UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AGUA CALIENTE BAND OF CAHUILLA INDIANS,

Plaintiff,

v.

RIVERSIDE COUNTY, et al.,

Defendants, and

v.

DESERT WATER AGENCY

Defendant-Intervenor.

Case No.: ED CV 14-0007-DMG (DTBx)

ORDER RE PARTIES' MOTIONS FOR SUMMARY JUDGMENT [144, 149, 150]

Currently before the Court are three cross-motions for summary judgment:

1. Plaintiff Agua Caliente Band of Cahuilla Indians' ("Agua Caliente" or the "Tribe") Motion for Summary Judgment ("Tribe MSJ") [Doc. # 144];
2. Defendants Riverside County (the "County"), Larry W. Ward, Paul Angulo, and Don Kent's, in their official capacities as County Assessor, County Auditor-Controller, and County Treasurer-Tax Collector, respectively, (collectively, the

"County Defendants") Cross-Motion for Summary Judgment ("County MSJ") [Doc. # 150]; and

3. Defendant-Intervenor Desert Water Agency's ("DWA") Motion for Summary Judgment ("DWA MSJ") [Doc. # 149].

The central issue presented in these motions is the propriety, under federal law, of a possessory interest tax ("PIT") assessed by the County and imposed on non-Indian lessees who use and occupy Indian trust land within the Agua Caliente Indian Reservation. Having duly considered the more fully developed factual record and for the reasons set forth below, the Court **GRANTS** the County and DWA MSJs and **DENIES** the Tribe MSJ, and therefore upholds the PIT.

I.

PROCEDURAL BACKGROUND

On January 2, 2014, Agua Caliente filed a Complaint against the County Defendants alleging unlawful taxation in connection with the PIT. [Doc. # 1.] The Tribe seeks "(1) a declaration that the assessment and collection of taxes on lessees' possessory interest in lands and permanent improvements on lands held in trust by the United States for the benefit of the Tribe and its members are unlawful[;] and (2) an injunction against the County's future assessment or collection of these . . . taxes." Complaint at ¶ 4.

To date, several motions have been filed in this suit. On February 18, 2014, DWA filed a motion to intervene as a defendant in the Tribe's suit, which the Court granted on April 21, 2014. [Doc. ## 17, 34.] On July 28, 2014, DWA and the County Defendants (collectively, "Defendants") filed a Motion for Judgment on the Pleadings ("MJP") as to the Tribe's action against the County, but not as to any claims against DWA. [Doc. # 42.] On August 27, 2014, the Court ordered supplemental briefing on issues raised for the first time in Defendants' reply, namely that 25 C.F.R. section 162.017(c) is invalid because it exceeds the authority of the Bureau of Indian Affairs ("BIA"), and that section 162.017(c) does not preempt the County's PIT because the regulation states that it is "subject to applicable federal law." [Doc. # 46.] Through 2015, the parties filed

supplemental briefs, and *amici* filed briefs in opposition to the MJP. [Doc. ## 49–50, 55–56, 77, 110–12.] In April 2015, Agua Caliente moved to voluntarily dismiss claims against the DWA as to the DWA's *ad valorem* tax, groundwater replenishment fee, and water service charge. [Doc. # 99.]

On June 29, 2015, the Court granted the Tribe's motion for partial voluntary dismissal [Doc. # 107], and the Court denied the MJP on February 8, 2016 ("MJP Order") [Doc. # 118]. In the MJP Order, the Court applied the *Bracker*[1] balancing test solely to the facts alleged in the Complaint, and concluded that federal law preempted the County's PIT. MJP Order at 17–22. On July 20, 2016, in anticipation of this action's summary judgment stage, the United States filed an *amicus* brief to clarify the Department of the Interior's (the "Interior") interpretation of section 162.017(c). [Doc. # 142.]

The MSJs followed. The Court held a hearing on May 12, 2017, in which the Court invited clarification on the Tribe's land ownership—how much of the reservation land at issue consists of trust lands versus allotted land. The parties submitted a joint supplemental brief ("Jt. Suppl. Br.") on May 16, 2017. [Doc. # 161.]

II.
FACTUAL BACKGROUND

The Court sets forth the following uncontroverted material facts.[2]

A. The Reservation and Leased Lands

Agua Caliente is a federally recognized Indian tribe, and the Agua Caliente Indian Reservation (the "Reservation") is located within the exterior geographic boundaries of

[1] *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

[2] Agua Caliente and DWA lodged objections to each other's and the County's factual assertions. [*See* Doc. # 149-3; 153-1 at 32–33, 74–76.] Insofar as the Court does not consider the challenged assertions, the objections are **OVERRULED** as moot. Otherwise, the Court resolves the objections individually, when the factual assertions are cited herein. Similarly, DWA asks that the Court take judicial notice of two public records submitted in support of the DWA MSJ. [Doc. ## 149-6, 149-7.] Because the Court need not consider the records in deciding the motions, the request is **DENIED**.

the County. SUF at ¶¶ 1–2.[3] In 1876, President Grant established the Reservation by executive order, and President Hayes expanded the Reservation in 1877. County SUF at ¶¶ 17–18.[4] The Reservation now comprises over 31,000 acres of land. SUF at ¶ 3. The Reservation spreads in a "checkerboard" pattern across Palm Springs, Cathedral City, and Rancho Mirage, and extends to unincorporated areas outside those cities' limits. County SUF at ¶¶ 16, 27, 40.

The United States holds in trust some—12.7% as of 2014—of the Reservation's land for the benefit of Agua Caliente and its members (the "Trust Land"). SUF at ¶ 4; Jt. Suppl. Br. at 2. The Tribe exercises jurisdiction over the Trust Land, and has enacted many codes and ordinances that regulate the use and possession of that land. *Id.* at ¶ 6. Subject to federal law, the Tribe and its members lease certain parcels of Trust Land for commercial development and other purposes. *See id.* at ¶¶ 11–13. There are approximately 20,000 master leases, mini-master leases, subleases, and sub-subleases for the use and occupancy of Trust Land. *Id.* at ¶ 14. The leases include two large residential projects (which include residential units that are each leased separately), a post office, a utility site, and billboards. Davis Depo. at 17:11–19:24 [Doc. # 150-14]; *see also* County SUF at ¶ 13 ("[The] Tribe leases out approximately 14.75 acres of tribal land under four commercial leases and two residential leases.").

Tribal employees within the real estate division review residential leases on Trust Land for compliance with federal regulations and then submit the leases to the Bureau of

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[3] The parties have submitted supporting and responsive Statements of Undisputed Facts in connection with their respective MSJs. [Doc. ## 145, 149-2, 150-1, 150-2, 153-1.] The Court cites to Agua Caliente's responsive submission ("SUF") [Doc. # 153-1] because it comprehensively presents all parties' factual assertions and responses, disputed or otherwise.

[4] The County presented its separate SUF with a renumbered list of factual assertions (beginning with ¶ 1), rather than a continued list (beginning with ¶ 102, to follow DWA's earlier-filed separate SUF that is numbered ¶¶ 70–101). [*See* Doc. ## 149-2 at 26; 150-1; 153-1 at 31, 54.] To avoid confusion due to overlapping paragraph numbers, the Court references the County's separate factual assertions, which are included in Agua Caliente's comprehensive filing [Doc. # 153-1], with the label "County SUF."

Indian Affairs ("BIA") for approval.[5] Medina Depo. at 8:1–21, 9:16–10:19 [Doc. # 150-13]. Regulations include environmental regulations, land use, zoning, and related services. County SUF at ¶ 14. Some of the leased parcels of Trust Land include permanent improvements, many of which the Indian lessor owns outright or includes a reversionary interest that will vest in the Indian lessor upon the lease's expiration. SUF at ¶¶ 15–16. The income derived from Trust Land leases funds Agua Caliente's government and its provision of governmental services. *Id.* at ¶ 17.

The Tribe also owns and extends master leases on allotted land, which is land that the United States owns in trust for the individual allottee's—not the Tribe's—benefit. Jt. Suppl. Br. at 2; Medina Depo. at 12:20–22; Davis Depo. at 17:5–7, 29:13–30:7. In fact, the majority of Reservation land that is leased—58% in 2014—consists of allotted land. County SUF at ¶¶ 13, 22; Jt. Suppl. Br. at 2; *see also* Exhibit L to MacLean Decl. at 23–26 (maps of the Reservation that distinguish tribal leased land from allotted and non-leased land, allotted and leased land, tribal and non-leased land, and land owned in fee) [Doc. # 150-15]. While individual Tribe members who own allotted land receive revenue from leases on that land, the Tribe does not receive any funds from lease payments paid to allottees. *See* Davis Depo. at 25:6–8. Tribal employees review the residential leases on allotted lands as they do with leases on Trust Land, but they do so as a BIA function and do not share with the Tribe any information related to residential leases on allotted land. Medina Depo. at 12:20–13:19. The Tribe is thus unaware of the identities of the lessees of allotted land. Medina Depo. at 13:9–12, 13:16–19, 15:6–9, 19:5–9; Davis Depo. at 24:5–18.

