SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

CASE TITLE: Herpel v. County of Riverside CASE NO.: PSC1404764 DATE: March 16, 2018	Department 5	FILED SUPERIOR COURT OF CALIFORNIA COUNTY OF RIVERSIDE MAR 16 2018 J. ALVAREZ
PROCEEDING: Tentative Ruling re Trial on Federal Preemption		

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Tentative Ruling:

The Court finds that the County's possessory interest tax is not preempted by federal law.

Analysis:

Procedural Setting:

The Court issues the following tentative ruling based on the Court's understanding that the parties have stipulated substantially as follows. The Court advised the parties of its understanding prior to the trial, and no parties expressed any disagreement.

1. The trial of the issues in this case shall be bifurcated, so that the issue of whether the County's possessory interest tax ("PIT") – i.e., its taxation of the value of lessees' leasehold interests in Indian land – is preempted by federal law ("bifurcated issue") shall be tried separately from the trial of all other issues.

2. The trial of the bifurcated issue shall be tried before the plaintiffs move for class certification.

3. The facts to be considered during the trial of the bifurcated issue shall be limited to the factual stipulations recited in the stipulation filed October 2, 2018 ("Stipulation"), the documents attached to the Stipulation, and matters of which judicial notice may be taken. No other evidence shall be admissible and no other facts shall be considered.

4. The Stipulation frequently refers to documents that are attached to the Stipulation, and states that "these documents are genuine and authentic, and that [the parties] will not challenge their admissibility." (See, e.g., ¶¶ 8 and 9.) The Court understands those references to mean that the parties are stipulating that those documents are admitted into evidence.

Issue to Be Decided

In their complaint, the plaintiffs challenge the County's taxation of the leasehold interests of all lessees of Indian land anywhere in the County. According to the County, there are 12 federally recognized Indian tribes that own land in Riverside County. (6-15-17 hearing.) Although the Court does not recall seeing a written stipulation expressly saying so, the Court's

understanding is that the plaintiffs are limiting their challenge to the taxation of lessees of land belonging either to the Agua Caliente tribe or to its allottees.

The Court has previously ruled that the PIT was not preempted prior to January of 2013. (Order filed 5-5-16.) The Court has also previously ruled that 25 CFR section 162.017, subdivision (c), does not have any preemptive effect, but merely states the agency's interpretation of existing law and its prediction of the results that would usually be reached under the balancing test prescribed by *White Mountain Apache Tribe v. Bracker* (1980) 448 U.S. 136, 145 ["*Bracker*"].) (Order filed 6-5-17.)

The issue, therefore, is whether the *Bracker* test, when applied to the stipulated facts, shows that the PIT is preempted.

The *Bracker* Balancing Test

Disputes over federal preemption of state law has traditionally been resolved by determining whether there are either express or implied indices of a congressional intent to preempt. Disputes over state taxation of activities involving Indian land was no exception. For instance, in *Agua Caliente Band of Mission Indians v. Riverside County* (9th Cir. 1971) 442 F.2d 1184 ("*Agua Caliente I*"), the Band had appealed "from a judgment of the District Court . . . refusing to enjoin the imposition of the California Possessory Interest Tax on the lessees of the Indian land." (*Id.* at pp. 1184-1185.) The Ninth Circuit affirmed the judgment on the ground that "there is no statute which expressly forbids the imposition of a state use tax" like the PIT (*id.*, p. 1186) and no congressional "purpose to exempt these allotments from the kind of a tax herein imposed may be" inferred from other legislation dealing with Indians and Indian land (*id.*, p. 1187).

In 1980, however, the U.S. Supreme Court held that the standard preemption analysis does not apply to the evaluation of state taxation of Indians. "The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of preemption that have emerged in other areas of the law. Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other. The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law." (*Bracker,* p. 143.)

Instead, when "a State asserts authority over the conduct of non-Indians engaging in activity on the reservation," the preemption question must be addressed by "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." (*Bracker*, p. 145.) A state law is preempted if "it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." (*New Mexico v. Mescalero Apache Tribe* (1983) 462 U.S. 324, 334.)

