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BEFORE THE BOARD OF EQUALIZATION
FOR THURSTON COUNTY

8 CTGW, LLC,

9 Petitioner,

10 v.

11 PATRICIA COSTELLO, THURSTON
12 COUNTY ASSESSOR,

13 Respondent.

Parcel Nos. 99740331400; 99002085874
All Assessment Years

CONFEDERATED TRIBES OF THE
CHEHALIS RESERVATION'S
MOTION FOR LEAVE TO
INTERVENE AND MEMORANDUM
IN SUPPORT THEREOF

14 **I. INTRODUCTION**

15 The Confederated Tribes of the Chehalis Reservation ("Tribe") seeks leave to intervene
16 in this proceeding. As the petitioner on every Taxpayer Petition at issue in this matter, the
17 Tribe is already a party. But based on communications from the Board of Equalization
18 ("Board"), it appears the Board may erroneously believe the Tribe is not a party to this action.
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20 Nonetheless, the Tribe has particularized interests that cannot be fully represented by
21 CTGW, LLC ("CTGW"). The Tribe is a lessor in a property lease to CTGW, the majority
22 owner of CTGW, and a government that provides services to CTGW. These particularized
23 interests will be exposed to harm if the Board rules against CTGW in this proceeding.
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1 Accordingly, in order to represent the Tribe's particularized interests, the Tribe asks the Board
2 to either formally recognize it as a party to this matter or allow it to intervene.

3 **II. RELIEF REQUESTED**

4 The Tribe respectfully requests that the Board either (1) formally recognize it as a party
5 to this matter, or (2) grant the Tribe leave to intervene in this proceeding.

6 **III. STANDARD FOR INTERVENTION**

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8 State law does not provide express standards for parties seeking to intervene in
9 proceedings before county Boards of Equalization. The State's Administrative Procedure Act
10 ("APA"), however, does allow a presiding officer to grant a petition for intervention at any
11 time, upon determining that the petitioner qualifies as an intervener under any provision of law
12 and that the intervention sought is in the interests of justice and will not impair the orderly and
13 prompt conduct of the proceedings. RCW 34.05.443; *see also Columbia Gorge Audubon Soc'y*
14 *v. Klickitat Cnty.*, 989 P.2d 1260, 1263 (Wash. Ct. App. 1999) ("RCW 34.05 provides for
15 intervention by interested parties in proceedings seeking judicial review of administrative
16 actions."). Civil Rule 24(a) also allows intervention when someone claims an interest relating
17 to the property that is the subject of the action, and "is so situated that the disposition of the
18 action may as a practical matter impair or impede his ability to protect that interest, unless the
19 applicant's interest is adequately represented by existing parties." CR 24(a). "[T]he
20 requirements of CR 24(a) are liberally construed to favor intervention." *Columbia Gorge*
21 *Audubon Soc'y*, 989 P.2d at 1263 (citing *Fritz v. Gorton*, 509 P.2d 83 (1973)). "CR 24(a)
22 allows intervention as of right *unless* it would work a hardship on one of the original parties."
23 *Id.* (citing *Loveless v. Yantis*, 513 P.2d 1023 (1973)) (emphasis in original).
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IV. FACTS SUPPORTING INTERVENTION

The Tribe has filed Taxpayer Petitions challenging the County's taxes every year since 2007. *See* September 29, 2014, BOE Agenda. Starting in 2009, the Tribe and CTGW filed two Taxpayer Petitions each year for parcels 99740331400 and 99002085874. *Id.*

The Tribe, along with Great Wolf Resorts Inc. ("GW"), is a member of the joint venture limited liability company, CTGW, which was formed for the purpose of building and owning the Great Wolf Lodge Grand Mound ("Lodge").¹ The Tribe leases property to CTGW, property that is held in trust by the United States for the benefit of the Tribe.² The Tribe provides all governmental services to the Lodge, either directly or by contract.³