[5] As will be discussed in more detail below, the BIA is an agency within the U.S. Department of the Interior (the executive department charged with, *inter alia*, managing and administering Indian reservation lands) that oversees programs, activities, and operations related to Indian lands and affairs. 25 U.S.C. § 2.

B. The Possessory Interest Tax

The County PIT is a 1% state tax on the "full cash value" of a lessee's interest in the leased property. SUF at ¶¶ 18, 70; Cal. Rev. & T. Code § 107.1. The County assesses the tax on the non-Indian lessees as a "general revenue" tax. SUF at ¶¶ 19–22. The lessee must pay the PIT regardless of whether the lessee takes advantage of the services the PIT funds. *Id.* at ¶¶ 22, 40. If the lessee fails to pay the PIT, neither the Tribe nor its members are held liable for payment, nor does the unpaid tax become a lien or other charge upon the Trust Land. *Id.* at ¶ 101. Because of the County's PIT, the Tribe has refrained from imposing its own PIT on lessees. *Id.* at ¶¶ 25–26.

Although the County levies the tax against the non-Indian lessee, and not the Tribe, the Tribe paid the PIT as a sublessee of allotted land during a period of time from 2006 to 2012. Davis Depo. at 25:12–26:8 (general payment of PIT), 27:12–21 (same), 28:7–21 (2006–2012 instances). That appears to be the only instance in which the Tribe ever paid the PIT. *See* SUF at ¶ 100.

As recently as May or November 2015, the Tribe has negotiated with developers who have communicated that they would prefer not to lease land that is subject to a PIT. Davis Depo. at 39:13–41:19.[6] Developers also cite other reasons for not leasing Trust Land, including BIA lease-approval time and the marketability of leasehold versus fee-held property. *Id.* at 41:20–42:23. Nevertheless, the County does not dispute that if it did not assess the PIT at issue here, more residences and businesses may seek to locate themselves on the Trust Land currently subject to the PIT. SUF at ¶ 24.[7]

[6] Pages 39 and 41 of the deposition are included in the exhibit located at Doc. # 150-14, but page 40 appears in the exhibit located at Doc. # 147-23.

[7] The DWA objects to this factual assertion on grounds of relevance, speculation, foundation, and hearsay. The objection is **OVERRULED**. The effect of the PIT on potential lessees' desire to occupy the Trust Land is probative of the PIT's effect on tribal economic interests, and the Tribe's representatives have testified to the effect of the PIT on the Trust Land's attractiveness for leasing, providing a proper foundation for the assertion. Further, developers' out-of-court statements about their motives for not entering into leasehold agreements on Trust Land reflect their then-existing states of mind, a hearsay exception. Fed. R. Evid. 803(3).

Notably, Agua Caliente enacted a tribal tax code and its own PIT applicable to Trust Land. *Id.* at ¶¶ 7, 25; Exhibit E to Smith Decl. ("Tribal Tax Code Ordinance") at ¶¶ 2.2–2.12 [Doc. # 147-5]. As originally established, the tribal PIT is valued at 1%, and its broadly stated purpose is to "benefit[] the Reservation and the general welfare of those residing on the Reservation." Tribal Tax Code Ordinance at ¶¶ 2.6.1, 2.12.2. Because of the County PIT, the Tribe has held its PIT in abeyance "to benefit Reservation residents and avoid double taxation." Response to Interrogatory No. 12 [Doc. # 147-21]. With few exceptions, the Tribe has not indicated definitively how it would assess its own tax or use the revenues generated by such a tax, but it has stated that it may offer "credits, rebates, and incentive programs" to reduce the tax burden. *Id.*

C. The Provision of Governmental Services

The Tribe, the County (or other local government), the DWA, or a private entity contracting with the local jurisdiction all provide certain types of governmental services to lessees of Trust Land. The Tribe provides road maintenance services on two of the roadways on Trust Land, those which are not in a public right-of-way, but the local government (the County, Palm Springs, Cathedral City, or Rancho Mirage) otherwise provides all road maintenance services on Trust Land. Davis Depo. at 50:19–52:6. The Tribe provides water services specifically to a Tribe-operated park on Trust Land. *Id.* at 54:1–14. Subject to its Environmental Policy Act, the Tribe also offers environmental permitting services on Trust Land. *Id.* at 55:22–56:14. Additionally, the Tribe provides a handful of code enforcement services on Trust Land, including uniform building code and inspection services, environmental review, occupational and safety code services, and food safety services. *Id.* at 58:11–59:12.

The Tribe works with local agencies and local governments to provide some services. With regard to criminal matters, the Tribe cooperates with public agencies. *Id.* at 58:22–25. Concurrently with the County, the Tribe provides flood protection services to portions of the Trust Land. *Id.* at 53:13–25. In conjunction with the Environmental

Protection Agency ("EPA"), the Tribe provides storm water permitting and waste water permitting services to the Trust Land. *Id.* at 56:17–57:1.

Either the County, other local government entity (*e.g.*, Palm Springs, Rancho Mirage, Cathedral City), or the private entity which contracts with that local government (*e.g.*, Southern California Edison) provides other essential services on Trust Lands. These services include the following: fire protection, police protection, public right-of-way road maintenance, most water services, sewer, trash, public transportation, property assessment, animal control, pest abatement, and electrical services. *Id.* at 50:7–18 (fire, police), 51:23-52:1 (road), 54:1–5 (water), 54:18–24 (sewer), 54:23–56:5 (electric), 55:6–12 (trash), 55:13–21 (transit), 57:2–15 (property), 57:16–21 (animal), 57:22–25 (pest).[8] The Tribe has indicated that if and when it imposes its own PIT, it plans to provide property assessment services on Trust Land. *Id.* at 57:2–12.

The DWA specifically provides water supplies and delivery services to businesses and residential customers, including non-Indian lessees of Trust Lands, in Palm Springs and surrounding areas. SUF at ¶¶ 73–74. The water demands by DWA's customers, including the lessees here, exceeds the natural recharge to the groundwater basin. *Id.* at ¶ 84. To prevent basin depletion, the DWA obtains water supplies through a purchase arrangement with the State Water Project ("SWP"). *Id.* at ¶¶ 57, 75, 85. The DWA then imports the water into the groundwater basin to recharge the basin and meet water needs. *Id.* at ¶ 86.

As for services provided to Tribal members, the Tribe provides childcare services, such as after-school activities and fieldtrips. *Id.* at 64:15–21. The Tribe does not appear to provide veteran services, nor does it maintain a Tribal court, grand jury, police force, police training, public school, or airport facilities. *Id.* at 80:2–19. The Tribe does not provide any education services to non-Indian lessees of Trust Land. County SUF at ¶ 44.

[8] With regard to allotted land, the Tribe provides little to no services. The County, applicable local government, or private entity contracting with the local government provides those services. *See* Davis Depo. at 59:13–64:9.

D. The County PIT Funds Governmental Services

The PIT helps fund governmental services provided to the Reservation's residents and businesses, including the Tribe and Trust Land lessees. The County does not track PIT revenues separately from other tax revenues, nor does it specifically track how PIT revenues are spent. SUF at ¶¶ 30–33. Like the County, the DWA does not specifically track PIT revenues separately from other property tax revenues it receives. *Id.* at 56. The County's share of PIT revenues goes to the County's discretionary general fund. *Id.* at 28. DWA's portion of the PIT goes into the Agency's general fund, which is used to pay DWA's contractual obligations to the water supplier, SWP. *Id.* at ¶¶ 55, 57–58. Despite some uncertainty over specific PIT revenue tracking, it is uncontroverted that the PIT funds governmental services.

