BEFORE THE BOARD OF EQUALIZATION
FOR THURSTON COUNTY

CTGW, LLC; CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION; Petitioner, v. STEVE DREW, THURSTON COUNTY ASSESSOR, Respondent.	Thurston County Petition: Parcel Nos. 99740331400; 99002085874 All Assessment Years OPENING BRIEF

I. INTRODUCTION

The Thurston County Assessor's ("Assessor") taxes on property belonging to CTGW, LLC ("CTGW") are illegal for at least four distinct reasons.

First, "[t]he state may not tax Indians or Indian tribes in Indian country." Wash. Admin. Code § 458-20-192(5). Pursuant to state law, a tribal corporation is one in which "at least half of the owners" are tribal. Wash. Admin. Code § 458-20-192(5)(d). Tribal and federal law also dictates that CTGW is an arm of the Confederated Tribes of the Chehalis Reservation ("Tribe"). The Assessor cannot tax CTGW's property located in Chehalis Indian Country. *Id.*

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Second, the Assessor's taxation "interferes [and] is incompatible with federal and tribal interests reflected in federal law." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983); *see also Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005); *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985). The taxes are therefore preempted.

Third, federal law, particularly 25 U.S.C. § 465, explicitly exempts from taxation "permanent improvements" on Indian trust land, as defined by federal—not Washington State—law. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *Drye v. United States*, 528 U.S. 49, 52-53 (1999); *Confederated Tribes of Chehalis Reservation v. Thurston County Bd. of Equalization* ("*Chehalis*"), 724 F.3d 1153, 1158 (9th Cir. 2013). Because the Assessor assessed the subject improvements as non-permanent under state law, the assessments are invalid.

Finally, the assessed taxes are preempted by the Tribe's the inherent right to make its own laws and be ruled by them. *Mescalero Apache Tribe*, 462 U.S. at 334 n.16; *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 837 (1982).

From 2010 to 2014, the Assessor improperly imposed taxes on the Petitioners' exempt property. Petitioners CTGW and the Tribe have timely filed of appeals with this Board for all assessment years, thereby staying all obligations until the Board issues its final determination. *Heidgerken v. State, Dept. of Natural Resources*, 993 P.2d 934, 940 n.4 (Wash. Ct. App. 2000) (citing Wash. Rev. Code § 76.09.170(5)). This matter is now ripe for final determination.

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II. FACTS

A. The Tribe Has Significant Interests in CTGW's Property.

The Tribe is a federally recognized tribal government that governs a Reservation near the Black and Chehalis Rivers in Southwest Washington, together with additional parcels of trust land located in Thurston and Grays Harbor Counties. *Chehalis*, No. 08-5562 (W.D. Wash. July 2, 2009), ECF No. 61, at 3. The Reservation, which constitutes about 4,200 acres of the Tribe's aboriginal homelands, was created by U.S. Secretarial Order in 1864 for "the use of the Chehalis Indians"—not the State of Washington ("state"). *Id.*

The Tribe has approximately 800 enrolled members, roughly three hundred of whom are under the age of 18. Through its on-Reservation economic development programs, the Tribe is planning to help find or provide employment for these minors in the next twenty years. Declaration of Chairman David Burnett in Support of Opening Brief ("Burnett Decl."), ¶ 5.

The Tribe provides a broad spectrum of essential governmental services and programs to Tribal members, as well as its non-Indian neighbors, including, without limitation: a health and dental clinic, law enforcement, judicial services, social services, drug and alcohol abuse programs, Indian Child Welfare assistance, early childhood education, higher education scholarships, employment and vocational assistance, housing, water and sanitation, environmental and natural resource protection, and road maintenance. *Id.* at ¶ 6.

In 2005, the Tribe and Great Wolf Resorts, Inc. ("GWR"), a corporation with substantial waterpark expertise, formed CTGW under Delaware law.[1] *Id.*, Ex. A at 1. The purpose of the Tribe's joint venture with Great Wolf Resorts, Inc. ("GWR") was to develop 39-acres of a 42.99 acre trust land parcel adjacent to Interstate 5, and off of Highway 12, in Grand Mound,

[1] As Professor Kalt explains: "Tribal LLCs are commonly incorporated under a variety of legal systems, including tribal incorporation codes and various states' incorporation codes (such as the familiar use of Delaware as the state of incorporation)." Declaration of Gabriel S. Galanda in Support of Opening Brief ("Galanda Decl."), Ex. R at 12.

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Washington, into a destination conference center, hotel, and waterpark. *Id*. at 1-2. The trust land parcel lies within the Tribe's aboriginal territory and constitutes Indian country under 18 U.S.C. 1151. As such, the trust land parcel is subject to the Tribe's **exclusive** jurisdiction, per *Worcester v. Georgia,* 6 Pet. 515, 561 (1832), and its progeny.

The Tribe owns an undivided 51% interest of CTGW; GWR owns an undivided 49%. Burnett Decl., Ex. A. Because CTGW is 51% owned by the Tribe, it is an "Indian economic enterprise," pursuant to federal law, 25 C.F.R. § 103.25(b); 25 C.F.R. § 273.2(e), and a nontaxable "entit[y] comprised solely of enrolled members of a tribe" pursuant to state law. *See* Wash. Admin. Code § 458-20-192(5)(d) ("business will be considered as satisfying the 'comprised solely' criteria if at least half of the owners are enrolled members of the tribe"). Chehalis Tribal Chairman David Burnett serves as CTGW's Chairman. Burnett Decl. at ¶ 1; *id.*, Ex. B. The Tribe's governing body enjoys the power to dismiss the Tribal Council members of the CTGW governing board. *Id.*, Ex. A. In addition, Tribal officials exercise control over the administration and accounting activities of CTGW. *Id.* The Tribe, as the managing member of the entity, has complete and full control over the operating and capitol budgets, and suffers 51% of the entity's losses. Any judgments against CTGW directly impact Tribal fiscal resources. *Id.*

Specifically, the Tribe has control over the following: setting the annual Operating Budget; setting the Annual Capital Improvement Budget; hiring architects and general contractors; entering into litigation; settling litigation; settling insurance claims; entering into a partnership or a joint venture; acquiring a direct interest in another entity; merging or consolidating CTGW with any other entity; managing debt obligations (beyond the construction loan and any material modification of any environmental remediation); modifying, amending, or

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terminating the Business Lease; modifying, amending, or terminating the Management Agreement; modifying, amending, or terminating the Construction Management Agreement; modifying, amending, or terminating the License Agreement; modifying, amending, or terminating any Employment or Severance Agreement; entering into any union or collective bargaining agreement; entering into or enrolling employees into any Employee Benefit Plan (or terminating such Plan); permitting any activities that require a Gaming License. *Id.*

In 2008, as planned, the Tribe and its partner developed the intended conference center, hotel, and waterpark on the trust land parcel. Burnett Decl. at ¶ 7. The facility, which cost $172 million to build, is commonly known as the Great Wolf Lodge ("Lodge"). *Id*.

B. The United States Asserted, and Continues to Assert, Significant Interests in the Tribe's Property.

On August 28, 2002, the Tribe purchased the 42.99-acre land tract on which the Great Wolf Lodge sits ("the Land"). Galanda Decl., Ex. A at 1. On May 10, 2004, the Tribe petitioned the United States to take the Land into trust for the explicit purpose of Tribal economic diversification and tax base expansion through building and owning the Lodge and entering into a joint venture. *Id.*

As part of having the Land taken into trust, the U.S. Bureau of Land Management reviewed the legal description, title commitment, statutory warranty deed and a federal record of survey. *Id*. Based on the Tribe's business plan and trust application, the Bureau of Inain Affairs ("BIA") concluded that "the Tribe[] plan[s] to use the subject property for a hotel and convention center and thus[, the] acquisition of the land is necessary to facilitate tribal self-determination and economic development." *Id.* at 2-3. The BIA also found that:

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> A majority of the reservation is situated in a floodplain, and thus, there is little opportunity for further economic development within the Reservation. For the Tribes to achieve a reasonable level of self-sufficiency, they must acquire additional land outside the floodplain. In 2002, the Tribes acquired the subject property for the purpose of economic development and the land is also located outside the floodplain. The Tribes plan to construct a 125,000 square foot convention center and a 200-room hotel.

Id. at 3. The BIA explicitly contemplated the Tribe's lease of the Land, once held in trust, to its "joint venture." *Id.* at 8. The BIA further concluded that:

> The acquisition of the parcel into trust status would greatly enhance the Tribe's economic development potential, which is the paramount objective of the Tribes. The proposed project will provide much needed economic and/or employment opportunities for tribal members, and thus, allow many to stay in their aboriginal homeland. It will also provide the Tribes with revenue that could be used for the following:
>
> - Strengthen the tribal government.
> - Provide new tribal housing.
> - Improve the quality of life of the tribal members by enabling the Tribes to fund a variety of social, governmental, administrative, educational, health and welfare services.
> - Provide capital for other economic development and investment opportunities.
>
> Based on the above facts, I find that the Tribes have demonstrated a need for the subject property.

