permanent improvements assessed as parcel 99740331400 were not taxable by applying 25 U.S.C. § 465, the federal statute barring state and local taxation of land taken into trust for a tribe. *Confederated Tribes of the Chehalis Reservation, et al. v. Thurston County Board of Equalization, et al.*, 724 F.3d 1153, 1158 (2013). Dec. of Futterman, Exhibit R-2. The Court ruled that the exemption from taxation under § 465 extends to the permanent improvements on the land. *Confederated Tribes of the Chehalis Reservation,* 724 F.3d at 1159. The appellate court ruling decided the tax status of the building and permanent improvements by applying a different legal analysis than that used by the U.S. District Court. *See* Dec. of Futterman, Exhibit R-3, Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment on *Bracker* Preemption at 14 (the "Summary Judgment Order") (granting judgment in favor of the Defendants on *Bracker* preemption). The Ninth Circuit did not find error with the facts or the manner of weighing the tribal, federal, and state interests by the lower court. Instead, the Ninth Circuit reversed because the building is a permanent improvement connected to the land that is not taxable under federal statute. *Confederated Tribes of the Chehalis Reservation,* 724 F.3d at 1155 (deciding "the purely legal question whether the exemption of trust lands from state and local taxation under § 465 extends to permanent improvements").

II. LEGAL HISTORY

On February 27, 2007, Washington State Department of Revenue (DOR) issued a letter ruling based on facts provided by the Tribe and concluded that excise taxes on CTGW should be preempted by

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federal law. Galanda Decl, Exhibit D. This decision was withdrawn in 2012. *See* Dec. of Futterman, Exhibit R-4.

In 2007, the Assessor assessed the Lodge building as parcel 99740331400.

After representatives of DOR met with the Tribe and with the Assessor, DOR issued an opinion on August 28, 2008 regarding the property tax assessment of parcel 99740331400 based on information provided by the Tribe. DOR opined that the Tribe's membership in the CTGW joint venture supported preemption of the property tax. Galanda Decl, Exhibit J.

On September 18, 2008, the Tribe and CTGW filed suit against Thurston County and its officials in federal court. The assessed value of the Lodge was greater than 0.25% of the assessed value of the entire county triggering RCW 84.52.018, such that the tax on CTGW's property was not extended on the tax rolls, and was, therefore, not collectible until the litigation challenging the taxation was final.

On March 16, 2009, DOR wrote the Assessor confirming that DOR's August 28, 2008 opinion was not an exercise of DOR's authority under RCW 84.08.010 ordering or directing the Assessor, but was an opinion based solely on information provided by the Tribe. *See* Dec. of Futterman, Exhibit R-5.

On December 21, 2009, DOR declined the Tribe's request to halt the assessment and taxation of the Lodge, and also declined to issue any order or opinion, stating the federal court was the best venue to resolve the issues and apply the *Bracker* balancing test. *See* Dec. of Futterman, Exhibit R-6.

In 2009, the Assessor began assessing the removable business personal property as parcel 99002085874.

On April 2, 2010, the United States District Court issued its decision upholding the tax on parcel 99740331400 after conducting a *Bracker* balancing test. Dec. of Futterman, Exhibit R-3.

The Tribe and CTGW appealed and on July 30, 2013 the Ninth Circuit Court of Appeals decided that, based on the purely legal issue, taxation of the Lodge permanent improvements is barred under

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federal law, 25 U.S.C. §465, which prohibits state and local taxation of tribal trust land. *See* Dec. of Futterman, Exhibit R-2.

After the Ninth Circuit issued its decision, the Assessor asked both the U.S. District Court and the Ninth Circuit to rule on the removable business personal property, but both courts declined because the business personal property was not called out as an issue in the complaint filed in the U.S. District Court more than four years earlier.

III. FACTS

The Lodge is a 398-room hotel, conference center, indoor water park, including 78,000 square feet of entertainment area, a 30,000 square foot conference center, a 10,800 square foot ballroom, various meeting rooms, a business center, and catering services. Dec. of Futterman, Exhibit R-3 at 3: 6-9. The Lodge employs over 500 workers. Exhibit R-3 at 3: 18-19. The Lodge draws in excess of 400,000 customers per year travelling to and from the Lodge on roads through Thurston County. Report of Joseph Kalt, Galanda Decl, Exhibit R at 44. The Lodge is accessed by Old Highway 99, a Thurston County road. Dec. of Futterman, Exhibit R-3 at 6-7.

Management Authority and Control of CTGW

CTGW, LLC is a Delaware chartered limited liability company, which is a joint venture of Great Wolf Resorts, Inc. (GWR), through its wholly-owned subsidiary Great Wolf Lodge of Chehalis, LLC , and the Tribe. The operation and management of the Lodge is not performed by the Tribe or CTGW, but by a subsidiary of GWR, Great Lakes Services, LLC ("GLS"), pursuant to a Management Services Agreement. Dec. of Futterman, Exhibit R-3 at 4-5. The Tribe is significantly removed from the day-to-day management of the Lodge that is performed by GLS. Dec. of Futterman, Exhibit R-3 at 11: 23-25. The Management Services Agreement states that the Tribe has no input on the operation of the Lodge: "Owner will not interfere or involve itself in any way in the day-to-day operation of the