For example, in the 2013–2014 fiscal year, the County collected approximately $28,477,720 in PIT revenues and retained 11.7% for the provision of services. Exhibit Z to Maclean Decl. [Doc. # 150-29].[9] The County expended "most" of the County service funds (the 11.7% retained) on fire protection, health and sanitation, and road districts services, including emergency services, all of which were available to the Tribe and non-Indian lessees. *See* County SUF at ¶ 29. That same fiscal year, the County used the retained PIT revenues to fund the Sheriff's Office, corrections services, the district attorney, health and mental health services, the public defender, probation services, code enforcement services, and animal services. *Id.* at ¶ 39. From 2011–2015, the County Fire Department responded to a total of 2,392 incidents on the Reservation, with an average of 478 incidents per year. *See id.* at ¶ 41. Additionally, it is undisputed that the

[9] The remainder of those funds were distributed as follows: Cathedral City (2.4%), Palm Springs (11.1%), Rancho Mirage (0.9%), schools and education (including the Education Revenue Augmentation Fund ("ERAF")) (58.3% total), the County Regional Park & Open Space (0.3%), flood control (1.9%), the Palm Springs Public Cemetery (0.1%), the Desert Hospital (1.6%), Coachella Valley Mosquito & Vector Control (0.8%), Coachella Valley Resource Conservation (0.0001%), and the water districts (10.9%). Exhibit Z to Maclean Decl. The Court will discuss some of these allocations in more depth below.

PIT helps fund the County Counsel's office, the County's executive office, the Board of Supervisors, the tax assessor, the tax collector, County information technology, law enforcement generally, jails, and health clinics. SUF at ¶¶ 43, 45. The County services all unincorporated areas, including parts of the Reservation and Trust Lands that fall outside of Palm Springs, Cathedral City, and Rancho Mirage. County SUF at ¶ 40.

In the 2013–2014 fiscal year, 14.4% of total PIT revenues that the County collected were allocated to Palm Springs, Cathedral City, and Rancho Mirage. Exhibit Z to Maclean Decl. That fiscal year, the three cities received approximately $4,102,535 in PIT revenues. *Id.* Palm Springs uses its revenue to provide police, fire, street maintenance and lighting, building and safety, railroad, park maintenance, and recreation and library services, all of which are available to Trust Land lessees, and the city manages a convention center, which Trust Land lessees may use. County SUF at ¶ 46. Rancho Mirage uses its revenues to provide, *inter alia*, public safety and police, general government, and engineering services. *Id.* at ¶ 48.

Of the total PIT revenues that the County collected in 2013-2014, 15.6% was allocated to agencies with specific functions, including water districts such as the DWA, flood control, and the regional medical center. *Id.* at ¶ 49; SUF at ¶ 77. Other agencies or service providers that received PIT revenues included regional parks, the public cemetery, mosquito and vector control, and the Riverside County Flood Control and Water Conservation District. County SUF at ¶¶ 50–51; *see also id.* at ¶¶ 54–56, 59–61 (discussing flood and pest agencies' services). The water districts that served the Reservation received approximately $3,096,186. Exhibit Z to Maclean Decl. In that same time frame, $420,165.78 of the $547,961.93 that the flood control district received from PIT revenue was expended on sewer systems and maintenance and construction of facilities that service the district zone in which the Trust Land falls. Rey Decl. at ¶¶ 3–5 [Doc. # 150-35]; Exhibit Z to Maclean Decl. These facilities shelter the Trust Land and provide a floodwater outlet from Trust Land. Rey Decl. at ¶ 5.

In the 2013 fiscal year, DWA received approximately $161,158 in PIT revenue from the Trust Land lessees. Exhibit Z to Maclean Decl. That money was then "applied in whole" to DWA's financial obligation to SWP for the provision of water supplies and delivery to its customers, including non-Indian lessees of Trust Lands. *See* Krieger Depo. at 16:21–25 [Doc. # 147-28]; *see also* SUF at ¶¶ 57, 73–75, 84–86 (discussing DWA's provision of services and SWP contract).

It is undisputed that education-related entities receive a larger percentage of PIT revenues than any other entity. County SUF at ¶ 43. Approximately 43% of PIT revenues collected but not retained by the County in fiscal year 2013–2014 funded two school districts in Palm Springs, the Desert Community College, and the County Office of Education, and approximately 15.2% went to the Education Revenue Augmentation Fund ("ERAF").[10] *See* Exhibit Z to Maclean Decl. For example, in the 2013 fiscal year, the Palm Springs school districts and Desert Community College, which serve Reservation residents (Tribe and non-Indians alike), received approximately $11,323,813 in PIT revenues. *Id.*; County SUF at ¶ 44. The ERAF received approximately $4,102,535 in PIT revenues that same year. Exhibit Z to Maclean Decl.[11]

III.
LEGAL STANDARD

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *accord Wash. Mut. Inc. v. United States*, 636 F.3d 1207, 1216 (9th Cir. 2011). Material facts are those that may affect the outcome of the case.

[10] Revenue allocated to this fund is "distributed to other local governments that do not necessarily serve the taxed properties to provide additional funds to [elementary, middle, and high school, and community college] districts that do not receive sufficient property tax revenue to meet their minimum funding level or to reimburse cities and counties for the loss of other revenue sources . . . due to changes in State policy." Elias Decl. at ¶ 9 [Doc. # 150-7].

[11] Defendants have provided the same break-down in PIT revenue distribution discussed in this section for fiscal years 2014–2015 and 2015–2016. [Doc. ## 150-24, 150-30.]

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

Where, as here, there are no disputed issues of material fact and the issues before the Court are questions of law, the case is particularly "well suited" for summary judgment. *Del Real, LLC v. Harris*, 966 F. Supp. 2d 1047, 1051 (E.D. Cal. 2013); *see also Asuncion v. Dist. Dir. Of U.S. Immigration & Naturalization Serv.*, 427 F.2d 523, 524 (9th Cir. 1970).[12]

IV.
DISCUSSION

The Tribe seeks a declaratory judgment that the County-assessed PIT is unlawful on three grounds: (1) Section 5 of the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465,[13] expressly preempts the tax; (2) application of the *Bracker* test to the now-developed factual record results in a finding of federal preemption; and (3) the PIT unlawfully interferes with the Tribe's sovereignty. Tribe MSJ at 5, 11, 14, 23.

Conversely, Defendants seek the opposite result and summary judgment in their favor on the same three issues. The County argues that the IRA's tax exemption does not apply to the Trust Land, let alone expressly preempt the PIT. County MSJ at 14–15; County Reply at 7–10. According to the County, even if section 465 applies to the Trust

[12] Agua Caliente argues that the law of the case doctrine applies to several of this Court's holdings at the judgment on the pleadings stage ("MJP Order") [Doc. # 118]. Tribe MSJ at 9–11; Tribe Reply at 7–8 [Doc. # 153]. The Court addresses the law-of-the-case issue only to clarify one thing: the Court's previous observation that the County "may attempt [in later proceedings] to demonstrate a direct connection between its tax and any services it provides to the Tribe" was merely that—an observation. MJP Order at 22 n.9. The Court did not, as the Tribe asserts, set forth as a matter of law the requisite "factual showing it needs to see from Defendants in order to defeat summary judgment in Agua Caliente's favor." Tribe MSJ at 10.

[13] Since the initiation of this action, section 465 has been recodified as 25 U.S.C. section 5108, but the statutory text remains the same. *See* 25 U.S.C. § 5108 ("Formerly cited as 25 [U.S.C.] § 465"). For consistency with this Court's previous orders in this case, the Court continues to refer to the law as section 465.

Lands, the statute does not apply to the PIT because the County taxes non-Indians' contract rights as opposed to the Trust Lands, tribal rights acquired under section 465, or the Tribe or its members. County MSJ at 15–17. The County also contends that Agua Caliente's *Bracker* and tribal sovereignty analyses are flawed and weigh in favor of upholding the PIT. *Id.* at 18–21, 24–31. DWA seeks summary judgment insofar as its charges are included in the County's PIT. DWA MSJ at 7. To that extent, DWA's arguments closely mirror those of the County. *Id.* at 13–31.

The Court addresses these issues *seriatim* below.

A. Express Preemption Under Section 465

The IRA provides that "[t]itle to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation." 25 U.S.C. § 465. Agua Caliente contends that this language expressly preempts the PIT, while the County argues that the IRA does not even apply to the Trust Lands at issue here. The DWA also maintains that section 465's exemption does not apply to the non-Indian lessees' interests, but under a different statutory interpretation. As explained below, the County's argument prevails.

The County contends that section 465 does not preempt the PIT in part because the Tribe did not acquire the Trust Land pursuant to the Acts mentioned in the statute. County MSJ at 14–15. Indeed, as described above, an 1876 executive order established the Reservation, and another executive order extended its boundaries one year later. The Tribe argues that its technical means of acquiring the Trust Land is irrelevant under *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and the Tribe analogizes the land grant there to the one in this case for purposes of section 465's application. Tribe Reply at 10–11.