Because the test is a factual one, there is no bright line dividing permissible exercises of state authority from those that are barred by preemption. (*Barona Band of Mission Indians v. Yee*

(9th Cir. 2008) 528 F.3d 1184, 1190.) However, the relevant factors to be considered when determining whether a state tax borne by non-Indians is preempted include the degree of federal regulation involved, the respective governmental interests of the tribes and states (both regulatory and revenue raising), and the provision of tribal or state services to the party the state seeks to tax. (*Ibid.*)

After considering all of those factors in light both of the the stipulated facts and of the arguments presented and authorities cited in the parties' respective opening and reply briefs, the Court concludes that the state interests in collecting the PIT are sufficient to outweigh the federal and tribal interests. Therefore, the PIT is not preempted.

Federal and Tribal Interests

Federal interests are greatest when the government's regulation of a given sphere is "comprehensive and pervasive." (*Barona Band of Mission Indians v. Yee* (9th Cir. 2008) 528 F.3d 1184, 1192.) In *Bracker*, for instance, the federal regulation of timber operations on Indian land was extraordinarily detailed, and occurred on a daily basis.

Federal law does regulate the issuance of leases of Indian land, including both tribal land and land owned by allottees. (25 U.S.C. § 415, subd. (a).) The degree of that regulation is significantly detailed, governing not only the approval process and the power of the BIA to cancel a lease, but also the terms of the lease such as mandatory lease provisions, amount and manner of payment of rent, late charges, and the maximum duration (25 CFR § 162.311).

That regulatory scheme clearly demonstrates a strong federal and tribal interest in the issuance of leases. But that interest is not nearly as strong as in Bracker, where the federal supervision was continuous. The plaintiffs have not cited the Court to any federal statute or regulation that seeks to control the residential, commercial or industrial purposes to which the leaseholds are devoted by the lessees.

The purposes of the federal regulations are "to promote leasing on Indian land for housing, economic development, and other purposes" (25 CFR § 162.001) with the goal of obtaining the "'highest economic return to the owner consistent with prudent management and conservation practices'" (*Segundo v. City of Rancho Mirage* 813 F.2d 1387, 1393 (9th Cir. 1987). The tribal interest is undoubtedly the same: the highest sustainable return to itself and its allottees.

Although no evidence has been presented on the issue, it is reasonable to assume that if the leaseholds were not subject to the PIT, the tribe and the allottees could obtain higher rents. Stated otherwise, the PIT presumably reduces the rents to some degree, and thus to some degree interferes with the goal of obtaining the highest economic return on the leased property.

However, the Court does not place much weight in that factor. First, the fact that the imposition of a state tax on non-Indians will tend to reduce tribal revenues does not, by itself, invalidate that tax. (*Barona Band of Mission Indians v. Yee, supra,* 528 F.3d at p. 1191.)

Second there is no evidence that the reduction in rents is anything other than marginal. (Stip. #72 [Tribe has not attempted to quantify the PIT's burden on allottee lessors].) A "marginal effect on the demand for on-reservation leases," and thus of the value of those leases to the tribe, "is

simply too indirect and too insubstantial" to support a claim of pre-emption. (*Cotton Petroleum Corp. v. New Mexico* (1989) 490 U.S. 163, 187 [109 S.Ct. 1698, 1713, 104 L.Ed.2d 209, 233].)

Finally, there is no evidence that the PIT has any disproportionate impact on the tribe's leasing efforts or otherwise places the tribe at an economic disadvantage vis-à-vis non-Indian lessors in the area. There is no evidence, for instance, that rents received on leases on tribal lands are less than those derived from comparable leases on non-Indian land. Without that evidence, there is no convincing argument that the PIT substantially impairs the goal of maximizing the tribe's and allottee's interests in maximizing their returns.

County's Interests

The county's interest is obvious: to raise the revenue necessary to fund governmental services. That is a legitimate state interest. (*Barona Band of Mission Indians v. Yee, supra,* 528 F.3d at pp. 1192-1193.)