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lodge." Dec. of Futterman, Exhibit R-3 at 4-5. In the original CTGW, LLC Agreement, GWR was the "managing member" of CTGW with authority to make decisions on behalf of CTGW, including authority to appoint all the officers of CTGW. Burnett Declaration, Exhibit A at 27-28 (LLC Agreement, section 4.1(a)). The Tribe and CTGW amended the agreement on August 16, 2011 making the Tribe the "managing member" of CTGW. Burnett Declaration Exhibit A at 84 (Eleventh Amendment of the Limited Liability Agreement). In addition, the 2011 amendment changed the officers of CTGW to provide three representatives appointed by the Tribe, including the Tribal Chairman, and two representatives of Great Wolf Resorts.[1] While these changes to the structure of CTGW represent an increase in the Tribe's authority within CTGW, management and control of the Lodge was retained by Great Wolf Resorts' subsidiary, GLS, as the operator of the Lodge, and CTGW is not allowed to interfere or involve itself in any way with the operation. Dec. of Futterman, Exhibit R-3 at 4-5.

Services Provided to the Lodge

The property tax assessments include levies that fund services of the state and local schools, Thurston County, Medic One, Thurston County roads, Timberland library, the Port of Olympia, fire district, cemetery district and public utility district. Dec. of Futterman, Exhibit R-7. Thurston County provides services supported by the property tax that provide specific benefit to commercial enterprises and hotels, including law enforcement, roads and transportation, emergency services, public health and general government services. Dec. of Futterman, Exhibits R-8 and R-10.

Services the Lodge relies upon include the local law enforcement, emergency medical and fire services, and road maintenance services. Dec. of Futterman, Exhibit R-3 at 14: 1-3. When a person is

[1] Prior to August 16, 2011, Great Wolf appointed all officers of CTGW, and prior to September 23, 2009 the CTGW officers were all representatives of GWR and did not include any Tribal member. Great Wolf Resorts, Inc. Resolutions of the Board of Directors, Burnett Decl., Exhibit B.

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arrested at the Lodge, services provided include the sheriff's response and investigation, custody in the county jail, prosecution by the prosecuting attorney, adjudication by the courts, and frequently public defender services. Dec. of Futterman, Exhibit R-10 at 2.

Both the Tribe and the federal government regulate certain aspects of the *land*, but do not provide all government services for the property. Because hundreds of thousands of customers stay at the Lodge each year County services are required to respond to the emergencies, medical calls, and criminal activity that occur.

IV. ANALYSIS

All property in Washington is subject to taxation unless exempted by law. RCW 84.36.005. Furthermore, Wash. Const. art. VII § 1 provides, in relevant part: "All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax . . . ."

The property tax assessment is based on the true and fair value of the personal property pursuant to RCW 84.40.030 and 84.40.040, not based on the value of services to the property. While the Petitioners seem to assert that a determination of the cost of the services provided to them may substitute for the property tax assessment, this approach is rejected by both Washington state property tax law which requires uniformity in assessment based on fair market value, and the U.S. Supreme Court in *Cotton Petroleum v. New Mexico*, holding that taxation is not premised on a strict *quid pro quo* relationship between the taxpayer and the tax collector. 490 U.S. 163, 185 n. 15, 109 S. Ct. 1698 (1989).

A. <u>The Property Tax on CTGW's Personal Property is Not Barred because the Tax on Parcel 99002085874 Is Not a Tax on the Tribe</u>

1. CTGW Is a Delaware Limited Liability Company, Not a Tribe

The petitioners state that "in order to determine whether CTGW's property is taxable, the Board must determine whether the legal incidence of the tax fall on the Tribe or a non-Indian—that is,

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is CTGW an Indian or a non-Indian." Opening Brief at 17. Legal incidence refers to the entity who is legally obligated to pay the tax. In this case the entity is CTGW.

CTGW is a Delaware limited liability company and is not a tribe, tribal entity, tribal corporation, or arm of the tribe; nor does CTGW have an imputed racial identity. CTGW owns the improvements that are taxed as Parcel 99002085874.

The Ninth Circuit has held that even if the members or stockholder of a company or corporation bear the *economic* incidence of a tax, it is the company or corporation who bears the *legal* incidence of tax. *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107, 1113 (9th Cir. 1997), *cert denied* 522 U.S. 1076, 118 S. Ct. 853 (1998). The United States Supreme Court has determined that the legal incidence of the tax, not the economic incidence of the tax, is the proper test to use in determining taxability. *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 459-60, 115 S. Ct. 2214 (1995). Even if the stockholders of a corporation, as the underlying owners, bear the economic incidence of a tax, the legal incidence of the tax falls on the corporation. *Yavapai-Prescott Indian Tribe*, 117 F.3d at 1113.

Here, CTGW is a distinct legal entity separate from its two members, the Tribe and GWR, regardless of the members' proportionate shares. Both Delaware and Washington law provide: "A limited liability company formed under this chapter shall be a separate legal entity." 6 Del. C. Section 18-201; RCW 25.15.070(2)(c). "State chartered corporations, being fictional persons created by the states, should be treated as non-Indians even if owned by Indians." F. Cohen, Handbook on Federal Indian Law (1982 ed.) at pages 355-56; *see Moline Properties, Inc. v. Comm'r of Internal Revenue*, 319 U.S. 436, 440, 63 S. Ct. 1132 (1943); *Myrick v. Devils Lake Sioux Mfg. Corp*., 718 F.Supp. 753, 755 (D.N.D. 1989); *Airvator, Inc. v. Turtle Mountain Mfg. Co.*, 329 N.W.2d 596, 602 (N.D. 1983); Steven L. Pevar, in *The Rights of Indians and Tribes* 179 (3d Ed. 2002).