In *Mescalero*, the U.S. Supreme Court determined the propriety under the IRA of a state tax imposed on gross receipts and out-of-state personalty purchases of a tribe-owned and -operated ski resort located off of tribal land. 411 U.S. at 146. At the outset, the

Court recognized that the ski resort land was not "'acquired' 'in trust for the Indian tribe'" under section 465. *Id.* at 155 n.11 (quoting 25 U.S.C. § 465). Nor was the land ever held in trust. Rather, the United States—specifically, the U.S. Forest Service—already owned the land and leased it to the tribe under another section of the IRA. *Id.* at 146. The Court found the lease arrangement "sufficient to bring the Tribe's interest in the land within the immunity afforded by [section] 465," even though it ultimately upheld the nondiscriminatory gross receipts tax imposed upon the Tribe's ski resort. *Id.* at 155 n.11, 157.

The circumstances that gave rise to the Reservation here are distinct in several ways. First, as the County points out, the *Mescalero* land, before its designation as tribal-leased property, was already tax-exempt land that belonged to the United States. County Reply at 8. Thus, "it would have been meaningless for the United States, which already had title to the forest, to convey title to itself for the use of the Tribe." *Mescalero*, 411 U.S. at 155 n.11 (quoting Brief for the United States as *amicus curiae*). There is no such need for logical acrobatics here because two executive orders that long predate the IRA and the 1955 Act established and expanded the Reservation, taking this case outside of section 465's purview.

The fact that the Reservation was set aside as land held by the United States in trust for the Tribe's benefit, says Agua Caliente, actually makes section 465 more applicable here because the statute envisions that such an arrangement gives rise to tax-exempt Indian trust land. Tribe Reply at 11. When construing an ambiguous statute, the Court "must be guided by that 'eminently sound and vital canon' that 'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.'" *Bryan v. Itasca County, Minnesota*, 426 U.S. 373, 392 (1976) (alteration in original) (citation omitted) (quoting *N. Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976); *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 89 (1918)). It is also a fundamental canon of construction, however, that when interpreting a statute, the Court begins with the text's plain meaning to

determine ambiguity in the first place. *See Carcieri v. Salazar*, 555 U.S. 379, 387 (2009) (interpreting the IRA). "The preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.' Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (alteration in original) (citation omitted) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)).

The plain language of section 465 unambiguously restricts its tax exemption to those lands or rights that were placed in the United States' name in trust for the Indian's benefit under the IRA or the Act of July 28, 1955—neither of which are at issue here. *See* 25 U.S.C. § 465 ("Title to any lands or rights *acquired pursuant to* this Act or the Act of July 28, 1955 . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and *such lands or rights* shall be exempt from State and local taxation." (emphasis added)). Further, cases examining whether a state or local jurisdiction may impose a tax on Indian-related land or activity begin the analysis with the treaty, executive order, or act that established the land or enterprise at issue. *See, e.g., McClanahan v. State Tax Commission of Ariz.*, 411 U.S. 164, 173–74 (1973) ("The beginning of our analysis must be with the treaty which the United States Government entered with the Navajo Nation in 1868.").

The Tribe has not offered an alternative statutory construction—as opposed to other legal theories—that permits its broad interpretation of the statute. Nor has the Tribe presented any evidence or argument that it, its leasing arrangement, or the Reservation was established or advanced pursuant to the IRA or the Act of July 28, 1995 to bring this case within section 465's scope. In contrast, the ski resort in *Mescalero* was "developed under the auspices of the [IRA]," which brought the land within the scope of section 465. 411 U.S. at 146.

Despite these distinctions, the Tribe insists that "the history of federal trusteeship over Indian lands" supports section 465's application. Tribe Reply at 11 (citing *Chase v.*

McMasters, 573 F.2d 1011, 1018 (8th Cir. 1978); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 666 (9th Cir. 1975); *White Earth Band of Chippewa Indians v. County of Mahnomen*, 605 F. Supp. 2d 1034 (D. Minn. 2009)). The cases cited do not support the application of section 465 in this instance. Notably, both *Chase* and *Santa Rosa* involve tribes or tribal lands expressly established pursuant to the IRA. *Chase*, 573 F.2d at 1015; *Santa Rosa*, 532 F.2d at 657. For example, in *Chase*, the Eighth Circuit concluded that section 465 authorized the Secretary of the Department of the Interior to approve a land transfer, conveyed pursuant to section 465, even though the land, before being transferred to the United States in trust for an individual Indian under the IRA, was owned in fee by the beneficiary Indian's parents. 573 F.2d at 1015–16. Accordingly, the city's denial of the Indians' application for city sewer and water line connections to the land impaired the beneficiary's right under section 465 "to enjoy the beneficial use of land held in trust for her." *Id.* at 1018. To the extent that *Chase* speaks to the tax-exempt status of land under section 465, the case stands for precisely this Court's conclusion: that trust lands acquired pursuant to section 465—as opposed to another statute or grant—are to be free from state and local taxation. *See id.* ("Section 465 expressly states that title to land acquired under its provisions will be held in trust by the United States for the Indian or Indian tribe, and that the land will be exempt from taxation.").

The Court in *Santa Rosa* determined the reasonableness of a federal zoning regulation that denied the states the authority to zone federal Indian trust property acquired under section 465. 532 F.2d at 664–65. The Ninth Circuit examined the history of federal policy toward land held in trust for the Indians' benefit and, applying section 465 against that backdrop (to land acquired under that statute), concluded that the regulation reasonably implemented the statute. *Id.* at 665–66. Significantly, the Court expressly declined to determine the validity of the same regulation "as applied to lands *not* acquired pursuant to [section] 465 [because] the lands involved [in the case] were so acquired." *Id.* at 666 n.19 (emphasis added).

In *Chippewa*, neither the tribal land nor its tax-exempt status had anything to do with the IRA, which makes Agua Caliente's reliance on the case puzzling. Rather, the tribe purchased the land at issue with funds made available in the White Earth Lands Settlement Act ("WELSA"), and the Court concluded that the land was tax-exempt under Section 18 of that Act. *Chippewa*, 605 F. Supp. 2d at 1036–37, 1046–49. In fact, the District Court there distinguished WELSA from section 465 of the IRA and its implementing regulations in response to the defendant county's argument that the Chippewa land was not automatically, by virtue of its being purchased with WELSA funds, held in trust (and therefore tax exempt). *See id.* at 1047 ("[T]his case does not involve land acquisition pursuant to the [IRA], 25 U.S.C. [section] 465. Rather, WELSA is a unique statute which, on its face, provides that certain land acquisition shall be held in trust *and* shall be deemed reserved from the date of the establishment of the Reservation and to be part of the trust land of the Band for all purposes. Thus, . . . Section 18 of WELSA is, by its terms, self-executing or automatic." (emphasis in original)).

Furthermore, Agua Caliente's reliance on the history of federal trusteeship is circular. The fact that a long history of immunity of Indian trust property has informed courts' interpretation of section 465 in the context of lands acquired pursuant to the statute does not mean that section 465 applies retroactively to land *not* acquired under that statute. At the hearing, Agua Caliente advanced the proposition that section 465 codified the tax exemptions that existed under common law at the time of its 1934 passage such that tribal trust lands that pre-existed the IRA should be swept into section 465's scope despite the statute's plain language. The Tribe pointed to the Ninth Circuit's reasoning in *Santa Rosa*: "[T]he immunity of Indian use of trust property from state regulation, based on the notion that trust lands are a Federal instrumentality held to effect the Federal policy of Indian advancement and may not therefore be burdened or interfered with by the state, is a product of judicial decision," and, in turn, Congress likely passed section 465 with the "underst[anding] and inten[tion] [that] such lands

[purchased and held in trust by the Secretary of the Interior] . . . be held in the legal manner and condition in which trust lands were held under the applicable court decisions free of state regulation." 532 F.2d at 666.

This language does not support the Tribe's codification argument as applied to lands preexisting the IRA or otherwise not mentioned in section 465. Rather, it stands for the proposition that the judicial history of trust land immunity informed the Ninth Circuit's interpretation of the zoning regulation in the context of land obtained pursuant to the IRA. Thus, the Court will not apply section 465 retroactively to the Trust Lands here, which do not fall within the statute's expressly narrow sweep. *Cf. Cass County, Minnesota v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114 (1998) ("In [section] 465, . . . Congress has explicitly set forth a procedure by which lands held by Indian tribes may become tax exempt. It would render this procedure unnecessary, as far as exemption from taxation is concerned, if we held that tax-exempt status automatically attaches when a tribe acquires reservation land.").