Under the LLC Agreement, the Tribe has a majority "proportionate share" of CTGW profits — while the Tribe possesses a 51% share, and GW possesses a mere 49% share.⁴ The LLC Agreement secures to the Tribe the significant rights to, among other things, approve or disapprove: (1) the construction budget and modifications; (2) the general contractor and architect; (3) operating and capital improvement budgets; and (4) with specified exceptions⁵, GW's decision to sell, assign or otherwise transfer CTGW's interest under the Lease or any portion of the project.⁶ The LLC Agreement prohibits members from partitioning any asset owned by CTGW.⁷

22 ¹ Declaration of David Burnett in Support of Motion to Intervene ("Burnett Decl.") at ¶ 2.

23 ² Burnett Decl., Exhibit A ("Lease").

24 ³ Burnett Decl., ¶ 4.

25 ⁴ Burnett Decl., ¶ 3.

⁵ The exceptions involve security for specified borrowing and mortgage financing to refinance the construction loan or other permanent loan. Burnett Decl. at ¶ 3.

⁶ Burnett Decl., ¶ 3.

⁷ Burnett Decl., ¶ 3.

1 The U.S. Department of the Interior agreed to approve minimal annual rent of \$1.00
2 only because the Lodge maximized achievement of the Tribe's key sovereign objectives: i.e.,
3 economic diversification for the good of the members, and training and employment of
4 Chehalis tribal members to increase their capacity to participate in and contribute to the local
5 economy for the betterment of the Chehalis people.⁸

6 The Tribe is economically disadvantaged by the tax on CTGW, even if the tax is
7 limited to a 49% "ownership" of GW.⁹ Without doubt, the incidence of any taxation will
8 disproportionately fall upon the Tribe in excess of its 51% interest.¹⁰ First, due to the financial
9 structure of the equity, certain portions of the project's equity are deemed preferred and payable
10 to GW to a significant degree before profit.¹¹ In addition, GW receives revenue, based on
11 gross receipts, before equity from its management and licensing its brand.¹² Thus, the County's
12 tax will reduce the net revenues available to the Tribe.¹³ As a result of the fees and preferred
13 payments to GW, the reduction in profit will fall more heavily upon the Tribe than GW and the
14 incidence of taxation will be passed to the Tribe and its members.¹⁴

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17 **V. ANALYSIS**

18 **A. The Tribe Is Already A Party.**

19 Regarding parcel number 99002085874,¹⁵ the Tribe has filed every petition that is
20 before the Board. The petitioners on each petition are:

21 ⁸ Burnett Decl. at ¶ 5-6.

22 ⁹ Burnett Decl. at ¶ 7.

23 ¹⁰ *Id.*

24 ¹¹ *Id.*

25 ¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Parcel number 99002085874 is the only parcel truly at issue since the Ninth Circuit Court of Appeals struck down the County's taxes on parcel number 99740331400.

1 09-1559 (no petitioner named; executed by Chehalis Chairman David Burnett)
2 10-1232 CTGW, LLC; Confederated Tribes of the Chehalis Reservation
3 11-0778 CTGW, LLC; Confederated Tribes of the Chehalis Reservation
4 12-0894 CTGW, LLC; Confederated Tribes of the Chehalis Reservation
5 13-0607 CTGW, LLC; Confederated Tribes of the Chehalis Reservation

6 If the County believes the Tribe is not a proper party, the appropriate mechanism was to
7 request that the Board dismiss the Tribe as a petitioner. The County has never filed such a
8 motion.

9
10 RCW 84.40.038 dictates that the owner or person responsible for payment of taxes on any
11 property has standing to bring a petition like that before the Board. *See Royal Skies Investors*
12 *Ltd. Partnership v. Schwab*, 1996 WL 509547, *5 (Wash. Ct. App. 1996) (“persons with a
13 financial interest in a given parcel of property may challenge the tax assessment of that
14 property”); *State ex rel. Weyerhaeuser Timber Co. v. State Tax Com’n*, 189 Wash. 56, 58
15 (1937) (a “grievance must relate to an interest that is direct and of immediate pecuniary kind in
16 the subject matter”). First, because the County has not clearly explained what it intends to tax
17 through parcel number 99002085874, the Tribe believes it is the owner or real party in
18 interest—let alone the payor of taxes—on any property targeted under such parcel. Second, the
19 Tribe would be responsible for payment of taxes if they were not illegal. Finally, the Tribe will
20 suffer the kind of direct and immediate pecuniary harm required in *Weyerhaeuser*, 189 Wash.
21 56, if the County’s illegal taxes are paid.