Id. at 3.

Notice of the proposed fee-to-trust conversion and the underlying business proposal was sent to Thurston County and the Washington State Governor on June 1, 2004. *Id*. at 4. In response, the proposed project generated a substantial amount of support, from the likes of State Senator Dan Swecker; House Republican Leader Richard DeBoldt; Representative Gary C. Alexander; U.S. Congressmen Norm Dicks and Brian Baird; the State of Washington's Governor's Office of Indian Affairs; Thurston County's Fire Department; and the Thurston County Chamber of Commerce.[2] *Id.* at 4-5.

[2] For example, Congressmen Dicks and Baird wrote that development of an economic anchor in Grand Mound and South Thurston County would generate hundreds of jobs in a region struggling with high unemployment. Galanda

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Per federal law, Thurston County was asked by the BIA to provide: "(1) The annual amount of property taxes currently levied on the property. (2) Any special assessments, and amounts thereof, which are currently assessed against the property. (3) An governmental services which are currently provided to the property by your jurisdiction. (4) If subject to zoning, how the property is currently zoned." *Id.*, Ex. B. In response, Thurston County indicated to the federal government that the only local governmental services provided the Land were police, fire, and water and sewer services. *Id.*, Ex. A at 5; *id.*, Ex. C.

Neither the County nor its Assessor expressed concern that the Land would be removed from the County tax rolls. *Id*., Ex. C. Indeed, the County expressed "support for the development plans of the Chehalis Tribe for a hotel and convention center" and stated that it "looks forward to the prospect to the prospect of the Tribe's hotel-convention center." *Id.*, Ex. G. The County's only stated concerns regarded of wetlands and woodlands preservation, which were ultimately accommodated. *Id*., Ex. C. The United States determined:

> According to Thurston County the property taxes are $10,537.25; however I do not consider the amount of property taxes to be a loss to the County, if the land is taken into trust, to be so significant as to weigh against the acquisition, especially since there is so much support for the fee-to-trust acquisition. Most of all the letters of support indicate that the development of a hotel and convention center would have positive impact/influence on the economy, which is much needed due to the national economy and the federal timber policies.

Id., Ex. A at 6. The federal government also concluded that:

> [T]he Tribes have a need to acquire this property for self sufficiency and economic purposes . . . . I confirm my foregoing conclusions and further conclude that the Tribe's justification of anticipated benefits from the acquisition (i.e. hotel and convention center—an economic development activity) withstands my utmost scrutiny when considering the distance of the subject property from the Tribes' reservation (i.e. approximately 7 miles).

Decl., Ex. A at 4. They indicated that without a doubt, the project would benefit Tribal and non-Tribal residents. *Id*. County Fire Chief Robert W. Scott likewise expressed his support for the fee-to-trust conversion, believing the development of a facility on the Land would be extremely important to the growth and economic wellbeing of South Thurston County. *Id.* Similarly, the Thurston County Chamber of Commerce noted that the development of a hotel/convention center would be a "hinge pin" for economic growth in South Thurston County. *Id.* at 5.

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Id. The United States specifically found that the removal tax revenue from the County's tax rolls would result, but that it would be of slight impact when considering the mutual benefit to the Tribe and the state. *Id.*

The United States also found that the Tribe's existing law enforcement could absorb additional workload regarding the Land: "We assume that the County and the State concur in our conclusion because neither raised any jurisdictional when their comments were sought about this proposed acquisition." *Id.* at 7. The federal government further found that "the State of Washington did not raise any concerns about jurisdiction problems and/or potential conflicts concerning land use." *Id*. Additionally, "the County did not indicate any opposition of the proposed action. In fact, the County previously indicated on July 20, 2004, that they have and continued to have a good working relationship with the Tribes on various public works projects in the area." *Id.*

Ultimately, the United States found that the "(1) Fee to Trust Acquisition, and (2) hotel and convention center development and operation" would:

> provide the greatest socioeconomic benefit to the Tribes. In addition to providing local economic opportunities for the Tribes, it would also provide an economic benefit for the community. The Grand Mound community and Thurston County recently invested, through the bond process, $12.5 million to upgrade water and wastewater infrastructure serving the project area. Development of the proposed hotel and convention center would result in payments to the local utility district and would assist in paying down debt from this infrastructure investment.

Id. at 8-9. As discussed herein, the Lodge has accomplished all of these goals.

In June of 2006, the United States acquired title to the Land from the Tribe, converting the 42.99 acres from fee to trust title, and thereby removing the Land from the state's jurisdiction and taxing authority. Burnett Decl., Ex. C. Effective July 9, 2007, after an extensive review and

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approval process by the federal government, the Tribe leased 39 acres of the trust land parcel to CTGW, for a 25-year term, with a 25-year option to renew. *Id.*, Ex. D.

C. The Tribe Created the Joint Venture as Tribal Arm to Develop the Land.

In 2005, the Tribe formed the joint venture contemplated by the Tribe, the United States and the state, in the Tribe's fee-to-trust application. *Id.*, Ex. A. The Tribe's single purpose when purchasing the Land, having the Land taken into trust by the United States, and joint venturing with GWR to develop the property, was to further the Tribe's goal of economic development—which in turn would increase Tribal economic self-sufficiency and, as a corollary, further reduce the Tribe's dependence upon federal funding. *Id.*; Galanda Decl., Ex. A at 3.

The Tribe recognized the necessity of diversifying its economic base due to, *inter alia,* its inability to tax real property like non-tribal governments[3]; the economically and politically volatile nature of Indian gaming, which has been the principle source of revenue for Tribal programs; and the steady decline in the types and amounts of federal dollars available to tribal governments pursuant to the federal-tribal trust relationship. Burnett Decl. at ¶ 8-10.

By 2005, the Tribe had local hospitality experience, as owner and operator of the Lucky Eagle Casino and the adjoining Eagle's Landing Hotel, but wanted to diversify beyond its gaming-related revenues. *Id.* at ¶ 11. Appreciating its hospitality experience and the absence of any regional resort or conference facility in Thurston County, developing such a facility on the Land dovetailed with the Tribe's goals, strengths and economic comfort level. *Id*.

The Tribe selected GWR as its partner to develop the Land for a number of governmental reasons. *Id*. at ¶ 12. GWR was a premier waterpark and hotel industry proprietor, meaning it

[3] *See* National Congress of American Indians, Current Tax Needs in Indian Country, *available at* http://www.ncai.org/initiatives/partnerships-initiatives/ncai-tax-initiative/NCAI_Tax_Reform_Briefing_Paper.doc ("[T]ribal governments do not have the typical taxing base of state and local governments and their business revenues are the core revenue base . . . ."); *see generally* Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 779 (2004).

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could bring the necessary expertise to accomplish the development of the Lodge. *Id*. The Tribe also realized that GWR would bring a balance sheet that would complement the Tribe's, and a history of financial performance that would allow the partners to obtain tens of millions of dollars in financing for the Lodge project—funding that the Tribe could not obtain by itself. *Id*.

The Members underwent substantial commercial negotiations, which involved various potential terms for the proposed joint venture. *Id.* at ¶ 13; *id.*, Ex. A. The negotiations led to the signed, binding Limited Liability Agreement of CTGW, LLC ("LLC Agreement"), and related covenants about Tribal ownership and control of the company, as alluded to above. *Id*.

The LLC Members—led by Tribal CFO Kris Salmon—jointly drafted and issued a request for proposals to banks and financiers, including those with which the Tribe had preexisting relationships, such as Wells Fargo and Bank of America. *Id.* at ¶ 15; *id.*, Ex. E. The Tribe concluded that federal loans and guaranties were not available for the project. *Id.* at ¶ 16.

The Members eventually expended $172 million to build the Lodge. *Id.* at ¶ 17. They borrowed $102 million from the Marshall Financing Group, of which the Tribe guarantied 51% with its own balance sheet ("Marshall Loan"). *Id.* The Members contributed another $70 million to CTGW to finance the project. *Id*. The Tribe contributed $6.3 million in cash as common capital; $10.95 million in state construction excise tax savings (subject to true up), which the Members referred to as "sovereign benefits"; the Land leasehold interest valued at $3.64 million; and $8 million in preferred equity. *Id.* at ¶ 18-19. GWR contributed $19.2 million in cash as common capital and $8 million in preferred equity, and loaned the LLC another $14.9 million in subordinated debt for construction cost modifications. *Id.* at ¶ 20. The Tribe, as majority owner, insisted that GWR's $14.9 million expenditure become a loan to the

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LLC, rather than equity, and further that the loan be subordinated to both the Tribe's $8 million in preferred equity and the Marshall Loan. *Id.* at ¶ 21.

The Lodge broke ground in March of 2008. The Tribe co-managed the Lodge's construction, and the Tribe's construction company, Saxas, also assisted with the building efforts. *Id.* at ¶ 24.