Secondarily, the county has an interest in preventing lessees from unfairly benefiting from county services that the lessees do not help to support. The tribe's reservation encompasses approximately 31,000 acres, spread in a checkerboard pattern of alternating one-square-mile sections across the cities of Palm Springs, Cathedral City, and Rancho Mirage, as well as unincorporated portions of Riverside County. (Stip. #33.) Because of that pattern, it is not feasible to provide services to residents and occupants of non-Indian land but to deny it to residents or occupants of Indian land. (Stip. #78.) As a result, the non-Indian lessees would benefit from the service provided regardless of whether the PIT were collected. If it were not collected, those agencies would have the obligation and burden to provide the same level of service, but the tax revenues to fund the provision of those services would be $22.8 million less. (Stip. ##124-126.)

Provision of Services

The tribe provides very limited governmental services to the 7,674 acres of tribal trust lands. (Stip. ##53, 63.) It provides no governmental services whatsoever to the approximately 4,300 acres of allotted land, except for environmental review and building code enforcement services provided to allotted land located in unincorporated areas not subject to land use agreements with local jurisdictions. (Stip. ##47, 61.) Only five such parcels are located in the reservation. (Stip. #62.)

By contrast, the county and the local jurisdictions and special districts within it, which are funded in part by the PIT, provide fire protection, police protection, road maintenance, flood control, sewage services, electrical service, trash collection, public transportation, animal control services, and mosquito abatement services directly to the allotted lands, included those occupied by non-Indian leasees. In addition, the county and other local public agencies provide general services to the occupants of the allotted lands, such as the leasees, including corrections, district attorney, probation, public defender, health, mental health, libraries, and parks and recreation. (Stip. ## 64, 81-87, 96, 106-123.)

The interest of the state in collecting taxes from a non-Indian taxpayer is stronger when the taxpayer is the recipient of state services. (*Barona Band of Mission Indians v. Yee, supra,* 528

F.3d at p. 1193.) Here, the lessees are the recipients of the services funded by the PIT. Thus, unlike the situation in *Bracker*, this *is* "a case in which the State seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall." (*Bracker* at p. 150.)

The plaintiffs' reliance on *Bracker* for the proposition that a state's "generalized interest in raising revenues . . . is insufficient to overcome the strong federal and Tribal interests in preemption" is misplaced, because it ignores the factual context in that case:

> They [i.e., the state taxing agencies] refer 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 Bureau of Indian Affairs roads. Pinetop's business in Arizona is conducted solely on the Fort Apache Reservation. Though at least the use fuel tax purports to "[compensate] the state for the use of its highways," [citation], no such compensatory purpose is present here. The roads at issue have been built, maintained, and policed exclusively by the Federal Government, the Tribe, and its contractors. We do not believe that respondents' generalized interest in raising revenue is *in this context* sufficient to permit its proposed intrusion into the federal regulatory scheme with respect to the harvesting and sale of tribal timber.

(*Bracker*, p.; 150.)

Here, by contrast, the factual context is entirely different. Whereas Pinetop operated entirely on tribal roads, virtually all governmental services enjoyed by the lessees are provided by the agencies funded by the PIT.

The plaintiffs also cite to *New Mexico v. Mescalero Apache Tribe* (1983) 462 U.S. 324 for the same proposition, that a generalized interest in raising revenues is insufficient. Against, the language of the Supreme Court's opinion reveals no such rule:

> [T]the State has pointed to no services it has performed in connection with hunting and fishing by nonmembers which justify imposing a tax in the form of a hunting and fishing license, [citations], and its general desire to obtain revenues is simply inadequate to justify the assertion of concurrent jurisdiction in this case.

(*Id.*, p. 343.) Thus, *Mescalero Apache Tribe* stands for the proposition that, when the state provides no services to those on whom the tax falls, the desire to generate tax revenue is insufficient to justify the impairment of the federal and tribal interests. Here, the tax falls on the lessees. The county and other local agencies are providing a panoply of local governmental services to the lessees, and to all of the sub-lessees, occupants, customers and other users of their leasehold interests.

While the Court agrees with the plaintiffs that the PIT is a general rather than a special tax, the Court rejects the contention that the imposition of a general tax can never be justified. To the contrary, the Court finds that it is justified on these facts.