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1 **B. Alternatively, The Tribe Should Be Allowed To Intervene.**

2 As noted above, the APA allows intervention when a party “qualifies as an intervenor
3 under any provision of law and that the intervention sought is in the interests of justice and will
4 not impair the orderly and prompt conduct of the proceedings.” RCW 34.05.443. Civil Rule
5 24(a) also allows intervention when “when the applicant claims an interest relating to the
6 property or transaction which is the subject of the action and he is so situated that the
7 disposition of the action may as a practical matter impair or impede his ability to protect that
8 interest, unless the applicants interest is adequately represented by existing parties.”
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10 The Board should grant the Tribe leave to intervene. The Tribe has a particularized
11 interest in the personal property that is the subject of the action. *See* CR 24(a). The Tribe has
12 an interest: (1) as the lessor under a federally-approved Lease that is an integral part of an
13 overall economic development joint venture intended to benefit Tribal governmental interests,
14 which will be harmed by the County’s tax; (2) as majority owner of CTGW; (3) as a
15 government that is less able to provide services and jobs because of the tax; and (4) as the
16 entity that can fully assert a federally-protected right to tax immunity. These interests are
17 distinct from the interests of CTGW. Accordingly, CTGW cannot adequately represent the
18 Tribe’s interests.
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20 The Tribe is situated such that the Board’s disposition of this action could, as a practical
21 matter, impair or impede its ability to protect its interest. *See* CR 24(a). If the Board rules in
22 favor of the tax, the Tribe will bear significant burdens when the County attempts to enforce
23 the tax. Because of the financial structure, the tax will fall disproportionately upon the Tribe,
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1 in excess of its 51% interest.¹⁶ Additionally, if the County places a lien on 49% of the personal
2 property, and sells the personal property at public auction, it will significantly impact the
3 operation of the Lodge. The effect would be an unraveling of (1) the federally-approved
4 Lease, (2) the LLC Agreement, and (3) the Tribe's economic development project.

5 In short, the fact that CTGW is 51% tribally owned is dispositive — CTGW is an “arm-
6 of-the-tribe” that is not taxable. *Uniband, Inc. v. C.I.R.*, 140 T.C. 230, 252 (U.S. Tax Ct.
7 2013); *see also Pourier v. South Dakota Dept. of Revenue*, 658 N.W.2d 395, 403 (S.D. 2003),
8 *aff'd in relevant part and rev'd in part on other grounds on reh'g*, 674 N.W.2d 314 (S.D.
9 2004) (“If the legal incidence of a tax falls upon a Tribe or its members . . . the tax is
10 unenforceable.”); *Auto-Owners Ins. Co. v. Tribal Court of Spirit Lake Indian Reservation*, 495
11 F.3d 1017, 1021 (8th Cir. 2007) (tribal “sub-entit[ies]” are to be “considered a part of the
12 Indian tribe”); 25 C.F.R. § 103.25(b) (“[A] business entity or tribal enterprise must be at least
13 51 percent owned by Indians.”); 25 C.F.R. § 273.2(e) (defining an Indian “economic
14 enterprise” as “any commercial, industrial, agricultural, or business activity that is at least 51
15 percent Indian owned”); Wash. Admin. Code § 458-20-192(5)(d) (“[E]ntities comprised solely
16 of enrolled members of a tribe are not subject to tax on business conducted in Indian country. .
17 . . [T]he business will be considered as satisfying the ‘comprised solely’ criteria if at least half
18 of the owners are enrolled members of the tribe.”).