D. The Assessor's Attempt to Levy Taxes Upon CTGW's Personal Property.

In February of 2007, the Department of Revenue determined that, as a 51% majority Indian owned business, CTGW was not taxable. Galanda Decl., Ex. D at 7 ("[T]here is an argument to make that the joint venture should be viewed as a nonIndian, and thus would be subject to tax. We do not take that view . . . ."). In August of 2008, the Department of Revenue again concluded that CTGW personal property could not be taxed. *See id.*, Ex. J at 4 ("[I]t appears that the balance of federal, state, and tribal interests tilt in favor of federal preemption for this property."). From Tax Years 2007 to 2009, CTGW's personal property was deemed exempted from State taxation and preempted by federal law. *Id*. By 2013, the Ninth Circuit Court of Appeals agreed with the state's conclusions. *See Chehalis*, 724 F.3d at 1157.

Yet without explanation, and in violation of the Department of Revenue's 2007 and 2008 preemption determinations, the Assessor began assessing CTGW's "personal property" in 2010, beginning with a $91,683.09 assessment.[4] *Id.*, Ex. F. For the next four years, the Assessor charged CTGW with payment of roughly $738,185 in taxes on its personal property. *Id.*

[4] At deposition, the Assessor testified that she need not follow the Department of decision:

> Q. Who has the authority with respect -- the overall authority with respect to assessment matters, as you understand it?
> A. I do.
> Q. Do you believe that there's any limitation on your authority with respect to assessment matters?
> A. I think that there are probably the courts that you could go through if somebody challenged my decision, yes.

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E. U.S. District Court and Ninth Circuit Court of Appeals Litigation.

On September 18, 2008, the Tribe[5] filed a complaint against the Assessor, seeking declaratory and injunctive relief that would prevent the County taxation of improvements locate

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> Q. Other than the courts, or other than administrative boards or the courts, is there any governmental entity that has authority over your actions as an assessor?
> A. You mean subject to the RCWs, to the laws as written?
> Q. Sure.
> A. And interpretation?
> Q. Sure.
> A. I have no idea. It's never come up. I would have to research that.

Galanda Decl., Ex. P at 178:17-179:11. The Assessor's staff testified that they could not ever recall an Assessor disobeying an exemption decision or opinion by Revenue — except in this lone instance. Lynn Pearl testified about Revenue's authority regarding senior citizen, non-profit and tribal property tax exemptions vis-à-vis the Assessor:

> Q. So, every time you're aware of when you've requested Department of Revenue guidance on a senior property tax exemption and they've rendered some opinion, you've followed it? Is that a yes?
> A. As far as I can remember, yes. . . .
> Q. Have you ever had occasion to disobey a Department of Revenue determination on exemption?
> A. No.
> Q. Is it your practice that when the Department of Revenue issues a determination to follow it?
> A. Yes.
> Q. Are there other types of Department of Revenue exemptions that your office handles?
> A. Tribal for essential government services.
> Q. And what are Department of Revenue tribal exemptions for essential governmental services in your experience?
> A. Property owned by tribal land that has applied for exemption through Department of Revenue for essential government services, Department of Revenue sends in writing a determination either whole or part of the land is exempt from taxation.
> Q. And have you received such exemptions from the Department of Revenue?
> A. Yes. . . .
> Q. And when you receive what you term tribal exemption determinations, have you ever had occasion to disagree or disobey with any of those determinations?
> A. No.
> Q. So, when you receive tribal exemption determinations from the Department of Revenue, it's your practice to honor those determinations?
> A. Yes. . . .
> Q. Are you aware of other situations where the Department of Revenue has issued the assessor a written opinion?
> A. Yes.
> Q. Are you aware of any instance where the assessor has received a written opinion from the Department of Revenue but has proceeded to not follow the opinion of the Department of Revenue?
> A. Not that I can recall.

Id., Ex. Q at 18:10-20:20, 20:25-21:4, 21:11-22:5, 38:10-20; *see also* Wash. Rev. Code § 84.08.010(1) (county assessors must "perform any act . . . relating to the administration of the assessment and taxation laws of the state" as ordered by the Department of Revenue).

[5] The plaintiffs in the action were the Tribe and CTGW. For ease of reference, however, Appellants will refer to both entities as "the Tribe." As described in more detail below, CTGW is an "arm of the Tribe" at law.

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on tribal trust land. Complaint, *Chehalis*, No. 08-5562 (E.D. Wash Sept. 18, 2008), ECF No. 1.[6] Contemporaneously with its Complaint, the Tribe filed a Motion for Preliminary Injunction. ECF No. 2. The Assessor argued that the injunction should not be granted, in part because this Board, not a federal court, was the proper forum to determine "real [and] personal tax exemption[s]." ECF No. 13, at 3, 8-10. The Court denied the Motion for Preliminary Injunction but disagreed with the County's jurisdictional assertions. *Chehalis*, No. 08-5562, 2008 WL 4681630, at *3 (W.D. Wash. Oct. 21, 2008). The Court held that "although functionally equivalent, a state tax exemption is not federal immunity from state taxation. Therefore, the Court will not . . . abstain from exerting jurisdiction over this action." *Id.* at *3. The Court did not analyze the merits at that time.

After another couple years of District Court litigation, and then appeal, the Ninth Circuit Court of Appeals ruled that CTGW's Lodge-personal property could not be taxed:

> The Grand Mound Property at issue here is owned by the United States and held in trust pursuant to [25 U.S.C.] § 465. Under *Mescalero*, § 465's exemption from state and local taxation applies to the permanent improvements on that land. Thus, neither Thurston County nor any other state or local entity can tax the Great Wolf Lodge or other permanent improvements on that land. Thurston County's property taxes on the Grand Mound Property are therefore invalid.

Chehalis, 724 F.3d at 1157. The Ninth Circuit held that "the Tribe's decision to give ownership of the Lodge to its limited liability company for the duration of the lease" had no bearing on the matter. *Id.* Nor did it matter that the "Lodge constitutes 'personal property' under Washington law." *Id.* According to the Court, "federal law defines 'property and rights to property' for purposes of a federal tax statute, irrespective of whether the right is defined as a 'property' right under state law." *Id.* at 1158 (quoting *Drye v. United States*, 528 U.S. 49, 52-53 (1999)).

[6] Hereinafter, documents found in the District Court's *Confederated Tribes of Chehalis Reservation* docket will be referred to by ECF number only.

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In turn, the County filed a motion to clarify whether "the Court's opinion [wa]s meant to encompass the Great Wolf Lodge and the personal property included in th[at] separate parcel number." Appellees' Motion for Clarification, *Chehalis*, No. 10-35642 (9th Cir. Aug. 13, 2013), ECF No. 102-1.[7] In a one-sentence order, the Ninth Circuit denied the County's motion. ECF No. 104.

Then, on remand to the District Court, the Assessor took another bite at the apple, by filing a motion for declaratory judgment and arguing that "the property tax assessment of the removable business personal property located at the Great Wolf Lodge is not preempted as a matter of law." ECF No. 210, at 1. The District Court denied the Assessor's motion, too. ECF No. 218 at 2. The District Court closed the case by entering a Judgment in favor of the Tribe and CTGW, and imposing a Taxation of Costs against the County in the amount of $22,316.49, which the County has not yet satisfied pending this dispute. ECF No. 228.

F. Unable to Tax the Land or Lodge, the Assessor Targets New Property.

Undeterred by the federal courts' decisions against the County, on February 11, 2014, the Thurston County Treasurer wrote to CTGW: "[T]he taxes on the un-attached business personal property are now subject to collection. CTGW will have until March 14, 2014, to pay for the 2010 through 2014 taxes without interest and penalties." Galanda Decl., Ex. H. Today, as a result of interest, penalties, and costs the Assessor demands that CTGW pay roughly $3,477,093 in personal property taxes for Tax Years 2010 to 2014. *Id.*, Ex. F.

In making these determinations, the Assessor relied on state, not federal, law. Indeed, the County's Deputy Assessor has admitted that the Assessor's Office refused to analyze federal law regarding the Lodge's property tax exemption:

[7] Hereinafter, documents found in the Ninth Circuit's *Confederated Tribes of Chehalis Reservation* docket will be referred to by ECF number only.

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> Q. Did you examine federal law?
> A. I don't know of any federal law that grants an exemption.
> Q. Did you examine federal law? . . .
> A. No.
> Q. Has your office made a determination on a proper and sound basis in this case? . . .
> A. Well, we made a determination that we believe, after reviewing state law, that there's no exemption for this property, that it would be taxable.

Id., Ex. I; *see also id.*, Ex. K at 1-2 (applying state and not federal law to determine what constitutes "personal property").