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This issue was addressed by the United States District Court in ruling on taxation of CTGW's permanent improvements at the Lodge:

> [The Tribe and CTGW'S] first claim for relief is that [the Thurston County Assessor's] attempt to levy and collect taxes is "*per se* invalid as a matter of federal law." Amended Complaint, ¶ 44. The Supreme Court has stated that in "the special area of state taxation of Indian tribes and tribal members, we have adopted a per se rule." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 n. 17 (1987**). The tax, however, is levied against CTGW, a Delaware corporation, which is neither an Indian Tribe nor a tribal member.**

Dec. of Futterman, Exhibit R-3 at 7. Just as the federal court recognized, CTGW is not an Indian Tribe, and, as such, the legal incidence of the tax does not fall on the Tribe.

2. CTGW Is Not a Tribe Under State or Federal Regulations

The Tribe and CTGW also claim that under state law, CTGW is "unquestionably Chehalis." Opening Brief at 20. This assertion is based on a misapplication of WAC 458-20-192(5)(d), a Department of Revenue excise tax regulation. WAC 458-20-192(5) is titled "Enrolled Indians in Indian Country." Petitioners misrepresent the scope of the regulation by quoting only the following language from WAC 458-20-192(5)(d):

> [E]ntities comprised solely of enrolled members of a tribe are not subject to tax on business conducted in Indian country. … [T]he business will be considered as satisfying the 'comprised solely' criteria if at least half of the owners are enrolled members of the tribe.

Opening Brief at 20. Below is the full text of subsection 5(d):

> Corporations or other entities owned by Indians. A state chartered corporation ***comprised solely of Indians*** is not subject to tax on business conducted in Indian country ***if all of the owners of the corporation are enrolled members of the tribe*** except as otherwise provided in this section. The corporation is subject to tax on business conducted outside of Indian country, subject to the exception for treaty fishery activity as explained later in this rule. Similarly, partnerships or other entities comprised solely of enrolled members of a tribe are not subject to tax on business conducted in Indian country. ***In the event that the composition includes a family member who is not a member of the tribe, for instance a business comprised of a mother who is a member of the Chehalis Tribe and her son who is a member of the Squaxin Island Tribe, together doing business on the Chehalis reservation, the business will be***

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considered as satisfying the "comprised solely" criteria if at least half of the owners are enrolled members of the tribe.

WAC 458-20-192(5)(d) (emphasis added). It is clear that from the full text that this regulation concerns "Enrolled Indians" and only exempts an entity from taxation if "at least half of the owners are enrolled members of the tribe." Subsection 5(d), by its clear wording, applies to tribal members, not a tribe. WAC 458-20-192(5)(d) does not exempt CTGW from property tax.

The Tribe and CTGW also cite to two federal regulations to support their contention that because the Tribe is entitled to a 51% proportionate share of CTGW's profits and losses, it means that CTGW is a tribal entity. Opening Brief at 20. Neither federal regulation is remotely relevant to the matter before the Board. One regulation, 25 C.F.R. 103.25(b), regulates eligibility for a Federal Bureau of Indian Affairs guaranteed or insured loan program, stating, "To be eligible for a BIA-guaranteed or insured loan, a business entity or tribal enterprise must be at least 51 percent owned by Indians." 25 C.F.R. 103.25(b). The other regulation, 25 C.F.R. 273.2(e), deals specifically with education contracts under the Johnson O'Malley Act. Neither of the two cited federal regulations are applicable to the current matter before the Board.

3. CTGW Is Not an Arm of the Tribe

The Tribe and CTGW ask the Board to find that CTGW is an "arm of the tribe." Opening Brief at 17-22. In their brief, the Tribe and CTGW state as a general rule that "'[a] subdivision of tribal government or a corporation attached to a tribe may be so closely allied with and dependent upon the tribe that it is effectively an arm of the tribe. It is then actually a part of the tribe *per se*' and is nontaxable." Opening Brief at 17 (*citing Uniband, Inc. v. C.I.R.*, 140 T.C. 230, 252 (U.S. Tax Ct. 2013). However, the *Uniband* case is a federal income tax case decided by the U.S. Tax Court and involved a corporation wholly owned by a tribe. *Uniband, Inc.*, 140 T.C. at 232-33. The *Uniband* court stated: "Uniband, however, chartered not by the tribe but by the State of Delaware, is an entity that exists by

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virtue of the sovereign powers of Delaware, and Uniband's powers are defined and limited by Delaware law." *Id.* at 252-253. The Uniband corporation was originally held 51% by a tribe, yet the court concluded "Uniband was simply a business owned in part by [the tribe] and was clearly 'a separate corporate entity created [in part] by the tribe''." *Id.* at 253 (citations omitted). The court ultimately concluded that the Uniband corporation failed to be an arm of the tribe. *Id.* at 252.