Finally, Agua Caliente argues that the County's interpretation of the statute "would run afoul" of 25 U.S.C. section 5123(f)–(g)'s bar on non-uniform treatment of federally recognized Indian tribes. Tribe Reply at 10. The Court agrees with the County that section 5123's prohibition on federal agencies from enacting discriminatory regulations or decisions does not "override the express terms of hundreds of treaties, executive orders, and federal statutes that are tribe- and/or reservation-specific." County Reply at 9. Indeed, Congress intended, in certain circumstances, the non-uniform treatment of Indian tribes under the IRA itself. *See Carcieri*, 555 U.S. at 382 ("[Title 25 U.S.C. section] 479 limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934.").

In sum, section 465 does not apply to the Trust Lands at issue. Accordingly, the IRA does not expressly preempt the PIT in this case, and the County is entitled to summary judgment on that issue as a matter of law. The Court thus **GRANTS** summary

judgment in the County's favor and **DENIES** the Tribe's motion for summary judgment as to the issue of express preemption under the IRA. Because the Court has determined that section 465 does not apply to the Trust Land, it need not reach DWA's alternative statutory argument and **DENIES** as moot DWA's motion for summary judgment on this issue.

B. *Bracker* Preemption

Finding no express preemption under the IRA, the Court next turns to the *Bracker* balancing test for federal preemption of a state tax. This test requires "a particularized inquiry into the nature of the state, federal, and tribal interests at stake"—rather than a mere consideration of "mechanical or absolute conceptions of state or tribal sovereignty"—to determine "whether, in the specific context, the exercise of state authority would violate federal law." 448 U.S. at 145.

"[T]he Supreme Court has identified a number of factors to be considered when determining whether a state tax borne by non-Indians is preempted, including: 'the degree of federal regulation involved, the respective governmental interests of the tribes and states (both regulatory and revenue raising), and the provision of tribal or state services to the party the state seeks to tax.'" *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1190 (9th Cir. 2008) (quoting *Salt River Pima-Maricopa Indian Cmty. v. Arizona*, 50 F.3d 734, 736 (9th Cir. 1995)). As a further "backdrop" to the balancing inquiry, the Court considers traditional notions of tribal sovereignty. *Bracker*, 448 U.S. at 143–44.

The Court first examines the federal interests in the leasing of Indian lands and then turns to the state interests in the PIT. Finally, the Court considers the tribal interests, the legal incidence of the tax, and the actual burden the PIT imposes on the Tribe. For the reasons that follow, the Court concludes that the test weighs against preemption.

1. Federal Interests

In *Bracker* and its progeny, courts evaluating the federal interests at stake have considered the comprehensiveness of the relevant federal regulations, the purpose of

relevant federal laws or regulatory schemes, and, when applicable, the federal agency's position or interpretation of its regulations. *Bracker*, 448 U.S. at 145–49; *accord Seminole Tribe of Fla. v. Stranburg*, 799 F.3d 1324, 1338–41 (11th Cir. 2015); *see also Wyeth v. Levine*, 555 U.S. 555, 576 (2009) (Courts may properly "attend[] to an agency's explanation of how state law affects the regulatory scheme" in a preemption analysis, and the "weight . . . accord[ed] . . . depends on [the federal scheme's] thoroughness, consistency, and persuasiveness.").

"Federal interests are greatest when the government's regulation of a given sphere is 'comprehensive and pervasive.'" *Barona*, 528 F.3d at 1192 (quoting *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 839 (1982)). Within the sphere of leasing Indian land, the federal interests are great, and the County's argument to the contrary is belied by well-established precedent. *See Seminole Tribe*, 799 F.3d at 1341 ("[T]he federal government administers an extensive, exclusive, comprehensive, and pervasive regulatory framework governing the leasing of Indian land."); *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1393 (9th Cir. 1987) ("The statutory and regulatory scheme [for leasing of Indian lands] is substantially similar to those involved in [*Bracker*], *Ramah*, and *Mescalero* . . . ."); *id.* at 1392 ("We cannot agree" "that the federal statutes authorizing the leasing of trust lands and the regulations governing such leasing do not constitute a comprehensive regulatory scheme."). Indeed, even the DWA acknowledges the comprehensiveness of the federal regulation at issue here. *See* DWA MSJ at 28.

The Interior is the "executive department charged . . . with managing and administering the lands of Indian reservations." *Desert Water Agency v. U.S. Dep't of the Interior*, 849 F.3d 1250, 1251 (9th Cir. 2017). The BIA, an agency within the Interior, oversees "the management of all Indian affairs and of all matters arising out of Indian relations." 25 U.S.C. § 2. Among its many duties, the Interior, through the BIA, approves the leasing of Indian land to third parties. *Id.* at § 415(a). In fact, the Secretary of the Interior (the "Secretary") must approve all leases and lease extensions of Indian

lands. *Id.*[14] There are over a dozen federal statutes that govern this process. *See id.* at §§ 415–416j.

Pursuant to section 415, the Secretary has promulgated many regulations, codified at 25 C.F.R. part 162, which govern the administration of these leases. 25 C.F.R. §§ 162.001–162.703. These regulations serve to "promote leasing on Indian land for," *inter alia*, "housing[] [and] economic development." 25 C.F.R. § 162.001(a). The BIA recently revised the regulations related to non-agricultural surface leasing of Indian land, and added new regulations that address residential, business, wind energy evaluation, and wind and solar development leases on Indian land. 77 Fed. Reg. 72440 (Dec. 5, 2012) (the "Final Rule"). Now, "[f]ederal regulations cover all aspects of leasing." *Id.* at 72447. The Preamble to the Final Rule points to 28 separate areas of Indian leasing that are regulated by federal law, plus a 29th area of "miscellaneous" regulations. *Id.* at 72440; *see also Brown v. United States*, 86 F.3d 1554, 1561–63 (Fed. Cir. 1996) (discussing federal control over leasing of allotted land); *Segundo*, 813 F.2d at 1391, 1393 (discussing some regulations in detail).

The United States, as *amicus curiae* in this case, contends that the comprehensiveness of the federal and regulatory scheme governing the leasing of Indian land, coupled with the federal interest in tribal sovereignty, "weigh heavily against state and local taxation." Brief of the United States as Amicus Curiae at 3 [Doc. # 142]. The Secretary takes the same position. *See Desert Water Agency*, 849 F.3d at 1254 ("[25 C.F.R. section 162.017] clarif[ies] [the Interior's] opinion that under *Bracker*, the federal and tribal interests at stake are strong enough to have a preemptive effect on the generality of cases."); 25 C.F.R. § 162.017(a) ("Subject only to applicable Federal law, permanent improvements on the leased land, without regard to ownership of those improvements, are not subject to any fee, tax, assessment, levy, or other charge imposed

[14] In some circumstances and at the tribe's discretion, a lease does not require the Secretary's approval if the lease is executed pursuant to tribal regulations that the Secretary has approved. 25 U.S.C. § 415(h)(1).

by any State or political subdivision of a State."), (c) ("Subject only to applicable Federal law, the leasehold or possessory interest is not subject to any fee, tax, assessment, levy, or other charged imposed by any State or political subdivision of a State.");[15] Final Rule at 72447–48 ("Assessment of State and local taxes would obstruct Federal policies supporting tribal economic development, self-determination, and strong tribal governments. State and local taxation also threatens substantial tribal interests in effective tribal government, economic self-sufficiency, and territorial autonomy. . . . State and local taxation of lessee-owned improvements, activities conducted by the lessee, and the leasehold interest also has the potential to increase project costs for the lessee and decrease the funds available to the lessee to make rental payments to the Indian landowner. Increased project costs can impede a tribe's ability to attract non-Indian investment to Indian lands where such investment and participation are critical to the vitality of tribal economies.").