What is more, because the Assessor did not have access to the Lodge[8], he based his assessment on "a rough outline of the non-permanently attached property **one would one would expect to find** in a Great Wolf Lodge."[9] *Id.* at 1 (emphasis added); *see also id.*, Ex. L (list of personal property used by the Assessor). For Tax Year 2010, the Assessor based his assessment on "[o]ther Great Wolf Resorts, industry data, and a resort in Washington." *Id.*, Ex. M. For the remaining tax years, the assessment was merely based on "print media and press releases," CTGW's website, and "other jurisdictions in which Great Wolf Lodges are located." *Id.*, Ex. N, at 5-6; *see also id.* Ex. O, at 5-6 (same). Upon this information, the Assessor levied personal property taxes on the following permanent improvements:

- Lobby – large decor and decorative items, clock tower, MagiQuest stations, phone system, specialized structures, lighting and chandeliers;
- Guest Rooms – cabin structures;
- Conference Center – lighting, sound systems, phone system;
- Spa – manicure stations and chairs, pedicure chairs, lockers, specialized lighting, phone

[8] Indeed, the District Court Judge alluded to the County's inability to legally enter upon Chehalis Reservation lands for taxation purposes, when in 2010, he asked the County's counsel: "[I]sn't there a problem or conflict with tribal sovereignty and the enforcement of this tax?" ECF No. 203, at 33.

[9] The Assessor has asked the Tribe to inspect the Lodge, but the Tribe asserted its sovereign rights and denied the request. Per federal law, State agencies are barred from entering the Reservation to engage in any collection or other unwelcomed activity. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144-45 (1982); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 162 (1980); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 658-59 (9th Cir. 1976).

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system;

- Fitness Room – lockers, sound system, phone system;
- Retail Stores – sound system, specialized lighting, phone system;
- Restaurant & Bar – special structures, special lighting, phone system, sound system;
- Kitchen – ovens, walk-in coolers, food holding devices, counters;
- Ice Cream Shops – walk-in freezers/coolers;
- Arcade – wall-imbedded computer equipment of various types, sound systems;
- Children's Activity Area – shelving units, some play equipment, phone system, sound system;
- Pool Area and Water Park – lockers, water slides and climb-on structures, fountains, decretive structures, specialized lighting, sound system;
- Grounds – compaction equipment, attached benches and tables.

Id., Ex. L. The Assessor also taxed non-permanent improvements, but the assessment amounts make no distinction between the various taxes personal properties. *Id***.**

III. LAW AND ARGUMENT

Taxes on value located on Indian lands can be (A) categorically barred by federal law, (B) preempted by federal law under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), (C) barred by operation 25 U.S.C. § 465, or (D) prohibited because of the inherent "right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1958). Here, all four doctrines bar the Assessor's taxes on CTGW's property.

A. The Assessed Taxes Are Categorically Barred As Illegal Taxes On A Tribal Entity.

Generally, state taxes apply to everyone "**outside** a tribe's reservation" and are "federally preempted only where the state law is contrary to 'express **federal** law.'" *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691, 694-95 (9th Cir. 2004) (quoting *Mescalero*, 462 U.S. at 148-49) (emphasis added).

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Within the reservation, however, "the initial and frequently dispositive question in Indian tax cases is who bears the legal incidence of the tax." *Wagnon*, 546 U.S. at 101. When the legal incidence falls on tribes or tribal members, "[s]tates are categorically barred" from implementing the tax. *Id.*; *see also Montana*, 471 U.S. at 764 (1985) ("Indian tribes and individuals generally are exempt from state taxation within their own territory."); *Bercier v. Kiga*, 103 P.3d 232, 236 (Wash. Ct. App. 2004) ("[T]he State may not tax Indians or Indian tribes in Indian country . . . .") (citing Wash. Admin. Code § 458-20-192(5)); *Van Mechelen v. State of Washington Dep't of Revenue*, No. 08-011, 2009 WL 979712, at *16 (Wash. Bd. Tax. App. Feb. 26, 2009) ("Indian tribes and individuals generally are exempt from state taxation within their own territory.").

"[T]he question of who bears the legal incidence of the tax is the initial and frequently dispositive question in Indian tax cases." *Id.* (quotation omitted). "If the legal incidence of a tax falls upon a Tribe or its members . . . the tax is unenforceable." *Pourier v. South Dakota Dept. of Revenue*, 658 N.W.2d 395, 403 (S.D. 2003), *aff'd in relevant part and rev'd in part on other grounds on reh'g*, 674 N.W.2d 314 (S.D. 2004). Thus, in order to determine whether CTGW's property is taxable, the Board must determine whether the tax incidence falls on the Tribe or a non-Indian—that is, is CTGW an Indian or a non-Indian?

The general rule is 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. *Uniband, Inc. v. C.I.R.*, 140 T.C. 230, 252 (U.S. Tax Ct. 2013) (quotation omitted). Although preemption of state taxes "is most assured for tribal corporations organized pursuant to federal or tribal law," COHEN'S HAND BOOK OF FEDERAL INDIAN LAW § 8.06 (2012 ed.), "the mere organization of such an

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entity under state law does not preclude its characterization as a tribal organization as well." *Duke v. Absentee Shawnee Tribe of Oklahoma Housing Authority*, 199 F.3d 1123, 1125 (10th Cir. 1999). As the Ninth Circuit Court of Appeals observed in specific reference to CTGW, "'the question of tax immunity cannot be made to turn on the particular form in which the Tribe chooses to conduct its business.'" *Chehalis*, 724 F.3d at 1156 (quoting *Mescalero,* 411 U.S. at 157 n.13); *see also Giedosh v. Little Wound School Bd., Inc.*, 995 F.Supp. 1052, 1059 (D.S.D. 1997) ("[T]he fact that the Board is incorporated as a nonprofit corporation under [state] law does not affect its status as an 'Indian tribe.'").

In *Eastern Navajo Industries, Inc. v. Bureau of Revenue*, 552 P.2d 805 (N.M. Ct. App.), *cert. denied*, 558 P.2d 619 (1976), *cert. denied*, 430 U.S. 459 (1977), for instance, the state had attempted to tax the gross receipts of a state-chartered corporation, 51% of which was owned by the Tribe and 49% by two non-Indian individuals. *Id.* at 806. The corporation had offices and a plant located on Indian trust land and "was formed at the instigation and under the auspices of the Navajo Tribal Council." *Id.* at 805, 807. The state argued that "organizing a modern business corporation, the character of which is determined by state law, is a departure from the ancestral customs and folkways of Indian people. Once, that step has been taken, the participants have made the choice, for better or worse, to separate themselves, at least for purposes of the corporate activity, from those traditions." *Id.* at 807. The New Mexico Court of Appeals disagreed, holding that "[t]o disregard the Indian ethnicity of taxpayer's shareholders would be to fail to recognize the specific directives" of federal regulations that "look beyond the taxpayer's corporate form to the fact that 51% of its stock is owned by individual Navajo Indians." *Id.* at 809 (citing 25 C.F.R. § 80.12 (1971); 25 U.S.C. § 13 (1970)).

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In *Pourier v. South Dakota Dept. of Revenue*, the Supreme Court of South Dakota likewise concluded that a state-chartered corporation whose shareholder was a member of the Oglala Sioux Tribe was "an enrolled member for the purpose of protecting tax immunity." 658 N.W.2d at 404. The *Pourier* Court found that the entity was "Indian" for the purpose of tax preemption because its "sole shareholder is an enrolled member of the Tribe, the business is operated on the reservation, the vast majority of its customers are Indians residing on the reservation, and it is licensed by the Tribe to do business on the reservation." *Id.* at 404. The Court noted that it had

> consistently been willing to go beyond the corporate fiction to reach the people behind the corporate veil. Behind incorporation, there remain individuals who maintain a distinct racial identity that protects them from some government actions. . . . [T]he Court look[s] to factors such as people who [are] members in the corporation, the purposes the corporation serve[s] and [whether] it was granted a tribal charter by the Tribal Council.

Id. at 404; *see also Bains LLC v. Arco Prods. Co.*, 405 F.3d 764, 770 (9th Cir. 2005) (finding that corporation "undoubtedly acquired an imputed racial identity" for the purpose of showing 42 U.S.C. § 1981 liability); *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1059 (9th Cir. 2004) (same); *In re: Stuart B. Mills*, Op. No. 111, 1985 WL 168597, at *3 (Neb. A.G. Jul. 8, 1985) ("[T]he personal property of a tribally-chartered corporation doing business upon an Indian land or reservation, where the majority of the corporation's stock is owned by Indians, is immune from [state] tax . . . .").

In *Flat Center Farms, Inc. v. State Dept. of Revenue*, the Supreme Court of Montana held that the state's "corporation license tax may not be imposed on an Indian-owned corporation which does business entirely within the Fort Peck Reservation." 49 P.3d 578, 580 (Mont. 2002). The Court based its holding on federal preemption in regard to "[t]he exercise of state

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jurisdiction over activities occurring entirely on Indian lands is an infringement on inherent tribal authority . . . contrary to principles of self-government and tribal sovereignty." *Id.* (citing *Williams*, 358 U.S. at 220-23).