The Tribe and CTGW also argue that CTGW should be viewed similarly as:

- a state-chartered corporation wholly owned by an Indian Tribe. *Uniband, Inc.*, 140 T.C. at 232-33;

- a state-chartered housing authority that was created to provide and maintain low-income housing for absentee Shawnee tribal members; whose members of the housing authority were selected by the Tribe; whose function was to serve the needs of the Tribe; and whose activities were supervised by the Tribe. *Duke v. Absentee Shawnee Tribe of Oklahoma Housing Authority*, 199 F.3d 1123, 1124-25 (10th Cir. 1999);

- a state-chartered school board wholly comprised of Indians at a school chartered by Indians. *Giedosh v. Little Wound School Bd., Inc*. 995 F. Supp 1052, 1054-55 (D.S.D. 1997);

- a corporation qualified through the Federal Housing Administration as an Indian-owned organization that is owned 51% by individual Navajo Indians and 49% by two individuals who are not Navajo Indians but are related by blood with other Indian tribes. *Eastern Navajo Industries, Inc. v. Bureau of Revenue*, 552 P.2d 805 (N.M. Ct. App. 1976);

- a corporation solely-owned by an enrolled member of Oglala Sioux Tribe *Pourier v. South Dakota Dept. of Revenue*, 658 N.W.2d 395, 397 (S.D. 2003);

- a corporation solely-owned by three brothers from India who were Sikh and were discriminated against based on their nationality and religious beliefs. *Bains LLC v. Arco Prods. Co.*, 405 F.3d 764 (9th Cir. 2005);

- a minority-owned corporation "certified by the United States Small Business Administration as a firm owned and operated by socially and economically disadvantaged individuals" whose shareholders were all African-American. *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1055, 1059 (9th Cir. 2004);

- a solely-owned Indian corporation chartered by a tribe as a tribal corporation whose ownership consists of two people who are husband and wife. *Flat Center Farms, Inc. v. State Dept. of Revenue*, 49 P.3d 578, 579 (Mont. 2002);

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- a company wholly-owned by Cherokee Nation Businesses, Inc, which is a corporation wholly owned and regulated by the Cherokee Nation, a federally recognized Indian tribe. *Somerlott v. Cherokee Nation Distribs*., 686 F.3d 1144, 1146 (2012);[2]

- a corporation wholly owned by the Chickasaw Nation of Oklahoma and federally chartered as a Chickasaw Nation tribal corporation doing business in New Mexico. *Bales v. Chickasaw Nation Industries*, 606 F. Supp. 2d 1299, 1300 (D.N.M. 2009); and

- a tribal corporation incorporated under Seneca tribal law. *Warren v. U.S.*, 859 F. Supp. 2d 522, 541 (W.D.N.Y 2012);

CTGW—a non-Indian, Delaware company with partial tribal membership that owns the Lodge, a for-profit hotel, waterpark, and conference center—bears no resemblance to and is not analogous to any of the entities described above.

Further, the Tribe and CTGW cite *Johnson v. Harrah's Kan. Casino Corp*., asserting that because "the Tribe does own and control the land and the building where the casino is located" that factor should support a finding that the entity was an arm of the tribe. Opening Brief at 21, *citing Johnson v. Harrah's Kan. Casino Corp*., No. 04-4142, 2006 U.S. Dist. LEXIS 7299, *7 (D.Kan. Feb. 23, 2006). Yet the court did not find the entity was an arm of the tribe. Ownership and control of the land and building was one factor weighed in favor of the Tribe, however, it was but one of 10 factors that the court analyzed. In fact, the Court stated: "The Court finds that the lack of control over Harrah's corporate structure by the Tribe weighs heavily against extending its tribal sovereignty immunity." *Johnson*., 2006 U.S. Dist. LEXIS at *28. The case also states that the subordinate economic enterprise doctrine[3] was never meant to protect entities conducting non-tribal business, which his precisely what CTGW is. *Id.* at *17 (internal quotations omitted).

[2] The Tribe and CTGW cited the United States District Court for the Western District of Oklahoma; the case cited here is the 10th Circuit case which is the decision of the same matter on appeal.

[3] This doctrine is essentially the arm-of the-tribe argument. *Johnson*, 2006 U.S. Dist. LEXIS at *17.

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The case law cited by the Tribe and CTGW does not support their conclusions. CTGW is not an arm of the Tribe.

B. A *Bracker* Balancing Test Weighing The Tribal, Federal, And State Interests Does Not Support Preemption Of The Property Tax On CTGW's Property.

The *Bracker* balancing test is used by federal courts to determine whether the tribal and federal interests in non-taxation outweigh the state interest in imposing the property taxes on non-tribal entities such as CTGW. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). As the Supreme Court stated, the *Bracker* test was "designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 145.

In presenting the factors to be weighed in a *Bracker* test, the Petitioners incorrectly contend that there should be a presumption that the state does not have jurisdiction to tax. See Opening Brief at 25, lines 10-14 (citing an Oklahoma City Law Review article and no applicable court decision). Instead, the applicable holding by the courts is that the burden of proof is on the party seeking preemption. *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107, 1109 (9th Cir. 1997), *cert. denied*, 522 U.S. 1076 (1998).