The regulations that caution against state and local taxation of Indian lands (and the Secretary's interpretation thereof) align with the federal policy of promoting tribal self-sufficiency. "The purposes of residential, business, and [wind and solar resource] leasing on Indian land are to promote Indian housing and to allow Indian landowners to use their land profitably for economic development, ultimately contributing to tribal well-being and self-government." Final Rule at 72447. Given the Ninth Circuit's pronouncements on the federal statutory and regulatory scheme of Indian leasing, the Secretary's thorough and persuasive interpretation of the statutes and regulations it administers, and the federal policy of promoting Indian welfare and economic independence, the Court concludes that the federal interests here, like those at stake in

[15] In *Desert Water Agency*, the Ninth Circuit went on to clarify that the section 162.017 regulation, on its own, has no independent legal effect on a court's preemption analysis. 849 F.3d at 1254. Rather, the "Interior's views as set out in [section] 162.017 may well influence courts when they gauge the federal and tribal interests under *Bracker*," "[b]ut on the ultimate question of whether any *specific* state tax or charge is preempted under *Bracker*, . . . courts must answer such questions in the same way they always have, by applying the *Bracker* test de novo." *Id.*

Bracker and *Ramah*, are pervasive enough to preclude the burdens of a tax, absent sufficient state interests.

The Court turns next to a consideration of the countervailing state interests at issue.

2. State Interests

The Supreme Court and Ninth Circuit have expressed disfavor of state taxes untethered to the activity or interest being taxed. *Ramah*, 458 U.S. at 843 ("[T]he State does not seek to assess its tax in return for the governmental functions it provides to those who must bear the burden of paying this tax. Having declined to take any responsibility for the education of these Indian children, the State is precluded from imposing an additional burden on the comprehensive federal scheme intended to provide this education . . . ."); *Bracker*, 448 U.S. at 150 ("[T]his is not a case in which the State seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall. . . . [The State] refer[s] to a general desire to raise revenue, but we are unable to discern a responsibility or service that justifies the assertion of taxes imposed for on-reservation operations conducted solely on tribal and [BIA] roads."); *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 661 (9th Cir. 1989) ("Although California points to a variety of services that it provides to residents of the reservation and the surrounding area, none of those services is connected with the timber activities directly affected by the tax."); *cf. Barona*, 528 F.3d at 1192 (no preemption where "California's tax is not on Indian gaming activity or profits [the subject of the comprehensive federal regulatory scheme], but rather on construction materials purchased by a non-Indian electrical subcontractor, which could be used for a multitude of purposes unrelated to gaming").

The same authorities also counsel that the tax revenues need not be directly proportional or connected to the taxed interests or activity. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S.163, 185–86 (1989) ("Neither *Bracker* nor *Ramah* . . . imposes such a proportionality requirement on the States."); *Gila River Indian Communityv. Waddell* ("*Gila II*"), 91 F.3d 1232, 1239 (9th Cir. 1996) ("The Tribe's insistence that there be a direct connection between the state sales tax revenues and the services

provided to the Tribe is . . . meritless. . . . [T]here is no requirement that a tax imposed on non-Indians for reservation activities be proportional to the services provided by the State."); *Salt River*, 50 F.3d at 737 ("Not only would such a proportionality requirement create nightmarish administrative burdens, but it would also be antithetical to the traditional notion that taxation is not premised on a strict *quid pro quo* relationship between the taxpayer and the tax collector."). Rather, "[t]o be valid, the California tax must bear *some* relationship to the activity being taxed." *Hoopa Valley*, 881 F.2d at 661 (emphasis added).[16]

Before turning to the relationship between the tax and the taxed activity here, the Court must identify and define the scope of the conduct being taxed, which is a question of state law. *See Wagnon v. Prairie Band Potawatomi Nation*, 546, U.S. 95, 102–03 (2005). It is uncontroverted that the taxed activity is the right to possess or enjoy the use of Indian land. *See* Hr'g Tr., May 12, 2017, 2:00 PM (Agua Caliente's counsel speaking). Accordingly, the PIT is a usufructuary tax that applies to the leaseholders' use and enjoyment of their interests in the land. *See United States of America v. County of Fresno* ("*Fresno I*"), 50 Cal. App. 3d 633, 638, 640 (1975) ("In [California], the right to possess and use land or improvements . . . is treated as a possessory interest and is subject to taxation. [A] possessory interest includes the right of a private individual or corporation to use government-owned tax exempt land or improvements, and this right is considered a private interest taxable by the state and its taxing agencies. . . . A

[16] The Court rejects the Tribe's claim that legal precedent requires a "direct and narrowly tailored nexus" between the PIT and the leasing activity here. Tribe Reply at 22. *Bracker* and its progeny do not mandate a direct nexus test. *See, e.g.*, *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107, 1111 (9th Cir. 1997) ("It is evident that once a requirement of proportion between state services and state tax is not the criterion, the requirement of narrow tailoring is elusive . . . ."); *compare Gila River Indian Cmty. v. Waddell* ("*Gila I*"), 967 F.2d 1404, 1412 (9th Cir. 1992) (stating that taxes must be "narrowly tailored to funding the services it provides" where strong federal and tribal interests are at stake), *with Gila II*, 91 F.3d at 1239 (rejecting the Tribe's argument that the taxes at issue were not narrowly tailored, and stating that taxes need not be proportionate to services provided). In any event, and as explained further below, the state services provided on the Trust Lands and funded by the PIT are sufficiently related to the taxed activity to satisfy a nexus test, if such a test exists.

possessory interest assessment is not made against the government or government property; the assessment is against the private citizen, and it is the private citizen's usufructuary interest in the government land and improvements alone that is being taxed." (citations omitted) (citing, *inter alia*, *United States v. City of Detroit*, 355 U.S. 466, 469–70 (1958))), *aff'd*, 429 U.S. 452 (1977) ("*Fresno II*").[17]

Indeed, this is how the Ninth Circuit viewed the PIT in its earlier cases involving a California PIT imposed on non-Indian lessees of trust lands. *See Fort Mojave v. San Bernardino County*, 543 F.2d 1253, 1256 (1976); *Agua Caliente Band of Mission Indians v. Riverside County* ("*Agua Caliente I*"), 442 F.2d 1184, 1186 (1971);[18] *see also Detroit*, 355 U.S. at 469 (affirming Michigan Supreme Court's ruling that the tax "was a tax on the lessee's privilege of using the property"), 470 ("A tax for the beneficial use of property . . . has long been a commonplace in this country."), 472 ("Here we have a tax

[17] That some of the Trust Land contains permanent improvements does not change the usufructuary nature of the PIT. Arguing otherwise (albeit in its section 465 analysis), the Tribe points to the U.S. Supreme Court's decision in *Mescalero* that the use tax imposed on the permanent improvements on the tribe's tax-exempt land was unlawful. Tribe MSJ at 11–12 (citing *Mescalero*, 411 U.S. at 158 ("'[U]se' is among the 'bundle of privileges that make up property or ownership' of property and, in this sense, at least, a tax upon 'use' is a tax upon the property itself. . . . [U]se of permanent improvements upon land is so intimately connected with use of the land itself that an explicit provision relieving the latter of state tax burdens must be construed to encompass an exemption for the former." (quoting *Henneford v. Silas Mason Co.*, 300 U.S. 577, 582 (1937)))). Notably, in *Mescalero*, the use tax was imposed directly on the Tribe—not its non-Indian lessees—which collapsed the distinction between a lawful tax (imposed on the Tribe) on income derived from the land and an unlawful tax on the land itself. *Id.* at 147, 157–58; *see also Fresno II*, 429 U.S. at 456–62 (state use tax on permanent improvements on federally owned property, which was computed based on the value of such permanent improvements, permissible "as long as that property is being used by a private citizen or corporation and so long as it is the possession or use by the private citizen that is being taxed") (decided four years after *Mescalero*); *Fresno I*, 50 Cal. App. 3d at 638 ("In [California], the right to possess and use land or improvements, '*except when coupled with ownership of the land or improvements in the same person*', is treated as a possessory interest and is subject to taxation." (emphasis added) (quoting Cal. Rev. & Tax. Code §107)). In any event, the Court's analysis in *Mescalero* was dependent on the operation of section 465, which this Court has already explained does not apply here.

[18] Although *Bracker* repudiated and superseded these cases' preemption analysis, the Ninth Circuit's understanding of the nature of the taxable interest is instructive. *See* MJP Order at 10.

which is imposed on a party using tax-exempt property for its own 'beneficial personal use' and 'advantage.'").

Despite this, Agua Caliente insists that the PIT must fund specifically lease-related services to pass muster under *Bracker*. The Tribe takes too rigid a view of the necessary relationship between the tax imposed and the activity taxed. In *Ramah*, for example, the state imposed a gross receipts tax on a non-Indian construction company in connection with the company's contracted-for construction of an Indian school on tribal lands. 458 U.S. at 834–35. Although the Court evaluated the federal interests in the context of the government's comprehensive regulatory scheme of, specifically, the construction of Indian educational facilities, the Court's state-interests discussion focused on New Mexico's failure to provide educational services to the Indian children more broadly. *Id.* at 841–42, 843–45.