The facts at hand counsel for a ruling similar to *Eastern Navajo Industries*, *Pourier*, and *Flat Center Farms*. The fact that CTGW is 51% tribally owned is dispositive—CTGW, as an arm of the Tribe, is not taxable. *See also e.g.* Wash. Admin. Code § 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."); 25 C.F.R. § 103.25(b) ("[A] business entity or tribal enterprise must be at least 51 percent owned by Indians."); 25 C.F.R. § 273.2(e) (defining an Indian "economic enterprise" as "any commercial, industrial, agricultural, or business activity that is at least 51 percent Indian owned").

Under state law, CTGW is unquestionably Chehalis. As Wash. Admin. Code § 458-20-192(5)(d) dictates, a business that is more than half tribally owned is considered to be an "entit[y] comprised solely of enrolled members of a tribe [that] are not subject to tax on business conducted in Indian country."

In addition, the following factors, also discussed in more detail above, are relevant:

- CTGW was formed to manage and develop tribal resources—specifically, tribal trust land. In the period leading up to the creation of CTGW, in order to better fulfill its governmental responsibilities, the Tribe entered into a series of transactions that involved the purchase, leasing, development, and maintenance of certain lands in the Grand Mound, Washington area. Following acquisition, these lands were brought into tribal trust status by the Federal Government, consistent with the Chehalis Tribe's expressed desire to employ the lands in its economic development efforts. These efforts vis-à-vis the subject trust land culminated in the creation of its limited liability company, CTGW,

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and the construction and operation of the Great Wolf Lodge, which is regulated, maintained, and majority-owned by the Tribe. *See e.g. Somerlott v. Cherokee Nation Distributors Inc.*, No. 08-0429, 2010 WL 1541574, at *4 (W.D. Okla. Apr. 16, 2010) (arm-of-the-tribe status to entity "aimed at benefitting the tribe as a whole through the management and exploitation of business profits and other resources for the good of the tribe"); *Bales v. Chickasaw Nation Industries*, 606 F.Supp.2d 1299, 1300 (D.N.M. 2009) (arm-of-the-tribe status for corporation that "enable[d] the development of tribal resources for the benefit of the Chickasaw Nation").

- Federal policy designed to protect Indian assets and tribal cultural autonomy is furthered by the extension of preemption to CTGW. CTGW maximizes the ability of the Chehalis Tribal Government to govern and meet the needs of its citizens; this is wholly consistent with contemporary federal interest in Indian economic self-sufficiency and effective self-government. *See e.g. Sommerlott*, 2010 WL 1541574, at *4 ("protecting and encouraging the Cherokee Nation's continued efforts at economic self-sufficiency" helped to preserve cultural autonomy).
- The Tribe has legal ownership of the property used by CTGW, in that it possesses the beneficial title to the federal trust land. As with all of the Tribe's trust lands, the use of the land upon which the hotel and resort is located, and from which it conducts its business and derives its revenues, is regulated through the Tribe's land use regulations, including its Comprehensive Land Use Plan and related ordinances and directives. *See e.g. Johnson v. Harrah's Kan. Casino Corp.*, No. 04-4142, 2006 WL 463138, at *7 (D. Kan. Feb. 23, 2006) (fact that "the Tribe does own and control the land and the building where the Casino is located" weighed in favor of the entity being an arm-of-the-tribe).
- Tribal officials exercise control over the administration and accounting activities of CTGW and a suit against the entity would impact the Tribe's fiscal resources. The Tribe is the managing member of the entity, has complete and full control over the operating and capitol budgets, comprehensively oversees and regulates CTGW and its employees, and suffers 51% of the entity's losses. Specifically, as of the LLC's restructuring in August of 2011, the Tribe has control over the following:
    - Setting Annual Operating Budget

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- Setting Annual Capital Improvement Budget
- Hiring Architect and General Contractor
- Entering into Litigation
- Settling of Litigation
- Settling of Insurance Claims
- Entering Into a Partnership or Joint Venture
- Acquiring a Direct or Indirect Interest in another Entity Merging or Consolidating CTGW into any Entity
- Debt Obligations beyond the Construction Loan Commencement or Material Modification of any Environmental Remediation
- Modification, Amendment or Termination of the Business Lease
- Modification, Amendment or Termination of the Management Agreement
- Modification, Amendment or Termination of the Construction Management Agreement
- Modification, Amendment or Termination of the License Agreement
- Entering into, Modification or Termination of any Employment or Severance Agreement
- Entering into any Union or Collective Bargaining Agreement
- Entering into or Enrolling Employees into any Employee Benefit Plan or Termination of Such Plan
- Permitting Activities requiring a Gaming License

See e.g. Sommerlott, 2010 WL 1541574, at *5 (fact that Tribe "exercises control over the personnel and accounting" weighed in favor of the entity as an arm-of-the-tribe).

- The Tribe's governing body has power to dismiss the Tribal Council members of CTGW's governing body. *See e.g. Warren v. U.S.*, 859 F.Supp.2d 522, 541 (W.D.N.Y. 2012) (entity an arm-of-the-tribe where the entity's charter stated that "the tribal Council may remove . . . board members for cause").

In sum, because CTGW is an "arm of the tribe," the legal incidence of the property tax levied upon CTGW necessarily falls upon the Tribe. The tax is therefore *per se* prohibited by both state and federal law. *See Bercier*, 103 P.3d at 236 ("[T]he State may not tax . . . Indian tribes in Indian country . . . ."); *Montana*, 471 U.S. at 764 (1985) ("Indian tribes . . . are exempt from state taxation within their own territory.").

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B. The Assessed Taxes Are Preempted By Federal And Tribal Interests As Reflected In Federal Law.

State and local taxation is preempted by implication where it "interferes or is incompatible with federal and tribal interests reflected in federal law." *Mescalero Apache Tribe*, 462 U.S. at 334 (1983); *see also In re Blue Lake Forest Prods. Inc.*, 30 F.3d 1138, 1142 (9th Cir. 1994) ("Indian law preemption [is] broader than traditional preemption: That is, in the Indian law context, state law is preempted not only by an explicit congressional statement—the traditional preemption standard—but also if the balance of federal, state and tribal interest tips in favor of preemption.").

Even if CTGW is not an "arm of the tribe"—clearly it is—when the legal incidence of a state tax falls on non-Indians the tax may still be prohibited, depending upon the outcome of the test laid out in *Bracker*, 448 U.S. 136. *See Wagnon*, 546 U.S. at 110 ("[T]he balancing test articulated in *Bracker* [applies] only where the legal incidence of the tax f[alls] on a nontribal entity engaged in a transaction with tribes or tribal members on the reservation.") (quotation and citation omitted); *e.g. Okla. Tax Comm'n*, 515 U.S. at 459; *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 466-67 (2nd Cir. 2013). Under *Bracker*, courts "subject a state tax scheme over on-reservation, non-member activities to 'a particularized inquiry into the nature of the state, federal, and tribal interests at stake.'" *Oneida Nation of New York v. Cuomo*, 645 F.3d 154, 165 (2nd Cir. 2011) (quoting *Bracker*, 448 U.S. at 145).

Eschewing "mechanical or absolute conceptions of state or tribal sovereignty," this interest-balancing test "determine[s] whether, in the specific context, the exercise of state authority would violate federal law." *Bracker*, 448 U.S. at 145. Thereunder, state interests are

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strongest "when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." *Colville*, 447 U.S. at 157. The converse, of course, is also true: state interests are weakest when, as here, the tax is directed at on-reservation value and when the services in connection with the regulated or taxed activity are provided by the tribe. *Mescalero Apache*, 462 U.S. at 336-40. Generally, the court must examine such factors as:

- The United States and the Tribes' "significant interest[s]" in value "generated on the reservations." *Colville*, 447 U.S. at 155 (1980); *see also Crow Tribe of Indians v. State of Mont.*, 819 F.2d 895, 899 (9th Cir. 1987), *aff'd sub nom.*, 484 U.S. 997 (1988) (same).
- The United States and the Tribes' interests in "inherent sovereign interests in activities on their land . . . ." *Nevada v. Hicks*, 533 U.S. 353, 401 (2001).
- The United States and the Tribes' interests in "involvement in the production of the entertainment events which take place on its reservation." *Gila River Indian Community v. Waddell*, 967 F.2d 1404, 1410 (9th Cir. 1992).
- The United States and the Tribes' interests in providing a "form of entertainment" to the tribal community. *Indian Country U.S.A., Inc. v. Oklahoma ex rel. Oklahoma Tax Comm'n*, 829 F.2d 967, 986 (10th Cir. 1987).
- The United States and the Tribes' interests in advancing its "deeply rooted" historic "policy of leaving Indians free from state jurisdiction and control." *Rice v. Olson*, 324 U.S. 786, 789 (1945).
- The United States and the Tribe's interests in attaining the "congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Cabazon*, 480 U.S. at 216.
- The United States and the Tribes' interests in the promulgation of tribal ordinances that establish and regulate the activity involved. *Id.* at 218.