1. Tribal and Federal Interests

In their opening brief, Petitioners present eight reasons for their argument regarding the strength of the tribal and federal interests. Opening Brief at 25-32. In balancing the interests, on the Tribal and Federal interest side of the scale, Petitioners point out:

- The property that is taxed results from CTGW's business activities on the Tribe's reservation land. Opening Brief at 25-26. While the Assessor acknowledges that CTGW holds the lease to the property, the business activity performed on the property is the management and operation of the Lodge by Great Lakes Services. Dec. of Futterman, Exhibit R-3 at 4-5.
- The Tribe has zoning, building code, land use, and health and safety authority over the land where the Lodge is located. Opening Brief at 26: 1-2 and at 20-31.

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- Both the United States and the Tribe have significant interests in the Tribe's economic development, raising revenue, providing employment for members of the Tribe, and in the Tribe's self-determination. Opening Brief at 26-27 and 29.

- The United States and Tribe have significant interests in employment for tribal members. Opening Brief at 32: 6-12.

- Members of the Tribe have been employed at the Lodge. The Petitioners assert that 42 members of the Chehalis Tribe have been employed at the Lodge for some period of the last 6 ½ years. Opening Brief at 32: 10-11. With over 500 employees at any one time, there have been hundreds or more individuals employed at the Lodge during this time. The number of Tribal members is a very small fraction of the total number of Lodge employees.

The Assessor disagrees with the following assertions presented in Petitioners' Opening Brief:

- Petitioners assert that CTGW is a tribal entity. Opening Brief at 25: 17-18. Although, the Chehalis Tribe is a member of CTGW, CTGW is a Delaware limited liability company, not a tribal entity.

- Petitioners assert that the Tribe provides "primary law enforcement" at the Lodge. Opening Brief at 26: 2; 32: 3-6. However, the Tribe lacks legal authority to maintain criminal charges against individuals at the Lodge who are not members of the Tribe. The County is the lead agency with regard to criminal proceedings against the non-tribal-member customers, employees and others who frequent the Great Wolf Lodge. Due to the location of the Lodge in the far south of the County, the Chehalis Tribal police may frequently be closer than the Thurston County sheriff's deputies when responding to a 911 dispatch and arrive on scene more quickly. Yet the Sheriff responds to 911 dispatches to the Lodge, takes those suspected of criminal activity at the Lodge into custody at the Thurston County Jail, and leads criminal investigations. *See* Dec. of Futterman, Exhibit R-10 at 2.

- Petitioners assert "the United States and the Tribe are deeply involved in the production of the entertainment events which take place at the Lodge." Opening Brief at 28. Petitioners also state "CTGW is subject to strict federal government regulation and control." Opening Brief at 29: 12-14; 31-32. In fact, the United States has little involvement with CTGW. As the U.S. District Court found, "[A]side from the federal government approving the Lease and a single health inspection performed by the United States Department of Health and Human Services, there is no significant regulatory oversight of the Lodge by the federal government." Dec. of Futterman, Exhibit R-3 at 11: 5-8.

- There is no evidence that the property tax would increase the total cost of maintaining the Lodge. Opening Brief at 29. Rather, the tax is borne by CTGW as a cost of doing business. The Ninth Circuit has even gone so far to conclude, "It is clear that a state tax is not invalid merely because it erodes a tribe's revenues, even when the tax substantially impairs the tribal government's ability to sustain itself and its programs." *Crow Tribe of Indians v. State of Mont.*, 650 F.2d 1104, 1116 (9th Cir. 1981), *amended on denial of reh'g*, 665 F.2d 1390 (9th Cir. 1982) ("*Crow I*"). The fact that the tax could impact the profits received by the Tribe is not a basis to invalidate the tax.

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2. State Interests

Petitioners downplay the state interests supporting taxation of CTGW's business personal property, arguing that CTGW receives no state services, and the state has only a general interest in revenue collection. Opening Brief at 32-34. To the contrary, significant services funded by the property tax are provided directly to CTGW and the Lodge.

Several hundred thousand customers visit the Lodge each year. CTGW's employees and customers are predominantly non-Tribal members. While the Petitioners argue the state services should be given little weight, the U.S. District Court found, "[T]he Lodge relies upon the local law enforcement, emergency medical and fire services, and road maintenance services. These services are directly correlated to the taxes imposed." Dec. of Futterman, Exhibit R-3 at 14: 1-3.

Direct services include the Sheriff's response to crime committed at the Lodge; holding individuals accused of committing crime at the Lodge in the Thurston County Jail or Thurston County Juvenile Detention; Medic One emergency response to medical emergencies at the Lodge; Thurston County Superior Court and District Court adjudication of crimes committed at the Lodge; Thurston County Prosecuting Attorney prosecuting crime committed at the Lodge and obtaining restitution owed to CTGW; Assigned Counsel providing indigent defense so those charged may be prosecuted; Thurston County Public Works' maintenance of the County road system to the Lodge; and emergency coordination and response by Thurston County Emergency Services for ice and snow storms, earthquakes, floods, and power outages. Dec. of Futterman, Exhibit R-10.

In addition to these direct services to CTGW, the property tax supports the public school system, including the Rochester School District which has provided the education for individuals employed at the Lodge. Dec. of Futterman, Exhibit R-9, at 19: 24-25.