19 The fact that the Tribe decided to incorporate CTGW under Delaware State law is
20 irrelevant. *See Confederated Tribes of Chehalis Reservation v. Thurston County Bd. of*
21 *Equalization*, 724 F.3d 1153 (9th Cir. 2013) (“the question of tax immunity cannot be made to
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25 ¹⁶ Burnett Decl. at ¶ 7

1 turn on the particular form in which the Tribe chooses to conduct its business”) (quoting
2 *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 158 (1973)); *see also e.g. Eastern Navajo*
3 *Industries, Inc. v. Bureau of Revenue*, 552 P.2d 805 (N.M. Ct. App.), *cert. denied*, 558 P.2d
4 619 (1976), *cert. denied*, 430 U.S. 459 (1977) (state-chartered corporation 51% owned by the
5 Tribe is a nontaxable “arm of the tribe”); *Pourier*, 658 N.W.2d at 404 (same); *Flat Center*
6 *Farms, Inc. v. State Dept. of Revenue*, 49 P.3d 578, 580 (Mont. 2002) (same).

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8 The interests of justice will be furthered by allowing the Tribe to intervene in the
9 proceedings. *See* RCW 34.05.443. As discussed above, the Tribe has interests that are not
10 adequately represented by CTGW. These interests stand to be substantially harmed if the Tribe
11 cannot participate in this proceeding. Therefore, it is in the interest of justice to allow the Tribe
12 to participate in the proceeding.

13 Finally, allowing the Tribe to intervene in this proceeding will not impair the orderly
14 and prompt conduct of the proceedings. *See* RCW 34.05.443. Counsel for the Tribe is
15 available to appear at the September 29, 2014, hearing without further actions. The proceeding
16 will not be impacted if the Tribe is allowed to intervene.

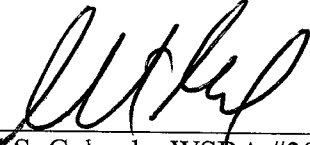
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18 Case law also supports intervention. In *In re Estate of Duxbury*, for example, Division
19 2 of the Washington State Court of Appeals held that where, as here, a government is
20 potentially aggrieved by a third party, that government “always retains the right to intervene.”
21 304 P.3d 480, 485 (Wash. Ct. App. 2013). Outside of the realm of government, generally, a
22 majority interest holder that has a “direct and substantial” impact on a corporation is generally
23 allowed to intervene. *Asbury Glen/Summit Ltd. P'ship v. Se. Mortgage Co.*, 776 F. Supp. 1093,
24 1095 (W.D.N.C. 1991); *see also SEC v. Hollinger Int'l, Inc.*, No. 04-0336, 2004 WL 422729, at
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1 *3 (N.D. Ill. Mar. 2, 2004) (allowing for a parent corporation, as a majority shareholder, to
2 intervene); *276-8 Pizza Corp. v. Free*, 118 A.D.3d 591 (2014) (corporation's co-president and
3 majority shareholder established permitted to intervene). Clearly, intervention is warranted
4 here.

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6 **VI. CONCLUSION**

7 For the reasons described above, the Board should acknowledge that the Tribe is
8 already a party to this proceeding because it filed the petitions initiating this matter. In the
9 alternative, the Board should grant the Tribe leave to intervene in this proceeding.

10 Signed this 1st day of August, 2014.

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12 _____
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24 the Chehalis Reservation and CTGW, LLC
25

1 **CERTIFICATE OF SERVICE**

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3 I, Molly A. Jones, say:

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

7 2. On August 1, 2014, I delivered a copy of the foregoing documents, via
8 email and U.S. Mail to:

9

10 Ruth Elder
11 2000 Lakeridge Drive SW
12 Olympia, WA 98502-6045
elder@co.thurston.wa.us

and via email to:

13

14 Jane Futtermann
Futterj@co.thurston.wa.us

15

16 Scott C. Cushing
cushins@co.thurston.wa.us

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18 DATED this 1st day of August, 2014.

19

20 
21 Molly A Jones