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- The United States and the Tribes' interests in the Tribe's ability to "raise revenues and provide employment for [its] members." *Id.* at 219.
- The state's interest in "funding the services . . . provided in connection with the activities taking place **on the reservation**." *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107, 1111 (9th Cir. 1997) (quotation omitted, emphasis added); *see also Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 661 (9th Cir. 1989), *cert. denied*, 494 U.S. 1055 (1990) ("[A] state's general interest in revenue collection is insufficient . . . ."); *Ute Mountain Ute Tribe v. Rodriguez*, 660 F.3d 1177, 1201 (10th Cir. 2011) (state services must be "connected to the on-reservation activity in some substantial way").

1. The Interests of The United States and The Tribe Are Significant.

Because of the strong tribal interests at issue when property is located on tribal land, this "analysis generally results in a presumption of the **absence** of state [taxing] jurisdiction." Dennis W. Arrow, *Contemporary Tensions in Constitutional Indian Law*, 12 OKLA. CITY U. L. REV. 469, 583 (1987) (emphasis added). Here, this general norm should prevail as well.

First, the United States and the Tribe have very significant interests in value generated on the Chehalis Indian Reservation. The at-issue tax is not levied on revenue generated from sales, *cf. Colville*, 447 U.S. 134, but on property—property belonging to a tribal entity—constituting literal value generated on tribal trust lands. The Tribal 51% share of CTGW net profits *and* the Tribe's tax revenues are quite literally "bounty" from Chehalis Indian land. *Crow Tribe of Indians v. State of Mont.*, 650 F.2d 1104, 1117 (9th Cir. 1981), *amended on denial of reh'g*, 665 F.2d 1390 (9th Cir. 1982). **The revenues are generated on-reservation, through the activities of the Tribe, both as a government and majority equity owner of CTGW and its personal property**, in the development, financing, and construction of the Lodge. What is more, the

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taxpayer here, CTGW, is the recipient of an abundance of Tribal services such as zoning and building code permitting and inspections, primary law enforcement, Tribal employee preference, and health and safety governance. Galanda Decl., Ex. R, at 57.

Second, the United States and the Tribe have significant interests in managing the activities that take place at the Great Wolf Lodge. As the United States concluded: the Tribe's property "is necessary to facilitate tribal self-determination and economic development." *Id.* Ex. A, at 2-3. The federal government further concluded that the revenue derived from the Land will:

- Strengthen the tribal government.
- Provide new tribal housing.
- Improve the quality of life of the tribal members by enabling the Tribes to fund a variety of social, governmental, administrative, education, health and welfare services.
- Provide capital for other economic development and investment opportunities.

Id. at 3. Joseph P. Kalt, Professor of Political Economy at Harvard University, has observed, too, that "[t]he Federal Government and the Chehalis Tribe have parallel and compelling interests in the attempt by Thurston County to levy a personalty tax on the Tribe's Great Wolf Lodge development project." Galanda Decl., Ex. R, at 32.

> The federal interest, as expressed in its policies of self determination, include compelling interests in self-government and economic self-sufficiency for American Indian tribes. Achieving these ends requires that tribes develop the financial wherewithal to carry out federal objectives of effective self-government and economic self-sufficiency. . . . Similarly, for the Chehalis Tribe, meeting its citizens' needs for civil society and economic development in the contemporary era of federal policies of tribal self-determination requires effective tribal government. Effective tribal government, especially a self-sufficient tribal government, requires that the Chehalis Tribe develop and maximize the supporting and indispensable revenue streams upon which effective tribal government depends.

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Id. at 32. In addition, the Indian Self-Determination and Education Assistance Act of 1975 concisely sums up the strong federal interest in Chehalis Tribal economic development as a manifestation of self-determination and with a view towards self-sufficiency:

> The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy that will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable governments, capable of administering quality programs and developing the economies of their respective communities (emphasis added).

Pub. L. No. 93-638, 25 U.S.C. §§ 450, *et seq.*; *see also Santa Rosa Band of Indians v. Kings Cnty.*, 532 F.2d 655, 663 (9th Cir. 1975) ("The assimilation policy . . . was to a great extent a failure and has been discarded in favor of policies fostering Indian autonomy, reservation self-government and economic self-development.") (citing Indian Financing Act of 1974, 25 U.S.C. §§ 1451, *et seq.*); *Timbisha Shoshone Tribe v. Kennedy*, 714 F. Supp. 2d 1064, 1070 (E.D. Cal. 2010) (noting the "policy of Indian self-determination and self-government as mandated by the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341").

The Tribe's joint venture ownership of this personal property exemplifies the federal interest in Tribal economic self-determination and in turn self-sufficiency. Although the Tribe utilized the federal government's tools for tribal economic development—*i.e.* the fee-to-trust process, the trust property, and the federal lease—no federal dollars were used for CTGW's personal property. This is the epitome of federal interests in Indian self-sufficiency.

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The structure of the joint venture with GWR also embodies this interest. Key to the joint venture was GWR's expertise and balance sheet, which allowed the Tribe to seek the substantial funding necessary to obtain its personal property. Galanda Decl., Ex. R at 11, 13, 33. With no Tribal tax base, and without substantial waterpark expertise, financing the project would not have been possible had the Tribe gone it alone; the Tribe needed GWR's balance sheet in the minority equity position. *Id.* So, rather than rely on federal funding to develop the project, the Tribe partnered with a reputable company, which agreed to take a minority equity position in the joint venture and the personal property itself. The Tribe's initiative in this regard embodies and epitomizes the federal and Tribal goals of Indian self-determination and the "orderly transition from the Federal domination of programs for, and services to, Indians" to "developing the economies of [its] respective communit[y]." 25 U.S.C. § 450a; 25 C.F.R. § 900.3.

Third, the United States and the Tribe are deeply involved in the production of the entertainment events which take place at the Lodge. The Tribe has built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservation, make purchases, and depart, but instead spend extended periods of time there, enjoying the services that CTGW provides. *Cabazon*, 480 U.S. at 219. The Tribal property at issue generates funds for essential Tribal services and provides employment for Tribal members. *Id.* The Tribe exercises control over the entire administration and the accounting activities of CTGW, as outlined above. Burnett Decl., Ex. A. The Tribe, in other words, is not merely marketing an exemption from state regulations—it is generating value on the Chehalis Reservation through activities the Tribe which it has a substantial interest, and which it controls. *Cabazon*, 480 U.S. at 220.

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Fourth, the United States and the Tribe have very substantial interests in providing well-run entertainment to patrons and in furnishing "comfortable, clean, and attractive facilities." *Id.* at 219. The imposition of a tax on the personal property that allows the Tribe to provide this atmosphere "would burden the tribal enterprise by increasing the total cost" of maintaining the Lodge and "by imposing collection, remittance, and recordkeeping requirements." *Indian Country*, 829 F.2d at 986-87. Although these burdens alone might not serve to displace the tax, they are highly relevant when, as here, "the state's own interest in taxing the on-reservation transaction is minimal." *Id.*

Fifth, the United States and the Tribe have significant interests in advancing the "deeply rooted" federal "policy of leaving Indians free from state jurisdiction and control"—a policy that should control here. *Rice*, 324 U.S. at 789. As discussed above, by operation on the Tribe's trust property, CTGW is subject to strict federal government regulation and control. *See e.g. Kahn v. Arizona State Tax Comm'n*, 411 U.S. 941, 944 (1973). In addition, as also discussed above, providing entertainment and a vacation facility has generally become "important avenue by which the Indian tribes can attempt to salvage a decent life style, and in many instances a subsistence existence." *Id.* As in the situation of a tax on the income of a trading post, *see Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685 (1965), an additional tax on this essential business would indeed "disturb and disarrange the statutory plan Congress set out in order to protect Indians . . . ." *Kahn*, 411 U.S. at 944 (quotation omitted).

Sixth, the United States and the Tribe have significant interests in attaining the "congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *California v. Cabazon Band of Mission*

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Indians, 480 U.S. 202, 216 (1987). Here, any taxes on the CTGW's personal property would necessarily and actually harm the Tribe: taxes would be paid as operational expenses of CTGW and thereby reduce "Available Cash" for distribution to the Tribe "in proportion to [its] respective Proportionate Share." Burnett Decl., Exs. A, C. As explained by Professor Kalt:

> The economic reality is that, per the terms of the LLC ownership agreement, earnings from Great Wolf Lodge are paid proportionately to the majority and minority owners respectively, net of taxes. Thus any levy, regardless of the magnitude of any discount (say, to 49%) that might be offered by the County off the otherwise fully assessed value of the improvements, would be an operational expense paid out of pre-tax revenues. This would reduce net income distributable to the owners and they would both bear their proportionate shares of the County's tax levy. . . . **The economic effect of the tax would then be to reduce directly the amount of monies available to the Chehalis Tribal Government for meeting its responsibilities to its citizens under federal policies of tribal self-determination through tribal self-government.** This can only have a negative effect on the capacity of the Tribal Government to meet the needs of its citizens and maintain the functions necessary to create an environment that promotes societal well-being and sustainable economic activity.