Examples of the Thurston County law enforcement at the Lodge were provided in a 2009 declaration regarding cases prosecuted by the Thurston County Prosecuting Attorney's Office. Declaration of Wendy Ireland (attachments omitted), Exhibit R-8. Two individuals were arrested, held

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in the jail and prosecuted for theft from the Lodge. They were convicted in Thurston County Superior Court. A court order requiring payment of restitution to the Lodge was issued, in addition to no contact orders prohibiting the individuals from having any contact with the Lodge for 10 years. Declaration of Wendy Ireland ,Exhibit R-8 at ¶ 3. Another referral for charges involved allegations of rape made by one Lodge employee against another. *Id.* Other cases involved allegations of domestic violence incidents and no contact order violations at the Lodge. *Id.* at ¶ 4.

If the Sheriff did not provide law enforcement, and those breaking the law at the Lodge were allowed to remain at the Lodge, it is unlikely CTGW would continue to attract the same level of customers to the waterpark and hotel. The Petitioners construe the County's law and justice services and plowing the roads into the Lodge as providing service to the Lodge customers and employees. In fact, without customers and employees who can travel to the Lodge and stay at the Lodge safely, CTGW would not be a business at all. As the Petitioners' expert Joseph Kalt concluded with regard to law enforcement, "Such services are essential to preserving an environment in which visitors to Lodge and employees of CTGW feel safe and business can occur." Galanda Decl., Exhibit R-37.

3. Analysis of Tribal, Federal, and State Interests

The factors to consider in a *Bracker* analysis include: "the degree of federal regulation involved, the respective governmental interests of the tribes and states (both regulatory and revenue raising), and the provision of tribal or state services to the party the state seeks to tax." *Salt River Pima-Maricopa Indian Community v. Arizona*, 50 F.3d 734, 736 (9th Cir. 1995), *cert denied*, 516 U.S. 868 (1995). The relevant case law establishes that the importance of the tax in funding the services relied upon at the Lodge tips the balance in favor of taxation rather than preemption of the taxes.

The Petitioners repeatedly cite to the *Crow* cases in their Opening Brief, arguing that the property taxes should be preempted because the tax is on bounty from the Tribe's land. *Crow* is too factually different from the tax assessment on CTGW's business personal property to provide guidance. See Opening Brief at 25, citing *Crow I*, 650 F.2d at 1117; and Opening Brief at 24, 32, 38-

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39 *citing Crow Tribe of Indians v. Montana*, 819 F.2d 895 (9th Cir. 1987) ("*Crow II*"), *aff'd* 484 U.S. 997 (1988). The case *Crow Tribe of Indians v. Montana*, upon which the Petitioners' argument is based concerned a state tax on coal mined from tribal lands. 819 F.2d at 902. The case concerned taxation of the natural resources that were considered part of the tribe's land or, as the court stated, the coal was the Tribe's "bounty from its own land." *Crow I*, 650 F.2d at 1117. By contrast, here the Tribe leased land to CTGW. CTGW built and owns the Lodge and contracts out the operation and management of the Lodge. CTGW and its business personal property are neither part of the tribal trust land, nor the Tribe's natural resources extracted from the trust land.

Petitioners also present various arguments regarding the Tribe's economic development. As the Ninth Circuit has held, tribal economic development and self-sufficiency are important interests, but, without more, those interests alone are insufficient to defeat state and local taxation. *Salt River Pima-Maricopa Indian Community*, 50 F.3d at 739. Here, the state services provided to CTGW and the Lodge establishes a strong state interest in the property taxation which supports those services. As a result, the tribal interests are insufficient to tilt the balance in favor of preemption of the property tax.

4. The United States District Court Determined that the State Interests Outweigh Federal and Tribal Interests

The Ninth Circuit did not engage in a *Bracker* analysis when considering the property tax on the Lodge stating, it "need not consider *Bracker* or any other theory of preemption." *Confederated Tribes of the Chehalis Reservation*, 724 F.3d at 1159, Exhibit R-2. As a result, the U.S. District Court remains the only court to have considered *Bracker* balancing of the tribal, federal, and state interests with regard to property taxes assessed on CTGW's property. The U.S. District Court's analysis is therefore instructive, even with the court of appeals' reversal of the decision based on a different legal theory.

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With regard to the federal interests to be balanced, the U.S. District Court stated, "aside from the federal government approving the Lease and a single health inspection performed by the United States Department of Health and Human Services, there is no significant regulatory oversight of the Lodge by the federal government." Dec. of Futterman, Exhibit R-3 at 11: 5-8.

With regard to the tribal interests, the Tribe and CTGW argued that "Tribe has a majority interest in and control over the Lodge . . . ." just as it argues here. Dec. of Futterman, Exhibit R-3 at 11: 18-19. But the U.S. District Court determined, "The Tribe's only relevant exercise of authority, however, is the authority to approve the annual operating budget for the Lodge, which may not be unreasonably withheld and is subject to binding arbitration" and "the Tribe is significantly removed from the day-to-day management of the Lodge that is performed by Great Lakes Services, LLC." Dec. of Futterman, Exhibit R-3 at 11: 19-26.