Here, the PIT's imposition arises out of the lease transaction between the lessor and the lessee, but that does not mean that the state revenues flowing from the tax must fund services specifically related to the act of renting Trust Land property, as opposed to services that advance and support the lessees' leasehold interest. Simply put, the PIT must bear some relationship to the lessees' use and enjoyment of the Trust Land.

The evidence presented in this case shows an intimate relationship between both the lessees' enjoyment of the Trust Land and the tax assessed, and the PIT revenues and the services rendered to the tax-paying lessees. As described above, the County and DWA provide a myriad of essential governmental services on the Reservation. In fact, it is undisputed that the County (or other local jurisdiction that receives PIT revenues) exclusively provides the majority of the public services rendered on the Trust (and allotted) Land, which range from smaller ticket items such as public road maintenance and animal and pest control services, to larger undertakings such as public safety, law enforcement, and education. Similarly, the DWA, with few exceptions, exclusively supplies the water for the Reservation and its commercial and residential inhabitants. The uncontroverted evidence shows that even where the Tribe provides government

services on Trust Lands, it often does so in conjunction with the County or other local government entities. These services directly benefit all Reservation residents and visitors and, at least indirectly, promote Reservation habitability and therefore support the Tribe's ability to extend leases on Trust Land. *See also* County Reply at 17 (direct connection discussion).

While Defendants do not specifically trace, dollar for dollar, the PIT revenues to the services they fund on the Reservation, Defendants have demonstrated with ample evidence the relationship between the tax and the taxed activity—namely, non-Indian use and enjoyment of the Indian lands. The PIT and the allocation of its revenues appear to be based, at least in part, on the share of services and benefits that the lessees enjoy. *See* Elias Decl. at ¶¶ 5–8, 11–12 [Doc. # 150-7] (discussing property taxes under California law, including how Assembly Bill 8 "establishes the appropriate share of the total property taxes collected within a community that is distributed to each local government," the role of taxing rate areas, and the "apportionment factors" used "to determine the approximate pro rata share of [PIT] revenues"); Exhibit E to MacLean Decl. at 4–5, 7 [Doc. # 150-8] (discussing distribution of property taxes under Assembly Bill 8, and the bill's objective "to provide local governments with a revenue source . . . [that] reflect[s] growth change within their boundaries").

This evidence contradicts Agua Caliente's claim that the PIT "amounts to nothing more than a generalized interest in raising revenue" that is insufficiently tied to the on-Reservation, non-Indian activity taxed. Tribe MSJ at 20. Indeed, unlike the fuel tax in *Bracker*, and the gross-receipts tax in *Ramah*, the PIT here helps fund the very state services from which its payers benefit. *Cf. Ramah*, 458 U.S. at 844 (rejecting state gross receipts tax, which claimed to compensate the state for "the privilege of engaging in business," where the privilege was "exclusively bestowed by the Federal Government"); *Bracker*, 448 U.S. at 150 (striking down state fuel tax, which purported to compensate the state for the use of its highways, where the Federal Government exclusively built,

maintained, and policed the roads at issue). "This is not a case in which the State has had nothing to do with the on-reservation activity, save tax it." *Cotton*, 490 U.S. at 186.

As the Court has explained, the state services provided on and around the Reservation directly support lessees' enjoyment of Trust Lands—the activity being taxed. In turn, the availability of these services permits the Tribe to market the leasing of Trust Land. This is not to say that the PIT does not generate revenue more generally in some respects. It is undisputed that a portion of the PIT revenues funds services separate and apart from the Reservation, such as those revenues that are allocated to the ERAF. Under binding Circuit precedent, however, the state interest in raising revenues here is at its strongest because, by and large, "the taxpayer is the recipient of state services." *Salt River*, 50 F.3d at 737; *see also Barona*, 528 F.3d at 1193 ("[T]he state interest strengthens where there is a nexus between the taxed activity and the government function provided."). Although the federal interests in regulating Indian leasing are strong, they must bend to the state interests here, where the tax is valid and its revenues are closely related to the substantial services provided to taxpayers and nonpayers alike. *See Barona*, 528 F.3d at 1192 ("[T]he federal government's interest in Indian economic vitality does not alone defeat an otherwise legitimate state tax."); *Gila II*, 91 F.3d at 1237 ("[T]he [U.S.] Supreme Court has rejected [the promotion of tribal economic development] as an overriding force preempting an otherwise valid state tax on non-Indians.").

In sum, the state interests outweigh the federal interests in this case. The Court turns last to examine the tribal interests at stake and evaluate the actual burden the PIT imposes on the Tribe to determine whether the balancing of all factors must result in preemption.

3. Tribal Interests

Generally, "[t]he leasing of trust or restricted land is an instrumental tool in fulfilling 'the traditional notions of [tribal] sovereignty," and such leasing "facilitates the implementation of the policy objectives of tribal governments through vital residential,

economic, and governmental services." Final Rule at 72447 (quoting *Bracker*, 448 U.S. at 145); *see also Segundo*, 813 F.2d at 1393 ("It is beyond question that land use regulation is within the Tribe's legitimate sovereign authority over its lands."). In this case, there are approximately 20,000 leases on the Reservation, of which only about 100 are Trust Land leases that help raise revenue for the Tribe. *See* SUF ¶ 14; County SUF ¶ 12.[19] The majority of leases are on allotted trust land, from which rent receipts do not go to the Tribe. Note 19, *supra*; Davis Depo. at 25:6–8.

Nonetheless, Agua Caliente argues that the economic effect of the PIT is substantial. It claims that the County PIT's $22 million in annual revenues would go to the Tribe if it collected its own PIT but, according to the Tribe, the County PIT precludes the Tribe from imposing its own tax. *See* Tribe Reply at 26–27. This argument falls flat. The Tribe has submitted no evidence from which the Court can draw a reasonable inference that it would have the infrastructure and wherewithal to provide the types of public services currently provided by the County if it were only given the chance. Moreover, it is well-established that the Tribe may impose its own PIT regardless of the County's. *Cotton*, 490 U.S. at 188–91 (state and tribe may impose concurrent taxes on the same non-Indian, on-reservation activity); *Segundo*, 813 F.3d at 1393 ("[In] the field of taxation, . . . the laws of both the State and the Tribe may be enforced simultaneously . . . ."). In this case, the Tribe has *chosen* not to impose such a tax. Thus, while the challenged PIT generates substantial revenues for, as relevant here, the County and DWA, the Tribe is free to impose its own tax that would also generate funds for its development should it choose to do so.

The Court nevertheless draws the reasonable inference from the evidence that the challenged PIT has some adverse effect on the Tribe. *See Cotton*, 490 U.S. at 186–87 ("It

[19] The Tribe disputes the County's factual assertion that "[t]he Tribe does not know any details regarding over 19,900 master leases subleases and sub-subleases on allotted land" only to the extent "it mischaracterizes the witness testimony, which speaks for itself." County SUF ¶ 12. It is uncontroverted that the majority of the leased Reservation land consists of allotted trust land. *Id.* at ¶ 13, 22; Jt. Suppl. Br. at 2.

is, of course, reasonable to infer that New Mexico taxes have at least a marginal effect on the demand for on-reservation leases, the value to the Tribe of those leases, and the ability of the Tribe to increase its tax rate."); *see also Fort Mojave*, 543 F.2d at 1256 ("[T]he imposition of a [PIT] on the leasehold interest will have an economic effect on the Indian lessors, and perhaps, although not certainly, will reduce the amount of rent they will be able to collect . . . ."); *Agua Caliente I*, 442 F.2d at 1186 ("[A] lessee can afford to pay more rent if he is not required to pay a possessory interest tax. If an Indian's land is not subject to that tax he enjoys a better bargaining position than he otherwise would, and hence that the tax has an adverse economic effect upon him."). As reflected in the Tribe's deposition testimony, the PIT plays a role in developers' decision whether to lease Trust Land. Indeed, the County does not dispute this point.