Galanda Decl., Ex. R. (emphasis added). If taxes were imposed on the CTGW's personal property, the Tribe ***would*** be impacted directly. This is not a case in which taxes paid by a non-Indian party or lessor would make a tribe's business relationship less favorable or more expensive. *Cf. Squaxin Island Tribe v. State of Wash.*, 781 F.2d 715, 720 (9th Cir. 1986). Rather, the taxes would ***directly*** reduce Tribal revenue for governmental programs and services.

Seventh, the United States and the Tribe have a significant interest in the promulgation and enforcement of Tribal ordinances that establish and regulate the activities that take place at the Great Wolf Lodge. The Tribe regulates every aspect of the at-issue property. As part of the construction of the Property, the Tribe—not the County—issued electrical, building, and utility permits to every contractor or sub-contractor involved in the project. Burnett Decl., Ex. F. The

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Tribe employed a full-time building inspector to ensure that Tribal Building Code standards were adhered to during construction. *Id.*, Ex. G. Indeed, to that end, the Tribe issued at least one citation for a Tribal Building Code violation. *Id.*

That is because Tribal—not State—land use regulations govern the at-issue property. *See United States v. Big Eagle*, 684 F. Supp. 241, 245 (D.S.D. 1988), *aff'd*, 881 F.2d 539 (8th Cir. 1989) ("As a general rule, Indian tribes have the power to manage the use of their territory and resources by both members and nonmembers.") (quotation omitted). Several Tribal laws dictate how personal property is used and how and where it may be located on the Tribe's trust land. This includes, for example, the Tribe's Flood Damage Prevention Ordinance; Permitting Code; Zoning Ordinance; Natural Hazards Mitigation Plan; Comprehensive Flood Hazard Management Plan; and Comprehensive Emergency Management Plan. Galanda Decl., Ex. R at 27 n.68. Put otherwise, only the Tribe's laws govern the at-issue personal property.

Moreover, outside of the taxes in dispute, no personal property taxes are assessed on the Tribe's trust property because the Tribe does not assess taxes on personal property, as a matter of Tribal law. Burnett Decl., ¶ 22. The Tribe assesses a 3% room and a 3% sales tax on Lodge patrons, to the exclusion of state excise taxes. *Id.* It would be difficult to find any other tribal government who has regulated CTGW's personal property—whether tribally owned or not—as comprehensively as the Chehalis Tribe regulates the Great Wolf Lodge.

In addition, the federal government comprehensively regulates the at-issue property. First, the United States regulates CTGW's personal property through annual inspections. For instance the physical safety of the Lodge is often inspected by the U.S. Department of Health and Human Services' Indian Health Service. *See e.g.* Galanda Decl., Ex. R at 27 n.65. Clearly, the property

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that the state seeks to tax is the subject of ongoing federal inspection and safety regulation. Moreover, the federal government has conferred its public service responsibilities in Indian Country to the Tribe, pursuant to Public Law 93-638. As such, the Tribe in turn provides public services like primary law enforcement to the Great Wolf Lodge, which the Assessor has also attempted to tax vis-à-vis its personal property. *Id.* at 37.

Finally, the United States and the Tribe have significant interests in providing employment for tribal members and the tribal community. CTGW, like all other Tribally-owned enterprises, operates pursuant to Tribal preference employment policies. Burnett Decl., at ¶ 4. Approximately 42 Chehalis Tribal members have been employed there since March of 2008. *Id.*, at ¶ 23.

In sum, the state faces a heavy burden in overcoming the interests of the United States and the Tribe with a showing of legitimate state interests. *Crow Tribe*, 819 F.2d at 901. Even if the State's interests are sufficiently legitimate—as described below, they are not—there is *substantial* evidence that the personal property taxes are not narrowly tailored. *Id.*

2. The Interests of the State Are De Minimis.

The State has minimal interest in "funding the services . . . provided in connection with the activities taking place on the reservation." *Yavapai-Prescott*, 117 F.3d at 1111.

First, the State's tax in not "'directed at off-reservation value.'" *Salt River Pima-Maricopa Indian Cmty. v. State of Ariz.*, 50 F.3d 734, 737 (9th Cir. 1995) (quoting *Colville*, 447 U.S. at 157). Clearly, any value created by CTGW's personal property is on-reservation value. CTGW's sole purpose for existence is to create on-reservation value:

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> The Company is organized to (i) lease the Land under the Lease, develop the Project on the Land and own, hold, operate, maintain, repair, improve, renovate, sell, finance, refinance and otherwise use or deal with the Project, the other Improvements, the Personal Property and the Company's leasehold interest in the Land; (ii) acquire interests in additional parcels of land to the extent expressly contemplated elsewhere in this Agreement and own, hold, operate, maintain, repair, improve, finance, refinance and otherwise use or deal with such land and the improvements and personalty situated therein or used or useful in connection therewith, (iii) borrow money (on a secured or unsecured basis) in furtherance of the business of the Company, including, without limitation, the issuance of promissory notes or other evidences of indebtedness in connection therewith and the securing of the same by mortgages; and (iv) do any and all other acts or things which may be incidental or necessary to carryon the business of the Company as herein contemplated and as may be lawful. The Company shall not engage in any other business, or acquire any assets not related or incidental to the conduct of the foregoing business, without the unanimous vote of the Members. The Company shall not engage in any business on non-trust land without the unanimous vote of the Members.

Burnett Decl., Ex. A.

Second, CTGW is not "'the recipient of'" the type of "'state services'" that weigh in the State's favor. *Salt River*, 50 F.3d at 737 (quoting *Colville*, 447 U.S. at 157). While the Tribe concedes that, in general, State tax revenue "helps fund various services used by tribal members," the State's "general interest in revenue collection" to fund these services is insufficient to outweigh the more "**specific** federal and tribal interests" that apply here. *Hoopa Valley*, 881 F.2d at 660 (emphasis added). CTGW does no business in Washington State outside Chehalis Indian country, specifically the Land. The State and County do not even serve CTGW itself. At most, CTGW indirectly benefits from the services provided to its customers and employees—*i.e.* "road, law enforcement, welfare, and health care services that benefit both tribal and non-tribal members." *Id.* But when, as here, the services provided by the state and county are provided to all residents, the connection to the at-issue personal property is neither direct nor

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specific enough to add much weight to the State's side of the scale. *Id.*; *see also Gila River*, 967 F.2d at 1412 (same); Sean Flavin, et al., *Personal Property*, 1 Tax. Cal. Prop. § 5:5 (4th ed., 2014) (a "state's general interest in revenue collection" is "insufficient to outweigh" a tribe's "specific federal and tribal interests") (quotation omitted); Larry Ecohawk, *Balancing State and Tribal Power to Tax in Indian Country*, J. Multistate Tax'n & Incentives, Jan. 2005, *available at* 2005 WL 165516, at *11 ("[I]n order to justify the imposition of a state tax, state services must bear some relationship to the activity being taxed. . . . [S]tate taxation of on-reservation activity will require state regulatory conduct or substantial state services relating to the taxed transactions in order to avoid federal preemption.") (quotation omitted).

Finally, the Tribe is not attempting to "market an exemption from state taxation to persons who would normally do their business elsewhere." *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1191 (9th Cir. 2008) (quoting *Colville*, 447 U.S. at 155). There are hotels and conference centers in every jurisdiction in the state, and a larger waterpark just sixty miles up the freeway. The Tribe is not marketing an exception to anybody.