The U.S. District Court explained, "the relevant contracts limit the Tribe's control over the Lodge." The management agreement states that CTGW "will not interfere or involve itself in any way in the day-to-day operation of the Lodge." Therefore, even though the Tribe may receive 51% of the net profits of CTGW, the evidence in the record shows that the Tribe lacks control over the Lodge and business decisions regarding the Lodge." Dec. of Futterman, Exhibit R-3 at 12: 4-10.

With regard to the state interests, the U.S. District Court determined "the services that Thurston County provides to the Lodge weigh heavily against preemption because there is a close nexus between the local tax and some local governmental services. Law enforcement, emergency fire and medical services, road maintenance, and the county court system are important services that are funded by the challenged property tax." Dec. of Futterman, Exhibit R-3 at 13: 1-5. The U.S. District Court concluded, "In conclusion, the Court finds that Plaintiffs have failed to meet their burden in showing that the federal and tribal interests overcome the state interests." Dec. of Futterman, Exhibit R-3 at 13: 21-22.

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After the U.S. District Court's decision in 2010, the CTGW, LLC agreement was amended effective August 16, 2011. See Burnett Declaration, Exhibit A at 84 (Eleventh Amendment of the Limited Liability Agreement). The Tribe was designated as the "Managing Member" of CTGW. *Id.* In addition, the 2011 amendment changed the officers of CTGW from all appointees of GWR, to three officers appointed by the Tribe, and two appointed by Great Wolf Resorts.

While these changes to the structure of CTGW represent an increase in the Tribe's authority within CTGW, management and control of the Lodge was retained by Great Wolf Resorts' subsidiary, GLS, as the exclusive operator and manager of the Lodge, and CTGW is not allowed to interfere or involve itself in any way with the operation. Dec. of Futterman, Exhibit R-3 at 4-5. Thus, the operation and management of the Lodge continues to be performed by Great Wolf Resorts, not CTGW or the Tribe. Furthermore, the 2011 amendment to the LLC Agreement does not alter the significant state services provided to the Lodge and CTGW that are supported by the property tax.

The services paid for with property tax that are relied upon by CTGW and the Lodge demonstrate strong state interests. The *Bracker* balancing of federal, tribal and state interests analysis establishes that the taxes should not be preempted.

C. The Personal Property Assessed as Parcel 99002085874 Does Not Include Permanent Improvements -- 25 U.S.C. § 465 Does Not Apply.

In issuing its decision regarding parcel 99740331400, the Ninth Circuit ruled that 25 U.S.C. § 465 exempts permanent improvements attached to tribal trust land from state and local property tax. The Petitioners contend that the removable business personal property assessed as parcel 99002085874 should also be considered to be permanent improvements which are exempted under 25 U.S.C. § 465.

The Tribe and CTGW argue that federal law, not state law, defines property. Opening Brief at 34. The Tribe and CTGW also state that "there is no one definition of 'permanent improvements' for taxation purposes." Opening Brief at 35 *citing PPL Corp. v. C.I.R.*, 135 T.C. 176, 193 (U.S. Tax Ct.

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2010). The Tribe and CTGW cite various U.S. Tax Court and other cases dealing with federal income taxes to support their argument. But the income tax cases do not pertain to defining what are "permanent improvements" on tribal trust property.

The Bureau of Indian Affairs recently defined permanent improvements as they relate to 25 U.S.C. § 465 and tribal trust property by adopting 25 CFR Part 162. *Confederated Tribes of the Chehalis Reservation,* 724 F.3d at 1157 n.6. The regulations define "permanent improvements" as follows: "*Permanent improvements* means buildings, other structures, and associated infrastructure attached to the leased premises." 25 CFR §162.003, Declaration of Futterman, Exhibit R-11. In the Motion to Take Judicial notice filed at the Ninth Circuit, the Tribe and CTGW wrote:

> Here, section 162.017(a) can be viewed as "filling a gap" in the statutory law. Neither 25 U.S.C. § 415 on leasing of Indian land nor 25 U.S.C. § 465 on taxation of trust land specifically address State or local taxation of permanent improvements on leased Indian land. Section 162.017(a) "addresses ambiguity in the statute or fills a space in the enacted law." *See United States v. Mead*, 533 U.S. at 229.

Declaration of Futterman, Exhibit R-12 at 10.

Thus, permanent improvements are, in fact, defined for the purposes of 25 U.S.C. § 465 and that definition does not extend to removable business personal property. The property included in parcel 99002085874 does not include buildings, structures, or associated infrastructure attached to the leased premises. The Petitioners' argument to the contrary should be rejected.

The Tribe and CTGW state, without analysis, that a list of property at the Lodge is not subject to personal property taxation because the items are permanent improvements. Opening Brief at 36.[4] But as noted above, the items listed are not, by federal definition, permanent improvements.

[4] The list of items in the Opening Brief includes, "Ice Cream Shops-walk-in freezers/coolers." Opening Brief at 36. Parcel 99002085874 does not include walk-in freezers or coolers and is a mischaracterization of the unattached personal property list given to the Tribe and CTGW. See Galanda Decl., Exhibit L-05.

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D. The Property Tax On CTGW's Property Does Not Infringe On Tribe's Sovereignty.