Notwithstanding the existence of some adverse effect, "the Ninth Circuit and [U.S.] Supreme Court have repeatedly held that 'reduction of tribal revenues does not invalidate a state tax.'" *Gila II*, 91 F.3d at 1239 (quoting *Salt River*, 50 F.3d at 737)). Furthermore, the evidence here suggests that there are other deterrents from leasing Trust Land independent of the PIT, such as the BIA's own handling of lease applications and the nature of leasehold versus fee-held property. *See* Davis Depo. at 41:20–42:23. The Tribe has submitted no evidence that the PIT has chilled economic development on the Reservation, prevented—legally or structurally—the Tribe from imposing its own PIT, or otherwise actually interfered with tribal governance. *See Crow Tribe*, 819 F.2d at 899–900 (federal preemption under *Bracker* of state coal tax where tribe submitted expert evidence of tax's effect on coal marketability). Thus, the Court concludes that the PIT's adverse effect on the Tribe is "simply too indirect and too insubstantial to support [Agua Caliente]'s claim of preemption." *Cotton*, 490 U.S. at 187. The evidentiary record bolsters this conclusion because, even assuming that the PIT has some ill effect on the Tribe, that adverse effect arises from only 100 leases that contribute to the reduction of tribal revenues – as opposed to approximately 19,900 leases on allotted land that generate rental income to which the Tribe can lay no claim. *See* Davis Depo. at 25:6–8

("Q[uestion:] Is any portion of the lease payments that third parties pay to allottees paid to the Tribe? A[nswer:] No.").

Additionally, "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 (alterations in original) (quoting *Okla. Tax Comm'n v. Chickasaw Nat.*, 515 U.S. 450, 458 (1995))). Here, it is undisputed that "the legal incidence of the tax indeed falls on non-Indians." Tribe MSJ at 19. In fact, that distinguishes this case from *Seminole Tribe*, where the Tribe lessor was liable for its lessee's failure to pay the rental tax, and could face penalties under the state code if it did not remit the tax to the state. *See* 799 F.3d at 1326.

Under the Court's balancing analysis thus far, the strong federal interests must nonetheless yield to the state interests that justify the imposition of the PIT on the non-Indian lessees. Given the finite number of essential services that the Tribe provides on the Trust Lands, the fact that the non-Indian lessees pay the PIT, the lack of evidence that the PIT interferes with tribal governance or economic development, and the minimal effect the PIT has on the Tribe's leasehold marketability and revenue collection, the Court concludes that any adverse effect the PIT has on the Tribe is minimal and insufficient to tip the *Bracker* scale in favor of preemption.

Because federal law does not preempt the PIT under *Bracker*, the Court **GRANTS** summary judgment for Defendants and **DENIES** the Tribe's summary judgment motion as to this issue.

C. Interference with Tribal Sovereignty

Finally, the Court considers the parties' arguments on the PIT's interference with the Tribe's sovereignty. The U.S. Supreme Court has explained that interference with tribal sovereignty poses an "independent" "barrier[]" to a state regulation of reservation or tribal activity and that "either [preemption or unlawful interference], standing alone, can be a sufficient basis for" striking a state tax. *Bracker*, 448 U.S. at 143.

Claiming that the PIT unlawfully infringes on its sovereignty, Agua Caliente compares this case to *Crow Tribe of Indians v. State of Montana* ("*Crow II*"), where the

Ninth Circuit invalidated Montana's state coal tax, which the state applied to coal mined on tribal property. 819 F.2d 895, 902 (9th Cir. 1987), *aff'd*, 484 U.S. 997 (1988). In *Crow II*, Montana imposed a coal tax on a tribal resource that the Court deemed "a component of the reservation land itself." 819 F.2d at 902 (quoting *Crow Tribe of Indians v. State of Montana* ("*Crow I*"), 650 F.2d 1104, 1117 (9th Cir. 1981)). The Ninth Circuit concluded that "[b]y taking revenue that would otherwise go towards supporting the Tribe and its programs, and by limiting the Tribe's ability to regulate the development of its coal resources, the state tax threaten[ed] Congress' overriding objective of encouraging tribal self-government and economic development." *Id.* at 902–03. Because the tax was not "narrowly tailored" to meet an assumed legitimate state interest, the Court invalidated the tax for "erod[ing] the Tribe's sovereign authority." *Id.* at 903. Notably, and as mentioned above, in *Crow II*, the tribe supported its interference argument with expert evidence of the tax's effect on tribal economic interests. *See id.* at 899–900.

The County and DWA oppose Agua Caliente's tribal interference argument on several grounds. The County distinguishes the severance tax in *Crow II*, which applied to the reservation land itself, from the PIT here, which, the County argues, taxes the non-Indian "private citizen, and . . . the private citizen's usufructurary interest in the government land and improvements alone." County Reply at 18–19 (quoting *United States v. Fresno* County, 429 U.S. 452, 45–57 (1977)). The County also contends that U.S. Supreme Court precedent has established that a state tax applied on a non-Indian does not interfere with tribal sovereignty. *Id.* at 19 (citing *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 161 (1980) ("Nor would the imposition of Washington's tax on these purchasers [Indians not enrolled in the reservation tribe] contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing tribe."). DWA argues along a similar line, reasoning that the Tribe's sovereign interests do not extend so far as to shield non-Indians on tribal lands from a tax that helps pay for the costs of supplying the non-Indians with water because such payment "does not 'infringe' on the Tribe's right to

'make [its] own laws and be ruled by them.'" DWA MSJ at 30 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)).

As a preliminary matter, the Court concludes that the *Crow II* tax, which applied to the Indian land itself, is materially different from the PIT, which applies to the non-Indian's use and enjoyment of the Trust Land. The PIT does not, as the Tribe asserts, "tax[] resources that 'are a component of the reservation land itself.'" Tribe Reply at 29 (quoting *Crow II*, 819 F.2d at 903); *see* note 17, *supra*. More importantly, Agua Caliente has not provided this Court with evidence of the PIT's actual obstruction of tribal governance. As explained above, the Tribe may impose its own tax concurrently with that of the County. Thus, this is not a case where the state has "tak[en] revenue that would otherwise go towards supporting the Tribe and its programs." *Crow II*, 819 F.2d at 902. Additionally, as the DWA urges, the non-Indian lessees' payment of a tax that funds the multitude of government services provided to them by Defendants does not "limit[] the Tribe's ability to regulate the development of its" Trust Land leasing. *Id.* at 902–03. Despite the existence of a state tax, the Tribe and its employees, in conjunction with the BIA and without any state input, decide which leases are extended on Trust Lands. In fact, in some cases, the Tribe does not even require the Secretary's approval to enter into a lease. *See supra* note 14.

To the extent that the PIT intrudes on the Tribe's economic interests, that interference is too insignificant to compel the conclusion the Tribe seeks, particularly given the proportionally low number of leaseholds that financially support the Tribe here. *Fort Mojave*, 543 F.2d at 1258 ("Such an indirect economic burden cannot be said to threaten the self-governing ability of the [T]ribe."). Further, as explained in depth above, the tax is intimately connected with services provided to those who pay it—non-Indian lessees—and there is no evidence that it actually impairs Agua Caliente's ability to self-govern.

"While the federal tradition of Indian immunity from state taxation is very strong, th[e] [Ninth Circuit] has recognized that a state tax is not invalid merely because it

deprives the Tribe of revenues used to sustain itself and its programs. The principle of tribal self-government is to seek 'an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other.'" *Crow II*, 819 F.2d at 902 (citation omitted) (quoting *Colville*, 447 U.S. at 156)). Here, the PIT strikes that balance. While it may minimally affect the Tribe's revenue generation, it does not affect the Tribe's ability to self-govern. Nor does it appear to interfere at all with the Tribe's leasing process. Further, the state interests are sufficiently tailored to the tax imposed because, as explained, California's design of TRAs and revenue allocation formulas results in lessees paying their fair share of state-provided services. Significantly, the governmental services that the PIT helps fund promote the very activity being taxed—the enjoyment and use of Trust Land by non-Indian lessees and Tribe members alike. Thus, this case is easily distinguishable from *Crow II*.

The Court concludes that the PIT does not unlawfully interfere with the Tribe's sovereignty. The Court therefore **GRANTS** summary judgment in favor of Defendants and **DENIES** the Tribe's motion for summary judgment on this issue.

V.
CONCLUSION

In light of the foregoing, the County MSJ is **GRANTED** in its entirety. The DWA MSJ as to preemption under section 465 of the IRA is **DENIED as moot** and the DWA MSJ as to the *Bracker* balancing test and unlawful interference with tribal sovereignty is **GRANTED**. The Tribe MSJ is **DENIED**. The Court **VACATES** all dates and deadlines set forth in the Schedule of Pretrial and Trial Dates. Judgment shall be entered in favor of Defendants.

IT IS SO ORDERED.

DATED: June 15, 2017

DOLLY M. GEE
UNITED STATES DISTRICT JUDGE