C. The Assessed Taxes Are Explicitly Preempted by Federal Law.

Title 25 U.S.C. § 465 explicitly exempts Indian trust land from state and local taxation. What is more, in *Mescalero*, it was held that Section 465 explicitly exempts not only tribal land from state and local taxation, but any tax that the court deems to be an equivalent to a tax on land, **including any "permanent improvements" thereon**. 411 U.S. at 158. This is the case regardless of how the state characterizes those improvements—**the issue must be determined in reference to federal law**. *See Drye v. United States*, 528 U.S. 49, 52-53 (1999) (federal law, not state law, defines "property and rights to property" for purposes of a federal tax statute); *Van*

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Mechelen, 2009 WL 979712, at *16 ("There is no question that Federal law controls the right of states to tax Indians and activities in Indian country. . . . There are no Washington State statutes that control taxation of Indians in Indian country; Federal law controls the taxation of Indians in Indian country."). The Assessor's determination of what constitutes a "permanent improvement" under the broader state law definition was in error.[10]

Under **federal law**, there is no one definition of a "permanent improvement" for taxation purposes. *PPL Corp. v. C.I.R.*, 135 T.C. 176, 193 (U.S. Tax Ct. 2010). Instead, courts look to six factors, the "primary focus" of which "is the question of the permanence of depreciable property and the damage caused to it or to realty upon removal of the depreciable property." *Id.* (quoting *Trentadue v. C.I.R.*, 128 T.C. 91, 99 (U.S. Tax Ct. 2007)). These factors are as follows:

- "Is the property capable of being moved, and has it in fact been moved?" *Whiteco Industries Inc. v. Commissioner of Internal Revenue*, 65 T.C. 664, 672 (U.S. Tax Ct. 1975); *see also Consolidated Freightways, Inc. v. C.I.R.*, 708 F.2d 1385 (9th Cir. 1983) (abandoning appearance tests to determine whether a structure qualifies as a permanent improvement and adopting the functional test of *Whiteco*).
- "Is the property designed or constructed to remain permanently in place?" *Whiteco*, 65 T.C. at 672.
- "Are there circumstances which tend to show the expected or intended length of affixation, i.e., are there circumstances which show that the property may or will have to be moved?" *Id.*

[10] Under state law, "personal property" includes numerous properties that would constitute a "permanent improvement" under Federal law. The State's definition includes:

> all goods, chattels, stocks, estates or moneys; all standing timber held or owned separately from the ownership of the land on which it may stand; all fish trap, pound net, reef net, set net and drag seine fishing locations; all leases of real property and leasehold interests therein for a term less than the life of the holder; all improvements upon lands the fee of which is still vested in the United States, or in the state of Washington; all gas and water mains and pipes laid in roads, streets or alleys; and all property of whatsoever kind, name, nature and description, which the law may define or the courts interpret, declare and hold to be personal property for the purpose of taxation and as being subject to the laws and under the jurisdiction of the courts of this state, whether the same be any marine craft, as ships and vessels, or other property holden under the laws and jurisdiction of the courts of this state, be the same at home or abroad . . . .

Wash. Rev. Code § 84.04.080.

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- "How substantial a job is removal of the property and how time-consuming is it? Is it 'readily removable'?" *Id.* at 673.
- "How much damage will the property sustain upon its removal?" *Id.*
- "What is the manner of affixation of the property to the land?" *Id.*

Here, the Assessor improperly applied the state's broad definition of "personal property," which included permanent improvements not subject to taxation per 25 U.S.C. § 465. At minimum, the following permanent improvements are not subject to personal property taxation under the *Whiteco* factors used in federal law:

- Lobby – large decor and decorative items, clock tower, MagiQuest stations, phone system, specialized structures, lighting and chandeliers;
- Guest Rooms – cabin structures;
- Conference Center – lighting, sound systems, phone system;
- Spa – manicure stations and chairs, pedicure chairs, lockers, specialized lighting, phone system;
- Fitness Room – lockers, sound system, phone system;
- Retail Stores – sound system, specialized lighting, phone system;
- Restaurant & Bar – special structures, special lighting, phone system, sound system;
- Kitchen – ovens, walk-in coolers, food holding devices, counters;
- Ice Cream Shops – walk-in freezers/coolers;
- Arcade – wall-imbedded computer equipment of various types, sound systems;
- Children's Activity Area – shelving units, some play equipment, phone system, sound system;
- Pool Area and Water Park – lockers, water slides and climb-on structures, fountains, decretive structures, specialized lighting, sound system;
- Grounds – compaction equipment, attached benches and tables.

Galanda Decl., Ex. L.

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While on their own many of these improvements *may* be properly classified as personal property, "it is the manner in which they are combined and/or affixed in the ground that changes their classification from personal to 'real property.'" *Trentadue*, 128 T.C. at 105. Thus, in *Trentadue*, for example, the U.S. Tax Court found that a drip irrigation system, composed of pipe, tubing and emitters, risers, and other assorted hardware, was a permanent improvement. *See also id.* at 106 (well boring and casing deemed permanent improvement). Likewise, in *PDV America, Inc. & Subsidiaries v. C.I.R.*, it was held that aboveground fuel storage tanks are permanent improvements. T.C. Memo. 2004-118, 2004 WL 1059518 (U.S. Tax Ct. 2004). Other cases have concluded similarly. *See e.g. Munford, Inc. v. C.I.R.*, 849 F.2d 1398 (11th Cir. 1988) (refrigerated storage not personal property); *Hospital Corporation of America & Subsidiaries v. C.I.R.*, 109 T.C. 21, 84-85 (U.S. Tax Ct. 1997) (overhead lighting not personal property); *id.* at 88 (soap dispensers, mirrors, towel racks, grab bars, toilet paper holders, bathrobe hooks, shower curtain rods, and toiletry shelves not personal property).

Here, the manner in which the above property is used by CTGW, as well as the physical characteristics of the property, render the above properties "permanent" and thus preempted from the assessment of the County's personal property tax. These personal properties are combined and/or affixed to the Lodge in such a manner that their classification has been changed from personal to nontaxable "real property" under to federal law. *Trentadue*, 128 T.C. at 105. Indeed, 26 C.F.R. § 1.48-1(e)(2) explicitly names "electric wiring and lighting fixtures" as examples of permanent improvements. The Assessor erred by attempting to tax this property, which, under **federal law**, constitutes permanent improvements.

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D. The Assessed Taxes Are Preempted By The Tribe's Inherent Right To Make Its Own Laws And Be Ruled By Them.

Although "courts now focus primarily on traditional federal preemption with inherent sovereignty serving as a 'backdrop,'" tribal inherent sovereignty still stands as an independent barrier to state taxation. Joel H. Mack & Gwyn G. Timms, *Cooperative Agreements: Government-to-Government Relations to Foster Reservation Business Development*, 20 PEPP. L. REV. 1295, 1300 (1993); *see e.g. Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980) (relegating inherent sovereignty preemption as a backdrop of federal preemption); *White Earth Band of Chippewa Indians v. Alexander*, 683 F.2d 1129, 1137-38 (8th Cir. 1982) ("[I]nherent sovereignty is 'only' a backdrop in determining whether there has been federal preemption . . . .") (quoting *Bracker*, 448 U.S. at 143); *Mescalero*, 462 U.S. at 334 n.16 ("The exercise of State authority may also be barred by an independent barrier—inherent tribal sovereignty — if it unlawfully infringes on the right of reservation Indians to make their own laws and be ruled by them.") (quotation omitted).

In *Crow Tribe*, for example, the Ninth Circuit held that imposing the State of Montana's coal taxes on coal mined on Indian personalty impermissibly infringed on the tribal sovereignty of the Crow Indians. 819 F.2d at 896. The Court expressly noted that "[t]ribal sovereignty contains a significant geographic component, and tribes have the power to manage the use of their territory and resources by both members and nonmembers." *Id.* Thus, for example, "[t]axing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation is not permissible absent congressional consent." *Id.* Ultimately, the Ninth Circuit concluded that "the Montana tax is invalid because it erodes the Tribe's

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sovereign authority." *Id*. at 903; *see also id.* (noting that "Montana taxes mineral resources that are a component of the reservation itself.") (quotation omitted).

Here, similar to *Crow Tribe*, the County is imposing a tax on something that is "essentially a part of the lands." *Rickert*, 188 U.S. at 442. Under Chehalis law, personal property located on the Chehalis Reservation is not taxable. Burnett Decl. at ¶ 22. Allowing the County to tax the Tribe's personal property would frustrate Tribal law, and would "infringe unlawfully 'on the right of reservation Indians to make their own laws and be ruled by them.'" *Crow Tribe*, 819 F.2d at 902. The County's tax, in other words, "is invalid because it erodes the Tribe's sovereign authority." *Id*. at 903. The Assessor's contention otherwise must be rejected.

IV. CONCLUSION

From 2010 to 2014, the Assessor has improperly imposed taxes upon the Petitioners' exempt personal property. Because CTGW is an arm of the Tribe, the Assessor is categorically barred from assessing any tax upon its personal property because it "interferes [and] is incompatible with federal and tribal interests reflected in federal law." *Mescalero*, 462 U.S. at 334. In addition, federal law explicitly exempts "permanent improvements" on Indian trust land, as defined by federal—not state—law. Finally, the assessed taxes are preempted by the Tribe's the inherent right to make its own laws and be ruled by them.

In all, just as the State of Washington and United States trial and appellate courts have rejected the County's attempts to tax CTGW or the Lodge, the Assessor's improper imposition

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of taxes upon exempt Petitioners' personal property must also be overruled.

Signed this 14th day of August, 2014.

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CERTIFICATE OF SERVICE

I, Molly A. Jones, say:

1. I am now, and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of 18 years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

2. Today, August 14, 2014, I caused the following documents to be served on the parties listed below via email and via Federal Express:

Opening Brief

Declaration of David Burnett

Declaration of Gabriel S. Galanda

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DATED this 14th day of August, 2014.

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