Petitioners argue that the property tax on parcel 99002085874 is essentially a tax on a part of the Tribe's lands. Opening Brief at 39. Furthermore, CTGW argues the Tribe itself does not tax personal property, so the state property tax infringes on the Tribe's sovereignty by taxing in an area the Tribe does not tax. Opening Brief at 39.The case *Crow II*, upon which the Petitioners' argument is based, concerned a state tax on coal mined from tribal lands. 819 F.2d at 902. The Ninth Circuit ruled that the tax infringed on the Tribe's sovereignty because the coal was deemed a "component of the reservation land itself." *Id.* at 898. Furthermore, whether state taxes infringe on tribal sovereignty depends on the degree to which tribal self-government is adversely affected. *See id.* at 902. Here, CTGW's personal property is owned separately from the tribal trust property and is not part of the reservation land.

The Petitioners also point out that the Tribe does not impose property taxes and considers the personal property to be tribal property. Opening Brief at 30. The Supreme Court made clear that a lack of tribal tax on property does not bar state taxing jurisdiction, particularly because, in the area of taxation, concurrent state jurisdiction does not interfere with tribal sovereignty. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 189, 109 S. Ct. 1698 (1989); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 158, 100 S. Ct. 2069 (1980). If the state law and tribal law can be imposed and enforced concurrently without rending the other null and void, tribal sovereignty is not affected. *See Colville*, 447 U.S. at 158.

In the area of taxation, courts have almost uniformly found that concurrent state jurisdiction does not interfere with tribal sovereignty. *See Wagnon v. Kansas Department of Revenue*, 546 U.S. 95, 114-115, 126 S. Ct. 676 (2005); *Cotton Petroleum*, 490 U.S. at 189; *Colville*, 447 U.S. at 158; *Gila River II*, 91 F.3d at 1239; *Segundo*, 813 F.2d at 1393; *Chemehuevi*, 800 F.2d at 1449; *Fort Mojave Tribe v. City & County of San Bernardino*, 543 F.2d 1253, 1258 (9th Cir. 1976) *cert. denied* 430 U.S. 983 (1977). This is because "[t]here is *no direct conflict* between the state and tribal schemes, since

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each government is free to impose its taxes without ousting the other." *Colville*, 447 U.S. at 158 (emphasis added); *see also Crow I*, 650 F.2d at 1115 ("Each taxing body is free to impose its tax, since neither tax by its terms precludes the other.").

Here, the Tribe claims that the property tax infringes "on the right of reservation Indians to make their own laws and be ruled by them." Opening Brief at 39 (citing *Crow II*, 819 F.2d at 902). Specifically, the Petitioners allege that under Chehalis tribal law, all property on the Chehalis Reservation is not taxable and that "[a]llowing the County to tax the Tribe's personal property would frustrate Tribal law." Opening Brief at 39. However, concurrent taxation permits the County to tax the Lodge regardless of whether the Tribe chooses to. The Washington State Department of Revenue also rejected this argument when analyzing the property taxes on the permanent improvements, stating, "This is not a situation where the exercise of state authority, that is the property taxation of the improvements located at the Lodge, would unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by then.'" Galanda Decl., Exhibit J at 2.

The Tribe and CTGW's attempt to analogize *Crow II* with the facts of this case is misplaced. *Crow II* is the only Ninth Circuit case denying concurrent tax jurisdiction and its fact-specific holding does not apply to the present case.

In *Crow II*, the Ninth Circuit held that a state tax on coal mined from tribal land infringed on the Tribe's sovereignty because the subject of the tax—the coal removed from the Tribe's land—was a "component of the reservation land itself." 819 F.2d at 902. As explained in *Crow I*, "the revenues sought to be taxed by Montana may ultimately be traced to the Tribe's mineral resources, *a component of the reservation land itself*. . . Thus, when a state taxes a tribe's "natural resources," the tax interferes with the tribe's sovereignty. *Crow II*, 819 F.2d at 902-03 (emphasis added).

In contrast, in *Chemehuevi*, the Tribe argued that imposition of a state tax on cigarettes sold on the reservation infringed on the Tribe's sovereignty. *Id.* at 1448. The Ninth Circuit determined that the state cigarette tax did not "impermissibly interfere with the Chemehuevis' ability to govern

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themselves." *Id*. at 1450. In doing so, the Court found the facts "materially different from cases where states attempt to tax the value of *natural resources* on an Indian reservation." *Id*. at 1449 (citing *Crow I*, 650 F.2d at 1117) (emphasis added). The property tax on CTGW's property is also distinguishable because the property tax is on business personal property, not natural resources, and the property is owned by CTGW, not the Tribe.

V. CONCLUSION

The Tribe and CTGW have the burden of overcoming the Assessor's valuation and of establishing federal law preempts the property tax assessment of parcel 99002085874. The argument that CTGW is essentially the Tribe, an arm of the Tribe, or that the tax assessment impairs the Tribe's sovereignty has not been proven nor is it supported by the applicable law. Further, the removable business personal property is not permanent improvements, or the argument that federal law classifies the removable property as permanent improvements has no merit. Finally, the balancing of federal, tribal and state interests supports the validity of the assessment. The Assessor requests the Board to deny the exemption request and sustain the assessed values determined by the Assessor.

DATED this 15th day of September, 2014.

JON TUNHEIM
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A true and correct copy of this document was served by email and properly addressed and mailed, postage prepaid, to the following individual(s) on the date indicated below:

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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

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